



REPORT ON THE EUROPEAN OMBUDSMAN'S MEETING

COMPLAINT: 2272/2019/MIG

Case title: The European Union Agency for Law Enforcement Cooperation's alleged failure to maintain a comprehensive public register of documents.

Date: Thursday, 30 April 2020

Location: Conference call

Present

Europol

1 Senior Lawyer

2 Lawyers

European Ombudsman

Mr O'REGAN Fergal Anthony, Head of Unit

Ms GEHRING Michaela, Case handler

Ms MONGE SÁNCHEZ Coral, Trainee case handler

Purpose of the meeting

This inquiry is based on a complaint that Europol does not maintain a comprehensive public register of documents as provided for in Article 11 of Regulation 1049/2001. The purpose of the meeting was to discuss the issues raised by the complainant, and to gather information on the progress made as regards Europol's public register since own-initiative inquiry OI/9/2012/OV was closed.

Introduction and procedural information

The Ombudsman's inquiry team introduced themselves, thanked the Europol representatives for meeting with them and set out the purpose of the meeting. They outlined the legal framework that applies to meetings and inspections held by the Ombudsman. In particular, they informed Europol that the Ombudsman would not disclose any information or documents identified by Europol as "confidential" (in Europol's framework referred to as

sensitive non-classified and classified information), neither to the complainant nor to any other person outside the Ombudsman's Office, without Europol's prior agreement.¹

The inquiry team explained that they would draw up a report on the meeting to be sent to Europol by email for its confirmation whether it is factually accurate and complete. The meeting report will be included in the file and provided to the complainant. If there is any confidential information, it will be included in a confidential annex that will not be provided to the complainant or third parties.

Information exchanged

The rules and principles governing Europol's public register of documents

The Europol representatives explained that the latest change in Europol's legal framework was in 2016, when the 'Europol Regulation'² entered into force. In December 2016, Europol's Management Board then adopted a decision laying down the rules for applying Regulation 1049/2001 (the 'Management Board Decision'). The Europol representatives noted that this decision is publicly available on its website.³ It is also provided to applicants submitting a request for public access to documents.

Europol's representatives stated that Europol's policy governing its public register is set out in Article 9 of the Management Board Decision. This provision stipulates that a public register of documents shall be established to allow citizens to exercise their rights under the EU rules on public access to documents, and that references to documents shall be made in a manner which does not undermine any protected interest⁴. The Europol representatives clarified that there are no additional rules governing its public register, such as an internal policy.

Europol's document management system

The Europol representatives explained that the Agency has, in addition to other operational processing environments, a document management system (DMS) and a communication system (the Secure Information Exchange Network Application or so-called 'SIENA System').

The DMS is a complex system that stores all the documents that Europol draws up itself or receives from others (also certain documents referring to operational activities of Europol, managerial documents, strategic documents, etc.), however not the actual operational information which can legally only be stored in the operational processing environments as outlined in the Europol Regulation (Article 18). Generally, all documents that are drawn up by Europol, irrespective of whether these are drafts or final documents, are stored in the DMS. The person drawing up the document (as internal document 'owner') decides on its accessibility in the DMS to other colleagues. Therefore, when Europol receives a request for

¹ Article 4.8 of the European Ombudsman's Implementing Provisions.

² Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol): <http://data.europa.eu/eli/reg/2016/794/oj>

³ <https://www.europol.europa.eu/publications-documents/decision-of-europol-management-board-laying-down-rules-for-applying-regulation-1049/2001-regard-to-europol-documents>.

⁴ Under Article 4 of the Management Board Decision.

public access to documents, the Legal Officer dealing with the request consults all departments that could potentially be in possession of a document that fits the description provided by the applicant. The Legal Officer, in close consultation with the public access focal points in the departments, then assess every document identified as falling within the scope of the request, including draft documents.

The “SIENA System” is a communication system that connects Europol with EU Member States and third parties with which Europol has a cooperation agreement in place and allows users to exchange operational and strategic crime-related information in a swift and secure manner. It is governed by a strict data protection and security regime and mainly contains operational information, including personal data related to particular cases such as pictures or fingerprints of suspects. Depending on the content, documents received from a Member State or third country via this system may also be registered in the DMS, though this is normally prevented by EU data protection rules (specifically Article 18 of the Europol Regulation providing the legal conditions to process personal data). However, the decision as to where a document is registered does not affect whether public access can be requested, the law enforcement data accessible via SIENA is generally covered by one or more of the exceptions set out in Article 4 of Regulation 1049/2001.

In addition, granting public access to documents received from third countries is sometimes more cumbersome as their transparency rules are sometimes different than the EU rules. When Europol receives a request for public access to a document that it has received from others for internal use only, Europol consults the owner of the document and then assesses whether it can be disclosed under the EU rules.

Documents included in Europol’s public register

The Europol representatives stated that, at the moment, Europol’s public register comprises about 2000 documents. They explained that it is difficult to establish as a rule that a certain category of documents may be automatically included in the public register. There is always a potential risk that a document will include strategic or operational information that is not disclosable under Regulation 1049/2001. For this reason, Europol follows a case-by-case assessment of the nature and content of documents as regards their inclusion in the public register.

The Agency strives to make as many documents as possible proactively publicly available. Nevertheless, the majority of Europol’s documents are by definition very sensitive and would fall under one or more of the exceptions of Article 4 – such as the exceptions for the protection of the public interest as regards public security, or the privacy and integrity of the individual. Europol’s documents often include operational information on specific investigations or personal data, for instance, the name of a suspect or criminal organisation or the *modus operandi* of certain investigations. In some cases, disclosing the title of a document may already be detrimental for Europol’s work, or more important, be harmful for the activities of the law enforcement authorities of the Member States (and those of Europol’s partners).

The Ombudsman’s inquiry team took note of Europol’s view as regards the very sensitive nature of Europol’s work. In particular, they took note that, if the title or existence of a

document were likely to undermine any of the exceptions provided for in Article 4 of Regulation 1049/2001, it would be justified not to provide information even about the *existence* of a document.

When and how the public register is updated

The Europol representatives stated that updating the public register is mainly the responsibility of Europol's Corporate Communications Unit. This unit includes in Europol's public register documents that are drafted with the intention to be published (*e.g.* the annual report or the guidelines on the Covid-19 pandemic) shortly after they are finalised. It also records documents that it considers to be of public interest when it identifies such documents. To this end, the Corporate Communications Unit is in constant contact with all other units. In addition, following a notification by the Legal Unit, it includes documents in the public register that have been (partially) released following a request for public access.

Requests for public access to documents

The Europol representatives pointed out that, in recent years, Europol has increased its interactions with the public. Consequently, the number of requests for public access to documents has increased remarkably. Europol's representatives estimated that there has been a 250 % increase in the number of public access requests in the last few years, to a total of about 300 requests in 2018 and about 350 in 2019.

Europol will soon provide a dedicated overview regarding requests for access to documents on its website for the years 2017 onwards.

Conclusion of the inspection meeting

The Europol representatives agreed to provide an internal and confidential copy of the preliminary figures on request for access to documents to the Ombudsman's inquiry team.

The inquiry team thanked the Europol representatives for their time and for the explanations provided, and the meeting ended.

Brussels, 23 June 2020



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