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Proposal

for a solution on how the European Union Agency for Law Enforcement Cooperation (Europol) dealt with a request for public access to documents related to the proposal for a regulation to prevent and combat online child sexual abuse (CSAM) (case 1372/2024/OAM)

Made in accordance with Article 2(10) of the Statute of the European Ombudsman¹

Background to the complaint

1. The complainant, an academic researcher, sought to obtain public access from the European Union Agency for Law Enforcement Cooperation (Europol)² to correspondence concerning the fight against online child sexual abuse and, in particular, the European Commission's legislative proposal for a Regulation on Child Sexual Abuse Material (hereafter 'the proposed CSAM Regulation').³
2. Europol initially identified six exchanges with the Commission, and refused to disclose these documents in their entirety. The complainant turned to the Ombudsman, arguing that Europol had not identified all documents falling within the scope of his request.
3. In the course of a previous inquiry,⁴ the Ombudsman made a proposal for a solution to Europol that it reconsiders its position on the request with a view to granting the widest possible access, including to any additional documents identified as falling within the scope of the request.
4. In reply, Europol accepted to process the complainant's public access request anew. The Ombudsman therefore closed the previous inquiry as settled.
5. In April 2024, Europol decided to grant partial access to several additional documents, while still refusing to disclose others.

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%3A2021%3A253%3ATOC

² 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>, applicable to Europol in accordance with its Management Board Decision of 13 December 2016: https://www.europol.europa.eu/sites/default/files/documents/decision_of_the_mb_rules_applying_reg_1049_2001.pdf.

³ Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, COM(2022)209 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A209%3AFIN>

⁴ See case 1167/2023/PB concerning the refusal by Europol to disclose documents related to its communication with the European Commission on draft EU legislation on child sexual abuse (CSAM regulation): <https://www.ombudsman.europa.eu/en/case/en/64232>.

6. In May 2024, dissatisfied with the access received, the complainant asked Europol to review its decision (by making a 'confirmatory application'). The review concerned the following documents:

- Exchanges with the European Commission regarding online child sexual abuse/exploitation and/or the proposed CSAM Regulation covering the period 1 January 2022 - 24 February 2023 (hereafter 'exchanges with the Commission');
- Exchanges between Europol and the US-based foundation Thorn covering the period 1 January 2021 - 24 February 2023 (hereafter 'exchanges with Thorn').

7. In July 2024, Europol adopted its confirmatory decision maintaining its previous position.

8. As regards the exchanges with the Commission, it granted partial access to two documents (two records of meetings), redacting parts to protect personal data⁵ and a decision-making process.⁶ It refused access to the remaining four documents (a flow chart, two documents concerning the legal text of the proposed CSAM Regulation and a briefing note), based on the need to protect the public interest as regards public security,⁷ as well as a decision-making process.

9. As regards the exchanges with Thorn, Europol granted partial access to all documents identified. It withheld personal data and limited sections arguing that these needed to be redacted to protect commercial interests⁸ and its decision-making process, as well as the public interest as regards public security.

10. Dissatisfied with the access received to 15 specific documents, the complainant turned again to the Ombudsman.

The inquiry

11. The Ombudsman opened an inquiry into Europol's refusal to grant full public access to the documents at issue in the complaint.

12. As the complainant did not contest the redacting or withholding of personal data in his confirmatory application, the Ombudsman did not assess whether Europol's application of this exception was justified.

13. In the course of the inquiry, the Ombudsman inquiry team inspected the 15 documents in question as well as the documentation provided by Europol regarding its consultations with relevant third parties.⁹

⁵ Article 4(1)(b) of Regulation 1049/2001.

⁶ Article 4(3) of Regulation 1049/2001.

⁷ Article 4(1)(a) first indent of Regulation 1049/2001.

⁸ Article 4(2) first indent of Regulation 1049/2001.

⁹ Conducted in line with Article 4(4) of Regulation 1049/2001.

Arguments presented

14. In his confirmatory application, **the complainant** recalled that the purpose of Regulation 1049/2001 is to give the public the widest possible right of access and that exceptions to that right must be interpreted and applied strictly. It is not sufficient for a document to *relate* to an interest protected by an exception. Rather, Europol needed to show that there is an *actual and specific risk*, which is *reasonably foreseeable* and *not purely hypothetical*, to the interest it intends to protect.

15. The complainant said that while Europol had a wide margin of discretion when it comes to applying the exception for the protection of the public interest as regards public security, it still needed to demonstrate that there is a risk to public security arising from disclosure. The complainant considered that Europol had failed to do so in this case, relying on general statements only, without providing compelling evidence to show how disclosure of the documents could undermine the protection of this public interest.

16. The complainant further argued that Europol misapplied the exception for the protection of a decision-making process. It is not sufficient to state that the documents contain details of internal deliberations. Rather, Europol needed to show how disclosure of each document would seriously undermine the relevant decision-making process. As regards the exchanges with the Commission concerning the proposed CSAM Regulation, the complainant argued that, if those documents pertain to a legislative decision-making process, the highest standards of transparency apply in line with existing case-law.

17. The complainant also contested the application of the exception for the protection of commercial interests, in view of a lack of reasoning in the confirmatory decision.

18. Finally, the complainant considered that there was an overriding public interest in disclosure of the requested documents because the proposed CSAM Regulation attracted significant public debate with regards to its implications for data protection and further rights enshrined in the EU Charter of Fundamental Rights. He also referred to concerns regarding the relationship between Europol and Thorn.¹⁰ In the complainant's view, there was a need for transparency, to inform EU citizens about the relevant decision-making processes in relation to the fight against child sexual abuse online.

19. In its confirmatory decision, **Europol** invoked the exception for the protection of the public interest as regards public security to refuse access to four documents exchanged with the Commission and to parts of two documents exchanged with Thorn. It argued that disclosure would undermine “[...] *the proper fulfilment of Europol's tasks, as it could jeopardize the trust and mutual cooperation between Europol and its partners, which is essential to Europol's activities, consequently hindering Europol's ability to effectively perform its tasks*”.

20. Europol furthermore relied on the exception for the protection of a decision-making process to refuse (full) access to the six documents exchanged with the Commission and limited parts of four documents exchanged with Thorn, arguing that their disclosure would “*impair the decision-making process of the Union's legislative bodies*” and “*reveal opinions*”

¹⁰ The complainant referred to European Ombudsman inquiry 2091/2023/AML.

for internal use as part of deliberations and preliminary consultations within Europol” respectively.

21. Europol also invoked the protection of commercial interests when redacting limited parts of three documents exchanged with Thorn. It said that it redacted “*sensitive information related to intellectual property of a legal person*”, as its disclosure would harm the commercial activities of that legal person, hindering their ability to perform their business functions.

22. Europol considered that the public interest that the complainant invoked would not outweigh the interests that it sought to protect. For the documents refused in full, Europol deemed partial access meaningless, as the parts of the documents that could be disclosed would have little value, given that the vast majority of their content is highly sensitive and would need to be redacted.

23. Finally, Europol redacted all personal data from the documents partially disclosed.

The Ombudsman's assessment

Exchanges between Europol and the Commission on the proposed CSAM Regulation

24. The inspection of the six documents showed that the exchanges between Europol and the Commission were meant to feed into the Commission’s legislative proposal for the CSAM Regulation. Some of the documents at issue have, presumably, been shared with the Commission with the aim of informing and/or influencing the drafting of the legislative proposal.

25. This is important, as, under the EU Treaties, every citizen has “*the right to participate in the democratic life of the Union*”.¹¹ Therefore, EU decisions must be taken “*as openly and as closely as possible to the citizen*”.¹² This prerogative is considered particularly important when EU institutions are acting in their ‘*legislative capacity*’.¹³ Indeed, the possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights.¹⁴

26. ‘*Legislative documents*’ must therefore be made directly accessible to the greatest possible extent.¹⁵ Unless tangible, concrete, and specific evidence¹⁶ of exceptional circumstances can be demonstrated, the EU institutions are legally bound to disclose the requested legislative documents promptly.

¹¹ Article 10 of the Treaty on European Union (TEU).

¹² Articles 1 and 10(3) TEU.

¹³ Recital 6 of Regulation 1049/2001.

¹⁴ See, to that effect, judgments of the Court of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, para. 46: <http://curia.europa.eu/juris/liste.jsf?num=C-39/05&language=en>, and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, para. 33: <http://curia.europa.eu/juris/liste.jsf?num=C-280/11&language=EN>.

¹⁵ Article 12(2) and Recital 6 of Regulation 1049/2001.

¹⁶ Judgment of 25 January 2023, Case T-163/21, *De Capitani v Council*, paragraphs 83, 85, and 93: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=269684&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=26618867>.

27. EU case-law has clarified that legislative documents include documents drawn up or received by the Commission in the preparation of a legislative proposal.¹⁷ The six documents at issue should therefore benefit from the wider access granted to legislative documents.

Protection of the public interest as regards public security (Article 4(1)(a) Regulation 1049/2001)

28. For the four documents withheld in their entirety (that is, a flow chart, two documents concerning the legal text of the proposed CSAM Regulation and a briefing note), Europol considered that they were covered in their entirety by the exception for the protection of the public interest as regards public security.

29. While EU institutions and agencies enjoy a wide margin of discretion when determining whether disclosing a document would undermine the protection of that public interest, they are still required to demonstrate a 'specific and actual risk' that is reasonably foreseeable and not purely hypothetical. It is not sufficient that the requested documents *concern* a protected interest.¹⁸

30. Based on a review of the documents, along with the reasoning provided by Europol in its confirmatory decision, it is not readily clear to the Ombudsman that all four documents include sensitive information throughout, which, if disclosed, could harm the public interest as regards public security.¹⁹ Thus, whilst, in principle, the Ombudsman accepts that, in light of Europol's wide discretion, the use of the exception for the protection of the public interest as regards the public security was not manifestly wrong, she does not agree that the four documents are covered by this exception in their entirety.

31. The Ombudsman therefore takes the view that Europol should better substantiate how disclosure of the entire content of the documents could undermine the public interest as regards public security. If it cannot do so, partial access to the documents should be provided.

Protection of an ongoing decision-making process (Article 4(3), first subparagraph, of Regulation 1049/2001)

32. According to Europol, (full) disclosure of the six documents exchanged with the Commission would undermine the decision-making process of the co-legislators, since the discussions on the proposed CSAM Regulation were still ongoing.²⁰

33. The Ombudsman understands that Europol is trying to protect an *ongoing* decision-making process. Under this exception, access to a document, which relates to a matter where a decision has not been taken by the institution, is to be refused if disclosure of the

¹⁷ See for example, judgment of 4 September 2018, *ClientEarth v Commission*, Case C-57/16 P, paras 85, 88, 90-93: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=205322&pageIndex=0&doclang=en&mode=lst&dir=&cc=first&part=1&cid=3693014>.

¹⁸ Judgment of 27 November 2019, Case T-31/18, *Izuzquiza and Semsrott v Frontex*, paras 61-62: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=221083&pageIndex=0&doclang=en&mode=lst&dir=&cc=first&part=1&cid=4082546>.

¹⁹ [REDACTED]

²⁰ <https://www.europarl.europa.eu/legislative-train/spotlight-JD22/file-combating-child-sexual-abuse-online>.

document would *seriously* undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

34. The Ombudsman finds that the arguments put forward by Europol to refuse access under this exception are not sufficient. Europol merely stated that, because the legislative process is ongoing, these documents cannot be disclosed. However, an ongoing decision-making process cannot in itself justify non-disclosure, even more so where the documents in question are legislative in nature. If Europol cannot substantiate how the documents' disclosure would seriously undermine the ongoing legislative process, in a reasonably foreseeable and not purely hypothetical manner,²¹ access should be granted.

Exchanges between Europol and Thorn

35. The inspection showed that these documents are e-mails exchanged in the context of Europol's activities to combat child sexual exploitation.

36. The Ombudsman welcomes the fact that partial access was given to these documents. She notes that the documents are short and only limited redactions have been applied. Nevertheless, following the inspection, it is not readily clear to the Ombudsman why certain parts were redacted, in view of the exceptions invoked and the reasoning provided.

37. For instance, Europol refused to disclose parts of two documents based on the need to protect the public interest as regards public security. Whilst Europol has wide discretion in the use of this exception (see paragraph 29), based on the review of the documents and Europol's explanations, it remains unclear to the Ombudsman how disclosure would harm the public interest as regards public security.

38. Furthermore, Europol argued that disclosure of parts of the documents would harm its decision-making process, as it would reveal internal opinions which are part of deliberations and consultations within Europol. However, Europol did not specify which decision-making process it is referring to and how the documents' disclosure would seriously, specifically and actually undermine taking that decision, in a reasonably foreseeable and not purely hypothetical manner.

39. Regarding the limited redactions made under the exception for protecting commercial interests, the Ombudsman recalls that EU institutions cannot rely on this exception simply because information relates to a company or its products. The relevant exception serves to protect commercially *sensitive* information, that is, information that, if disclosed, would undermine legitimate commercial interests of the entity concerned. This can be the case where information relates to an entity's business strategy or its expertise (for example, a specific methodology unique to an entity and unknown to competitors). In this case, it is questionable whether the redactions can genuinely be classified as sensitive information

²¹ See in that regard, judgment of 25 January 2023, Case T-163/21, *De Capitani v Council*: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=269684&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3531724>.

related to intellectual property. Rather, some of the withheld elements appear to be of a more general nature.²²

40. In view of the above, the Ombudsman takes the view²³ that Europol should reconsider if further access could be granted to the exchanges with Thorn. If not, Europol should provide better reasoning for withholding the redacted parts.

The proposal for a solution

The Ombudsman proposes that Europol reconsider its position on the disclosure of the documents at stake with a view to granting the widest possible access. Where Europol considers that access cannot be granted, it should explain, in detail and with reference to each document, how disclosure would undermine one or several of the interests listed in Article 4 of Regulation 1049/2001, if needed in a confidential annex.

Europol is invited to inform the Ombudsman by 23 May 2025 of any action it has taken in relation to the above solution proposal.



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Strasbourg, 19/02/2025

²³ More information about the right of public access to EU documents is available at: <https://www.ombudsman.europa.eu/en/document/en/163353>.