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European Union

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From:	Ms E. O'Reilly, European Ombudsman
To:	Mr Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the European Union
No. prev. doc.:	5416/19; 5417/19
Subject:	Complaint 2011/2018/MIG (ex 2011/2018/THH) - Decision of the European Ombudsman in the above case on the Council of the European Union's refusal to grant public access to a document

Delegations will find attached copy of a letter sent by the European Ombudsman to the Council concerning Complaint 2011/2018/MIG (ex 2011/2018/THH) and containing her final decision noting that there was no maladministration by the Council in refusing public access to the requested document.

E-MAIL / FAX

IM 006636 2019
14.06.2019



European Ombudsman

Emily O'Reilly
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen

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Strasbourg, 14/06/2019

Complaint 2011/2018/MIG

Decision of the European Ombudsman in the above case on the Council of the European Union's refusal to grant public access to a document setting out priorities for the military capability development of the European Union's Common Security and Defence Policy

Dear Mr Tranholm-Mikkelsen,

Please find enclosed a copy of my above decision, which has been sent to the complainant, Mr Carlos Martí Sempere.

On the basis of my inquiry into this complaint, I have decided to close it with the following conclusion:

There was no maladministration by the Council in refusing public access to the requested document.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure: Decision on complaint 2011/2018/MIG

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European Ombudsman

Emily O'Reilly
European Ombudsman

Decision

in case 2011/2018/MIG on the Council of the European Union's refusal to grant public access to a document setting out priorities for the military capability development of the European Union's Common Security and Defence Policy

The complaint concerned the refusal of the Council of the European Union (the Council) to grant public access to a document identifying the priorities of the European Union (EU) regarding the military capability requirements for the Common Security and Defence Policy. In refusing access to the document, the Council relied on the need to protect the public interest as regards defence and military matters.

The Ombudsman found that the Council was justified in refusing public access to the requested document. She therefore found no maladministration and closed the case.

Background to the complaint

1. In June 2018, the complainant asked the Council to provide him with access to a note from the European Union Military Committee to the Political and Security Committee. This document sets out priorities regarding the EU's military capability development in the area of the Common Security and Defence Policy (CSDP). The document is classified as 'restricted'.

2. The Council refused access to the note based on the need to protect the public interest as regards defence and military matters.¹

¹ Under Article 4(1)(a), second indent, of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>.



3. Following a request for review by the complainant (he made a so-called 'confirmatory application'), the Council confirmed its refusal to grant public access to the requested document.

4. Dissatisfied with this decision, the complainant turned to the Ombudsman in November 2018.

The inquiry

5. The Ombudsman opened an inquiry and her inquiry team met with Council representatives and inspected the requested document. The Ombudsman gave the complainant her inspection report and received the complainant's subsequent comments.

Arguments presented to the Ombudsman

6. The Council stated that the 'restricted' status of the document meant that revealing its content could harm the interests of the EU or its Member States. It argued that releasing the document *"would reveal to third parties the details of the current and the future EU military operations. This would affect the efficiency of the European Union's action and question the feasibility of the EU operations in the future"*. It said that the information could be used by hostile entities *"to understand the EU process of capability development planning."*

7. The Council also argued that it was not possible to grant partial access since *"the information contained in the document (...) forms an inseparable whole."*

8. The complainant doubted that the information in the document is very detailed; he presumed that it must be of a rather general nature. He therefore questioned the Council's assessment that disclosing the document would jeopardise the public interest concerned. He also suspected that some of the information in the document is already in the public domain.

9. The complainant also argued that, if the document does contain information that ought not to be disclosed, it should have been possible to draw up the document in such a way as to enable partial public access to some information, while putting confidential material in an annex.

10. Finally, the complainant stated that the document may be of interest to citizens, and that the interest of transparency should take priority over the public interest as regards defence and military matters. In the complainant's view, transparency in this area is particularly important to allow for a public scrutiny of the authorities' decisions and ensure accountability.



11. The Council noted that, in accordance with EU case law², an EU institution is obliged to refuse public access to a document if disclosing it would put the public interest as regards defence and military matters at risk.

The Ombudsman's assessment

12. The EU rules on public access to documents allow for the public interest in access to a document to be taken into account in certain circumstances (for example, when it is argued that releasing a document would seriously undermine an institution's decision-making processes, the document may still be released if there is an overriding public interest in disclosing the document). Defence and military matters are of a particularly sensitive nature. As a result, the EU rules on public access to documents take a much more restrictive approach to the disclosure of documents relating to defence and military matters; they do not provide for the use of public interest arguments to override the need to protect defence and military interests. Given this high level of sensitivity of such matters, the EU courts have found that the institutions have a broad margin of discretion when assessing whether or not the disclosure of a document could jeopardise the public interest as regards defence and military matters.³ In other words, the courts consider that the judgement of the relevant authorities on the likely harm arising from the public disclosure of such documents must be given very serious weight.

13. The Council stated that the document is not general, but rather is extremely technical and contains sensitive information throughout. If disclosed, it argued, this information could seriously risk the public interest as regards defence and military matters. Having examined the document, which sets out the priorities for the development of the military capability of the CSDP, the Ombudsman confirms that the Council's description of the content of the document was accurate and that all parts of the document, including its annexes, contain very sensitive information. The Council's conclusion that the disclosure of this information would very likely jeopardise the public interest at issue was therefore reasonable. Given that the public interest as regards defence and military matters cannot be balanced against any other interest, the Council was thus justified in refusing to grant any public access to the document.

14. In commenting on the Ombudsman's inspection report, the complainant said, "The Ombudsman is the only one who can verify if the argument [that the document is technical and sensitive such that its content cannot be released] can be sustained." The Ombudsman has carried out that assessment and carefully considered the content of the document and the arguments put to her. On that basis, she has reached the conclusion that the Council was justified in refusing to grant public access.

² Judgment of the Court of 1 February 2007, *Sison v Council*, C-266/05 P, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-266/05%20P&td=ALL>.

³ *Ibid.*, paragraph 35.



15. As regards the complainant's argument that the Council should have drafted a different document, and included any confidential information in a confidential annex to that document, the Ombudsman notes that the EU rules on access to documents do not require EU institutions to create a new document in order to satisfy a request for public access to documents. Based on her inspection, the Ombudsman considers that the separation of the content into confidential and non-confidential information would not be feasible. That is why partial disclosure is not a realistic option in this case.

Conclusion

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

There was no maladministration by the Council in refusing public access to the requested document.

The complainant and the Council will be informed of this decision.

Emily O'Reilly
European Ombudsman

Strasbourg, 14/06/2019