



Council of the  
European Union

102436/EU XXV. GP  
Eingelangt am 04/05/16

Brussels, 4 May 2016  
(OR. en)

6189/16

OMBUDS 4  
INST 58  
INF 24  
API 19

#### 'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	6188/16
Subject:	Complaint 916/2015/OV made to the European Ombudsman

Delegations will find enclosed a draft reply from the Council to the Ombudsman in complaint 916/2015/OV, approved by the Working Party on Information by written consultation which ended on 4 May 2016.

Sweden indicated that it would vote against the draft reply and made the following statement:

*"Sweden welcomes that increased access is granted to the documents. However, Sweden takes the view that further extended partial access should be given to doc. 5474/15 as regards the picture on p. 11 and the list of five indents on p. 48."*

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item

The annex is available in English only.

**DRAFT OPINION  
OF THE COUNCIL OF THE EUROPEAN UNION  
IN COMPLAINT 916/2015/OV**

**I. THE INQUIRY**

1. By letter of 22 July 2015, the European Ombudsman opened an inquiry on a complaint submitted by Ms Eva Schram concerning the Council's refusal to grant full public access to five documents concerning the operational results of the MOS MAIORUM, APHRODITE and PERKŪNAS Joint Operations.
2. In her letter of 22 July 2015, the European Ombudsman also requested the inspection of the documents concerned by the complaint, pursuant to Article 3(2) of the Ombudsman's Statute. This inspection took place in the Council's premises on 12 October 2015.
3. In her letter of 4 December 2015, the European Ombudsman invited the Council to submit an opinion in accordance with Articles 2(2) and 3(1) of the Ombudsman's Statute. In the letter, the Ombudsman also invited the Council to consider granting further partial access to certain parts of the documents.

**II. THE COMPLAINT**

4. In her complaint to the Ombudsman, the complainant alleged that the Council had wrongly refused to grant public access to documents 5474/15, 6224/13, 6224/13 ADD 1, 6224/13 ADD 2 and 16045/13 on the basis of the exceptions provided for in Article 4(1)(a), first and third indents, of Regulation (EC) No 1049/2001.

5. In particular, the complainant argued that the Council's refusal to grant access was not in conformity with Regulation (EC) No 1049/2001 since the Dutch Ministry of Defence did grant full access to documents concerning the MOS MAIORUM Joint Operation. She claimed that the Council should grant full access to the requested documents.

### III. THE COUNCIL'S OBSERVATIONS

#### Preliminary remarks

6. At the outset, the Council deems useful to clarify certain imprecisions contained in the complaint. In part 3 of her complaint, the applicant indicated that she lodged an application for disclosure of documents with the Council of the European Union on 18 February 2015 and that this was initially refused. This is not correct.
7. On 21 January 2015<sup>1</sup>, the applicant submitted a request for access to :
1. all the operational results of the Joint Operations "Mos Maiorum", which was carried out from 13-26 October 2014 and presided over by the Italian government, as mentioned in the document 11671/14 by the Council.
  2. the operational results of previous Joint Operations held during the last Presidencies of the Council of the European Union, as mentioned on page 1 of document 11671/14 by the Council.
8. The General Secretariat of the Council replied to the request on 12 February 2015. In its reply, it had granted partial access to three of the requested documents i.e. documents 5474/15 (which contains the operational results of the Joint Operation "Mos Maiorum"), 6224/13<sup>2</sup> (which contains the final report on Joint Police Operation APHRODITE) and 16045/13 (which contains the final report on operation PERKÜNAS). In addition, full access was given to document 17816/10 (which contains the final report of Joint Operation HERMES). Therefore, it is not correct to indicate that *"Initially this was refused"*.

---

<sup>1</sup> This request was registered on 22 January 2015 as it had been sent after 5 pm.

<sup>2</sup> No access was granted to document 6224/13 ADD 1 and 6224/13 ADD 2.

9. The applicant submitted a confirmatory application on 18 February 2015. The General Secretariat of the Council would like to recall that in reply to the applicant's confirmatory application of 18 February 2015, the Council had granted further partial access to documents 5474/15 and 6224/13. Access to documents 6224/13 ADD 1 and 6224/13 ADD 2 was denied. No further partial access was granted to document 16045/13.

*The applicant's allegation that the documents were wrongly refused*

10. The Council notes that in support of her allegation the complainant has put forward one single supporting argument. More specifically she refers to the circumstance that the Dutch Ministry of Defence did disclose the operational results of the Mos Maiorum joint police operation. According to the complainant, the Council could not refuse information that the Member States have already made public.
11. The Council considers that the applicant's argument is not founded. To start with, it appears that the documents to which access was given by the Dutch Ministry of Defence are of a different nature than document 5474/15 which contains the operational results of this Joint Operation for all the Member States, which had participated in this joint operation.

12. As a matter of fact, the applicant had requested to the Dutch Ministry of Defence all the filled out forms, which the national coordinator of the EU police operation Mos Maiorum had sent to the Italian authorities from 13 October 2014 till 26 October 2014. For technical reasons, it was not possible to extract the requested forms from the system. The content of the forms was transferred to an Excel file and the Dutch Ministry of Defence granted access to an excel sheet "External Border Form Mos Maiorum" and to an excel sheet "Internal Border Form Mos Maiorum" as well as to an example of the "External borders" and of the "Secondary Movement" (i.e. Internal borders) forms. The rough data contained in these documents cannot really be considered as being of the same nature as the result of the analysis of the whole operation contained in document 5474/15. Thus, contrary to the complainant's allegations, it cannot be argued that the information contained in document 5474/15 is already in the public domain. In such circumstances, the fact that different documents, containing different types of information, have been made public by a national authority has no bearing on the assessment carried out by the Council as to the existence of risks linked to the disclosure of the requested document.
13. Secondly, the fact that certain documents are disclosed by one or another national authority is not a piece of information which is automatically shared with the EU Institutions. Nor, in the present case, the complainant brought to the attention of the Council in her first or confirmatory request the fact that certain documents related to the Mos Maiorum operation had been disclosed by the Dutch authorities. In that regard, the Council stresses that when taking a decision on a request for access, EU Institutions have to rely on the information they possess at the time of the assessment. The failure to take the "Dutch disclosure" into consideration cannot therefore be invoked to challenge the legality of the Council's decision.

14. Thirdly, the Council points out that requests for public access to documents held by national authorities and addressed to those authorities are dealt with in line with the relevant national legislations on access to documents. Such legislations may differ among themselves and with the EU legal regime for access to documents, since the Member States and the Union, acting in their respective sphere of competence, may find different solutions when striking a balance between the principle of transparency and the protection of other relevant public interests. As a consequence, the considerations that may have led national authorities to conclude for the disclosure of certain documents, in application of the relevant provisions of national law, do not directly affect the assessment that EU Institutions have to carry out on the ground of Regulation (EC) No 1049/2001 when they are dealing with requests for access to related documents.
15. It follows from the above that the mere circumstance that the Dutch authorities granted access to certain documents containing information on the Mos Maiorum operation is not as such sufficient to put into question the assessment carried out by the Council in relation to the requested documents.
16. The Council finally notes that the complainant did not put forward any further arguments in support of her allegation that the partial refusal of the requested documents would not be in line with Regulation (EC) No 1049/2001. In particular, the complainant has not raised in her complaint to the Ombudsman the arguments that she had put forward in her confirmatory application. In such circumstances, the Council considers that the complainant is satisfied with the replies provided to her in the confirmatory reply and that she in any event failed to show any other reason why the Council's decision would be wrong.
17. Without prejudice to the considerations developed in the following section, in exercise of the wide discretion that it enjoys in this domain, the Council reiterates the view that disclosure of the refused parts of the requested documents would involve a concrete risk of undermining the public interest as regards public security and international relations, as made clear in detail in the reply to the confirmatory application.

Further partial disclosure

18. The Council would like to point out that the reply to the applicant's confirmatory application was sent in March 2015, i.e. a year ago and that the migration crisis that the European Union is facing since then has considerably changed the overall picture of EU migration policy.
19. In the light of this evolution, the Council has thoroughly examined the suggestions put forward by the Ombudsman in her letter of 4 December 2015 for extended access to documents 5474/15, 6224/13, 6224/13 ADD 1 and 6224/13 ADD 2.
20. After having re-consulted the originators of the documents in question and re-assessed the possible disclosure of additional parts of the documents in accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Council has come to the following conclusion.
21. While confirming the reasons given earlier that led to the denial of the publication of certain details of the abovementioned documents in accordance with Regulation (EC) No 1049/2001, namely that access to some specific sections of these documents would undermine the protection of the public interest as regards public security and international relations, taking into account the time elapsed since the abovementioned operations and the changing migration trends which are affecting the European Union (with particular reference to the Balkan and Syrian crises and the migration pressure in the Mediterranean sea), which indicate a likely change in the migration framework, data collection, risk analysis and police activities related to it, the Council has come to the conclusion that that an extended partial access can be granted to documents 5474/15 and 6224/13, no further partial access can be given to document 16045/13 and that access can be granted to documents 6224/13 ADD 1 and 6224/13 ADD 2.  
Regarding document 5474/15, full access can now be granted to pages 9, 10, 20 (except the first sentence), 21 to 25, 45 and 50.  
Regarding document 6224/13, pages 28 and 29 can now be fully disclosed.