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## Proposal

### of the European Ombudsman for a solution in case 2272/2019/MIG on the European Union Agency for Law Enforcement Cooperation's (Europol) public register of documents

Made in accordance with Article 3(5) of the Statute of the European Ombudsman<sup>1</sup>

## Background to the complaint

1. EU citizens, residents and legal persons with a registered office in the EU have the right to access documents<sup>2</sup> held by the EU institutions, bodies, offices and agencies ('the EU institutions').
2. EU rules on public access to documents<sup>3</sup> require the EU institutions to carry out their tasks as openly and transparently as possible. This includes providing public access to a 'register of documents'.<sup>4</sup>
3. The complainant, a non-profit organisation, considered that the European Union Agency for Law Enforcement Cooperation (Europol) does not comply with its obligations under the EU rules on public access to documents.
4. In March 2019, the complainant contacted Europol, asking it to establish a comprehensive public register of documents.
5. Europol replied to the complainant, referring to its dedicated webpage<sup>5</sup> on which it makes many documents proactively available.

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<sup>1</sup> Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

<sup>2</sup> Pursuant to Article 42 of the Charter of Fundamental Rights of the European Union: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT> and Article 15(3) of the Treaty on the Functioning of the European Union (TFEU).

<sup>3</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>, applicable to Europol pursuant to Article 65 of Regulation 2016/794 on Europol: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0794&from=EN>.

<sup>4</sup> Pursuant to Articles 11 of Regulation 1049/2001.

<sup>5</sup> Europol's register of documents is available at: <https://www.europol.europa.eu/publications-documents>.



**6.** In June 2019, the complainant contacted Europol again, reiterating its views as to why it considered that Europol's register of documents was incomplete.

**7.** When Europol did not reply to the complainant's second letter, the complainant turned to the Ombudsman in December 2019.

## The inquiry

**8.** The Ombudsman opened an inquiry into the complainant's concern that Europol did not provide public access to a comprehensive register of documents.

**9.** In the course of the inquiry, the Ombudsman's inquiry team met with Europol representatives to discuss the issues raised by the complainant. The Ombudsman drew up a meeting report, which she shared with the complainant, and, subsequently, received the complainant's comments on the meeting report.

## Arguments presented

**10.** The complainant accepted that Europol had established a register of documents. However, it considered that Europol's register was incomplete.

**11.** As an example, the complainant noted that Europol's register of documents did not appear to contain any reference to documents which are not, at the same time, made available for download. It was therefore concerned that Europol did not list in its register any documents that it deems should not be disclosed<sup>6</sup> under the EU's rules on public access to documents. The complainant considered that a lack of such records could discourage the public from making requests for public access.

**12.** The complainant also argued that, given that the EU rules on public access to documents did not specify which document an institution's register of documents must contain, the register should contain *all* documents in the possession of the institution concerned.

**13.** Europol said that it considered its register of documents to comply with the applicable rules, which require that reference to documents in the register is made in a way that does not undermine any protected<sup>7</sup> public interest.

**14.** Europol added that it was constantly striving for greater transparency and that it would assist citizens who would like to obtain access to specific documents.

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<sup>6</sup> Article 4 of Regulation 1049/2001 on public access to EU documents, sets out a series of exceptions, based on which EU institutions can refuse to disclose documents. These include the protection of public security, defence and military matters, international relations, financial or monetary policy, private data and internal decision making processes.

<sup>7</sup> Pursuant to Article 4 of Regulation 1049/2001.



15. During the inquiry, Europol explained that, due to the sensitive nature of its work, it decides on a case-by-case basis which documents to include in its register. Europol said that, while it strives to make as many documents as possible proactively available, many documents held by it include sensitive operational information or personal data that cannot be disclosed. In some cases, disclosing the title of a document could already undermine a protected public interest.

16. Europol also said that it updated its register of documents continuously and noted that there has been a sharp increase in requests for public access to documents in recent years. It added that it publishes documents, which it releases reactively, following a request for public access, on its register.

17. The complainant pointed out that some of the documents to which it had obtained access by making a request under Regulation 1049/2001 were not included in Europol's register of documents.

## The Ombudsman's assessment

18. Transparency and openness are the cornerstones of democratic societies such as the EU<sup>8</sup>, enabling citizens to participate in decision making and safeguarding the legitimacy, effectiveness and accountability of public administrations.<sup>9</sup>

19. The Ombudsman notes that Europol has made a significant number of documents proactively available on its website and commends Europol for its efforts towards establishing a register of documents since the Ombudsman's 2012 own-initiative inquiry into this matter<sup>10</sup> was closed.

20. While the EU's rules on public access to documents (Regulation 1049/2001) oblige institutions to establish a register, the Ombudsman notes that it was not the legislator's intention that *every* document included in an institution's register should be published proactively. Nor was the register intended to be a record of all documents that have been released following requests for public access (though publishing such documents is a commendable practice). Rather, the purpose of the register of documents is "*to make citizens' rights under [Regulation 1049/2001] effective*"<sup>11</sup> and "*to make it easier for citizens to exercise their rights*"<sup>12</sup>. In other words, the register of documents should **enable individuals to identify documents to which they may want to request public access.**

21. The Ombudsman considers that it greatly facilitates individuals exercising their right of access if they can adequately inform themselves about the

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<sup>8</sup> The EU Treaties establish the principle that the EU institutions should take decisions as transparently as possible. Article 1 of the Treaty on European Union, Article 15 of the Treaty on the Functioning of the European Union.

<sup>9</sup> See preamble (2) of Regulation 1049/2001.

<sup>10</sup> The decision closing own-initiative inquiry OI/9/2012/OV (Visit to the European Police Office - Europol) is available at: <https://www.ombudsman.europa.eu/en/decision/en/54568>.

<sup>11</sup> Article 11(1) of Regulation 1049/2001.

<sup>12</sup> Preamble (14) of Regulation 1049/2001.



documents that exist. It is therefore key that the EU institutions make sure that the public can find out what documents they hold.

**22.** While Regulation 1049/2001 applies to *all* documents in the possession of the EU institutions, the Ombudsman notes that the EU's rules on public access were drawn up two decades ago. Many EU institutions did not exist back then. In addition, the digitalisation of society has transformed how organisations work and communicate. These circumstances have to be taken into account when interpreting the EU's rules on public access to documents.

**23.** The Ombudsman also notes that each EU institution is different, and has to align its approach to a public register of documents with its distinct characteristics. For example, 'justice and home affairs agencies' such as Europol operate in particularly sensitive areas. It is thus inherent in the nature of its work that some documents it holds may be too sensitive even to be mentioned in a register, as disclosing their very existence could risk undermining a protected public interest.

**24.** However, the Ombudsman considers that all EU institutions should apply certain principles to their respective register of documents, so as to ensure good administrative practice and thus to ensure that their register is adequate. These include the following principles:

**25.** To make it as easy as possible for individuals to navigate through the register and to identify specific documents to which they may want to obtain access, the register of documents should be user-friendly. This includes having a dedicated public register webpage. If there are several locations where information/documents can be found, the layout of the register should be explained and links to the different sections should be provided. In general, the register should allow individuals to get an overview of the (kind of) documents that are held by the institution concerned.

**26.** The register of documents should be complete. This means that all documents concerning the core activities of the institution concerned – such as legislative documents and documents concerning its decisions, strategy, and policy – should be recorded individually (if not published proactively<sup>13</sup>). For other types of documents, the register should refer to their existence, at the very least by listing categories of documents, if they are not recorded individually. This concerns, for example, staff-related documents, such as personnel files, or documents concerning the management of an institution's premises.

**27.** Maintaining a complete register of documents also means that institutions should not *automatically* exclude documents, simply because they consider that the *content* of those documents should not be disclosed. While documents do not need to be recorded in the register if *disclosing their very existence* could very likely risk undermining any protected public interest, the institution should

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<sup>13</sup> The EU institutions are required "as far as possible, [to] make documents directly accessible to the public." This concerns first and foremost legislative documents and documents relating to the development of policy or strategy (see Article 12 of Regulation 1049/2001).



assess on a case-by-case basis whether it is indeed justified not to list such a document or categories of documents.

**28.** The Ombudsman also considers that the register of documents should be maintained in a timely manner. To this end, the public register needs to be updated on a very regular basis.

## **The proposal for a solution**

**Based on the above findings, the Ombudsman proposes that Europol should update its register of documents, taking into account the principles of good administrative practice set out in paragraphs 24 to 28 above.**

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