



Working for civil liberties in Europe since 1991

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Europol
P.O. Box 908 50
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20 March 2019

Dear Ms de Bolle,

I am writing on behalf of *Statewatch*, a registered charity based in the UK concerned with the advancement of education in the subject of civil rights and liberties, and the sound administration and development of the law relating to the civil rights and liberties of the individual.

We wish to register a complaint with you regarding Europol's rules on access to documents. These are set out in a Decision of the Europol Management Board of 13 December 2016 and seek to implement 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. We do not believe that Europol's current rules and practices with regard to access to documents comply with the requirements of that Regulation.

With our complaint, we call on you to ensure the following:

1. That the Agency establishes a comprehensive and complete register of documents that includes references to documents that the Agency has not published, but to which the public may request access.
2. That the Agency produces annual reports on access to documents that, alongside the number of requests received and processed, provide information on the grounds for refusals and on the number of sensitive documents held by the Agency not listed in the public register.
3. That the Agency amends its rules on access to documents to meet its previous commitment to include the term "seriously undermine" regarding grounds for refusal of access to documents.

Our reasoning is set out in the Annex to this letter.

Article 1 of the Lisbon Treaty enshrines the concept of openness, which, as Regulation 1049/2001 points out, “enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system,” and “contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.”

We hope you agree with us on the importance of ensuring the highest possible degree of openness in the Agency’s work and look forward to receiving your response.

Yours sincerely,

Chris Jones
Project Director, Statewatch
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Annex

1. Legal basis

Article 65 of Regulation 2016/794¹ states:

“1. Regulation (EC) No 1049/2001 shall apply to documents held by Europol.

2. By 14 December 2016, the Management Board shall adopt the detailed rules for applying Regulation (EC) No 1049/2001 with regard to Europol documents.”

A Decision of the Management Board of Europol of 13 December 2016 sets out rules for applying Regulation 1049/2001 with regard to Europol documents.²

2. Public register of documents

Following a previous inquiry by the Ombudsman:

“Europol stated that it initiated a project to establish a register of publicly accessible documents, which also takes into account the advice obtained from the Office of the European Ombudsman. The gradual implementation of the project has started and is planned for completion by the end of 2013. In this context, Europol will also make available on its website statistics regarding public access requests.”³

Europol’s website does contain a public register of documents, but it is manifestly incomplete, appearing only to include documents that the Agency is already obliged to make public, or which have been made public following access to documents requests.

Europol’s website states: “If a Europol document has not been published on or cannot be downloaded from the Public Register, an individual can ask to have access to it without providing any justification.”⁴

¹ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0794>

² DECISION OF THE MANAGEMENT BOARD OF EUROPOL laying down the rules for applying Regulation 1049/2001 with regard to Europol documents, 13 December 2016, https://www.europol.europa.eu/sites/default/files/documents/decision_of_the_mb_rules_applying_reg_1049_2001.pdf

³ Conclusions of the European Ombudsman's visit to the European Police Office (Europol): decision closing own-initiative inquiry OI/9/2012/OV, <https://www.ombudsman.europa.eu/en/decision/en/54568>

⁴ Public access to Europol documents, <https://www.europol.europa.eu/publications-documents/public-access-to-europol-documents>

However, it is obvious that if a document has not been published on the register, it is impossible to know of its existence. Furthermore, the register does not appear to contain any references to documents that cannot be downloaded (e.g. because they are deemed to fall under the exceptions to release set out in Regulation 1049/2001). Both these factors discourage requests for access, while the latter point reinforces the assertion that the register is incomplete.

Article 11 of Regulation 1049/2001 and Europol's own Management Board Decision on access to documents do not include any sort of distinctions about which documents should be entered in the register. The presumption is therefore that all documents should be entered in there in a way that does not undermine the protected interests set out in Article 4 of Regulation 1049/2011 and the Management Board Decision.

3. Reports on access to documents

Europol's 2017 Consolidated Annual Activity Report, its most recent annual report, makes no mention of access to documents.

Its 2016 and 2015 reviews do include brief reports on access to documents but neither includes information on the reasons for refusing access to documents or the number of sensitive documents held by the Agency and not listed in the public register.

The 2014 review includes a brief report on access to documents, including the grounds for refusing access, but nothing on the number of sensitive documents held by the Agency and not listed in the public register.

Following a previous Ombudsman inquiry, the Agency committed itself to "include a new section in its annual report on the handling of requests for public access to documents."⁵ It has partially met that obligation.

However, the current Management Board Decision on access to documents contains no reference to publishing 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.

⁵ Conclusions of the European Ombudsman's visit to the European Police Office (Europol): decision closing own-initiative inquiry OI/9/2012/OV, <https://www.ombudsman.europa.eu/en/decision/en/54568>

4. Failure to meet commitment to bring exceptions to public access to documents into line with Regulation 1049/2001

Article 4 of the Management Board Decision on access to documents, dealing with exceptions to access, includes the word “undermine” rather than the phrase “seriously undermine”, as used in Regulation 1049/2001. Europol told the Ombudsman in 2013 that: “The adjustment of the Europol MB decision on public access... will fully address the comment by the European Ombudsman.”⁶ However, the Agency has failed to meet its commitment.

5. Complaints

This complaint submits that:

4. The Agency should establish a comprehensive and complete register of documents that includes references to documents that the Agency has not published, but to which the public may request access.
5. The Agency should produce annual reports on access to documents that, alongside the number of requests received and processed, provide information on the grounds for refusals and on the number of sensitive documents held by the Agency not listed in the public register.
6. The Agency should amend its rules on access to documents to meet its previous commitment to include the term “seriously undermine” regarding grounds for refusal of access to documents.

⁶ Europol's opinion on the European Ombudsman's report following his visit to Europol (OI/9/2012/OV), <http://www.statewatch.org/ombudsman-cases/europol/europol-reply-to-omb-report-31-may-13.pdf>