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5 June 2019

Dear Mr Neumann,

I write regarding your letter of 28 May, in response to our complaint of 20 March. Thank you for your clarifications regarding the public provision of information on Europol's handling of requests for access to documents and the relation between Article 4(3) of the Europol Management Board Decision of 13 December 2016 and Regulation 1049/2001.

I would like to re-emphasise that, in our view, Europol is failing to meet its legal obligation to provide a comprehensive register of documents for the purpose of facilitating access to documents. I would also be grateful if you could clarify a point regarding Europol's annual reports on access to documents under the Regulation.

You point out in your letter that "the implementation approach in relation to the register of documents varies across the Union bodies and institutions." This is no doubt the case, but cannot be a way for those bodies and institutions to evade their responsibilities under Regulation 1049/2001. You refer to Article 9(1) of the Europol Management Board Decision of 13 December 2016, the wording of which essentially mirrors that of Article 11(2) of Regulation 1049/2001: "References [in the register] to those documents shall be made in a manner which does not undermine the protection of the interests set out in Article 4."

It is clear from this wording that public registers must include references to all documents (as defined in Regulation 1049/2001) held by the institutions or body in question, at the same time as protecting, where necessary, the interests set out in Article 4. The need to do the latter must be made compatible with the requirement to do the former. Article 9(2) of the Management Board Decision sets out precisely the information that the register should provide for each document.

The issue of the comprehensiveness of public registers of documents has been analysed previously by the European Ombudsman. In a 2009 inquiry into the European Commission's failure to maintain such a register, the Ombudsman cited a prior inquiry into the practice of the Council of the EU:

"... the Ombudsman noted that the relevant register was intended, as Article 11 of Regulation 1049/2001 underlines, "[t]o make citizens' rights under this Regulation effective". Article 2(3) of Regulation 1049/2001 provides that the Regulation shall apply to "all" documents held by an institution, "that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union". Recital 4 indicates that the purpose of Regulation 1049/2001 is to give "the fullest possible effect to the right of public access". In light of these provisions, the Ombudsman took the view that the register referred to in Article 11 could only achieve its aim "[t]o make citizens' rights under this Regulation effective" if it were as comprehensive as possible."

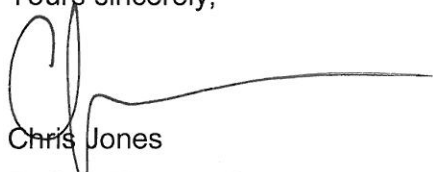
The Ombudsman went on to state that:

"Given that the term "document" is defined in Article 3(a) of Regulation 1049/2001 as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility", it was logical to assume that all these documents need to be included in the register. If the legislator had intended the term "document" to have a different, more limited meaning in Article 11 of Regulation 1049/2001, he could have been expected to include a provision to that effect. It should be noted in this context that Article 9 concerns the handling of "sensitive" documents and that Article 12(2) refers to "legislative" documents. This confirmed that the legislator distinguished between certain categories of documents in cases where he considered this to be appropriate. The absence of any such distinction in Article 11 could hardly be interpreted otherwise than as meaning that all documents within the meaning of Article 3(a) are meant to be covered by this provision."

Europol's efforts to increase transparency and provide assistance to citizens seeking further information on the Agency's activities are very welcome. However, it remains the case that the Agency is failing to meet its legal obligations to provide a comprehensive register of documents. As previously, we look forward to hearing how the Agency intends to meet that obligation.

Finally, I would be grateful if you could clarify a point in your letter regarding Europol's annual reports on access to documents. We noted in our initial complaint that the current Management Board Decision on access to documents contains no reference to the publication an annual report that includes the reasons for refusals and the number of sensitive documents not published in the register, as required by Article 17 of Regulation 1049/2001. Your confirmation that Europol will be producing an annual online report detailing public requests for access to documents is most welcome. Can you confirm that this overview will also include the number of sensitive documents held by Europol and not published in the register?

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Chris Jones', with a long horizontal flourish extending to the right.

Chris Jones

Project Director, Statewatch

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