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Warsaw, 12 April 2019

Dear Mr Jones,

Thank you for your letter of 20 March 2019, by which you note that you question how Frontex's current rules and practices with regard to public access to documents comply with the requirements of Regulation (EC) No 1049/2001¹. While I share your views related to the importance of institutions' adherence to Regulation (EC) No 1049/2001, please allow me to point out that some of your assumptions are not correct.

First, the detailed annual report for the year 2017 contained on page 71 of Management Board Decision 11/2018 of 13 June 2018² is in fact available on our website³.

Second, in regard to your overarching concern regarding the nature of Management Board decisions vis-à-vis Regulation (EC) No 1049/2001: Decisions of the Frontex Management Board cannot supersede obligations laid down in EU secondary legislation such as Regulation (EC) No 1049/2001 or the current European Border and Coast Guard Regulation⁴. Article 74(1) which provides that the Agency shall be subject to Regulation (EC) No 1049/2001 when handling applications for access to documents held by it. This hierarchical difference is expressed again in the non-operative Recital (3) of Management Board Decision No 25/2016 of 21 September 2016⁵ ("Management Board Decision"). In line with Article 74(3) of the European Border and Coast Guard Regulation and as highlighted in Article 1 of the Management Board Decision, the Management Board laid down practical arrangements - which are distinct from legal requirements - for the application of Regulation (EC) No 1049/2001.

In reply to the remainder of your points, I would like to note:

1. Since its establishment, Frontex has made an increasing number of documents available online. The launch of the current Frontex website in March 2018 enabled Frontex to give new impetus in this regard and to considerably expand the amount of documents made available, e.g. through the creation of a key documents section⁶.

¹ 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, 31.5.2001, p. 43).

² Management Board Decision 11/2018 of 13 June 2018 adopting Annual Activity Report 2017 and its assessment (2018).

³ https://frontex.europa.eu/assets/Management_Board/decisions/2018/MB_Decision_11_2018_adopting_Annual_Activity_Report_2017_and_its_assessment.pdf.

⁴ Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1).

⁵ Management Board Decision No 25/2016 of 21 September 2016 adopting practical arrangements regarding public access to the documents held by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the "Agency").

⁶ <https://frontex.europa.eu/about-frontex/key-documents/>.

While Frontex is continuously adding documents to its website and updating its content, I am most grateful for your suggestions on how to make citizens' rights under Regulation (EC) No 1049/2001 even more effective.

2. As indicated above, recitals of Management Board decisions do not have an operative quality. Your request to remove from Recital (6) of the Management Board Decision the words "specific requirements of Frontex" has to be seen in light of Recital (11) of Regulation (EC) No 1049/2001, which expresses the same notion in regard to rights of individuals to access documents of European Union bodies and institutions: to protect certain public and private interests by way of exceptions. While both "statements"⁷ are non-operational - "and only made in the recitals"⁸ - neither these recitals nor any operational provision of the Management Board Decision could be interpreted as introducing "further potential exceptions, or grounds for exceptions" in addition to those laid down in Regulation (EC) No 1049/2001.

Since the establishment of Frontex, the supervisory bodies have not found the Agency's practice in processing applications for public access to documents as being contradictory to the requirements of Regulation (EC) No 1049/2001.

3. Regarding the previous annual reports, and as indicated under point 1 above, Frontex is constantly strives to adhere to all requirements of Regulation (EC) No 1049/2001.

4. Developing the right of access to documents laid down in Article 15 of the Treaty on the Functioning of the European Union⁹ and Article 42 of the Charter of Fundamental Rights of the EU¹⁰, Article 2(1) of Regulation (EC) No 1049/2001 provides for such right for "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State". As I cannot comment on the practice of other European Union institutions and bodies that are subject to Regulation (EC) No 1049/2001, the fact that Article 2(2) of Regulation (EC) No 1049/2001 allows for an extension of the scope to also include persons and entities not residing or not having its registered office in a Member State does not mean an institution has to make use of this option. This is because the aims of Regulation (EC) No 1049/2001 are to enable "citizens to participate more closely in the decision-making process" and to ensure that institutions are "more accountable to the citizen"¹¹. Consequently, an institution does not have to justify why it does not avail itself of this option and your remark regarding Article 3(2) of the Management Board Decision has to be understood in this context.

Nevertheless, the binding legal framework for Frontex, as for other institutions, is Regulation (EC) No 1049/2001.

5. Building on point 4, please be informed that we already offer¹² the possibility to submit applications as an email attachment signed electronically through a qualified e-signature in line with the eDIAS Regulation¹³ in order to verify eligibility. As an alternative means, we are able to accept from natural persons an ID card/passport/residence permit for the European Union or the registration of a legal entity in an EU Member State and a proxy authorizing an applicant to act on behalf of this

⁷ As stated on page 1 of your letter.

⁸ As stated on page 5 of your letter.

⁹ Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47).

¹⁰ Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

¹¹ Recital (2) of Regulation (EC) No 1049/2001.

¹² <https://frontex.europa.eu/contact/public-access-to-documents/>.

¹³ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73-114).

entity. In any case, personal data is processed in compliance with Regulation (EU) 2018/1725¹⁴ applicable to Frontex, and applicants are informed about this requirement on the Frontex webpage prior to submitting an application and again before the eligibility check is conducted. Personal data regarding the eligibility check is retained only for this purpose and immediately deleted thereafter.

Based on your suggestion, for which I am obliged, Frontex will explore possibilities to also improve the transmission of personal data if an applicant choses to use this alternative means.

I respectfully concur with you regarding the significance of ensuring the highest possible degree of openness, and conclude by underlining that for Frontex, public access to documents is an important element of the principle of transparency among others. Consequently, Frontex also “make[s] public information on all of its activities” available pro-actively as required by Articles 8(3) and 74(2) of the European Border and Coast Guard Regulation.

Yours sincerely,

signed

Hervé Caniard
Head of Transparency Office

¹⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39-98).

