



## REPORT ON THE EUROPEAN OMBUDSMAN'S MEETING

### COMPLAINT: 2273/2019/MIG

**Case title:** The European Border and Coast Guard Agency's (Frontex) alleged failure to maintain a public register of documents and other issues related to public access to documents.

**Date:** Thursday, 30 April 2020

**Location:** Videoconference

### Present

#### *Frontex*

Head of Legal and Procurement Unit

Head of Inspection and Control Office

Senior Strategic Adviser

Project Support Officer

Documents and Records Management Officer

Senior Legal Officer

Senior Assistant Legal Officer

Assistant Legal Officer

#### *European Ombudsman*

Mr Ó REGAN Fergal Anthony, Head of Unit

Ms GEHRING Michaela, Case handler

Ms MONGE SÁNCHEZ Coral, Trainee case handler

### Purpose of the meeting

This inquiry is based on a complaint that: (i) Frontex fails to maintain a public register of documents in the meaning of Article 11 of Regulation 1049/2001; (ii) Frontex should mention in its annual report on requests for public access to documents how many sensitive documents it holds that are not recorded in its register; and (iii) Frontex should accept requests for public access to documents also from persons not residing or having their registered offices within the EU/Schengen area. The purpose of the meeting was to obtain clarifications on the issues raised by the complainant.

## Introduction and procedural information

The European Ombudsman's inquiry team introduced themselves, thanked the Frontex representatives for meeting with them and set out the purpose of the meeting. They outlined the legal framework that applies to meetings and inspections held by the European Ombudsman. In particular, they informed the Frontex representatives that the Ombudsman would not disclose any information or documents identified by Frontex as confidential, neither to the complainant nor to any other person outside the European Ombudsman's Office, without Frontex' prior consent.<sup>1</sup>

The inquiry team explained that they would draw up a report on the meeting to be sent to Frontex by email for its confirmation whether it is factually accurate and complete. The meeting report will be included in the file and provided to the complainant. If there is any confidential information, it will be included in a confidential annex that will not be provided to the complainant or to any third parties.

The Frontex representatives underlined that the Agency, in its endeavour to meet the proactive and indirect transparency and communication requirements laid down in Article 114 of Regulation 2019/1896<sup>2</sup> adheres to Regulation 1049/2001 as reemphasized in Article 114(1) of Regulation 2019/1896 and is apparent in the decisions of the European Ombudsman and the jurisprudence of the General Court<sup>3</sup> to date. They stated that Frontex welcomed this opportunity to discuss with the Ombudsman's inquiry team the questions raised in the complaint, as this would, together with Frontex' interaction with other addressees of Regulation 1049/2001, enable the Agency to further improve its processing of PAD applications and thus giving effect to Article 15 of the Treaty on the Functioning of the European Union<sup>4</sup> and Article 42 of the Charter of Fundamental Rights of the European Union<sup>5</sup>. The Frontex representatives also recalled that, as required by Regulation 1049/2001, Frontex had adopted Management Board Decision 25/2016 of 21 September 2016 regarding the internal handling of requests and that this Decision was not intended to and could not supersede Regulation 1049/2001.<sup>6</sup>

The Frontex representatives further illustrated that these efforts in regard to transparency and communication took time to bear fruits; they said it was work in progress and some patience was necessary. It was also one among other obligations the Agency was discharging simultaneously in light of the Agency's new mandate and the unique position it found itself in compared to other EU agencies. They stated that, while the Agency strongly advocated further transparency in this sense, it was experiencing difficulties in terms of limited resources

<sup>1</sup> Article 4.8 of the European Ombudsman's Implementing Provisions.

<sup>2</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

<sup>3</sup> <http://curia.europa.eu/juris/document/document.jsf?jsessionid=0B47C44E29A64377AB30E360A1ABE032?text=&docid=221083&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=854165>.

<sup>4</sup> *Consolidated version of the Treaty on the Functioning of the European Union* (OJ C 326, 26. 10.2012, p. 47).

<sup>5</sup> *Charter of Fundamental Rights of the European Union* (OJ C 326, 26. 10.2012, p. 391).

<sup>6</sup> In accordance with 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")., available at: <https://frontex.europa.eu/contact/public-access-to-documents-applications/>.

available for other (non-operational) purposes especially in regard to achieving and carrying out the many new and reinforced objectives and tasks under Regulation 2019/1896, such as the establishment of the first ever EU uniformed service - Frontex Standing Corps - which will comprise 10.000 operational staff.

The Frontex representatives explained that an additional challenge impeding to dedicate more resources to further centralise the register and to make more documents pro-actively available was owed to the significant increase of documents processed and applications received. In 2019, they said, Frontex had received a total of 255 applications – as opposed to 152 applications in 2018 and 140 in 2017. Applications thus had grown by 82 percent between the period 2017 to 2020. Furthermore, the trend towards more complex applications, involving more than one Frontex entity and consultations with third parties had continued also in 2019. Simultaneously, applications with a wide scope had remained the norm. They added that applications would more and more aim at a multitude of documents comprising up to several hundred pages. Faced with these considerations, Frontex staff was focusing on maintaining its 100 percent compliance rate with the legal deadlines provided in Regulation (EC) No 1049/2001.

## **Information provided by Frontex**

### **(i) Public register of documents**

*The rules and principles governing Frontex' public register of documents*

The Frontex representatives stated that the Agency did not have a written policy regarding its public register.

As regards Frontex' approach, the Frontex representatives explained that, until 2019, the Agency had not maintained a central public register. Rather, they said, Frontex provided information on the documents it holds in various locations on its website<sup>7</sup> maintained and uploaded by Frontex entities. Most notably, they said, Frontex maintained a 'register of key documents' on its website,<sup>8</sup> through which it made a large number of documents proactively publicly available, such as Management Board decisions or Working Arrangements with third countries. Especially since the launch of the new website in March 2018, the number of documents contained in "key documents" and other locations had been significantly increased.

The Frontex representatives also explained that, in November 2019, Frontex had created a 'public access to documents register'.<sup>9</sup> This-register, they stated, served to make available

<sup>7</sup> Under the following sections:

- Publications - <https://frontex.europa.eu/publications/?category=general>
- Consultative Forum - <https://frontex.europa.eu/fundamental-rights/consultative-forum/documents/>
- Non-EU countries - <https://frontex.europa.eu/partners/non-eu-countries/>
- Types of operations (video Operational Cycle) - <https://frontex.europa.eu/operations/types-of-operations/>
- Migratory Map - <https://frontex.europa.eu/along-eu-borders/migratory-map/>

<sup>8</sup> Available at: <https://frontex.europa.eu/about-frontex/key-documents/>.

<sup>9</sup> Available at: <https://frontex.europa.eu/contact/public-access-to-documents-registry/?category=fundamental-rights-officer-work-plan>.

documents that have been released on the basis of a request for public access to documents under Regulation 1049/2001 and would be continuously supplemented.

The Frontex representatives added that, if a citizen had difficulties describing or finding the document(s) they were looking for, Frontex would assist them as much as possible as required by Regulation 1049/2001.

They also pointed out that the Agency, in line with Article 114(2) of Regulation 2019/1896, was pro-actively increasing the number of documents made available and was considering further facilitating the access of the public to its documents. In this regard, Frontex staff had already reached out to other EU bodies to benefit from their experience and best practices.

#### *Frontex' document management system*

The Frontex representatives explained that incoming correspondence was registered centrally and then forwarded to the respective unit for handling. In this context, a correspondence item constituting a request for public access to documents was entered in the correspondence register and then forwarded to the Transparency Office within the Legal and Procurement Unit for handling. Meta data (such as the document type and the subject of the document) was assigned to each registered item upon receipt to make it identifiable in the correspondence register.

If Frontex received a request for public access to documents, the legal officer dealing with it liaised with the appointed case-handlers (who had received appropriate training) of the respective units to identify any document that falls within the scope of this request. In addition, following a European Ombudsman inquiry in 2017<sup>10</sup>, Frontex had also improved the search tools available to staff.

#### *Documents included in Frontex' public register*

The Frontex representatives explained that Frontex, in implementing Article 114(2) of Regulation 2019/2018, followed a case-by-case assessment of the nature and content of documents as regards their inclusion in registers on its website. Frontex did not have a specific policy that would exclude certain categories of documents from its public register.

Documents that have been released as part of public access to documents requests were increasingly uploaded to the PAD register. As regards the other registers, the responsible unit, together with the Transparency Office determined whether a document could proactively be made public. In addition, whenever the Agency considers that a specific topic is of public interest, it would encourage the unit concerned proactively to publish the documentation related to it.

<sup>10</sup> Case 1616/2016/MDC on the alleged failure by Frontex to make public Serious Incident Reports concerning Frontex or joint operations in Bulgaria.

#### *When and how the public register is updated*

The Frontex representatives stated that the various registers were continuously updated. New documents that can be disclosed were uploaded to Frontex' website as soon as they are made available by the relevant unit.

In addition, if Frontex notes that certain documents attract vast interest, it may also list new categories of documents on its website.

#### *Technical or substantive issues*

The Frontex representatives were not aware of any technical or substantive problems concerning the recording of documents on the Agency's website. They stated that Frontex did not include any documents in the public register the disclosure of which would undermine the protection of the interests in Article 4 of Regulation 1049/2001 pursuant to Article 11(2) of this Regulation.

In regard to specific documents, the Frontex representatives further highlighted that consideration had to be given to Article 114(2) of Regulation 2019/1896, which reads

*The Agency shall communicate on matters falling within the scope of its tasks on its own initiative. It shall make public relevant information, including the annual activity report, the annual work programme, the code of conduct, strategic risk analyses, and comprehensive information on past and current joint operations, rapid border interventions, pilot projects, technical assistance projects with third countries, migration management support team deployments, return operations or return interventions, including in third countries, and working arrangements, and shall ensure, without prejudice to Article 92, in particular that the public and any interested party are rapidly given objective detailed, comprehensive, reliable and easily understandable information with regard to its work. It shall do so without revealing operational information which, if made public, would jeopardise attainment of the objectives of operations.*

#### **(ii) Frontex' annual report**

The Frontex representatives informed the inquiry team that Frontex' 2019 Annual Activity Report would include information, as part of the annual report on PAD pursuant to Article 17 of Regulation 1049/2001, on the number of sensitive documents (250) that the Agency holds and that are not recorded on its website. The report was due to be adopted by the Management Board at the next Management Board meeting, which would take place in mid-June 2020.

#### **(iii) Admissibility criteria for Public Access to Documents requests from non-EU residents**

The inquiry team noted that Regulation 1049/2001 allowed for the possibility of extending the right to access to documents to non-EU residents.

The Frontex representatives stated that the Agency generally accepted as admissible any request for public access made by a citizen, resident or legal person from a European Union or Schengen Associated Country.<sup>11</sup>

As regards requests submitted by third-country residents/citizens/legal persons, the Frontex representatives took the view that, based on Recital (2) of Regulation 1049/2001, stating that the aim of this Regulation is to *enable "citizens to participate more closely in the decision-making process"* and to ensure that institutions are *"more accountable to the citizen"*, access to Frontex documents was only granted to citizens, residents and legal persons of its stakeholder countries. The practice showed that there was no need to extend further the personal scope of the right to access as Frontex hardly received any such requests from third countries (on average, they said, Frontex received one such request annually). However, Frontex would analyse the merits of all requests for Public Access to Documents and, if a request submitted by a non-EU/Schengen resident/citizen/legal person constituted in fact a 'request for information', the request would be forwarded to the Media and Public Relations Office for processing and reply.

## Conclusion of the meeting

The inquiry team thanked the Frontex representatives for their time and for the explanations provided, and the meeting ended.

Brussels, 11 June 2020



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<sup>11</sup> In accordance with 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")., available at: <https://frontex.europa.eu/contact/public-access-to-documents-applications/>.