

Proposal of the European Ombudsman for a solution in case 1849/2019/FP on the European Union Agency for Law Enforcement Cooperation's refusal to grant public access to documents relating to its operational tasks in combating illegal migrant smuggling

Solution - 28/11/2019

Case 1849/2019/DL - **Opened on** 10/10/2019 - **Decision on** 01/07/2020 - **Institution concerned** European Union Agency for Law Enforcement Cooperation (Settled by the institution) |

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

[\[1\]](#) [\[Link\]](#)

Background to the complaint

Context

1. The EU's Agenda on Migration [\[2\]](#) [\[Link\]](#) identifies the fight against migrant smuggling as a key priority. The European Migrant Smuggling Centre (EMSC) [\[3\]](#) [\[Link\]](#) was established in 2016 to support EU Member States in targeting and dismantling the complex criminal networks involved in migrant smuggling.

2. Europol's EMSC coordinates the Joint Liaison Task Force Migrant Smuggling and Trafficking in Human Beings [\[4\]](#) [\[Link\]](#) which focuses on intelligence-led coordinated actions against criminal networks involved in migrant smuggling and trafficking of human beings. Through the EMSC, liaison officers from all EU Member States work together to identify networks, prioritise, prepare and execute cross-border operations.

3. Member States furthermore cooperate in the fight against migrant smuggling by establishing Joint Investigation Teams (JIT) agreements, which are tools for operational cooperation amongst national investigative authorities, both in the judicial field (judges, prosecutors, investigative judges) and in the law enforcement field, established to tackle cross-border crime. They facilitate the coordination of investigations and prosecutions conducted in parallel across several States. [\[5\]](#)



4. The conditions under which a JIT operates vary from case to case, but they are based on the model JIT agreement [\[6\] \[Link\]](#) as appended to Council Resolution (2017/C 18/01). [7] The resolution “ *encourages the competent authorities of the Member States that wish to set up a Joint Investigation Team with the competent authorities from other Member States (...) to use, where appropriate, the Model Agreement (...) in order to agree upon the modalities for the joint investigation team* ”.

Background

5. On 8 and 18 July 2019, the complainant submitted to the European Union Agency for Law Enforcement Cooperation (Europol) two requests for public access to documents, namely:

a) 12 Joint Investigation Teams (JIT) agreements [\[8\] \[Link\]](#) between various EU Member States and Europol; and

b) the “Working Program, Operational Plan and/or any document regulating the recently launched Joint Liaison Task Force Migrant Smuggling and Trafficking in Human Beings”.

6. On 16 August 2019, Europol responded to the complainant: it identified 10 documents as falling within the scope of the first request [\[9\] \[Link\]](#) and two documents as falling within the scope of the second request. [\[10\] \[Link\]](#)

7. Europol refused access to all documents based on the protection of public interests as regards the proper fulfilment of Europol’s tasks and the investigations and operational activities of Member States, third parties and EU bodies, as well as the privacy and integrity of the individuals therein mentioned. [11]

8. On the same day, the complainant requested Europol to review its decision by way of a so-called “ *confirmatory application* ”.

9. On 2 October 2019, Europol confirmed its initial decision not to grant access to the documents requested.

10. Dissatisfied with Europol’s response, the complainant turned to the Ombudsman on 2 October 2019.

The inquiry

11. The Ombudsman opened an inquiry into Europol’s decision not to grant access to these documents.

12. In the course of the inquiry, the Ombudsman’s inquiry team inspected the file on this case. Europol provided the Ombudsman with two documents [\[12\] \[Link\]](#) and the model JIT



agreement. [\[13\]](#) [\[Link\]](#)

Arguments presented to the Ombudsman

Supporting arguments by the complainant

13. The complainant argued that Europol's refusal to grant access to the requested documents was not properly justified. The complainant contended that it is extremely difficult for the individuals to hold Europol accountable if information on the operational activities that Europol conducts on the ground, with reference to illegal migrant smuggling, are kept completely secret and not even partial access to documents is granted.

Supporting arguments by the Europol

14. Europol refused access to the documents as their disclosure would **undermine the protection of the public interest as regards public security**, such as the proper fulfilment of Europol's tasks and the investigations and operational activities of Member States, third parties or Union bodies, as well as **the privacy and integrity of the individuals therein mentioned**.
[14]

15. Europol argued that the disclosure of sensitive information, such as details on law enforcement methods and strategies employed in these cases, **risks prejudicing the effectiveness of present and future** operations conducted by the EU Member States.

16. Regarding the first request for access to the JIT agreements, Europol argued that the 10 documents identified contain sensitive operational details on the individual cases, information on the investigative steps and activities of the Member States taking part in the operations, in addition to details on the participation and support provided by Europol, as well as personal data of law enforcement officers and Europol staff.

17. Furthermore Europol claims that releasing such information, would undermine the relation of trust existing between the Agency and its partners and endanger their cooperation, which is essential to Europol's activities. This in turn would hinder Europol's ability to perform its tasks effectively.

18. Regarding the second request related to the "Joint Liaison Task Force - migrant smuggling" Europol argued that the documents were intended for release only to the competent authorities of the Member States and third countries. They contain details on the steps taken in the establishment and implementation of a Joint Liaison Task Force, which aims to promote and facilitate the joint identification, prioritisation and initiation of cross-border investigations and operations in the field of migrant smuggling. They also contain feedback provided by the Members States on the initiative. Europol claims that the disclosure of such sensitive information to the public would risk jeopardizing the processes and workflows within Europol in several ways, including the identification of prioritised cases and the set-up of a dedicated Joint



Liaison Task Force platform by the European Migrant Smuggling Centre. This would, in turn, risk undermining the operational activities of the Member States in their fight against migrant smuggling. The release of such information, including the input provided by the Member States, might jeopardize the cooperative relationships between Europol and its partners, thus hindering Europol's ability to fulfil its tasks.

The Ombudsman's assessment

Request for access to the JITs agreements

19. The Ombudsman recognises the sensitivity of the matter of illegal immigration and migrant smuggling and the significant importance of this topic for the EU agenda.

20. The Ombudsman has reviewed the “model JIT agreement” [\[15\] \[Link\]](#). It contains 18 clauses that need to be completed by the Member States that are party to the agreement. Based on that model, every individual agreement shall indicate, for example, **the purpose of the joint investigation** (point 2), **[16] the members and the leaders of the team** **[17]** (point 5 to 7), **the modality of the information/evidence gathering and sharing** (point 8 to 11) and **the way the parties should communicate with the media** (point 15).

21. From the content of the model JIT it can be inferred that the information included in a completed JIT will always be extremely sensitive. It concerns details about **individual investigations** including **information on suspects, information on the purpose of the specific criminal investigation** and **personal data of staff working on the issue of illegal migration at EU agencies and national authorities** .

22. The Ombudsman accepts the validity of Europol's argument that the disclosure of the individual JIT agreements would **undermine the protection of the public interest as regards public security** . She also notes that **this** exception in Regulation 1049/2001 cannot be overridden by other public interest considerations.

23. She concludes that Europol was justified in refusing to provide public access to the JIT's agreements and that there was no maladministration by Europol in refusing to provide access to them.

Documents concerning the “Joint Liaison Task force - migrant smuggling”

24. In response to the request for access to documents related to the “Joint Liaison Task force - migrant smuggling” Europol identified two documents namely:

1) The draft “Joint Liaison Task Force - Migrant Smuggling draft Process Description” (‘draft Process Description’), and;

2) The Liaison Bureaux Input for the Joint Liaison Task Force for Migrant Smuggling (‘Input form



Member States’).

25. The Ombudsman finds that the draft ‘Process Description’ bears the marking “Europol unclassified - basic protection level”. This document presents a description of the process related to the activity of the Task Force, a flowchart of the process and other details about documents retention. On her analysis of the document, the Ombudsman established that part of the draft Process Description does appear to be sensitive and should remain confidential, namely paragraphs 1, 2.8, 2.16 and 2.17; however, it is not evident to the Ombudsman why the remainder of the document is sensitive or in need of protection.

26. Therefore, while the Ombudsman agrees that the disclosure of the above-mentioned paragraphs of the draft Process Description is likely to undermine the ability of Europol to *properly fulfil its tasks*, as well as *the privacy and integrity of the individuals therein mentioned*, [18] she concludes that the remaining parts of the document should be disclosed.

27. In light of the above, the Ombudsman proposes a solution that Europol should disclose the draft Process Description, excluding paragraphs 1, 2.8, 2.16 and 2.17, with the redaction of the personal data of the individuals mentioned in it.

28. The second document ‘Input form Member States’ includes the Member States’ comments on the draft Process Description, as well as personal data of some of the Member States’ representatives. After careful analysis of the document the Ombudsman concludes that the disclosure of this document might undermine the protection of public security, with regard to *the proper fulfilment of Europol’s tasks, investigations and operational activities of Member States*, as its disclosure might jeopardize the relationships between Europol and the Member States participating in the task force, thus undermining Europol’s ability to fulfil its tasks.

29. The Ombudsman finds that Europol was justified in refusing public access to this document.

The proposal for a solution

Based on the above findings, the Ombudsman proposes the following solution: The European Union Agency for Law Enforcement Cooperation (Europol) should partially disclose the “Joint Liaison Task Force - Migrant Smuggling draft Process Description”, with the exception of paragraphs 1, 2.8, 2.16 and 2.17 and the personal data of any individuals mentioned in the document.

Europol is invited to inform the Ombudsman by 17 January 2020 of any action it has taken in relation to the above solution proposal.



Emily O'Reilly

European Ombudsman

Strasbourg, 28/11/2019

[1] [Link] 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] [Link]<https://ec.europa.eu/home-affairs/> [Link].

[3] [Link]
<https://www.europol.europa.eu/newsroom/news/europol-launches-european-migrant-smuggling-centre>
[Link] .

[4] [Link]
<https://www.europol.europa.eu/newsroom/news/new-task-force-europol-to-target-most-dangerous-criminal-groups-in-europe>
[Link] .

[5] [Link] For more information:
<https://www.europol.europa.eu/publications-documents/jits-practical-guide> [Link] .

[6] [Link]
<https://www.europol.europa.eu/publications-documents/model-agreement-for-setting-joint-investigation-team>
[Link] .

[7] [Link]
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2017%3A018%3ATOC> [Link]
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[8] [Link] The complainant requested 12 JITs agreements:

- JIT Agreement: Finland, France & Europol (2012) - <https://www.europol.europa.eu/newsroom/news/joint-international-operation-against-sri-lankan-people-smugglers>
- JIT Agreement: France, Denmark & Europol (2012) - <https://www.europol.europa.eu/newsroom/news/filipino-people-smuggling-ring-dismantled>



- JIT Agreement: UK, Portugal & Europol (2012) - <https://www.europol.europa.eu/newsroom/news/sham-marriage-criminal-network-dismantled>

- JIT Agreement: France, Belgium & Europol (2012) - <https://www.europol.europa.eu/newsroom/news/successful-action-against-people-smuggling-illegal-immigration>

- JIT Agreement: Germany, Czech Republic & Europol (2013) - <https://www.europol.europa.eu/newsroom/news/six-arrested-for-large-scale-document-forgery>

- JIT Agreement: France, UK & Europol (2014) - <https://www.europol.europa.eu/newsroom/news/yachts-used-to-smuggle-people-uk>

- JIT Agreement: Germany & Europol (2015) - <https://www.europol.europa.eu/newsroom/news/police-disrupt-organised-criminal-group-smuggling-people-africa-to-eu>

- JIT Agreement: Belgium, the Czech Republic, Germany, the UK & Europol (2015)

- <https://www.europol.europa.eu/newsroom/news/international-cooperation-delivers-major-hit-to-people-smuggling-network>

- JIT Agreement: Greece, UK & Europol (2016) - <https://www.europol.europa.eu/newsroom/news/suspected-criminal-network-smuggling-iranian-migrants-uk-tackled>

- JIT Agreement: Belgium, Bulgaria, France, the Netherlands, the UK & Europol (2017)

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<https://www.europol.europa.eu/newsroom/news/major-international-operation-dismantles-migrant-smuggling-network>

- JIT Agreement: Denmark, Germany & Europol (2018) - <https://www.europol.europa.eu/newsroom/news/sham-marriage-network-dismantled-in-denmark-and-germany>

- JIT Agreement: Belgium, Portugal & Europol (2019) - <https://www.europol.europa.eu/newsroom/news/criminal-gang-recruiting-portuguese-women-sham-marriages-dismantled>



[9] [\[Link\]](#) 10 Joint Investigation Teams (JIT) agreements between various EU Member States and Europol.

[10] [\[Link\]](#) Joint Liaison Task Force - Migrant Smuggling Process Description (Draft) and Liaison Bureaux Input For The Joint Liaison Task Force for Migrant Smuggling

[11] [\[Link\]](#) Article 4(1)(a) and (b) of the Management Board Decision laying down the rules for applying

Regulation 1049/2001 with regard to Europol documents.

[12] [\[Link\]](#) Joint Liaison Task Force - Migrant Smuggling Process Description (Draft) and Liaison Bureaux Input For The Joint Liaison Task Force for Migrant Smuggling.

[13] [\[Link\]](#) On which the actual JIT agreements are based, see footnote n. 7.

[14] [\[Link\]](#) Article 4(1)(a) and (b) of the Management Board Decision laying down the rules for applying Regulation 1049/2001 with regard to Europol documents:

“ Europol shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security, such as the safety of natural and legal persons, the proper fulfilment of Europol’s tasks, investigations and operational activities of Member States, third parties or Union bodies,*
- defence and military matters,*
- international relations, in particular the relations between Europol and its partners as regulated in Chapter V of the Europol Regulation,*
- the financial, monetary or economic policy of the Union or a Member State,*

(b) the privacy and integrity of the individual .”

[15] [\[Link\]](#) See paragraph 12.

[16] [\[Link\]](#) The model provides the following statement: *“ This description should include the circumstances of the crime(s) being investigated in the States involved (date, place and nature) and, if applicable, reference to the ongoing domestic procedures. References to case-related personal data are to be kept to a minimum.*

This section should also briefly describe the objectives of the JIT (including e.g. collection of



evidence, coordinated arrest of suspects, asset freezing ...). In this context, Parties should consider including the initiation and completion of a financial investigation as one of the JIT objectives”

[17] [\[Link\]](#) Where the names, position and rank of the leaders and members should be indicated.

[18] [\[Link\]](#) in accordance with Article 4(1)(a) and (b) of the Management Board Decision laying down the rules for applying Regulation 1049/2001 with regard to Europol documents: