

## Decision in case 935/2018/EA on the handling of requests for public access to EUNAVFOR Med Operation Sophia's documents

Decision

**Case 935/2018/FP - Opened on 22/07/2018 - Decision on 22/07/2019 - Institution concerned** European External Action Service ( No maladministration found ) |

The case concerned how the European External Action Service (EEAS) and Operation Sophia handled requests from a journalist for public access to documents relating to EUNAVFOR Med Operation Sophia. Operation Sophia is a European Union military operation in the Southern Central Mediterranean that seeks to identify, capture and dispose of vessels used by migrant smugglers or traffickers. Dissatisfied with the responses he received, the complainant turned to the Ombudsman.

The Ombudsman held a meeting with EEAS representatives and contacted Operation Sophia. The Ombudsman found that the EEAS handled the requests for access to documents properly. The Ombudsman noted that Operation Sophia is not itself an EU body, and is not formally subject to EU access to documents rules. However, the Ombudsman is reassured that Operation Sophia has recognised the importance of having a transparency policy and has now decided to adopt a policy for dealing with access to documents requests. Choosing to take such a position will enhance trust in Operation Sophia and in the EU. The Ombudsman suggests that the EEAS circulate the policy to other civilian and military missions and operations, and urge them to adopt similar rules.

## Background to the complaint

1. The complainant, a journalist, asked the European External Action Service (EEAS), the European Commission, the Council of the European Union, and EUNAVFOR Med Operation Sophia (Operation Sophia) to give him public access to documents relating to Operation Sophia. Operation Sophia is a European Union military operation in the Southern Central Mediterranean. It is one element of a broad EU response to concerns about migration in that region. Its core mandate is to identify, capture and dispose of vessels and enabling assets used or suspected of being used by migrant smugglers or traffickers. [1]

2. The EEAS provided the complainant with access to some of the requested documents.



However, it informed him that not all the requested documents were in its possession. It did not have information about Operation Sophia's rescues, nor documents about how Operation Sophia should deal with requests made under EU rules on public access to documents (Regulation 1049/2001). [2]

3. The complainant then contacted Operation Sophia and asked how he could submit a request to grant him public access to documents held by Operation Sophia. Operation Sophia replied that Regulation 1049/2001 does not apply to Operation Sophia.

4. Dissatisfied with these replies, the complainant turned to the Ombudsman.

## **The inquiry**

5. The Ombudsman opened an inquiry into the following aspects of the complaint:

1) Operation Sophia refuses to comply with Regulation 1049/2001.

2) There is a lack of clarity as to who is responsible for Operation Sophia's documents and whether and how access can be requested under Regulation 1049/2001.

6. The Ombudsman held a meeting with the EEAS to discuss the issues arising from the complaint and obtained written replies to a set of questions. The questions concerned the legal status of Operation Sophia and how the EEAS and Operation Sophia handle requests for public access to documents relating to Operation Sophia. After meeting with EEAS representatives, the Ombudsman received the complainant's comments on the meeting report. The Ombudsman also wrote to Operation Sophia and received its reply to a set of written questions. [3]

## **Whether the EU rules on public access to documents apply to Operation Sophia**

### **Arguments presented to the Ombudsman**

7. The EEAS explained to the Ombudsman that there are three types of Common Security and Defence Policy (CSDP) missions and operations: i) civilian missions, ii) military executive operations (such as Operation Sophia), and iii) military non-executive missions. These missions and operations are not 'EU bodies' and thus are not be subject to EU access to documents rules. The EEAS added further detail on the legal status and legal capacity of the various types of missions and operations.

8. The complainant argued that the EEAS's explanations create confusion and legal uncertainty. The lack of clarity as to whether Operation Sophia falls within EU law creates uncertainty as regards how the Operation can be held accountable for its actions.



## The Ombudsman's assessment

**9.** Regulation 1049/2001 applies directly to the European Parliament, the Council, and the Commission, as well as to a number of other EU institutions, bodies, offices and agencies by virtue of a specific provision in their respective founding acts or through voluntary acts.

**10.** The Treaty on the Functioning of the European Union (TFEU) extended the right of public access to documents of all the “ *EU institutions, bodies, offices and agencies* ”. [4]

**11.** To establish whether Operation Sophia is responsible for handling requests for public access to documents, it is thus necessary to determine whether Operation Sophia is an ‘ *EU body*’.

**12.** The EU case-law has established criteria determining the status of an EU “ *body, office, or agency* ” within the meaning of the TFEU. According to these criteria:

(i) political control and strategic direction should be exercised by the ‘body’ independently;

(ii) powers in budgetary and financial matters should not be exercised under the supervision/authority of another institution. [5]

**13.** As regards Operation Sophia, the Ombudsman notes that the Political and Security Committee exercises the political control and strategic direction under the responsibility of the Council and the High Representative of the Union for Foreign Affairs and Security Policy. The costs of Operation Sophia are met by the contributing States. [6]

**14.** The Ombudsman therefore accepts that Operation Sophia does not satisfy the formal criteria for an ‘ *EU body* ’ and so is not required to handle requests for public access to documents in accordance with EU rules under Regulation 1049/2001.

## Handling of requests for access to Operation Sophia's documents

### Arguments presented to the Ombudsman

#### Handling of requests by the EEAS

**15.** The EEAS explained to the Ombudsman how it deals with public access requests. If the EEAS holds a document originating from an operation or from another third party, a consultation is conducted, [7] unless it is clear that the document should or should not be disclosed. If the



EEAS is not in possession of the document, it informs the requestor accordingly. It explains that the operation in question is not part of the EEAS.

**16.** The EEAS receives approximately 160-180 initial requests for access to documents per year, some of which relate to CSDP operations. By way of example, in 2017, 10 out of 168 initial requests related to military operations. In 2 cases, the EEAS did not hold the requested documents.

**17.** The EEAS also replied to the complainant's concern that he received contradictory information from the EEAS and Operation Sophia as to whether Operation Sophia could handle public access requests. The EEAS said that it had indeed referred the complainant to Operation Sophia concerning certain documents, which the EEAS did not hold. However, in doing so, the EEAS did not indicate that Operation Sophia would handle access requests addressed to it under the framework of Regulation 1049/2001.

**18.** The complainant commented that the EEAS should communicate better with requestors of documents relating to Operation Sophia.

## Handling of requests by Operation Sophia

**19.** Operation Sophia informed the EEAS that it was developing a policy for dealing with access requests and identified its spokesperson as the person to whom such requests should be addressed or forwarded. In fact, in October 2018, Operation Sophia acknowledged receipt of a request for access to documents and said that it would provide a reply in 30 days.

**20.** In reply to the Ombudsman, Operation Sophia said that there is no specific EU legislation regarding public access to documents in CSDP missions or operations. It pointed out that providing access to documents concerning a military operation is challenging given the very nature of military operations. Many documents are classified, in accordance with EU rules, as being highly confidential and sensitive, requiring protection from publication or wide circulation. [8]

**21.** Notwithstanding the above, Operation Sophia expressed its commitment to a policy on transparency and accountability (while protecting sensitive and classified information). It provided the Ombudsman with its draft policy on dealing with requests for public access to documents. This policy applies by analogy the principles of Regulation 1049/2001. Once approved, it will be available on Operation Sophia's website and will be sent to the EEAS and to the Council for their information.

## The Ombudsman's assessment

**22.** Based on her inquiry, the Ombudsman finds that the EEAS follows the proper procedures for dealing with requests for public access to documents **it holds** relating to Operation Sophia.



It dealt appropriately with the requests it received from the complainant, in relation both to the documents it held and to those which it did not hold but thought might be directly obtainable from Operation Sophia. She thus considers that there was no maladministration by the EEAS in this regard.

**23.** The Ombudsman has also concluded, for the reasons stated above, that Operation Sophia is not to be considered as an ‘*EU body*’ and is not legally bound by EU rules on public access to documents. It follows that Operation Sophia, not being an ‘*EU body*’, is not formally subject to the Ombudsman’s jurisdiction. However, she appreciates that its personnel have cooperated fully with this inquiry and makes the following comments on the outcome with regard to public access to the documents it holds.

**24.** The Ombudsman very much welcomes Operation Sophia’s initiative to adopt a policy for dealing with requests for public access to documents. She is satisfied that the policy applies by analogy the principles of the legal framework applicable to EU institutions and bodies. The Ombudsman considers that this choice by Operation Sophia fills the “*legal vacuum*” as regards access to documents held by CSDP missions and operations and ensures an adequate level of transparency, equivalent to that provided by other EU bodies.

**25.** The Ombudsman is also satisfied that Operation Sophia plans to communicate its policy to the EEAS and to the Council, as well as to publish it on its website. This will ensure that citizens are provided with clear and consistent information as regards the exercise of their right for public access to documents.

**26.** The Ombudsman considers that other civilian and military missions and operations should follow Operation Sophia’s example. The Ombudsman will make a suggestion to the EEAS in this regard.

**27.** As regards the complainant’s requests for access, the Ombudsman has written to Operation Sophia to invite it to consider responding to the complainant’s new access to documents requests.

## Conclusion

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

**There was no maladministration by the EEAS.**

**The Ombudsman welcomes the decision of Operation Sophia to adopt an access to documents policy.**

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



## Suggestion for improvement

**The EEAS should communicate Operation Sophia's draft policy on dealing with requests for public access to documents to other civilian and military missions and operations and encourage them to adopt similar rules. The Ombudsman asks the EEAS to inform her about the follow-up measures taken by these missions and operations within six months.**

Emily O'Reilly

European Ombudsman

Strasbourg, 22/07/2019

[1] See <https://www.operationsophia.eu/about-us/> [Link] for more information about Operation Sophia.

[2] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R1049&from=EN> [Link] .

[3] All documents related to the inquiry, including the Ombudsman's letter opening the inquiry and the report on the Ombudsman's meeting with the EEAS are available at: <https://www.ombudsman.europa.eu/en/opening-summary/en/99917> [Link] .

[4] According to Article 15 (3) TFEU, “ *any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph* ”.

[5] Judgment of the Court of 12 November 2015 in case C-493/13 P, *Elitaliana SpA v Eulex Kosovo* : <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=2&docid=171381&mode=req&p> [Link] .

[6] Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0778> [Link].



[7] As per Article 4 (4) of Regulation 1049/2001.

[8] Council decision 2013/448 of 23 September 2013 on the security rules for protecting EU classified information:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D0488> [Link] .