



European Ombudsman

Emily O'Reilly
European Ombudsman

Mr Claude Moraes
Chair of the Committee on Civil Liberties,
Justice and Home Affairs

Strasbourg, 27 February 2015

Dear Mr Moraes,

As you know, in my decision of 2 September 2014 on a complaint submitted to me against the European Police Office (Europol), I reached the conclusion that it was not possible for me to proceed with my inquiry and that I thus had no alternative but to close that inquiry (1148/2013/TN). The reason for this decision was that Europol had refused to allow me to inspect the document to which the complainant had asked to be given access. However, without inspecting that document it was not possible for me to ascertain whether Europol's position, that no public access could be given to that document, was correct.

Europol based its refusal to allow me to inspect the document on the 'technical modalities' that had been agreed between the European Commission and the US under the TFTP Agreement and that Europol believed required it to obtain the permission of the US authorities before showing the document to the Ombudsman. This permission was not granted.

In my decision closing the case, I acknowledged that Europol had fully cooperated with my services throughout the inquiry. The problem thus appeared to stem from the above-mentioned 'technical modalities'.

In my decision, I therefore suggested that Parliament might wish to consider the various issues raised in this case. These include whether it is acceptable for arrangements to be agreed with a foreign government which have the consequence of undermining mechanisms established by or under the EU Treaties for the control of EU executive action.

I very much appreciate the fact that the LIBE Committee has accepted this invitation and decided to look into the matter. In particular, I am very grateful that you gave me the possibility to present my position to the members of the

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LIBE Committee at one of its last meetings. I also appreciate that the LIBE Committee sought to clarify matters by asking for an opinion from Parliament's Legal Service.

I gather from the information that was provided at the LIBE Committee's meeting on Feb 5th 2015 that Parliament's Legal Service reached the conclusion that the 'technical modalities' had not been adopted or approved under the procedure provided for by the TFEU and could therefore not be invoked in order to limit the European Ombudsman's right to inspect documents in the possession of EU institutions, bodies, agencies or offices. This is a very useful and welcome statement.

However, I also understand that Parliament's Legal Service nevertheless takes the view that Europol was entitled to refuse to allow me to inspect the relevant document without the consent of the American authorities. I do not find this at all convincing. In my view, the Ombudsman's Statute clearly gives the Ombudsman the right to inspect documents like the one at issue in the Europol case.

It may be helpful for your Committee to know that the right of the Ombudsman to inspect relevant documents, for the purposes of an Ombudsman inquiry, was raised by the first European Ombudsman in his 1998 annual report. The then Ombudsman, Jacob Söderman, made his comments in the context of the original wording of Article 3(2) of the Ombudsman Statute which allowed EU institutions to refuse the Ombudsman access to documents "on duly substantiated grounds of secrecy". Mr Söderman commented as follows:

"The normal principle in Member States with a national Ombudsman system is that the Ombudsman can inspect any document held by the administration, if he considers it necessary to do so as part of an inquiry, including documents to which citizens cannot have access.

This power is of fundamental importance, since it is a guarantee for the citizen that the Ombudsman can make an independent check on the accuracy and completeness of the answers given by the administration. For as long as Article 3 (2) continues to restrict the Ombudsman's access to documents, therefore, it is important that the restrictions should be interpreted narrowly and that the burden of proof should be on the institution or body which seeks to deny access.

The question of whether restrictions on the European Ombudsman's access to files are appropriate in a European Union which is committed to democracy, transparency and to efficient and honest administration could be considered by the three institutions (European Parliament, Council and Commission) involved in the procedure for amendment of the Statute of the Ombudsman.

Naturally, the Ombudsman's power of inspection is complemented by a duty of confidentiality...

It is therefore a mistake to suggest that the rules on public access to documents which Community institutions and bodies have adopted can be used to restrict the Ombudsman's

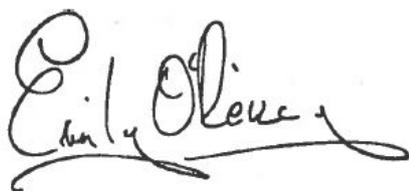
access to documents. This suggestion appears to be based on a fundamental misunderstanding of the nature of the Ombudsman's power of inspection, which is used to verify the truth and completeness of the administration's answers to a complaint and which does not result in public access to the documents concerned."

It can never have been the intention of the legislator that the European Ombudsman would be prevented from conducting an inquiry as a result of being denied access to a relevant document. This was made clear in 2001 when, in response to the Ombudsman's comments, Article 3(2) of the Ombudsman Statute was amended. The effect of the 2001 amendment is to provide, in the case of classified or sensitive documents, for certain restrictions on the manner of the Ombudsman's access; but the fundamental right of the Ombudsman to see such documents is protected.

It appears inconceivable to me that, in a union based on the rule of law, certain areas of the activity of the EU administration should be exempt from any external control whatsoever. If one were to accept the opinion put forward by the Parliament's Legal Service, which I do not, it would be a matter of real urgency to address the need to ensure that an agency such as Europol (or any other agency claiming it could not cooperate with the Ombudsman) is subject to external supervision.

If there is any other aspect of this issue on which you would like me to contribute, I will be very happy to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Emily O'Reilly". The signature is written in a cursive style with a long horizontal flourish at the end.

Emily O'Reilly