

Entscheidung über die Weigerung des Europäischen Auswärtigen Dienstes, der Öffentlichkeit Zugang zu Dokumenten im Zusammenhang mit der Polizeimission der EU für die Palästinensischen Gebiete zu gewähren (Fall 2051/2021/MIG)

Entscheidung

Fall 2051/2021/MIG - Geöffnet am 25/11/2021 - Entscheidung vom 07/03/2022 -

Betroffene Institution Europäischer Auswärtiger Dienst (Kein Missstand festgestellt) |

Der Fall betraf einen Antrag auf Zugang der Öffentlichkeit zu Dokumenten betreffend eine zivile EU-Mission in den palästinensischen Gebieten. Der EAD ermittelte sechs Dokumente, die Gegenstand des Antrags des Beschwerdeführers auf Zugang waren, und verweigerte den Zugang. Dabei berief er sich auf Ausnahmen gemäß den Rechtsvorschriften der EU für den Zugang der Öffentlichkeit zu Dokumenten und argumentierte, dass die Freigabe der Dokumente den Schutz des öffentlichen Interesses im Hinblick auf die öffentliche Sicherheit und die internationalen Beziehungen beeinträchtigen könnte.

Das Untersuchungsteam der Bürgerbeauftragten prüfte die fraglichen Dokumente und erhielt weitere, vertrauliche Erklärungen des EAD. Aufgrund dessen und in Anbetracht des breiten Ermessensspielraums, über den EU-Organe verfügen, wenn sie der Auffassung sind, dass die öffentliche Sicherheit und die internationalen Beziehungen gefährdet sind, stellte die Bürgerbeauftragte fest, dass die Entscheidung des EAD, den Zugang zu verweigern, nicht offenkundig falsch war. Angesichts der Tatsache, dass das jeweilige öffentliche Interesse nicht durch ein anderes, vermeintlich wichtigeres öffentliches Interesse zurückgestellt werden darf, schloss die Bürgerbeauftragte den Fall mit dem Befund ab, dass es keinen Missstand in der Verwaltungstätigkeit gegeben hat.

Background to the complaint

1. In 2006, the EU established the European Union Police and Rule of Law Mission for the Palestinian Territory ('EUPOL COPPS'). EUPOL COPPS's objective is to assist the Palestinian Authority in building its institutions, for a future Palestinian state, with a focus on security and justice sector reforms. [1] Its mandate is extended annually by a decision of the Council of the EU that is informed by a strategic review report prepared by the European External Action Service (EEAS). [2]



2. In July 2021, the complainant, a journalist, asked the EEAS to grant public access [3] to (i) any notes on EUPOL COPPS and its activities drawn up for the EU High Representative, as well as (ii) any minutes, transcripts and internal reports of all meetings which the High Representative held with representatives of EUPOL COPPS, since December 2019.

3. The EEAS identified six documents as falling under the scope of the complainant's access request, namely its most recent strategic review report and five documents that are classified (four six-monthly reports on EUPOL COPPS and one special report on anti-corruption drawn up by the Mission). The EEAS refused to give access to these documents, relying on the need to protect the public interest as regards public security, defence and military matters and international relations. [4]

4. In September 2021, the complainant asked the EEAS to review its decision (by making a 'confirmatory application').

5. The EEAS then issued a confirmatory decision maintaining that access must be refused. However, it no longer relied on the need to protect defence and military matters.

6. Dissatisfied with this reply, the complainant turned to the Ombudsman in November 2021.

The inquiry

7. The Ombudsman opened an inquiry into the EEAS's refusal to grant public access to the requested documents.

8. In the course of the inquiry, the Ombudsman inquiry team met with representatives of the EEAS. The inquiry team also inspected the strategic review report as well as a sample of the classified documents at issue. Subsequently, the Ombudsman drew up a report on the inspection and meeting, on which the complainant made comments.

Arguments presented

At the confirmatory stage

9. In his confirmatory application, the complainant argued that the exception for the protection of the public interest as regards international relations is not applicable given that the Palestinian Authority is not recognised as a state. The complainant also contended that disclosure would increase public security rather than undermine it, because transparency increases citizens' trust in public authorities.

10. In its confirmatory decision, the EEAS said that the documents include a detailed analysis of



the political and security environment in which EUPOL COPPS operates, and of certain aspects of the Palestinian institutions and processes within the security and justice sectors. The EEAS considered that disclosure of the documents would reveal possible shortcomings and gaps and would thus pose a threat to Palestinian public security.

11. The EEAS also argued that disclosure would severely undermine the trust needed for the cooperation between EUPOL COPPS and the Palestinian Authority, thereby impeding the Mission's activities, and that it would damage the EU's relations with the other stakeholders involved.

12. The EEAS emphasised that the Mission operates in a delicate political situation and considered that disclosure of the documents would jeopardise the efforts made towards strengthening the stability of the region concerned.

Before the Ombudsman

13. In his complaint to the Ombudsman, the complainant added that the EEAS had not put forward any evidence that suggests that disclosure would undermine public security. The complainant also argued that EUPOL COPPS does currently not meet the most basic standards of accountability and transparency.

14. In the meeting with the Ombudsman inquiry team, the EEAS explained that, when drawing up a strategic review report, it relies heavily on the input from all stakeholders involved. This includes other EU actors, such as the European Border and Coast Guard Agency (Frontex), but also United Nations Agencies, Palestinian institutions and organisations, and non-EU countries. It considered that, to ensure that the EEAS obtains the required information, it is important to maintain the mutual trust with those stakeholders, which would be breached if the documents were disclosed.

15. The EEAS also stated that the need to protect international relations and the need to protect public security are interrelated, as a loss of the stakeholders' trust would in turn diminish the EU's role as a security provider in the region concerned.

16. The EEAS also took the view that disclosure could undermine the decision-making leading to the adoption of its strategic review reports. [5] However, the EEAS had not considered it necessary to rely on this exception, given that this document was deemed to be covered in its entirety by the two exceptions invoked.

17. The EEAS also provided the Ombudsman inquiry team with further, confidential details as to why access had to be refused. [6]

18. In his comments on the meeting report, the complainant argued that there is a public interest in disclosure, namely in knowing the nature of the relationship between EUPOL COPPS and Frontex (which the EEAS had referred to) and in verifying whether these EU bodies respect



fundamental rights.

19. The complainant also contended that the exception for the protection of international relations should not apply to the EU's relations with Israel.

The Ombudsman's assessment

20. Based on the inspection of the documents at issue, the Ombudsman can verify that they contain the information described by the EEAS.

21. The EU institutions enjoy a wide margin of discretion when determining whether disclosing a document would undermine any of the public interests protected under Article 4(1)(a) of the EU legislation on public access to documents (Regulation 1049/2001), such as the protection of public security and the protection of international relations. [7]

22. As such, the Ombudsman's inquiry sought to determine if there was a manifest error in the EEAS's assessment on which it based its decision to refuse access to the documents it had identified as falling under the scope of the complainant's request.

23. To that end, the Ombudsman's inquiry team inspected the documents and obtained additional explanations from the EEAS, including confidential information that it could not share with the complainant so as not to undermine the very interests it aims to protect. On the basis of this information, the Ombudsman finds that it was not manifestly wrong for the EEAS to consider that disclosing the documents falling within the complainant's access request could undermine the public interest as regards public security and as regards the EU's international relations.

24. In addition, in light of the wording of Article 4(1)(a), 3rd indent of Regulation 1049/2001, the exception for the protection of the public interest as regards international relations does not seem to be limited to the EU's relations with *states*. Irrespective of that, the Ombudsman notes that the majority of the relevant stakeholders concerned are either (non-EU) countries or international bodies whose members include non-EU countries. It is therefore clear that this exception can be invoked in this case.

25. The EEAS also clarified during this inquiry that all documents at issue are covered by both exceptions it relied on. The Ombudsman considers this view to be reasonable.

26. The public interests protected under Article 4(1)(a) of Regulation 1049/2001 cannot be superseded by another public interest that is deemed more important. This means that, if an institution considers that any of these interests could be undermined by disclosure, they must refuse to give access. Thus, the complainant's arguments concerning a possible overriding public interest in disclosure could not be considered.

27. In light of all this, the Ombudsman finds that the EEAS was justified in refusing to grant



public access to the documents at issue.

28. Given the sensitive nature of the information contained in the documents at issue, the Ombudsman also considers that the EEAS provided the complainant with sufficient reasons for its decision to refuse access.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration by the European External Action Service.

The complainant and the EEAS will be informed of this decision.

Emily O'Reilly European Ombudsman

Strasbourg, 07/03/2022

[1] For more information, visit: <https://eupolcopps.eu/en> [Link].

[2] The latest decision was adopted in June 2021, see Council Decision (CFSP) 2021/1066 amending Decision 2013/354/CFSP on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS):
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D1066> [Link].

[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> [Link]; applicable to the EEAS pursuant to Article 11(1) of the Council Decision 2010/427 establishing the organisation and functioning of the European External Action Service:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0427&from=ES> [Link].

[4] In accordance with Article 4(1) (a), 1st, 2nd and 3rd indent of Regulation 1049/2001.

[5] In accordance with Article 4(3) of Regulation 1049/2001.

[6] The full meeting report is available at:
<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/153282> [Link].

[7] See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission*



, T-644/16:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=lst&dir>
[Link].