

Proposal of the European Ombudsman for a solution in case 1270/2017/EIS on the European Police Office's refusal to grant full access to documents regarding Joint Investigation Teams and operational plans at the 'hotspots'

Solution - 08/01/2019

Case 1270/2017/JAP - **Opened on** 28/06/2018 - **Decision on** 10/05/2019 - **Institution concerned** European Union Agency for Law Enforcement Cooperation (Solution achieved) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The complainant is a PhD researcher who on 1 April 2017 made a request for public access to documents to the European Police Office (Europol) regarding the mutual agreements of Europol's Joint Investigation Teams [2] and Europol's operational plans at the 'hotspots' [3] in Italy and Greece.
2. On 7 April 2017, Europol acknowledged receipt of the request, and on 24 May 2017, it sent its reply to the complainant. It had identified **six** documents as falling under the scope of his request. It refused to grant access to these documents in accordance with Article 4(1)(a) of its rules on access to documents [4] . It argued that the disclosure of the documents would undermine the proper fulfilment of Europol's tasks.
3. On 5 June 2017, the complainant asked Europol to review its initial decision (by making what is known as 'a confirmatory application'). He argued that, regarding finished operations, at least partial access should be granted.
4. On 17 July 2017, Europol replied to the request for review and granted partial access to **one** document. It had deleted personal data and private information to protect the privacy and integrity of the individuals mentioned therein. For the remaining **five** documents, its position remained unaltered, with public access refused.
5. Dissatisfied with Europol's decision, the complainant turned to the Ombudsman.



The inquiry

6. The Ombudsman opened an inquiry into Europol's decision not to grant full access to the six documents.

7. In the course of the inquiry, the Ombudsman's inquiry team inspected the six documents in order to be able to determine whether Europol had applied its rules on access to documents correctly.

Arguments presented to the Ombudsman

8. The complainant argued that Europol's refusal to grant access was not properly justified. While it was understandable that Europol could not grant access to documents regarding **ongoing** operations, it should at least grant partial access to documents concerning **finished** operations. In addition, the complainant claimed that Europol should not limit the scope of his request to Europol's role regarding the 'hotspots', but that it should identify any type of document that may help him further understand how Europol assists Member States in the management of the EU's external borders.

9. Europol explained that the documents contained “ *operational and sensitive information on standard operating procedures applicable to hotspots, the implementation and oversight of these procedures and situational reports regarding deployment of Europol staff to hotspots. The disclosure of such information risks prejudicing the effectiveness of present and future related operations in the hotspots conducted by Europol's partners and EU Member States. This would undermine their trust and endanger mutual cooperation, which is essential to Europol's activities, and would consequently hinder Europol's ability to effectively perform its tasks in this domain* ”.

10. In response to a question of the Ombudsman's inquiry team following the inspection, Europol said that, at the time when the complainant made his request, there were no further documents in its possession falling within the scope of the request.

The Ombudsman's assessment

11. Having inspected the six documents, the Ombudsman considers that Europol has interpreted the scope of the complainant's request reasonably. The complainant has not provided any valid arguments that would put into question Europol's statement that there were no further documents within the scope of the request. The inspection of the documents showed that they all contain detailed information pertaining to Europol's, other EU bodies', Member States' and third parties' operational activities in the hotspots, which were ongoing.

12. However, Article 8(1) of Europol's rules on public access to documents requires Europol to



state reasons for its refusal of a confirmatory application. In this case, Europol failed to do so as regards five of the documents concerned [5] .

13. The Ombudsman notes that any exceptions to the right of public access to documents must be interpreted strictly [6] . The application of an exception may be justified only if the institution has assessed whether access to the specific document in full and in part would **specifically and actually** undermine the protected interest.

14. In addition, as regards the document on the standard operating procedures applicable to hotspots in Greece, Europol explained to the Ombudsman's inquiry team that the author of that document, which is a draft, is the Greek ministry in charge of migration issues. It is not apparent from the inspected file why Europol did not consult Greece about the disclosure or whether Greece asked for it not to be disclosed. In this respect, the Ombudsman notes that an equivalent document about hotspots in Italy, authored by the Italian authorities, was apparently made public (with personal data deleted) by the Italian authorities and later disclosed by Europol.

15. In view of the above, the Ombudsman takes the view that Europol should reassess its position on the five documents at issue after consultation with the originating authorities. The Ombudsman therefore makes a corresponding proposal for a solution below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

The proposal for a solution

Based on the above findings, the Ombudsman proposes that Europol should reassess its position on the five documents at issue, having consulted the authorities who have authored or supplied the information contained in the documents.

Europol is invited to inform the Ombudsman by 28 February 2019 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly

European Ombudsman

Strasbourg, 08/01/2019

[1] 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.

[2] These are the terms in accordance with which Joint Investigation Teams are to operate.



[3] 'Hotspots' are areas of frontline Member States which are facing important migratory pressures at the EU's external borders.

[4] Article 4(1)(a) of the Decision of the Management Board of Europol laying down the rules concerning access to Europol documents: “ *Europol shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: - public security including the safety of natural and legal persons,*

- the proper fulfilment of Europol's tasks ,

- investigations and operational activities of Member States, third parties or EU bodies,

- defence and military matters,

- international relations,

- the financial, monetary or economic policy of the Community or a Member State, [...]”
(emphasis added).

[5] It released the sixth document blanking out the personal data of the persons concerned.

[6] See, for instance, judgment in case C-64/05, *Sweden v Commission* , ECLI:EU:C:2007:802, paragraph 66.