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Warsaw, 27 March 2014

Ms Emily O'Reilly
European Ombudsman
1, avenue du Président Robert Schuman
F-67001 Strasbourg Cedex, France

Subject: Follow-up to the closure of own inquiry OII/13/2012/MHZ

Dear Ms. O'Reilly,

With reference to the European Ombudsman recommendations related to the Frontex policy on public access to documents specified in the European Ombudsman's Decision of 26 September 2013 closing own inquiry OII/13/2012/MHZ, Frontex is glad to introduce its Management Board Decision adopting practical arrangements regarding public access to the documents of Frontex adopted on 19 February 2014 (Annex 1), replacing the previous Management Board Decision laying down practical arrangement regarding public access to the Frontex documents of 21 September 2006.

This decision entirely follows the recommendations of the European Ombudsman, highlighted during the European Ombudsman's visit in Frontex (04/10/2012) and implements concretely the provisions of the Regulation (EC) No 1049/2001 of 30 May 2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

I remain at your disposal should you require any further information.

Yours sincerely,



Hervé Caniard

Head of Frontex Legal Affairs Unit a.i.

Annex 1: Decision of the Frontex Management Board No. 3/2014 of 19 February 2014 adopting practical arrangements regarding public access to the documents of Frontex.

MANAGEMENT BOARD DECISION No 3/2014
of 19 February 2014

adopting

practical arrangements regarding public access to the documents of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)

THE MANAGEMENT BOARD

Having regard to the Frontex Regulation¹, and in particular to Article 28 thereof,

Whereas:

- (1) Article 1 of the Treaty on European Union (hereinafter referred to as "TEU") enshrines the concept of openness, stating that the decisions are taken as openly as possible and as closely as possible to the citizen.
- (2) The concept of openness enables the administration to enjoy greater legitimacy and to be more effective and more accountable. It also contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of TEU, in Article 15(3) of the Treaty on the functioning of the European Union (hereinafter referred to as "TFEU"), and in Article 42 of the Charter of Fundamental Rights of the European Union.
- (3) Regulation (EC) No 1049/2001 of 30 May 2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (hereinafter referred to as "Regulation (EC) No 1049/2001") defines the general principles and limits governing the right of access to European Parliament, Council and Commission documents.
- (4) In accordance with Article 28 of the Frontex Regulation, Frontex is subject to the Regulation (EC) No 1049/2001 when handling applications for access to documents held by it.
- (5) In principle, all documents should be accessible to the public. However, certain public and private interests should be protected by way of exception, where necessary, and, in particular, the protection of personal data should be taken into account. Frontex should be entitled to protect its internal consultations and deliberations where necessary to safeguard the ability to carry out its tasks.

¹ Regulation (EC) No. 2007/2004 of the Council of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, p. 1), as last amended.

- (6) Rights of individuals to have access to personal data concerning them are defined in the Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000. In order to safeguard the ability to carry out its tasks, special attention should be paid to the specific requirements of Frontex as a specialized expert body tasked with improving the integrated management of the external borders of the Member States of the European Union. Therefore, full account of the sensitive nature of tasks carried out by Frontex, in particular in relation to the coordination of operational activities at external borders and border related data should be taken into due consideration.
- (7) A two-stage administrative procedure applies, with the additional possibility of court proceedings or complaints to the European Ombudsman.
- (8) Frontex takes the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under Regulation (EC) No 1049/2001.
- (9) The principle of loyal cooperation governs the relations between the Member States and the EU-bodies and notably in the context of consultation, prior agreement or consent.

HAS DECIDED AS FOLLOWS:

Article 1

Purpose

1. The purpose of this decision is to lay down the practical arrangements, in particular the roles, responsibilities and actions to follow for the application of Regulation (EC) No 1049/2001 as regards the documents of Frontex, in such a way as to ensure the widest possible public access to documents, taking into account the specific nature of Frontex and its mandate of improving the integrated management of the external borders of the Member States of the European Union.
2. The aim of the present decision is also to ensure good administrative practices and standards of public access to documents.

Article 2

Scope

1. Any natural or legal person residing or having its registered office in an EU Member State, has a right of access to documents of Frontex, subject to the principles, conditions and limits defined by Regulation (EC) No 1049/2001 and the present decision.
 2. Frontex may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in an EU Member State.
 3. This decision applies to all documents held by Frontex and in its possession, in accordance with Regulation (EC) No 1049/2001.
 4. Sensitive documents as defined in Article 9 of Regulation (EC) No 1049/2001 are subject to special treatment in accordance with Article 8 of the present decision.
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Article 3

Frontex documents held by the EU Member States

In accordance with Article 5 of Regulation (EC) No 1049/2001 when an EU Member State receives a public access request related to documents which originate from Frontex, any correspondence from the Member State is addressed to the e-mail address available in the "public documents" section on the Frontex website. The Head of the Frontex Legal Affairs Unit answers the requesting Member State. As an alternative, the EU Member States are encouraged to refer the request to Frontex which handles it on their behalf, in compliance with Article 4 of the present decision.

Article 4

Applications

1. Pursuant to Article 10 of the present decision, Frontex provides information and assistance to the public on how and where applications for access to documents can be made.
2. All applications referred to in Articles 5 and 6 of the present decision for access to a document are made in a sufficiently precise manner in order to enable Frontex to identify the document. They must be addressed to Frontex by posted mail, or sent through the e-mail address available in the "public documents" section on the Frontex website, or be filled into the electronic form provided on the Frontex website in the "public documents" section. Frontex cannot guarantee the processing of requests which are not submitted using the appropriate channels explained above. The Frontex entity responsible for managing correspondence with the public pays special attention to the incoming correspondence, in particular that only requests for access to documents are processed in accordance with the rules herein.
3. If an application is not sufficiently precise, the Frontex Information and Transparency Team within the Executive Support (hereinafter "I&T") invites the applicant to provide additional information making it possible to identify the documents requested. The time limit to reply as referred to in Articles 5 and 6 of the present decision runs only when Frontex has received the requested information.
4. In the event of an application relating to a very long document or to a very large number of documents, Frontex may confer with the applicant informally, with a view to finding a fair solution.
5. All Frontex entities involved in the handling of public access to documents applications must respect the mandatory time limits. I&T monitors the processing of applications, reminds of the time limits, and sends Frontex answers.

Article 5

Processing of initial applications

1. I&T registers and processes initial applications. An acknowledgement of receipt is sent to the applicant by I&T.
 2. I&T makes a pre-screening of the request with no delay to assess whether the request can be handled by I&T without having to consult other Frontex entities. In the case of simple requests, I&T proceeds without consultation(s) allowing Frontex to answer the applicant swiftly.
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3. In the case that consultations are needed, I&T forwards the initial application to the Head of the entity responsible for the content of the document, if possible at Head of Unit (hereinafter "HoU") level.
4. Upon reception of the application, the responsible HoU assesses with no delay whether the work to be performed by his entity to process the request is complex or time-consuming, which may be the case, for example, when checking a very long document or a very large number of documents. In such exceptional case, the responsible HoU liaises immediately with I&T, which sends, with no delay and before the expiry of the time limit, a notification to the applicant about extension of the time limit by 15 working days, providing detailed reasons pursuant to Article 7(3) of Regulation (EC) No 1049/2001.
5. The HoU answers to I&T in writing whether the document can be fully released. In case of refusal or partial access, the HoU blanks out explicitly the exact excerpts which are not to be released. For each excerpt blanked out, the HoU mentions in writing the underlying reasons based for example on operational considerations or personal data protection, in compliance with the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001². The HoU sends the edited document to I&T, submitting it at least 5 working days before the deadline for answering the applicant.
6. If the document requested is classified under Frontex' security rules, Article 8 of the present decision applies.
7. Having received a final decision from the responsible HoU, in compliance with paragraph 5 of this Article:
 - a) in case full disclosure of the document is foreseen, I&T edits the answer, Head of I&T signs it. I&T sends it to the applicant.
 - b) in case of refusal or partial disclosure of the document is foreseen, I&T, with support of Frontex Legal Affairs Unit for matters related to the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001, edits the answer. Head of Frontex Legal Affairs Unit signs it and I&T sends it to the applicant.
8. Within 15 working days of registration of the application, Frontex either grants access to the document requested in accordance with Article 10 of Regulation (EC) No 1049/2001 or, in a written reply, states the reasons for the total or partial refusal and informs the applicant of his/her right to make a confirmatory application in accordance with paragraph 9 of this Article.
9. In the event of a total or partial refusal, the applicant may, within 15 working days from receiving Frontex' reply, make a confirmatory application to Frontex requesting it to reconsider its position.
10. In accordance with Article 7(4) of Regulation (EC) No 1049/2001, failure by Frontex to reply to the initial application within the prescribed time limit entitles the applicant to make a confirmatory application.

² For instance, Article 4 of Regulation (EC) No 1049/2001 lays down, *inter alia*, exceptions related to the public interest as regards public security, defence and military matters, international relations, commercial interests including intellectual property, courts proceedings / legal advice, inspections, investigations and audits, decision-making process, privacy and the integrity of the individual, in particular in accordance with the legislation on the protection of personal data.

Article 6

Processing of confirmatory applications

1. I&T registers and processes confirmatory applications. An acknowledgement of receipt is sent to the applicant by I&T.
2. Provisions related to consultations, laid down in Article 5(2)-5(7) above, apply.
3. The Head of the Frontex Legal Affairs Unit makes a proposal for a final reply to the Director of Administration. Within 15 working days from registration of such an application, Frontex either grants access to the requested document in accordance with Article 10 of Regulation (EC) No 1049/2001 or, in a written reply, states the reasons for the total or partial refusal. The decision is taken by the Director of Administration. I&T sends Frontex answer to the applicant.
4. In the event of a total or partial refusal, Frontex informs the applicant of the remedies open to him, namely the possibility to institute court proceedings and/or make a complaint to the European Ombudsman, under the relevant provisions of TFEU.
5. In exceptional cases, for example if processing the request requires checking a very long document or a very large number of documents, the time limit provided for in paragraph 3 may be extended by 15 working days pursuant to Article 8(2) of Regulation (EC) No 1049/2001. In that case I&T notifies the applicant with no delay and before the expiry of the time limit, providing detailed reasons.
6. Failure by Frontex to reply within the prescribed time limit is considered as a negative reply and entitles the applicant to institute court proceedings and/or make a complaint to the European Ombudsman, under the relevant provisions of TFEU.

Article 7

Documents originating from a third-party

1. When Frontex receives an initial or confirmatory application for access to a document which it holds but which originates from a third-party (e.g. EU Member State, EU body), I&T consults the third party in accordance with Article 4(4) of Regulation (EC) No 1049/2001, unless it is clear that the document can or cannot be disclosed.
 2. In the following situations the document can be disclosed without consulting the third-party:
 - (a) The document requested has already been disclosed either by its author or under Regulation (EC) No 1049/2001 or similar provisions; or
 - (b) The document does not originate from an EU Member State, the examination of the request does not give reason for refusal and the disclosure in accordance with Article 4 of Regulation (EC) No 1049/2001, or partial disclosure, of its contents would not manifestly affect the interests of the third-party; or
 - (c) The respective EU Member State has given its prior agreement for the disclosure.
 3. When consulting the third-party, Frontex sets a time limit in which the third party must provide a reply; that time limit is no shorter than five working days. In the absence of answer by the third-party, other than a Member State, within the prescribed period, or if the third party is untraceable or non identifiable, Frontex I&T proceeds with the application in accordance with Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. In the absence of agreement by an EU Member State within the deadline, I&T refuses access to the documents.
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4. If Frontex has sufficient grounds and therefore intends to give access to a document originating from a third party other than an EU Member State against the view of this third party, it informs the third party concerned about its intention and the grounds for the disclosure of the document.

Article 8

Treatment of sensitive documents

1. Applications for access to sensitive documents under the procedures laid down in Articles 5 and 6 are handled within Frontex only by staff members assigned to do so by the respective Frontex Head of Unit or Director. Staff members assigned must have a sufficient and confirmed security clearance pursuant to Frontex' internal security rules.
2. A document whose content partially contains sensitive information may be disclosed by Frontex provided that the parts containing the sensitive information have been deleted or removed.

Article 9

Minutes of the Management Board

1. The Secretariat of the Management Board prepares a public version of the minutes of the Management Board meeting and presents it to the Chairperson of the Management Board for approval.
2. The public version contains the main results of the meeting, the list of participants and the list of items debated and approved unless explicitly decided otherwise by the Management Board.
3. When preparing the public version, the obligation of professional secrecy as stipulated in Article 339 of TFEU has to be appropriately taken into consideration.
4. The public version is accessible on Frontex website.

Article 10

Easily accessible documents

If a document has already been released by Frontex or the third party concerned and is easily accessible, Frontex may fulfil its obligation of granting access to documents by informing the applicant on how to obtain the requested document.

Article 11

Information

Frontex informs the public on Frontex website of the rights they enjoy under Regulation (EC) No 1049/2001.

Article 12

Reproduction of documents

This decision is without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

Article 13

Annual Report

Frontex includes in its Annual Report the number of cases in which it refused to grant access to documents, supplemented by the reasons for such refusals and the number of sensitive documents not recorded in the public register.

Article 14

Register

Frontex maintains a register of documents according to Article 11 of Regulation (EC) No 1049/2001, including a list of sensitive documents, to be updated without delay.

Article 15

Entry into force

This decision enters into force on the day following the date of its adoption.

Done in Warsaw, 19 February 2014

For the Management Board



Ralf Göbel

Chairperson
