

To the attention of Europol
Security Coordinator, Deputy Director

Brussels, 31 August 2012

Dear Mr. Martinů,

I have received the letter with your decision of 19 July 2012, in reply to my request of 21 June 2012 for public access to the final inspection report of the Joint Supervisory Body (JSB) of Europol.

With your letter, Europol refused to grant full or partial disclosure of the inspection report of the JSB. With the present letter, I submit a confirmatory application requesting Europol to reconsider its position, on the basis of Article 7 (3) of the Decision of the Management Board of Europol laying down the rules concerning access to Europol documents.

First of all, allow me to refer to Article 45 of the Council Decision of 6 April 2009 establishing the European Police Office (2009/371/JHA). Article 45 states: "[...] the Management Board shall adopt rules concerning access to Europol documents, taking into account the principles and limits set out in 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."

Therefore, the rules concerning access to Europol documents and their interpretation should be in line with the principles and limits set out in Regulation 1049/2001, as well as with the jurisprudence in relation to these principles and limits. In this respect, I would like to refer to the *In 't Veld versus Council*-judgment (T-529/09), point 20, in which the General Court reminds the parties unambiguously that "[...] the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest [and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure]. Furthermore, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see Case T-36/04 *API versus Commission* [2007], ECR II-3201, paragraph 54 and the case-law cited)."

Throughout your decision, exceptions to the principle of access to documents are applied in a general way, without linking the exceptions to specific parts, paragraphs or sentences of the requested report. The refusal to grant access to the full report without indication of how the disclosure of such parts, paragraphs or sentences would specifically and actually undermine the protected interest gravely impedes citizens and the Members of the European Parliament to make a proper judgment of the way in which the EU-US TFTP Agreement has been implemented by Europol.

1 - Article 4(1) (a) First indent: Undermining the protection of the public interest as regards public security, including the safety of natural and legal persons

You consider in your letter, in reference to the application of this provision, that the document requested concerns and undermines public security including the safety of natural and legal persons.

It strikes me as odd that it is argued that a full or partial disclosure of the JSB report on the implementation of the TFTP Agreement would make the activities of Europol and its Member States and international partners less efficient. The JSB report concerns the implementation of the TFTP Agreement. The full text of this agreement is publicly available. The public can already make

itself aware of the tasks of Europol, and the data that is being used and transferred on the basis of the TFTP Agreement. Any related activities reported in the JSB report not covered by the TFTP Agreement should either not take place, or should be Europol's responsibility for which Europol can be held accountable.

In your decision, you state that highly sensitive and operational information will become available when the JSB report would be disclosed. It seems unlikely that every paragraph of the JSB report contains sensitive information that would specifically and actually harm the public interest as regards public safety. On the contrary, the JSB was set up to ensure that the rights of the individual are not violated by the storage, processing and use of the data held by Europol and to review the permissibility of the transmission of data originating from Europol (Article 34 Council Decision 2009/371/JHA establishing Europol). Its analyses and conclusions in the report must therefore first and foremost relate to these objectives and only – if at all – only tangentially to the sensitive and operational information which you refer to. In case Europol would have legitimate reasons for withholding sensitive information in the JSB report, partial access could be granted, while the concerned phrases can be removed or made unreadable. To deny access to the report in its entirety is a flagrantly disproportional approach.

Taking into account the very purpose of the JSB's work on the final inspection report, which is to review Europol's work and progress with regard to the implementation of the TFTP Agreement, it is unacceptable that the public security exception is applied in such a general way as to withhold the findings of the JSB from the public.

2 - Article 4 (1) (a) Second indent: Undermining the protection of the public interest as regards the proper fulfilment of Europol's tasks

You consider in your letter, in reference to the application of this provision, that the disclosure of the document requested would undermine the public interest as regards the proper fulfilment of Europol's tasks.

Let me underline that all exceptions to the principle of openness and transparency must be interpreted and applied strictly. In the application of this provision, Europol should carefully assess its interpretation of "public interest".

The fact that protecting public security is a core task of Europol does not imply that Europol should not take into account the interest of democracy, the Rule of Law and the protection of fundamental rights of citizens. In the instant case, the application of the TFTP Agreement has considerable impact on the right to privacy of citizens, guaranteed by the ECHR and the ECtHR jurisprudence, by article 6 TEU, by the Charter of Fundamental Rights. Consequently, it is very important to have access to the JSB report, which analyses how the TFTP Agreement has been implemented and how this has affected these fundamental rights. It would not be acceptable that, on the basis of the protection of the public interest as regards the proper fulfilment of Europol's tasks - as interpreted by Europol - such rights are put aside or violated.

3 - Article 4 (1) (a) Third indent: Undermining the protection of the public interest as regards investigations and operational activities of Member States, third parties or EU bodies

You consider in your letter, in reference to the application of this provision, that the disclosure of the document requested would undermine the public interest as regards investigations and operational activities of Member States, third parties or EU bodies.

However, Europol does not in any way clarify how disclosure of (parts of) the JSB report would prejudice ongoing investigations and operational activities of the Member States and third parties. This is contrary to Article 9(2) of the Decision of the Management Board of Europol laying down the rules concerning access to Europol documents, which states that "Europol classified documents shall not automatically be subject to refusal of access. Every classified document shall be examined whether any of the exceptions provided for by Article 4 apply. [...]."

Even if certain parts of the JSB report would, other than we expect, have the effect of undermining its investigations or operations activities (or those of third parties), the remainder of the document should be made public. As pointed out above, since the purpose of the report is to establish whether Europol's handling of personal data is in accordance with the relevant EU rules, most of the report should focus on this analysis and can therefore not undermine such investigations.

4 - Article 4 (1) (a) Fifth indent: Undermining the protection of the public interest as regards international relations

I fail to understand how transparency in this case can prejudice the public interest as regards to international relations. It is evident that Europol works with third countries. A possible explicit reference in the JSB report to the fact that a certain country has submitted information within the legal possibilities of the TFTP Agreement can therefore not negatively affect international relations. Instead, it would give a welcome insight of how Europol's acquired competences are in fact being used.

This does not mean that Europol could under no circumstance apply the fifth indent of Article 4 (1) (a). This provision can be applied on specific pieces of information of which disclosure would specifically and actually undermine international relations, while taking into account democratic rights and respecting the principle of transparency. The current provision was designed to protect the *public interest* as regards international relations. Public interest should not be interpreted in a way that every claimed interest of third countries is served at all costs.

The fact that Europol has been requested by the United States to withhold the JSB report from public scrutiny cannot be regarded as the sole reason to refuse access to the report, under EU law and Europol's own rules for access to documents'. Contrary to what your letter suggests, the JSB report is not a "third party document" in the sense of Article 4(4) of the Decision of the Management Board of Europol laying down the rules concerning access to Europol documents, and therefore the request of the United States to not grant access to this document cannot as such be an overriding reason to do so. In any event, even if certain parts of the report would contain information received from third parties, any request by a third party not to disclose such information, should still be considered by an EU agency in light of and applying the EU standards and rules on access to documents. A foreign request does not put aside EU law.

Additional considerations

You mention in the decision that the JSB would have recommended to maintain the classification level while sharing the full JSB report with directly involved staff members of the US authorities. This is not relevant with regard to my request. A balanced and fair assessment of the JSB report with regard to the legitimate, actual and specific protected interests would - in the first place - have resulted in a well reasoned document that could have been shared with the public as well as with directly involved staff.

Furthermore, I wonder on which legal basis Europol assumes the authority to autonomously decide on an access to documents request which concerns a JSB report. The JSB has evaluated the

implementation of the TFTP Agreement on the basis of Article 34 (6) of the Council Decision establishing the European Police Office. The second paragraph of this article states: "The Joint Supervisory Body shall decide whether or not to publish its activity report, and, if it decides to do so, shall determine how it should be published." Taking this into account, the aim of the JSB must not have been to unnecessarily publish sensitive information that undermines the protection of the public interest in any way. Ms. Cruz, Chair of the JSB, stated during the LIBE committee meeting of 21 June 2012 that "the report contains no operational information that could jeopardise confidentiality". Europol has not validated the JSB's advice and unilaterally decided not to disclose the report. In your decision, it has even been made to appear that the report is being held from publication with the consent of the JSB, while the statement of Ms. Cruz on this matter leaves no room for ambiguity.

The above is of particular concern, for the TFTP Agreement was only hesitantly adopted by the European Parliament. For many Members of Parliament, the assurance by the European Commission that "close monitoring" of the implementation of the agreement would be facilitated was one of the essential conditions to give their respective consent. Your decision to deny access to the JSB report is a serious impediment to the process of close monitoring of the implementation of the TFTP Agreement.

The specific nature of Europol's counter terrorism activities is exactly the reason why the principles of transparency and public access to documents should be respected to the largest extent as possible. The "security argument" has the potential of leading to practices that are not covered for by democratically established legislation and might encourage a mentality of secrecy within the concerned agency. Such forces can grow beyond the control of citizens and their elected representatives. This is precisely why I feel obliged to insist on a public and effective close monitoring of the implementation of the TFTP Agreement by Europol.

On the basis of the reasons outlines above, I request Europol to reconsider its position and grant access to the concerned JSB report.

Yours sincerely,

Sophie In 't Veld
Member of the European Parliament