



Council of the
European Union

**Brussels, 17 January 2019
(OR. en)**

5416/19

LIMITE

**API 4
INF 6
OMBUDS 1
JUR 30
INST 10**

COVER NOTE

From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	15 January 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject:	Complaint 2011/2018/THH to the European Ombudsman
----------	---

Delegations will find in the Annex a copy of a letter sent by the European Ombudsman to the Council concerning complaint 2011/2018/THH.

Personal data have been blanked out.

E-MAIL / FAX



European Ombudsman

IN 000460 2019
15.01.2019

Emily O'Reilly
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen

sj.ombudsman@consilium.europa.eu
cc. Hubert Legal

Strasbourg, 15/01/2019

Complaint 2011/2018/THH

Subject: The Council of the European Union's refusal to grant access to an European External Action Service (EEAS) document setting out priorities for the military capability development of the EU's Common Security and Defence Policy (CSDP)

Dear Mr Tranholm-Mikkelsen,

I have received a complaint from **DELETED** against the Council of the European Union.

My inquiry team provided a copy of this complaint to your services on 29th November, 2018, explaining that I have decided to open an inquiry into this complaint against the Council's decision to refuse access under Regulation 1049/2001¹.

Regulation 1049/2001 states, in its Articles 7 and 8, that applications for access should be handled promptly. It is in line with this principle that the European Ombudsman also seeks to deal with cases such as this as quickly as possible.

As a first step, my inquiry team considers it necessary to review the document at issue in the complainant's request. I therefore request that the Council provide a full, unredacted version of this document to my inquiry team as soon as possible. I would be grateful if your office could contact

DELETED

¹ Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1>.



DELETED, who is the case handler in charge of this inquiry, concerning timing in this regard.

Information or documents that the Council considers to be confidential will not be disclosed to the complainant or any other person without the prior agreement of the Council. Information and documents of this kind will be handled and stored in line with this confidential status, and will be deleted from the European Ombudsman's files shortly after the inquiry has ended.

The Council's position has been set out in its confirmatory response. However, should the Council wish to provide additional views, to be taken into account during this inquiry, please liaise with **DELETED** to discuss an appropriate time-frame for these views to be provided to us.

Should the Council consider it would be helpful to schedule a meeting to discuss this case, and the background to the complaint, again please contact **DELETED** to discuss timing and details.

Yours sincerely,

Emily O'Reilly
European Ombudsman

Enclosure: complaint 2011/2018/THH

DELETED

From: DELETED
Sent: 27 November 2018 12:51
To: EORegistry
Subject: [EOWEB#26372] New complaint from: cmartise@isdefe.es -
Attachments: Registered letter of reply_21_c_01_18.pdf; NOTES.pdf; confirmatory_application.pdf; Reasons.docx; 18-1340.en.mar.nh-ns.docx

Your complaint has been submitted to the European Ombudsman. We will send you an acknowledgement of receipt within a few days.

NB - Please note that this e-mail was sent from a notification only e-mail address. If you wish to contact technical support, please use the link below:

[Contact technical support](#)

Sender

From: DELETED
Date: 27/11/2018 11:51:41

Complaint about maladministration

Part 1 - Contact information

First name: DELETED
Surname:
On behalf of (if applicable):
Address line 1: DELETED
Address line 2:
Town/City: DELETED
County/State/Province: DELETED
Postcode: DELETED
Country: DELETED
Tel.:
Fax:
E-mail address: DELETED

Part 2 - Against which European Union (EU) institution or body do you wish to complain?

Council of the European Union

Part 3 - What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

The 26th of June of 2018, I requested the EU document 8703/18 Progress Catalogue 2018 (PC18).

The 17th of July I received a letter from the Directorate General Communication and Information denying the access to the document (first attached file), based on article 4(1)(a) second indent (protection of the public interest as regards defence and military matters) of Regulation No 1049/2001.

The 12th of August, I sent a confirmatory application requesting again the document and arguing the reason to deserve such access (second and third attached files).

Part 4 - What do you consider that the EU institution or body has done wrong?

The principles of transparency shall prevail into the work of EU institutions.

Part 5 - What, in your view, should the institution or body do to put things right?

Make public and available the content of the Progress Catalogue. Being not feasible disclose content as much as possible only suppressing those parts that may significantly jeopardize European essential security interests. In any case, future editions of the Progress Catalogue shall maximize public content. Classified information shall be contained in sections or annexes clearly separable from the main body.

Part 6 - Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify and submit copies of the relevant correspondence)

The 9th of October I received a letter for the Directorate General Communication and Information denying again the access to the document and inviting me, being in disagreement with the decision, to make a complaint to the EU Ombudsman based on article 8.1 of Regulation (EC) 1049/2001 (first attached document)

A complete description of arguments for the delivery of the document are contained in the second attached document. Based on the information provided, the EU Ombudsman shall make a full, accessible, and effective scrutiny of the validity of the restriction of public access to the requested document.

Part 7 - If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable

Part 8 - Has the object of your complaint already been settled by a court or is it pending before a court?

No

Part 9 - Please confirm that you have read the information below

You have read the information note on data processing and confidentiality

Part 10 - Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

No



Council of the European Union
General Secretariat
Directorate-General Communication and Information
The Director-General

SGS18/07958

Brussels, 09 -10- 2018

DELETED

Subject: your confirmatory application

Dear Sir,

Please find enclosed the reply from the Council to the confirmatory application you introduced on 12 August 2018.

Statutory remedy notice

Pursuant to Article 8(1) of Regulation (EC) No 1049/2001, we draw your attention to the possibility to institute proceedings against the Council before the General Court¹ or to make a complaint to the Ombudsman². The conditions for doing so are laid down in Articles 263 and 228 of the Treaty on the Functioning of the European Union respectively.

Yours sincerely,

Reijo KEMPPINEN

Enclosure

¹ For deadlines and other procedural requirements concerning the institution of proceedings at the General Court, please refer to the following page: http://curia.europa.eu/jcms/jcms/Jo2_7040/en/

² Any complaint to the Ombudsman must be made within two years of receiving the institution's final position on the matter. The Ombudsman's online complaint form is available at: <https://secure.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces>

REPLY ADOPTED BY THE COUNCIL ON 9 October 2018
TO CONFIRMATORY APPLICATION 21/c/01/18,
made by email on 12 August 2018,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,
for public access to document 8703/18

The Council has considered this confirmatory application for the subject document under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 26 June 2018, the applicant submitted a request for access to document 8703/18 (classified RESTREINT UE/EU RESTRICTED), which is a note from the European Union Military Committee (EUMS) to the Political and Security Committee containing an EEAS document EEAS(2018) 325 REV 5 entitled *Progress Catalogue 2018 (PC18)*.
2. In its reply dated 7 August 2018, the General Secretariat refused public access in its entirety to document 8703/18 pursuant to Article 4(1)(a), second indent (protection of the public interest as regards defence and military matters) of Regulation No 1049/2001.
3. In the confirmatory application dated 12 August 2018, the applicant asked the Council to review its position.

The Council has reassessed whether, in full consideration of the principles of transparency underlying Regulation No 1049/2001 and in the light of the applicant's comments, public access can be provided to the requested document fully or partially. It has in particular consulted the European External Action Service as these documents emanate from its services. The Council has come to the conclusions set out below.

GENERAL CONTEXT RELATED TO THE REQUESTED DOCUMENT

4. Document 8703/18 sets out the Progress Catalogue 2018 (PC18).
5. In December 2008 the European Council set a new Level of Ambition to enable the EU to conduct simultaneously, outside of its territory, a series of Common Security and Defence Policy (CSDP) civilian and military missions and operations. In 2016, as an addition to the new EU Global Strategy, the review of the Requirements Catalogue (RC) of 2005 was requested.
6. On 14 November 2016, the Council was tasked with reviewing the military requirements stemming from the EU Global Strategy and the EU Level of Ambition.
7. On 13 November 2017, the Council approved *the Requirements Catalogue 2017 (RC17) which identifies the military capability requirements for CSDP stemming from the EU Level of Ambition as agreed by the Council in November 2016, taking into account the three strategic priorities deriving from the EU Global Strategy. Based on the RC17, which is now broader and also takes into account new threats, work will continue in implementing its recommendations to identify and prioritise the EU military capability shortfalls contributing to the Capability Development Plan in view of identifying priorities for EU capability development*¹.
8. Document 8703/18 identifies the priorities as per the requirements set in RC 2017.

THE EXCEPTION CONCERNING THE PROTECTION OF THE PUBLIC INTEREST AS REGARDS DEFENCE AND MILITARY MATTERS (ARTICLE 4(1)(a), 2nd INDENT, OF ARTICLE 4 OF REGULATION NO 1049/2001)

The nature of the exception in general

9. Based on its content the requested document comes within the remit of the exception of protection of the public interest as regards defence and military matters and international relations (Article 4(1)(a) first, second and third indent of Regulation No 1049/2001).

¹ Council Conclusions 13 November 2017.

11. At the outset, the General Secretariat recalls that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001 are subject to a particular regime as compared to the other exceptions included in Article 4.
12. On the one hand, "the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"².
13. On the other hand, once the Council has come to the conclusion that release would indeed undermine the public interest in this area, it has no choice but to refuse access, because "it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests".³
14. Therefore, the Council enjoys a wide discretion in assessing the impact of the release of documents on international relations and defence and military matters, but is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interest and grant access nonetheless.
15. It also results from the above that, unlike the reasoning given by the applicant, the Council has no choice but to refuse access to a document that falls within the scope of the exception concerning defence and military matters and whose publication would undermine the public interest protected by it.

² ECJ case C-266/05, Sison, para. 35.

³ ECJ case C-266/05, Sison, para. 46.

Assessment of the harm to the protected interests that would ensue from the disclosure of the requested documents

16. The requested document sets out the Progress Catalogue 2018 (PC18) which is a follow-up to the updated EU military requirements, reasoning and modus operandi for overall CSDP operations. This information and the way it was put together reveal the grounds and aims of EU military planning.
17. If released to the public, this information would give third parties strategic and operational advantages and could be misused to jeopardise the EU military planning ability, as well as its Member States military planning ability individually. In fact, it could be misused by other powers and hostile entities (including non-state entities, like parties in conflict in a civil war, terrorist groups - DAESH for instance - smugglers or traffickers, transnational criminal groups, etc.) to understand the EU process of capability development planning, the key factors considered in this process, as well as the type, size, limits and shortfalls of the capabilities under development. Furthermore, it would allow them to refine the collection of military intelligence of EU military capabilities, and to counter or disrupt their development (for instance by means of hybrid actions, like sabotage or cyber attacks).
18. This information would also allow other powers and hostile entities to anticipate the capabilities the EU will be able to deploy into the Theatre of Operations and to counter or evade them, disrupting the EU external political and strategic action, and exposing EU military forces to unnecessary risk of casualties and military defeat. Finally, it would give them the possibility to improve their own process of capabilities development, developing capabilities that will be used to counter EU external political and strategic action.
19. As a consequence, disclosure of the requested documents would undermine the protection of the public interest as regards defence and military matters.

**PARTIAL ACCESS PURSUANT TO ARTICLE 4(6) OF REGULATION (EC)
NO 1049/2001**

20. The Council has thoroughly re-examined the requested documents in accordance with the provision on partial access laid down in Article 4(6) of Regulation 1049/2001. Following this examination, the Council must confirm that no partial access to the requested documents is possible.

CONCLUSION

21. The Council therefore considers that disclosure of the content of document 8703/18 would undermine the protection of the public interest as regards defence and military matters.
22. Public access to documents 8703/18, must therefore be refused pursuant to Article 4(1)(a), second indent, of Regulation No 1049/2001.
-

NOTES FOR REVIEWING DECISION ON DOCUMENT 8703/18

Being a classified document means that the document is accessible to those having the corresponding Security Clearance for accessing EU documents given by the National Security Authority as is the case of the person that subscribes the application. Furthermore, working in a defence firm and in the Spanish *Instituto Universitario General Gutierrez Mellado* whose main activity are post-master defence studies and research in the fields of defence capabilities, defence equipment and defence industries are enough "need to know" arguments to access to such document, certainly with the proviso of the duties regarding the preservation of the confidentiality and not disclosure to third parties of the document.

Whereas the applicant cannot made assumptions regarding the content of the document, he must say that the title "Progress Catalogue 2018", as is said in other documents, contains a description of the plans regarding the improvement of defence capabilities of the European Union for supporting the Common Security and Defence Policy.

Certainly, it cannot be understood why such disclosure can be disadvantageous to the interest of the European Union or their Member States. This case should only exist if the document would contain details explaining very detailed technicalities regarding the military capabilities or very detailed reasons for improving certain capabilities due for example to identified threats obtained through intelligence. Being this the case the document should be easily sanitized to drop such "critical" information.

Moreover, having in mind that the document may be of interest to citizens, a careful edition should have indicated which sections or paragraphs should be classified and dropped for free access to citizens. For example, details regarding *modus operandi* of EU CSDP should have been separated and moved to the corresponding section or annex. But, even in such a case, it is hard to believe that, for example, EU Peace Operations contain information whose disclosure may be disadvantageous to the EU or its Member States.

It is also difficult to believe that the revelation of the current EU military operations to third parties may compromise the efficient of EU actions where they are extensively publicised by MoDs, the EEAS and Member States. Even future operations, in this kind of documents, tend usually to be simply outlined without containing further references to specific scenarios, thus compromised such future missions.

Certainly the Council has to balance transparency with other criteria as the protection of the public interest, but as has been explained, there is no chance of compromising such interest. Even more, transparency should have priority and, being absolutely necessary, the document shall be sanitized for disclosure to EU citizens who are interested in defence and industrial policies. As a consequence, the applicant asks to reconsider his request and to make the necessary strides to give access to a complete or, in the worst case, sanitized copy of this document.



Application for access to documents

Please return this form duly completed to:

European Union Agency for Fundamental Rights
Document Access Coordinator
Schwarzenbergplatz 11
A-1040 Vienna
Austria

E-mail: documents@fra.europa.eu

Fax: +43 1 58030 691

Type of application

Type of application*

- Initial application
 Confirmatory application

Registration number of the initial application**

18/1340-PRO-jg made on 26.06.2018

Personal details

The processing of personal data entered on the application form is subject to the protection policies established by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

See: <http://fra.europa.eu/en/data-protection-statement>

Surname*

DELETED

First name*

DELETED

E-mail*

DELETED

Telephone

DELETED

Address*

DELETED

Postcode*

DELETED

Town/city*

DELETED

Country of residence*

DELETED

Status/activity

DELETED

Organisation***

Information concerning the documents requested

Description of the document(s)

Progress Catalogue (EU reference 8703/18).

Desired language version - first choice

English

Desired language version - second choice

Delivery

Electronic

Fax****

Post****

Notes

See attached document.

* compulsory field

** compulsory field for confirmatory applications

*** compulsory field for applications made on behalf of a legal person

**** the costs of producing and sending copies may be charged if the document exceeds 20 pages

Reasons for disclosure of document 8703/18 Progress Catalogue 2018 (PC) 18

1. The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen (Recital 1 of Regulation (EC) 1049/2001).
2. Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union (Recital 2 of Regulation (EC) 1049/2001).
3. The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process (Recital 3 of Regulation (EC) 1049/2001).
4. In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy (CFSP) and to police and judicial cooperation in criminal matters. Each institution should respect its security rules (Recital 7 of Regulation (EC) 1049/2001).
5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released (Article 4.6 of Regulation (EC) 1049/2001).
6. Document 8703/18 identifies and prioritise the EU military shortfalls contributing to the Capability Development Plan in view of identifying priorities for the EU capability development as per requirements set in RC 2017 (point 7 and 8 of Council Reply on 9 of October).
7. It is clear that future decisions regarding the development of capabilities in the European Union, including projects agreed within the Permanent Structured Cooperation (PESCO), will depend of the identification of capabilities that need enhancement, something contained in the Progress Catalogue. Therefore, information regarding development priorities and current shortfalls are important for understanding decision in this field. The accountability of such decisions is key for figuring out defence and military equipment expenditures. Otherwise, based on this exception, more discretionary decisions can be taken that cannot be subject to public scrutiny in order to: (a) verify consistency with European values, (b) the importance of the planned actions in defence and (c) the tracking of progress in this field.
8. Whereas the exception of public interest of article 4(1)(a) may have sense, it does not imply unlimited application to any question related to the CFSP. Being the document classified as RESTRAINT UE means that the disclosure of information could be disadvantageous to the interests of the European Union or one or more of the Member States (Article 2.2.(d) of Council Decision of 23 September 2013). Under the ambiguity of this classification rule, a correct interpretation will mean that: (1) specific, identifiable harm to legitimate interest shall be stated and (2) there is a clear correlation between the disclosure and the potential harm and (3) the restriction must comply with the principle of proportionality be the least restrictive means available to protect against harm.

9. As stated in point 7 of the Council Reply of 9 of October, the document provides recommendations regarding military capability shortfalls in order to identify priorities for EU capability developments. It cannot be stated that the document reveals the grounds and aims of EU military planning (points 16 and 17 of the Council Reply), much less of operational planning. The document aims mainly to identify capabilities (and probably acquisition programmes) deemed important for the CFSP. It is unlikely that such general information may put at risk the EU or their Members States security, being many of them already known. Moreover, the process of capability development of the EU does not impair on EU security (following this reasoning we will end up with the absurd recommendation of no releasing the defence budget or the inventory of national equipment in order to hide any weakness of the EU and their member states in defence). Certainly quite very detailed explanations of limits and shortfalls could endanger national interest (something unfortunately unknown by the complainer), but it can easily solved in a paragraph number or annex properly classified and easily deletable for public knowledge.

10. In addition to the previous points, when the information is public available, it is questionable that such document undermines public interest. This is particularly true when other European Institution publicly and largely report on this question as for example the document "The Impact of the Financial Crisis on European Defence" 2011. European Parliament. Directorate-General for External Policies. Policy Department, where shortfalls and problems related to the generation of EU capabilities are described in large detail (see 2.3.2 and 3.4). Equally, they are commented in the following European Defence Agency documents "Future Trends of the Capability Development Plan" (see for example the chapter "Potential Trends in Future Military Capability Characteristics) or "Exploring Europe's capability requirements for 2035 and Beyond" (see for example "Future Military Capability Requirements).

11. Certainly document 8703/18 may contain information whose disclosure could be disadvantageous (e.g. intelligence reports). However, the writing and the framing of the document shall be done in a way that such parts are easily separable (e.g as annexes) in order to proactively make public the largest part of the document (see point 5). Future editions should consider this alternative to avoid the overcharging of editorial work and the easy disclosure of parts of the document to European citizens.



Council of the European Union
General Secretariat

Directorate-General Communication and Information
Knowledge Management
Transparency
Head of Unit

Brussels, 7 August 2018

DELETED
Email: DELETED

Ref. 18/1340-nh/ns

Request made on: 26.06.2018
Deadline extension: 17.07.2018

Dear DELETED,

Thank you for your request for access to documents of the Council of the European Union.¹

After having consulted the European External Action Service (EEAS)², the General Secretariat of the Council has come to the following conclusion.

I regret to inform you that access to document 8703/18 cannot be given for the reasons set out below.

It is a classified document, bearing the classification "RESTREINT UE". This means that the unauthorised disclosure of its contents could be disadvantageous to the interests of the European Union or of one or more of its Member States.³

It is a note from the European Union Military Committee (EUMC) to the Political and Security Committee (PSC) containing a EEAS document EEAS(2018) 325 REV 5 entitled *Progress Catalogue 2018 (PC18)*.

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

² Article 4(5) of Regulation (EC) No 1049/2001.

³ Council Decision of 23 September 2013 on the security rules for protecting EU classified information (2013/488/EU), OJ L 274, 15.10.2013, p. 1.

These documents contain internal analysis on the modus operandi requirements, reasoning and modus operandi for overall CSDP operations.

Release of this information 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.

Disclosure of these documents would therefore undermine the protection of the public interest as regards defence and military matters. As a consequence, the General Secretariat has to refuse access to these documents.⁴

We have also looked into the possibility of releasing parts of the document(s).⁵ However, as the information contained in the document (in each of the documents) forms an inseparable whole, the General Secretariat is unable to give partial access (at this stage).

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).⁶

Yours sincerely,

Sally BLISS

(Enclosure)

⁴ Article 4(1)(a), second indent, of Regulation (EC) No 1049/2001.

⁵ Article 4(6) of Regulation (EC) No 1049/2001.

⁶ Article 7(2) of Regulation (EC) No 1049/2001.

Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.