

COMPLAINT REGARDING THE COUNCIL'S REFUSAL TO PROVIDE FULL ACCESS TO DOCUMENT 14704/14

1. INTRODUCTION

- 1.1 This complaint concerns the refusal by the Council of the European Union ("**Council**") to grant Mr Dennis de Jong ("**Applicant**") full access to document 14704/14 (the "**Document**") pursuant to Regulation No 1049/2001 ("**Regulation**").¹ The Document is a legal opinion prepared by the Council's Legal Service on the scope and terms of its proposed participation in the Inter-Institutional Agreement ("**IIA**") between the European Parliament and the European Commission on the EU transparency register ("**Transparency Register**").² The complaint is submitted by The Good Lobby ("**Complainant**") on the Applicant's behalf.
- 1.2 In the Complainant's view, the Council's refusal to grant access to the Document amounts to maladministration as it has failed to handle the request in accordance with its obligations under the Regulation and the applicable case-law. In particular, the Council has:
- 1.2.1 improperly relied on the exception for the protection of legal advice under Article 4(2), second indent, of the Regulation ("**Legal Advice Exception**"), having failed to establish any "*foreseeable and not purely hypothetical*"³ risk that disclosing the Document would undermine its ability to seek frank, objective and comprehensive legal advice;
 - 1.2.2 improperly relied on the exception for the protection of the Council's decision-making process under Article 4(3), first subparagraph, of the Regulation ("**Decision-Making Process Exception**"), having failed to demonstrate that disclosing the Document would be "*likely, specifically and actually*"⁴ to seriously undermine the protection of its decision-making process, and that the risk of that interest being undermined was "*reasonably foreseeable and not purely hypothetical*"⁵; and
 - 1.2.3 failed properly to take into account the existence of an overriding public interest warranting the full disclosure of the Document, stemming from the enhanced public debate and increased accountability with regard to the Council's participation in the Transparency Register as well as from the benefits that would flow from having an open debate among the institutions on the Council's concerns in this regard.
- 1.3 The remainder of this complaint is structured in three parts. Section 2 outlines the steps taken by the Applicant to obtain the disclosure of the Document. Section 3 demonstrates that the Council's refusal was in breach of the Regulation as well as of the applicable case-law. Finally, section 4 sets out the Complainant's conclusion and redress sought from the Ombudsman.

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

² Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 277, 19.9.2014, p. 11.

³ Judgment of 7 February 2002, *Kuijer v Council*, Case T-211/00, EU:T:2002:30, paragraph 56 and the case-law cited

⁴ Judgment of 7 June 2011, *Toland v Parliament*, Case T-471/08, EU:T:2011:252, paragraph 70 and the case-law cited.

⁵ Judgment of 7 June 2011, *Toland v Parliament*, Case T-471/08, EU:T:2011:252, paragraph 71 and the case-law cited.

2. BACKGROUND

- 2.1 On 8 June 2016, the Applicant requested that the Council disclose the Document.
- 2.2 In its reply of 5 July 2016, the Council refused to disclose the Document relying on (i) the Legal Advice Exception, and (ii) the Decision-Making Process Exception. Pursuant to Article 4(6) of the Regulation, it granted partial access to the parts of the Document which it considered not to be covered by those exceptions.
- 2.3 On 26 July 2016, the Applicant made a confirmatory application, asking the Council to reconsider its position and to grant the Complainant full access to the Document ("**Confirmatory Application**").⁶
- 2.4 In its reply of 4 October 2016 ("**Confirmatory Decision**"),⁷ the Council confirmed its decision not to disclose the Document, invoking the same exceptions as in its initial reply. It also concluded that no additional partial access could be granted with regard to the undisclosed parts of the Document.

3. THE COUNCIL'S REFUSAL BREACHES THE REGULATION AND THE APPLICABLE CASE-LAW

- 3.1 In rejecting the Applicant's request for full access to the Document and denying its Confirmatory Application, the Council has acted in breach of the Regulation and the applicable case-law, in that it has:
- A. improperly relied on the Legal Advice Exception;
 - B. improperly relied on the Decision-Making Process Exception; and
 - C. failed properly to take into account the existence of an overriding public interest warranting the full disclosure of the Document.

3.2 These complaints are set out in detail below.

A. The Council has improperly relied on the Legal Advice Exception

- 3.3 This section (i) sets out the relevant legal test for the Legal Advice Exception, (ii) demonstrates that the Council has not met this test in the Confirmatory Decision, and (iii) concludes that the exception is therefore not available in the present case.

(i) The legal test

3.4 The Legal Advice Exception provides that:

"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] legal advice, [...] unless there is an overriding public interest in disclosure."

3.5 The EU Courts' case-law provides that in order to determine whether a document is covered by the Legal Advice Exception, the Council must meet the following conditions:⁸

- 3.5.1 First, the Council must examine whether disclosure of the document would "*undermine the protection*" of the legal advice in question. This is clarified in *Sweden and Turco v Council* as meaning protection of the institution's interest "*in seeking legal advice and receiving frank objective and comprehensive advice*".⁹

⁶ See Annex III.

⁷ See Annex IV.

⁸ Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05 P, EU:C:2008:374, paragraphs 37 to 44.

⁹ Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05 P, EU:C:2008:374, paragraphs 42 to 43.

Moreover, the risk of that interest being undermined must be "*reasonably foreseeable and not purely hypothetical*".¹⁰

3.5.2 Second, if the Council is satisfied that the protection of the legal advice would indeed be undermined by disclosure, it must then ascertain whether there is any overriding public interest justifying disclosure.

(ii) The Council failed to meet the conditions of the Legal Advice Exception

3.6 The Council has failed to discharge its burden under either condition of the above legal test.

3.7 With regard to the first condition, the Council has failed to identify any "*foreseeable and not purely hypothetical*"¹¹ risk that the disclosure of the Document would undermine its ability to seek frank, objective and comprehensive legal advice. The Council has merely argued that (i) no obligation to disclose the opinions of an institution's Legal Service can be envisaged as a matter of principle in the administrative domain, (ii) there is a concrete and not purely hypothetical risk that the issues addressed will be the object of litigation, and (iii) disclosure of the Document could undermine the ability of the Legal Service to provide legal advice free from external influences. Each of these arguments is addressed in turn below.¹²

3.8 The Council's failure to discharge its burden under the second condition is detailed in Section C below as it concerns both the Legal Advice and the Decision-Making Process Exceptions.

In the administrative domain, no obligation to disclose the opinions of an institution's Legal Service can be envisaged as a matter of principle

3.9 First, the Council suggests that, as the legal advice falls within its administrative (rather than legislative) function, "*no obligation to disclose the opinions of an Institution's Legal Service can be envisaged as a matter of principle*".¹³

3.10 As elaborated further at paragraphs 3.54 to 3.55 below, the effect of the IIA is to introduce general rules that apply to private parties – which is in essence the function of a legislative act. The rules applicable to documents drawn up in the Institutions' legislative function should therefore arguably be applied to the Document. Accordingly, the Council has a *prima facie* obligation to disclose the Document.¹⁴

3.11 In any event, even if the Ombudsman does not agree that the Document should be considered to have been adopted in the framework of the Council's legislative function, the Council's statement is nonetheless plainly wrong.

3.12 The Council appears to base its argument on the statement in *Sweden and Turco v Council* that "[the Regulation] imposes, in principle, an obligation to disclose the opinions of

¹⁰ Judgment of 7 February 2002, *Kuijjer v Council*, Case T-211/00, EU:T:2002:30, paragraph 56 and the case-law cited.

¹¹ Judgment of 7 February 2002, *Kuijjer v Council*, Case T-211/00, EU:T:2002:30, paragraph 56 and the case-law cited.

¹² Please note for completeness that the Council appears to make two further arguments in paragraphs 16 and 17 of the Confirmatory Decision: (i) that the issues raised in the legal opinion are "*particularly sensitive*", as they are both controversial within the Council and likely to be the subject of future negotiations; and (ii) that the issue has attracted public attention, as well as considerable pressure on the institutions by NGOs and lobbyists. These arguments are not relevant to discussion of the Legal Advice Exception, as no link is drawn between these two assertions and the suggestion that this would undermine the Council's ability to seek frank, objective and honest legal advice. These arguments appear to be more pertinent to the Decision-Making Process Exception, and accordingly are dealt with (to the extent relevant) in section B below.

¹³ Confirmatory Decision, paragraph 15.

¹⁴ Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05 P, EU:C:2008:374, paragraph 68.

the Council's legal service relating to a legislative process".¹⁵ However, the fact that in the legislative domain, this obligation is as a matter of principle does not mean that the inverse is true in the administrative domain. Indeed, the Court of Justice has expressly stated that, "*contrary to what seems to be suggested [...], the administrative activity of the institutions does not escape in any way from the scope of [the Regulation]*".¹⁶ The Court went on to clarify that "*where an institution refuses access to such a document, it is obliged to provide explanations as to how access to that document might actually and specifically undermine the interest [...] upon which that institution relies*".¹⁷

- 3.13 Accordingly, the fact that the Document stems from the Council's administrative function does *not* exempt the Council from providing a full explanation as to how it meets the requirements of the Legal Advice Exception.

There is a "concrete and not purely hypothetical risk" that the issues addressed will be the object of litigation

- 3.14 Second, the Council argues that, as provisions of the IIA will be applied in individual cases, this gives rise to a "*concrete and not purely hypothetical risk*" that the issues raised in the Document will be the object of litigation. Accordingly, the Council suggests that disclosing the Document would negatively affect the ability of the Legal Service to defend decisions taken by the Council before the EU Courts.¹⁸
- 3.15 Article 4(2), second indent, of the Regulation provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice, [...] unless there is an overriding public interest in disclosure*." Where disclosure undermines the protection of court proceedings, the EU Courts have treated this as a separate exception ("**Court Proceedings Exception**")¹⁹ and have applied a separate test.²⁰
- 3.16 In the Confirmatory Decision, the Council does not draw any link between the assertion that the issues in the Document may at some stage become the subject of litigation and the suggestion that this will undermine the Council's ability to seek frank, objective and honest legal advice. The suggestion rather appears to be that disclosure of the Document would undermine the protection of any such court proceedings, in which case the Council's argument appears to pertain to the Court Proceedings Exception, rather than the Legal Advice Exception. If this is correct, the Confirmatory Decision should have been drafted on this basis. The Council's argument in the context of the Legal Advice Exception is therefore irrelevant.
- 3.17 In any event, even if the Council could have relied on the Court Proceedings Exception (*quod non*), it would still not have been successful in doing so, as the correct test, when applied, is not met.
- 3.18 The General Court has held that "*in order for [the Court Proceedings Exception] to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link with a dispute pending before the*

¹⁵ Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05 P, EU:C:2008:374, paragraph 68.

¹⁶ See Judgment of 9 September 2008, *MyTravel v Commission*, Case T-212/03, EU:T:2008:315, paragraph 109 (emphasis added).

¹⁷ Judgment of 9 September 2008, *MyTravel v Commission*, Case T-212/03, EU:T:2008:315, paragraph 110 (emphasis added).

¹⁸ Confirmatory Decision, paragraph 18.

¹⁹ Judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 80.

²⁰ Judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 88 (emphasis added).

Courts of the European Union...].²¹ No such dispute is currently pending before the EU Courts, nor does the Council appear to suggest that this is the case.

3.19 Rather, the Council argues that there is a "*very concrete and not purely hypothetical risk that the issues addressed [in the Document] will be object of litigation [sic]*". This appears to be based on a misapplication of the requirement for a "*foreseeable and not purely hypothetical*" risk of undermining the protection of legal advice (the test for the Legal Advice Exception), to the Court Proceedings Exception. There is no basis in the EU Court's case-law for such an application.

3.20 Accordingly, the fact that the issues addressed in the Document may at some stage be the object of litigation cannot be seen as identifying any risk that disclosure of the Document will undermine the Council's ability to seek frank, objective and comprehensive legal advice.

Disclosure of the Document could undermine the ability of the Legal Service to provide legal advice free from external influences

3.21 Finally, the Council asserts that disclosure of the Document could undermine the ability of the Legal Service "*to propose in a frank and objective way alternative solutions*", as well as exposing the Legal Service to "*external pressure*", potentially prejudicing its ability "*to express views free from external influences*".²²

3.22 In effect, this paragraph is a bold assertion that the test is met, without furnishing further supporting argument. The EU Courts' case-law makes it plain that this is not sufficient:

3.22.1 The Council must produce "*specific, detailed evidence which could establish the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive advice*" in order to rely on the Legal Advice Exception.²³

3.22.2 The Council may not rely "*solely on general and abstract considerations*" in invoking the Legal Advice Exception.²⁴

3.23 Accordingly, it is incumbent upon the Council to produce concrete and detailed evidence for its claim that disclosure of the Document would undermine the protection of its legal advice – a bar which has not been met in this case.

(iii) Intermediate conclusion

3.24 In light of the above, the Council has failed to demonstrate any "*foreseeable and not purely hypothetical*" risk that disclosing the Document would undermine its ability to seek frank, objective and comprehensive legal advice. Its refusal to disclose the Document based on the Legal Advice Exception is therefore impermissible.

B. The Council has improperly relied on the Decision-Making Process Exception

3.25 This section (i) sets out the relevant legal test for the Decision-Making Process Exception, (ii) demonstrates that the Council has failed to meet this test as it has not established that its decision-making process would be seriously undermined by disclosure of the Document, and (iii) concludes that the exception is therefore not available in the present case.

²¹ Judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 88 (emphasis added).

²² Confirmatory Decision, paragraph 19.

²³ Judgment of 4 May 2012, *In't Veld v Council*, Case T-529/09, EU:T:2012:215, paragraph 70 (emphasis added).

²⁴ Judgment of 9 September 2008, *MyTravel v Commission*, Case T-212/03, EU:T:2008:315, paragraph 109.

(i) The legal test

3.26 The Decision-Making Process Exception provides that:

"[a]ccess to a document, drawn up by an institution for internal use [...], which relates to a matter where the decision has not yet been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding objective in disclosure."

3.27 In light of the EU Courts' settled case-law, the Council should satisfy the following conditions in order to be able to rely on the Decision-Making Process Exception:

3.27.1 First, the Council must examine whether disclosure of the Document would seriously undermine its decision-making process. In this regard, the Council must establish that:

(A) The disclosure is "*likely, specifically and actually*" to undermine the protection of its decision-making process and the risk of that interest being undermined is "*reasonably foreseeable and not purely hypothetical*";²⁵ and

(B) The decision-making process would be "*seriously*" undermined by the disclosure. The case-law clarifies that this would be the case, in particular, where the disclosure of the documents in question has a "*substantial impact*" on the decision-making process and that the assessment of seriousness depends "*on all the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question*".²⁶

3.27.2 Second, if the Council is satisfied that the protection of the decision-making process would indeed be undermined, it must then ascertain whether there is any overriding public interest justifying disclosure.

(ii) The Council has failed to meet the conditions of the Decision-Making Process Exception

3.28 The Council has failed to demonstrate that either of the above two conditions is satisfied in the present case.

3.29 As regards the first condition, the Council has argued that disclosure of the Document would (i) reduce its ability to reach a final agreement on its participation in the Transparency Register, and (ii) reduce its marge of manoeuvre in the inter-institutional negotiations concerning the Transparency Register. As explained in more detail below, neither argument is sufficient to establish that full disclosure of the Document would seriously undermine the Council's decision-making process.

3.30 With regard to the second condition, the Council has erred in concluding that there was no overriding public interest justifying disclosure in the present case. This point – relevant also for the Legal Advice Exception – is addressed in more detail in section C below.

The Council's argument concerning the effect of disclosure on its ability to reach a final agreement on its participation in the Transparency Register

3.31 The Council's first argument is that upon disclosure, certain of the solutions discussed in the Document would (i) come under close public scrutiny and criticism (ii) leading to

²⁵ Judgment of 7 June 2011, *Toland v Parliament*, Case T-471/08, EU:T:2011:252, paragraph 70 and the case-law cited.

²⁶ Judgment of 7 June 2011, *Toland v Parliament*, Case T-471/08, EU:T:2011:252, paragraph 71 and the case-law cited.

external pressure on the Council members, which would make it more difficult for them to accept compromise solutions or to pursue certain options, and therefore (iii) would affect the possibility of reaching a final agreement on the Council's participation in the IIA.²⁷

- 3.32 As regards, firstly, that certain of the envisaged solutions in the Document could come under close public scrutiny and criticism, the General Court has held that "*the fact that a subject is a sensitive one and is followed with interest cannot constitute in itself an objective reason sufficient to justify the concern that the decision-making process would be seriously undermined, without calling into question the very principle of transparency intended by the TFEU.*"²⁸
- 3.33 It follows that the fact that the subject-matter of the Document could come under public scrutiny cannot, in itself, justify non-disclosure of the Document.
- 3.34 As regards, secondly, that external pressure would make it more difficult for the Council to reach a compromise agreement, the General Court has held that, "*the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there was a reasonably foreseeable risk that the process would be substantially affected owing to that external pressure.*"²⁹
- 3.35 In order to demonstrate that there was a non-hypothetical risk of external pressure in the present case, the Council merely states that "*the regulation of lobbyists at the EU level attracts public attention and that it is the object of important media campaigns by NGO activists*",³⁰ and provides no concrete evidence to justify them. Such general, vague and imprecise statements have been held not to prove that there is genuine external pressure on the decision-making process at issue,³¹ and the same is true in the present case.
- 3.36 As regards, thirdly, the argument that the disclosure of the Document (and the alleged subsequent external pressure) would make it more difficult for Council Members (i.e. Member States) to reach a compromise solution, the Council again confines itself to general, vague and imprecise claims and does not adduce any evidence in support of these. The Council has therefore failed to establish in concrete terms, as required under the case-law,³² that disclosure of the Document would make it more difficult for the Council members to reach a final agreement in the present case.
- 3.37 In any event, it is unclear how disclosure of the Document, which addresses the scope and terms of the Council's potential participation in the IIA, and, apparently, not the positions of individual Member States on this issue, could make it more difficult for Member States to accept compromise solutions and ultimately to reach a final agreement. In this regard, it should be noted that the unwillingness of Member States to cooperate with the Council if the latter allows access to a document, is not a sufficient basis on which to justify non-disclosure of the said document.³³
- 3.38 It follows that the Council's argument regarding the effect of disclosure on its ability to reach a final agreement on its participation in the Transparency Register fails to establish that disclosing the Document would likely, specifically and actually undermine the Council's decision-making process, or that the risk that it would be undermined is reasonably

²⁷ Confirmatory Decision, paragraph 11.

²⁸ Judgment of 20 September 2016, *PAN Europe v Commission*, Case T-51/15, EU:T:2016:519, paragraph 34 and the case-law cited.

²⁹ Judgment of 20 September 2016, *PAN Europe v Commission*, Case T-51/15, EU:T:2016:519, paragraph 30 and the case-law cited.

³⁰ Confirmatory Decision, paragraph 11.

³¹ Judgment of 20 September 2016, *PAN Europe v Commission*, Case T-51/15, EU:T:2016:519, paragraphs 31 and 32.

³² Judgment of 20 September 2016, *PAN Europe v Commission*, Case T-51/15, EU:T:2016:519, paragraphs 35 and 36, and the case-law cited.

³³ Judgment of 24 May 2011, *Batchelor v Commission*, Case T-250/08, EU:T:2011:236, paragraph 80.

foreseeable, or even, *a fortiori*, that the risk was that it would be "seriously" undermined, as required under the case-law.

The Council's argument concerning the effect of disclosure on its marge of manoeuvre in inter-institutional negotiations

- 3.39 The Council's second argument is that, even if it managed to reach an agreement internally, the terms of its participation in the IIA would then need to be negotiated with the European Parliament and the European Commission. The Council asserts that the disclosure of the Document would make known to the institutional interlocutors the Council's internal reflections and concerns on this issue and would therefore objectively limit its marge of manoeuvre in the negotiations, and, more specifically, its capacity to effectively propose certain solutions in those negotiations.³⁴
- 3.40 In short, the Council is seeking to justify its refusal to provide full access to the Document in part by reference to the effect of disclosure on the inter-institutional negotiations concerning the IIA. In doing so, the Council has erred in law in that it misinterpreted the scope of Article 4(3), first subparagraph, of the Regulation.
- 3.41 The language of Article 4(3), first subparagraph, of the Regulation is clear: an exception from the general disclosure obligation is potentially available where disclosure would seriously undermine the "institution's decision-making process". Furthermore, according to well-established case-law, exceptions under the Regulation must be interpreted restrictively.³⁵ It follows that the scope of the term "the institution's decision-making process" must likewise be interpreted restrictively, namely as encompassing only the internal decision-making process of the institution concerned.
- 3.42 In contrast, inter-institutional negotiations between the European Parliament, the European Commission and the Council are by definition a decision-making process which is external to the individual institutions. By the time such negotiations begin, each of the institutions involved would need to have adopted their respective negotiating position and it is therefore clear that their internal decision-making processes must have been concluded by then. It follows that inter-institutional negotiations fall outside the scope of "the institution's decision-making process" for the purposes of the Decision-Making Process Exception.
- 3.43 Accordingly, the Council was wrong to justify its refusal to provide full access to the Document by reference to the effect of disclosure on its marge of manoeuvre in the inter-institutional negotiations.
- 3.44 In any event, even if inter-institutional negotiations did fall within the scope of the "institution's decision making-process", the Council has still failed to establish to the required legal standard that its decision-making process would be undermined by the disclosure.
- 3.45 In order to show that the inter-institutional negotiations would be seriously undermined, the Council has again confined itself to general, vague and imprecise claims, namely that disclosure of the Document would limit its marge of manoeuvre in the inter-institutional negotiations because the information contained in the Document would make the Council's sensitivities concerning the IIA known to the other two negotiating parties. It has therefore failed to establish in concrete terms, as required under the applicable case-law,³⁶ that disclosure of the Document would have reduced its marge of manoeuvre.

³⁴ Confirmatory Decision, paragraph 12.

³⁵ Judgment of 12 November 2015, *Alexandrou v Commission*, Joined Cases T-515/14 P and T-516/14 P, EU:T:2015:844, paragraphs 79 and 85, and the case-law cited.

³⁶ Judgment of 20 September 2016, *PAN Europe v Commission*, Case T-51/15, EU:T:2016:519, paragraphs 35 and 36, and the case-law cited.

(iii) Intermediate Conclusion

3.46 In light of the above, the Council has failed to demonstrate that the disclosure of the Document would seriously undermine the Council's decision-making process and could therefore not base its refusal to provide full access to the Document on the Decision-Making Process Exception.

C. The Council has failed properly to take into account the existence of an overriding public interest warranting the full disclosure of the Document

3.47 This section (i) sets out the legal test for the assessment of an overriding public interest with the framework of the Legal Advice and the Decision-Making Process Exceptions, (ii) demonstrates that in the present case there is an overriding public interest in transparency, and (iii) concludes that full access to the Document should have been provided (also) on that basis.

(i) The legal test

3.48 Under both the Legal Advice and the Decision-Making Process Exceptions, if the Council concludes that disclosure would undermine the interests protected by those exceptions, it must then assess whether those interests could be outweighed by a public interest justifying disclosure.

3.49 The General Court has confirmed that "*an overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles which underlie [the Regulation].*"³⁷ However, in such circumstances, it is for the party requesting information to establish that "*the principle of transparency is of particularly pressing concern and capable of prevailing over the reasons justifying the refusal to disclose the documents in question.*"³⁸

3.50 The EU Courts have further clarified that the public interest in transparency is particularly strong when the institutions act in their legislative capacity but carries a lesser weight in relation to the institutions' administrative activities.³⁹

3.51 More specifically, in *Sweden and Turco v Council*, the Court of Justice held that the Regulation "*imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*"⁴⁰. In this regard, the Court of Justice noted that disclosure of such legal advice constitutes an overriding public interest as it "*increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act.*"⁴¹

(ii) There is an overriding public interest in transparency in relation to the Document

3.52 As developed further below, there is an overriding public interest in transparency in relation to the Document as it is a legal opinion relating to what is, in substance, a legislative process. Alternatively, the Document should have been disclosed on the basis that the principle of transparency is especially pressing in the present case and clearly outweighs the Council's reasons for justifying refusal.

³⁷ Judgment of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, Case T-245/11, EU:T:2015:675, paragraph 193 and the case-law cited.

³⁸ Judgment of 23 September 2015, *ClientEarth and International Chemical Secretariat v ECHA*, Case T-245/11, EU:T:2015:675, paragraph 193 and the case-law cited.

³⁹ Judgment of 12 May 2015, *Technion and Technion Research & Development Foundation v Commission*, Case T-480/11, EU:T:2015:272, paragraph 79.

⁴⁰ Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05 P, EU:C:2008:374, paragraph 68 (emphasis added).

⁴¹ Judgment of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05 P, EU:C:2008:374., paragraph 67.

The Document is a legal opinion relating to what is, in substance, a legislative process

- 3.53 In the Confirmatory Decision, the Council asserts that the Council's decision-making regarding its participation in the IIA or in the proposed inter-institutional agreement on the mandatory Transparency Register "*falls within the exercise of its administrative capacity*".⁴²
- 3.54 While the Complainant does not dispute that this might formally be the case, there are three reasons why the Council's decision-making in the context of the Transparency Register is, in practice, closer to a legislative act than to an administrative one, and should be treated as such for the purposes of the assessment of the overriding public interest:
- 3.54.1 First, the proposed mandatory Transparency Register in effect imposes new consequences on individuals (e.g. it makes meetings between individuals/companies and decision-makers from the three institutions conditional on the individuals/companies' prior registration in the Transparency Register). In this regard, the Council's role is therefore close to that of a legislator. This can be contrasted with situations where the EU institutions clearly perform an administrative function, such as when they apply or enforce existing rules in the context of an audit or of a state aid investigation.
- 3.54.2 Second, the regulation of lobbyists at EU level, the aim of which is to make the EU decision-making process more transparent, is inextricably linked to the EU's legislative process. Indeed, it is the transparency of the EU's legislative process as such that the regulation of lobbyist aims to enhance. By extension, the Document concerning the Council's participation in the mandatory Transparency Register is of direct relevance to the EU's legislative process and should therefore be considered to fall within the scope of the EU's legislative sphere for the purpose of the Regulation.
- 3.54.3 Third, even though the mandatory Transparency Register will most likely be implemented by way of an inter-institutional agreement, the European Parliament had originally called for it to be implemented by way of legislation.⁴³ This clearly shows that the subject matter addressed is substantively legislative in nature.
- 3.55 It follows from the above the Council's decision-making process concerning its participation in the Transparency Register, amounts to, if not formally then at least in substance, a legislative procedure. Accordingly, the public interest in transparency should have been considered as particularly strong in the present case. This is even more so, given that the Document is an opinion of the Council's Legal Service, which, in line with the Court of Justice's findings in *Sweden and Turco v Council*, the Council is in principle obliged to disclose.

Alternatively, the Document should have been disclosed on the basis that the principle of transparency is especially pressing in the present case

- 3.56 In any event, even if the Council's decision-making process in question did fall within the category of administrative acts, the arguments put forward in the Confirmatory Application demonstrate that the principle of transparency is especially pressing in the present case and capable of prevailing over the reasons justifying refusal.
- 3.57 The Applicant's first argument is that having access to the information contained in the Document would allow the public to have an informed debate on the reform of the Transparency Register and to participate more closely in the decision-making process concerning its implementation. Enabling an informed public debate is of particular importance in the context of the reform of the Transparency Register as its aim is precisely

⁴² Confirmatory Decision, paragraph 24.

⁴³ European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register (2014/2010(ACI)), paragraphs 3 and 4.

to enhance transparency of the EU decision-making process, which is of direct concern to EU citizens.⁴⁴

- 3.58 As regards the importance of having a public debate on the issues discussed in the Document, the Council concludes that, on balance, public interest was better served by protecting the Council's decision-making process than by granting immediate public access to the Document. It does not provide any reasons in support of this conclusion. The Council further considers that, given the "*sensitive nature*" and "*particularly wide scope*" of the legal advice contained in the Document, public interest in transparency does not outweigh the interest of protecting legal advice.⁴⁵
- 3.59 In a democratic legal order, such as the EU legal order, it is of fundamental importance that the public is able to scrutinise the formation of rules which directly affect them, such as those pertaining to the Transparency Register, and hold the decision makers accountable. The Council was therefore clearly wrong to conclude that the protection of decision-making or legal advice prevails over the public interest in transparency in the present case.
- 3.60 The Applicant's second argument is that disclosure of the Document would allow the European Parliament and the European Commission better to understand the legal implications for the Council of participating in the mandatory Transparency Register. This would, in turn, enable the three institutions to have an open debate on those issues and ultimately to progress the proposal more effectively.⁴⁶
- 3.61 According to the Council, disclosure of the Document for the purposes of having an open debate among the institutions is not necessary, as sufficient inter-institutional channels of communication are already in place.⁴⁷
- 3.62 The Council, again, fails to substantiate its claim with any factual evidence whatsoever. In contrast, it is clear that there is a strong public interest in ensuring that the mandatory Transparency Register is put in place as soon as possible.
- 3.63 As is apparent from the above, the Council has not explained in any detail why, on balance, it considers there to be no overriding public interest in disclosure. Moreover, it fails to appreciate that, as demonstrated by the Applicant, the principle of transparency is especially pressing in the present case and that it clearly outweighs the Council's reasons for refusing access.

(iii) Intermediate conclusion

- 3.64 In light of the above, even if it had been established by the Council that disclosure of the Document would undermine the protection of legal advice or of the decision-making process, which the Complainant strongly disputes, full access to the Document should have been granted on the basis that there is an overriding public interest justifying its disclosure.

4. CONCLUSION AND REDRESS SOUGHT

- 4.1 For the reasons given above, the Council's refusal to provide full access to the Document was in breach of the Regulation and the settled case-law of the EU Courts.

⁴⁴ Confirmatory Application, pages 1 and 2. What the Applicant's argument is referring to is that having access to the information contained in the Document is essential for the public to be able to scrutinise the Council's approach regarding the reform of the Transparency Register and effectively to exercise its right to hold public bodies accountable and to participate in the EU decision-making process. In particular, it would assist the public in understanding why the Transparency Register is being implemented by way of an inter-institutional agreement as opposed to a legislative proposal and whether the Council is favouring options which would produce a weaker outcome in terms of transparency.

⁴⁵ Confirmatory Decision, paragraphs 26 and 27.

⁴⁶ Confirmatory Application, page 2.

⁴⁷ Confirmatory Decision, paragraph 25.

- 4.2 The Council's maladministration in the present case is particularly grave considering that the Document concerns the Transparency Register, a subject of direct concern to EU citizens. Further, the Complainant finds it distressing, as well as somewhat ironic, that the Council would deny the public access to information concerning the Transparency Register, the very purpose of which is to increase transparency in the EU.
- 4.3 Further, the present case should not be seen as an isolated incident. Rather, it should be viewed as an instance of a broader pattern of malpractice on the part of the Council in the way it treats requests for access to documents.
- 4.4 In this regard, it should be noted that the overriding purpose of the Regulation is to put in place a simple and efficient system through which EU citizens can obtain documents from EU institutions, with a view to making EU decision making more transparent and democratic; an end whose importance is emphasised by the Ombudsman in past Decisions.⁴⁸ However, in practice, the system is dependent on the institutions' willingness to comply with the applicable rules. If, as in the present case and what appears to be the Council's practice more generally, access to documents is routinely refused in the absence of valid grounds, the system fails.
- 4.5 It is evident that in the present case, the Council has refused access without giving proper thought to the obligations imposed on it by the applicable legal rules. Aside from the fact that the Council has misinterpreted the provisions of the Regulation and ignored applicable case-law, its approach suffers from a broader and more fundamental issue, namely that the reasons it has put forward to justify non-disclosure are strikingly vague. The Complainant has every reason to believe that such an approach is symptomatic of a general failure of the Council to justify its refusal decisions in sufficient detail.
- 4.6 To ensure a properly functioning access-to-documents regime for the benefit of EU citizens, it is therefore essential that the Ombudsman raises the above issues with the Council and ensures that going forward the Council adapts its practice on access to document so as to comply with the relevant rules. This is all the more important in light of the shifting nature of the decision-making process in the EU, in which the importance of the Council's role has considerably increased in recent years.
- 4.7 The Complainant therefore respectfully requests that the Ombudsman investigate the Council's conduct in the present case and ensure that the Council adapts its current approach to requests for access to documents in light of its concrete obligations under the Regulation.

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⁴⁸ See, for example, Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the European Parliament, paragraph 44.