

## **Proposal for a solution on the European Maritime Safety Agency's (EMSA) refusal to provide full public access to statistics concerning maritime pollution (case 129/2022/OAM)**

Solution - 01/07/2022

**Case 129/2022/OAM - Opened on 03/02/2022 - Decision on 06/10/2022 - Institution concerned** European Maritime Safety Agency ( Solution achieved ) |

Made in accordance with Article 2(10) of the Statute of the European Ombudsman [1]

### **Background to the complaint**

1. The complainant, an investigative journalism platform, asked the European Maritime Safety Agency (EMSA) for public access to documents [2] containing information on maritime pollution in European waters, available via the CleanSeaNet service.

2. The CleanSeaNet service is operated by EMSA and uses satellite imagery to detect possible oil spills on the sea surface. It is available to all participating states including EU Member States and their overseas territories, candidate countries and EFTA Member States. When a possible oil spill is detected, EMSA sends an alert message to the relevant coastal states. The national authorities then decide how to respond to the alert report, for example by sending a helicopter to check the area and verify the spill. National authorities are also responsible for sending back to EMSA any feedback following verifications, for example if any oil discharges from ships were detected. [3]

3. The complainant initially asked for access to “ *CleanSeaNet warnings and alert reports*” sent by EMSA during certain periods in 2020 and 2021, “ *as well as any feedback forms by member states regarding those warnings and alerts*”. EMSA said it identified 210 reports falling within the scope of the access request. It argued that parts of the reports cannot be released because disclosure could undermine the protection of the purpose of inspections, investigations and audits, and the protection of commercial interests of a natural or legal person, including intellectual property. [4] EMSA said it needed to redact the protected parts manually. It asked the complainant if it wanted to narrow down the request so it can be processed faster.

4. On 15 October 2021, the complainant and EMSA discussed the access request in a call and



agreed to replace the initial request for alert reports with statistical information.

5. On 8 November 2021, EMSA provided a document with statistical information covering the time period 2007-2020 as requested by the complainant in e-mails following up to the call (although EMSA specified that data was not available for 2007-2012). The statistical information included the number of CleanSeaNet alert reports sent yearly to coastal states and percentages showing the proportion of cases where the potential polluter was identified, feedback was sent back by the coastal states and where the feedback provided included the identification of a potential polluter.

6. The complainant said that, in its view, the statistical information received was not as extensive as the scope of what was agreed in the call. On 18 November 2021, it wrote to EMSA restating what data it sought, including its request to receive statistics on verification results (feedback) received from the coastal states following alert reports and a breakdown of what was detected. The complainant gave an example of data already published by EMSA, that is, a table with verification results from 2015, including the number of CleanSeaNet detections, for how many detections feedback was provided and a breakdown of what was found (mineral oil, other substance, unknown feature, natural phenomena, nothing observed).

7. On 6 December 2021, EMSA adopted a confirmatory decision disclosing a document with further statistical information, which corresponded to its understanding of what was agreed in the call with the complainant. It did not, however, disclose data on verification results with the breakdown of what was detected.

8. The complainant considered EMSA failed to provide statistics on the verification results and turned to the Ombudsman in January 2022.

## The inquiry

9. The Ombudsman opened an inquiry into EMSA's refusal to give public access to documents containing statistics on the verification results for the whole period 2012-2020.

10. In the course of the inquiry, EMSA published detailed statistics on verification results for the year 2020. The complainant confirmed to the Ombudsman that he was still interested in receiving this data for the 'missing' years, in particular for 2019.

11. The Ombudsman inquiry team met with representatives of EMSA to obtain clarifications on the refusal to provide access to the requested statistics. [5] The Ombudsman then provided the complainant with a report on this meeting. The complainant did not send any comments on the meeting report.

## Arguments presented to the Ombudsman



**12.** The complainant said it was partially satisfied with the statistics disclosed. However, it considered EMSA should also grant access to statistics on the verification results following CleanSeaNet alert reports. The complainant contended that EMSA should hold this data, since it has already published it for certain years, namely for 2015 to 2018. [6] The complainant wanted to have access to the same type of data but covering the whole period between 2012 and 2020.

**13.** In the complainant's view, these statistics "*are of central importance in terms of public interest and transparency concerning environmental pollution*". The complainant contended that EMSA failed to consider the EU legislation on public access to environmental information (the EU Aarhus Regulation) [7] in its decision to withhold the requested information.

**14.** During the meeting with the Ombudsman inquiry team, the EMSA representatives emphasised that the data gathered in reply to CleanSeaNet alert reports is not 'owned' by EMSA, but rather is owned by the national authorities of the coastal states. The data is nevertheless held by EMSA, which compiles it and presents the statistics in yearly meetings to the CleanSeaNet user group (composed of representatives from the participating states). However, the EMSA representatives said that EMSA cannot decide on its own to publish or release such data.

**15.** The EMSA representatives added that, each year, the CleanSeaNet user group decides whether the statistics for the respective year can be proactively published. For the years 2015-2018 and 2020, the user group agreed to the publication, and this is why statistical data on verification results is available online for these years.

**16.** The EMSA representatives clarified that, if data is missing for some years (for example for the year 2019), this is because the CleanSeaNet user group decided against the data's proactive publication. In view of this, EMSA considered that consulting the user group on the complainant's individual request for public access to statistical data on verification results for the year 2019 was not necessary, as the user group had already decided against the disclosure of that data.

**17.** The EMSA representatives also noted that data older than 2015 is no longer available, either due to the expiry of retention periods or due to the data's incompatibility with the current version of the CleanSeaNet system.

## The Ombudsman's assessment

**18.** The Ombudsman recognises EMSA's efforts to date to reply in a satisfactory manner to the complainant's request for public access to documents, including by arranging a call with the complainant, by providing various replies in writing and by disclosing documents containing statistical information on the CleanSeaNet service.

**19.** The complainant also sought public access to a particular set of statistical data, namely the verification results and the breakdown of what was found.



**20.** The Ombudsman takes note of the explanations provided by the EMSA representatives during the meeting with her inquiry team, in particular that data prior to the year 2015 no longer exists. She also notes that the statistics on verification results for the years 2015-2018 and 2020 are publicly available. [8] It is therefore only the data for the year 2019 that has not been disclosed and that is still of interest to the complainant.

**21.** The Ombudsman understands that EMSA holds the requested data for the year 2019. However, EMSA considers that it cannot disclose it, as the CleanSeaNet user group had decided, in a previous meeting of the group, not to disclose that data proactively .

**22.** Regulation 1049/2001 provides for the consultation of EU Member States and third countries when a request for disclosure relates to documents emanating from them. While the data used to produce the statistics may come from Member States and third countries, it is not the case that the statistical reports come from Member States and third countries. In any event, the fact that the originators of the data may object to its disclosure cannot in itself justify refusing access. Rather, access to EU documents can be refused only if it is shown that disclosure would undermine one or several of the public and private interests listed in Article 4 of Regulation 1049/2001. EMSA has not stated which public or private interest would be undermined by granting access to the requested data for 2019. In the Ombudsman's view, it would seem unlikely that any exception could apply since the access request concerns aggregated statistics only and not data concerning a given pollution incident. It is also the case that similar data for other years has been disclosed without causing any evident harm to an interest referred to in Article 4 of Regulation 1049/2001.

**23.** The Ombudsman also notes that the data sought in this case concerns potential maritime pollution. The requested data thus certainly constitutes “ *environmental information* ” within the meaning of the EU Aarhus Regulation. Since the data relates to potential oil spills, the data may also relate to “ *emissions into the environment* ”. The Aarhus Regulation aims at ensuring that environmental information is progressively made available and disseminated to the public. The purpose of access to this information is to promote public participation in the decision-making process, thereby increasing the accountability of decision-making and contributing to public awareness and support for the decisions taken. [9] If the information in a document concerns emissions into the environment, an even higher level of public disclosure is required since it can be assumed that there is an overriding public interest in disclosure of this information. [10]

**24.** In the light of the above, the Ombudsman proposes that EMSA now assesses the statistical data on verification results for the year 2019, in line with Regulation 1049/2001, with a view to granting public access.

## **The proposal for a solution**

**EMSA should assess the statistical data on verification results for the year 2019, in line with Regulation 1049/2001, with a view to granting public access.**



EMSA is invited to inform the Ombudsman by 15 September 2022 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly European Ombudsman

Strasbourg, 01/07/2022

[1] Available at:

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3)  
[Link]

[2] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, applicable to EMSA in accordance with its access to documents policy: <https://www.emsa.europa.eu/documents/document-request.html> [Link].

[3] More information about the CleanSeaNet service is available at:

<https://emsa.europa.eu/csn-menu.html> [Link].

[4] Article 4(2) first and third indents of Regulation 1049/2001.

[5] The report of the meeting is available at:

<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/157678> [Link].

[6] EMSA presents the verification results in annual meetings of the CleanSeaNet user group (composed of representatives from the participating coastal states) and then publishes the related documents on its website. Tables containing verification results, more specifically the number of feedback comments provided and what was found (mineral oil, other substance, unknown feature, natural phenomena, nothing observed) are available in the CleanSeaNet user group documents for the years 2015, 2016, 2017, 2018:

<http://emsa.europa.eu/we-do/surveillance/earthobservationservices/324-cleanseanet-user-group.html>  
[Link].

[7] Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1367> [Link].

[8] See footnote 6 and the EMSA website for 2020 data:

<https://emsa.europa.eu/csn-menu/items.html?cid=122&id=4645> [Link].



[9] Judgment of the Court (Grand Chamber) of 4 September 2018, ClientEarth v Commission, C-57/16, para. 98: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> [Link]

[10] Article 6(1) of the Aarhus Regulation.