

**JOINT SUPERVISORY BODY
OF EUROPOL**

APPEALS COMMITTEE

APPEAL OF Mr A.

(Appeal no. 10/03)

DECISION

Brussels

1 March 2011

Decision on the appeal from Mr. A. against Europol's decision of 13 January 2010 regarding a request based on Article 19 of the Europol Convention.

The Appeals Committee,

Composed of: Mr. G. Konig, Ms. P. de Locht, Ms. M. Mateva, Ms. M. Matousova, Mr. Henrik Rubaek Jorgensen, Mr. A. Ojaver, Mr. H. Huhtiniemi, Mr. L. Lim, Mr. M. Heyn, Ms. E. Maragou, Ms. V. Palumbo, Ms. R. Vaitkevičienė, Mr. T. Lallemand, Mr. D. Cauchi, Ms. E. Van Beek, Mr. P. Drobek, Ms. I Cruz, Mr. P. Lieskovský, Ms. N. Pirc Musar, Mr. M. Garcia Sánchez, Ms. A. Runmarker, Ms. E. Butler.

Rapporteur: Mr. M. Heyn

Secretary: Mr. P. Michael

Parties:

1. Mr. A. represented by Mr Schmidtgal
2. Europol, represented by Mr. P. Donos

PROCEDURE

- On 19 April 2010, Mr. A. lodged an appeal based on Article 19 of the Europol Convention.
- The Appeals Committee declared the appeal admissible on 21 June 2010.
- On 24 June 2010, in accordance with Article 18 (2) of its Rules of Procedure, the Appeals Committee requested Europol to submit any observations on the appeal.
- At its meeting of 11 October 2010, the Appeals Committee considered the report of the rapporteur of 11 October 2010 and the observations of Europol.
- The Appeals Committee invited all parties to submit final statements on .. December 2010.
- The Appeals Committee considered all the documents in the case and the recommendations of the rapporteur at its meetings on 21 June 2010, 11 October 2010, 6 December 2010 and 1 March 2011.

FACTS

1. On 20 October 2009, Mr. Schmidtgall approached Europol on behalf of Mr. A. via the competent German Police Authority – the Bundes Kriminal Amt (BKA) - with a request of access based on Article 19 of the Europol Convention.
2. The Bundes Kriminal Amt (BKA) forwarded this request to Europol which was received by Europol on 18 November 2009
3. On 23 November 2009, Europol requested Mr. Schmidtgall to provide a letter of attorney and a copy of Mr. A.'s passport or identity paper.
4. On 3 December 2009, Mr. Schmidtgall provided Europol with the requested information.
5. On 13 January 2010, Europol decided on the request of Mr. A.
6. In its decision (original in the German language) Europol informed Mr. A.:

In accordance with the procedure stipulated in the Europol Convention and the applicable national legislation of Germany, I would like to inform you that following your request checks of Europol files have been made. Following Article 19 of the Europol Convention in combination with the applicable legislation of Germany, I would like to inform you that no data concerning you are processed at Europol to which you are entitled to have access to in accordance with Article 19 of the Europol Convention.

7. In accordance with Article 19 (2) of the Rules of Procedure, a copy of the complaint was sent to Europol with a request to submit their observations. Europol's response was received on 20 July 2010.
8. The report of the rapporteur of 11 October 2010 and the discussion of that report in the meeting of the Appeals Committee on 11 October 2010 indicated that the checks of Europol provided for a true reflection of the situation.

9. In his report of 11 October 2010, the rapporteur concluded that in view of the applicability of the German law and all arguments presented, Europol's response is not in compliance with the law and practice of Germany.

10. On 2 November 2010, Mr. Schmidtgal provided the Appeals Committee with a copy of an overview of data processed on his client by the central police authority in Bayern – Bayerische Landeskriminalamt.

RELEVANT LAW AND PRACTICE

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention of the Council of Europe of 28 January 1981) contains the following provisions:

Article 8

Any person shall be enabled:

a).....

b) to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated files as well as communication to him of such data in an intelligible form.

Article 9 (2)

Derogation from the provisions of Articles... and 8 of this convention shall be allowed when such derogation is provided for by law of the Party and constitutes a necessary measure in a democratic society in the interests of:

a....protecting State security, public safety or the suppression of criminal offences.

Recommendation No R(87)15 of the Committee of Ministers of the Council of Europe of 17 September 1987:

Principle 6.2

The data subject should be able to obtain access to a police file at reasonable intervals and without excessive delay in accordance with the arrangements provided by domestic law.

Principle 6.4

Exercise of the rights of access, rectification and erasure should only be restricted insofar as a restriction is indispensable for the performance of a legal task of the police.....

The Europol Convention (Convention of 26-7-95; OJC 316, 27-11-95) contains the following provisions:

Article 14 (1)

By the time of the entry into force of this Convention at the latest, each Member State shall, under its national legislation, take the necessary measures in relation to the processing of personal data in data files in the framework of this Convention to ensure a standard of data protection which at least corresponds to the standard resulting from the implementation of the principles of the Council of Europe Convention of 28 January 1981, and, in doing so, shall take account of Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987 concerning the use of personal data in the police sector.

Article 14 (3)

In the collection, processing and utilisation of personal data Europol shall account of the principles of the Council of Europe Convention of 28 January 1981 and of Recommendation no R(87)15 of the Committee of Ministers of the Council of Europe of 17 September 1987.

Article 19 - Right of access

1. Any individual wishing to exercise his right of access to data relating to him which have been stored within Europol or to have such data checked may make a request to that effect free of charge to the national competent authority in any Member State he wishes, and that authority shall refer it to Europol without delay and inform the enquirer that Europol will reply to him directly.

2.....

3. The right of any individual to have access to data relating to him or to have such data checked shall be exercised in accordance with the law of the Member State where the right is claimed, taking into account the following provisions:

Where the law of the Member State applied provides for a communication concerning data, such communication shall be refused if such refusal is necessary to:

- (1) enable Europol to fulfil its duties properly;
- (2) protect security and public order in the Member States or to prevent crime;
- (3) protect the rights and freedoms of third parties,

considerations which it follows cannot be overridden by the interests of the person concerned by the communication of the information.

4. The right to communication of information in accordance with paragraph 3 shall be exercised according to the following procedures:

(1) as regards data entered within the information system defined in Article 8, a decision to communicate such data cannot be taken unless the Member State which entered the data and the Member States directly concerned by communication of such data have first had the opportunity of stating their position, which may extend to a refusal to communicate the data. The data which may be communicated and the arrangements for communicating such data shall be indicated by the Member State which entered the data;

(2) as regards data entered within the information system by Europol, the Member States directly concerned by communication of such data must first have had the opportunity of stating their position, which may extend to a refusal to communicate the data;

(3) as regards data entered within the work files for the purposes of analysis as defined in Article 10, the communication of such data shall be conditional upon the consensus of Europol and the Member States participating in the analysis, within the meaning of Article 10 (2), and the consensus of the Member State(s) directly concerned by the communication of such data.

Should one or more Member State or Europol have objected to a communication concerning data, Europol shall notify the person concerned that it has carried out the checks, without giving any information which might reveal to him whether or not he is known.

5.....

6.....

7.....

Where the appeal relates to a communication concerning data entered by Europol in the information system or data stored in the work files for the purposes of analysis, the joint supervisory body, in the event of persistent objections from Europol or a Member States, may not overrule such objections unless by a majority of two-thirds of its members after having heard Europol or the Member States concerned. If there is no such majority, the joint supervisory body shall notify the enquirer that it has carried out checks, without giving any information which might reveal to him whether or not he is known.

Article 20

4. Any person shall have the right to ask Europol to correct or delete incorrect data concerning him. Europol shall inform the enquirer that data concerning him have been corrected or deleted. If the enquirer is not satisfied with Europol's reply or if he has received no reply within three months, he may refer the matter to the joint supervisory body.

In Germany, the right of access to data governed by Section 19 of the Federal Data Protection Act (BDSG) is both the prerequisite for and part of the right of the individual guaranteed by the Basic Law to determine the disclosure and use of his or her personal data. The right of access to data enables the data subject to exercise additional rights, such as the right to correct, block or erase data and the right to effective legal protection. The right of access to data therefore is one of the necessary procedural safeguards of the constitutional right to determine the use of one's own data. This provision is addressed to all public offices, including the police.

Under Section 19 (1) BDSG, the controller's obligation to provide access to data extends to the recorded data relating to the applicant, including information relating to the source of the data, the recipients or categories of recipients to which the data are transferred, and the purpose of recording the data.

The comprehensive provision of information also means informing the applicant if no data concerning him are recorded. This follows directly from the basic right to determine the use of one's own data. Determining the use of one's own data requires the freedom to decide whether to claim the right to erase or correct data and the right to effective legal protection. This requires knowing not only who processed which data for which purposes, but also knowing that none of one's personal data are recorded. Information which does not indicate whether data pertaining to the data subject are recorded does not fulfil the constitutionally guaranteed protective function of the right of access to data.

Under Section 19 (4) BDSG, information (including the information that none of one's personal data are recorded) may be withheld only if one of the following conditions applies:

- the information would endanger the orderly performance of tasks for which the controller is responsible,
- the information would threaten the public security or order or otherwise be detrimental to the Federation or a Land, or
- the data or the fact of their recording, in particular due to the overriding legitimate interests of a third party, must be kept secret by law or due to the nature of the data

and therefore the data subject's interest in obtaining information shall not take precedence.

ARGUMENTS BEFORE THE APPEALS COMMITTEE

Mr. A.

According to Mr. A., he has been controlled many times by the Czech police.

Mr. A. states that he received from the Czech police information that data from Europol concerning him were processed in a police computer without any indication of which computer. These data concern a German investigation and prosecution.

Mr. A. is also aware of the existence of two German arrest warrants. Mr. A. states that he has no written confirmation of the existence of Europol data in the police computer of the Czech police.

Europol.

In its observations of 20 July 2010, Europol explained the way in which it followed the procedures of Article 19 of the Europol Convention in deciding on the request of Mr. A. As far as relevant it answered that

The appeal of Mr. A.'s solicitor states that his client is appealing against Europol's response dated 13 January 2010: "... dass keinerlei Herrn A. betreffenden Daten bei Europol gespeichert seien bzw. Verarbeitet worden (.. that no data related to Mr. A. is stored or processed by Europol).

..That this appears to be a misunderstanding of Europol's response, which clearly stated: "...dass keinerlei Sie betreffende Daten, für die gemäß des Europol-Ubereinkommens Anspruch auf Auskunft besteht, bei Europol verarbeitet werden" (..that no information is processed by Europol to which you are entitled to have access in accordance with the Europol Convention).

The two responses are very different, and in this case Europol sent the "standard response" to the individual which neither confirms nor denies the existence of information.

It is stated in the complaint that the Czech police authorities informed Mr. A. upon request that there was information stored on him in the "police computer system", with corresponding information from Europol and information on pending criminal proceedings in Germany. His solicitor also mentions that Mr. A. is aware that two arrest warrants relating to him have been issued by the district court of Bayreuth, Germany. The solicitor states that there are reasonable grounds therefore to justify the complaint that Europol's response is wrong and that even though his client does not have written confirmation of the entries in the police computer, there is still justified cause to put forward the complaint as the "response provided by Europol date 13 January 2010 is incorrect".

With regard to the above, it is not clear which "police computer system" is being referred to and in any case it seems highly unusual (if at all possible) that Member States' police authorities would inform individuals during police checks that there is information stored on them by Europol.

As you know, the provisions in the Europol Convention on granting individuals access to their data does not include any proposal for a wording, nor any phrasing that could be used as a guideline when answering these requests. The wording used by Europol in its standard response is the result of careful consideration how to implement Europol's diverse responsibilities (to all Member States) as outlined in Article 19 of the Europol Convention".

FINDINGS OF THE APPEALS COMMITTEE

Article 19 (1) of the Europol Convention, contains a right of access or to have such data checked.

The appellant's request to Europol only concerns a request for access as referred to in Article 19 (1) of the Europol Convention.

The Europol Convention contains in Article 19 (1) a right of access for any individual. The extent of this right is not specifically defined but must in view of Article 14 (1) of the Europol Convention be regarded as the same right as defined in Article 8 of the Convention of the Council of Europe of 28 February 1981. This right enables the individual to establish whether personal data relating to him are stored and if so, gives the right of having this data communicated to him. The application of the general principles of the Council of Europe Convention in relation with the data subject's rights emphasises the principle of proportionality (Cf. Article 9 (2) of CoE Convention 108, Principle 6.4 of Recommendation No. R (87) 15 and Article 19 (3) of the Europol Convention: which use the terms “necessary” or “indispensable” to express the same idea). Exemptions to the right of access can only be allowed if and to the extent to which the interests of police, or third parties outweigh the interest in exercising the right of access. The principle of proportionality implies that a decision on the right of access requires an assessment on a case by case basis.

Article 19(3) of the Europol Convention uses the expression “communication concerning data,” which covers both the communication whether data are processed and communication of the data that are processed.

The appeal involves both aspects of the right of access. According to Article 19 (3) of the Europol Convention, this right shall be exercised in accordance with the law of the Member State involved where the right is claimed, in this case Germany. This also means that the assessment of an exemption to that right must be in accordance with the law of that Member State, within the limits set by Article 19(3).

In its decision of 13 January 2010, Europol informed the appellant that no data concerning him are processed to which he is entitled to have access in accordance with Article 19 and the German legislation. Taking into account that the German law recognises a right to have data communicated, there ought to be an assessment by Europol in this specific case whether, in the light of the exemption as referred to in Article 19(3) of the Europol Convention, it is necessary to refuse the communication.

Article 19 (3) of the Europol Convention contains similar provisions as in Article 19(4) of the BDSG. According to these provisions, communication concerning data shall be refused if the relevant information must be withheld from an individual due to specific concerns, and consideration of these concerns in the individual case leads to the conclusion that these concerns override the protected interests of the data subject.

Any limits to the right of access may be considered only if reasons to refuse access apply. Europol's response to the appellant does not refer to any such reasons and Mr. A. cannot be sure whether any data relating to him are indeed stored in Europol's information systems.

According to the rapporteur, such a response that leaves the enquirer in a state of uncertainty would not be permissible under German law.

In its observations to the Appeals Committee of 20 July 2010, Europol did not provide any information why in this case one of the exemptions to the right of access must be applied and do not demonstrate any assessment in this specific case that one of the exemptions of Article 19 (3) of the Europol Convention applies.

Furthermore and in view of Europol's specific obligation to assess whether in a specific case the exemptions of Article 19 (3) of the Europol Convention apply, Europol's observation that the wording used in its standard response is the result of careful consideration on how to implement Europol's diverse responsibilities as outlined in Article 19 of the Europol Convention (to all Member States) does not present a proper assessment of this specific case.

In assessing this case, Europol should at least have verified whether there was any reason to believe that the interests referred to in Article 19 (3) of the Europol Convention were relevant for this particular case. In the absence of such evidence, it was not right for Europol to withhold information and to refuse the communications as requested.

After a careful evaluation of the information available, the Appeals Committee can only arrive at the conclusion that in this case, Europol's response to Mr. A. that no data concerning him are processed by Europol to which he is entitled to have access in

accordance with Article 19 of the Europol Convention, fails to comply with Article 19 of that convention.

COSTS

Since no application was made based on Article 27 (1) of the Rules of Procedure, no decision on costs is needed.

DECISION

The decision of Europol of 13 January 2010 on a request from Mr. A. for access is not in compliance with Article 19 (3) of the Europol Convention.

This decision is announced at the public meeting of the Appeals Committee on 1 March 2011, and conveyed to the parties and forwarded to the Joint Supervisory Body.

Brussels, 1 March 2011

Agneta Runmarker,
Chairman of the Appeals Committee of the
Joint Supervisory Body of Europol.