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c/o MDR, 88 Fleet Street, London EC4Y 1DH

www.statewatch.org

office@statewatch.org

0203 691 5227

Registered UK charity no. 1154784 | Company no. 08480724

Frontex
Plac Europejski 6
00-844 Warsaw
Poland

20 March 2019

Dear Mr Leggeri,

I am writing on behalf of *Statewatch*, a registered charity based in the UK concerned with the advancement of education in the subject of civil rights and liberties, and the sound administration and development of the law relating to the civil rights and liberties of the individual.

We wish to register a complaint with you regarding Frontex's rules on access to documents. These are set out in Frontex Management Board Decision No 25/2016 of 21 September 2016 adopting practical arrangements regarding public access to the documents, and seek to implement 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. We do not believe that Frontex's current rules and practices with regard to access to documents comply with the requirements of that Regulation.

With our complaint, we call on you to ensure the following:

1. That the Agency establishes a public register of documents, as required by Article 11 of Regulation 1049/2011.
2. That the Agency removes from its Decision implementing Regulation 1049/2001 statements relating to the "specific requirements of Frontex", as these may constitute an additional ground to exceptions for access to documents beyond what is set out in Regulation 1049/2001.
3. That the Agency ensures it meets the obligation to publish an annual report on access to documents, including the number of requests received and processed, information on the grounds for refusals, and the number of sensitive documents held by the Agency which are not published in the register.

4. That the Agency widens the personal scope of application of the 2016 Management Board Decision to allow, without exception, applications from natural and legal persons outside the EU and Schengen Associated Countries. At the very least, it should publish its procedures for taking the “case-by-case decisions” referred to in the Management Board Decision regarding the acceptance or refusal of requests for access to documents.
5. That the Agency abolishes the requirement for individuals requesting access to documents to provide an identity document or “proof of registered office along with the proof of the bond between the individual presenting the application and the legal person”, unless it can demonstrate the necessity and proportionality of doing so. If it can do so, it must provide a secure means for transmitting the documentation requested to the Agency.

Our reasoning is set out in the Annex to this letter.

Article 1 of the Lisbon Treaty enshrines the concept of openness, which, as Regulation 1049/2001 points out, “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,” and “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.”

We hope you agree with us on the importance of ensuring the highest possible degree of openness in the Agency’s work and look forward to receiving your response.

Yours sincerely,

Chris Jones
Project Director, Statewatch
chris@statewatch.org

Annex

1. Legal basis

Article 28 of Regulation 2007/2004, which governed the Agency's activities until the entry into force of Regulation 2016/1624, says:

“1. Six months after the entry into force of this Regulation, the Agency shall be subject to Regulation (EC) No 1049/2001 when handling applications for access to documents held by it.

(...)

3. The Management Board shall lay down the practical arrangements for the application of paragraphs 1 and 2.”

Article 74 of Regulation 2016/1624 says:

“1. The Agency shall be subject to Regulation (EC) No 1049/2001 when handling applications for access to documents held by it.

(...)

3. The management board shall lay down the practical arrangements for the application of paragraphs 1 and 2.”

The Agency first introduced implementing rules in accordance with Article 28(3) of Regulation 2007/2004 in 2006, with the adoption of *Management Board Decision 14/2006 of 21 September 2006*.

In 2014, following an enquiry by the European Ombudsman (OI/13/2012/MHZ), the Agency adopted *Management Board Decision No 3/2014 of 19 February 2014 adopting practical arrangements regarding public access to the documents of... Frontex*.

In a letter to the Ombudsman, Frontex's Head of Legal Affairs said:

“This Decision [of 19 February 2014] entirely follows the recommendations of the European Ombudsman... and implements concretely the provisions of the Regulation (EC) No 1049/2001 of 30 May 2001...”¹

The 2014 Decision was subsequently replaced by Management Board Decision No 25/2016 of 21 September 2016 adopting practical arrangements regarding public access to the documents held by [Frontex].

¹ <https://www.ombudsman.europa.eu/en/event-document/en/54007>

This was adopted, according to a recital, because “changes introduced in the Agency’s organizational structure and the experience acquired since the adoption of the Decision of the Management Board No. 3/2014 require the revision of the existing rules.”

2. Requirement to establish a public register of documents

Article 11 of Regulation 1049/2001 sets out a requirement for “each institution” to “provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.” The register must “contain a reference number... the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register.”

Article 14 of the Agency’s 2014 Management Board Decision said:

“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.”

However, no register was ever set up in accordance with this Decision.

The 2016 Management Board Decision, which currently implements the rules on access to documents applicable to the Agency, contains no reference to a register of documents in accordance with Article 11 of Regulation 1049/2011.

The Agency is thus in breach of the obligation to “provide public access to a register of documents.”

3. Inclusion of additional grounds to refuse access to documents

Recital 6 to the 2016 Management Board Decision says:

“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 practitioner 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.”

Frontex claims it operates under Regulation 1049/2001 yet this provision appears to introduce a further ground for refusing requests for access to documents due to the “sensitive nature of its tasks” – a factor already provided for in Article 9 of Regulation 1049/2001.

Given the “sensitive nature” of the agency’s tasks – which include operations at the external borders of the Member States and various types of return operations, with potentially

significant implications for fundamental rights – the highest possible levels of transparency are required. While this statement is only made in the recitals, it should be removed as there is no need for the introduction of further potential exceptions, or grounds for exceptions, to access to documents.

4. Requirement to produce annual reports on access to documents

The Agency failed to include a report on access to documents in its Annual Activity Report 2017.

Previous Annual Activity Reports include a report on access to documents but make no mention of the number of sensitive documents held by the Agency and not recorded in the public register.

Notwithstanding the fact that the Agency has no public register, Article 17 of the 2016 Management Board Decision states that the Agency's annual report shall contain a report on access to documents, which shall include "the number of sensitive documents not recorded in the public register."

By failing to publish a report on access to documents in 2017; and in that year and at least the five preceding years failing to include in its report "the number of sensitive documents not recorded in the public register," the Agency has failed to meet its obligations under Article 17 of the 2016 Management Board Decision, Article 13 of the 2014 Management Board Decision, and Article 17 of Regulation 1049/2001.

5. Restrictive personal scope of application

Article 3(2) of the 2016 Management Board Decision says:

"On a case-by-case decision, the Agency may, subject to the same principles, conditions and limits set forth in the Regulation, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State or in a Schengen Associated Country."

Other EU institutions and agencies offer a more generous personal scope of application in the rules implementing Regulation 1049/2001. For example, Europol's 2016 Management Board Decision states that "citizens of third countries not residing in a Member State and legal persons not having their registered offices in one of the Member States shall enjoy the right of

access to Europol documents on the same terms” as those residing within a Member State. Although Frontex is entitled to restrict the scope of access,² it is not clear why it has done so.

Furthermore, there is no public information on the procedures followed by the Agency to determine whether applications submitted by a “natural or legal person not residing or not having its registered office in a Member State or in a Schengen Associated Country” should be accepted or not, creating a risk that decisions on such requests will be made on an arbitrary basis. Neither is there any requirement to inform applicants residing outside the EU or Schengen Associated Countries of the reasons for which their applications have been accepted or turned down.

6. Requirement to provide an identity document when making an application for access to documents

Article 5 of the Management Board Decision of 2016 states:

“3. All initial applications must be accompanied by an identity document or, in the case of legal persons, the proof of registered office along with the proof of the bond between the individual presenting the application and the legal person.”

This provision, which was introduced by the 2016 Management Board Decision, appears to be unique amongst EU institutions, agencies and bodies in relation to requests for access to documents.

The 2016 Management Board Decision offers no explanation or information as to why the provision has been included, although it may be assumed it is to implement Article 3 of that Decision.

“1. Any citizen of the European Union or of a Schengen Associated Country and any natural or legal person residing or having its registered office in an EU Member State or in a Schengen Associated Country, has the right of access to documents as set out in Article 4 subject to the principles, conditions and limits defined by the Regulation and this Decision.

2. On a case-by-case decision, the Agency may, subject to the same principles, conditions and limits set forth in the Regulation, grant access to documents to any

² Article 2 of Regulation 1049/2001 states: “1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation
2. The institutions may, subject to same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.”

natural or legal person not residing or not having its registered office in a Member State or in a Schengen Associated Country.”

This reflects Article 2 of Regulation 1049/2001, although there is no reference in that Regulation to a “case-by-case decision.”³ In any case, the requirements introduced by Article 5(3) of the 2016 Management Board Decision are overly-onerous and fail to respect data protection rules and principles.

Firstly, given that other institutions and agencies manage to implement the rules on access to documents without requiring a copy of the identity document of the individual making the request,⁴ it is not clear why Frontex needs to do so.

This does not appear to be in the spirit of the Regulation and, if it is not strictly necessary for the processing of requests for access to documents, does not meet the data minimisation requirement.⁵

Given that requests for access to documents are generally made by email, the Agency requests that such proof of identity or “proof of registered office along with the proof of the bond between the individual presenting the application and the legal person” be sent as an email attachment.

Standard email is widely-regarded as an insecure medium and its use for the transmission of personal data in the form of identity documents should not be encouraged. It does not appear that the Agency offers any alternative arrangements (such as encrypted email or an online form) which could assist in overcoming this problem.

7. Complaints

This complaint submits that:

1. The Agency must establish a public register of documents, as required by Article 11 of Regulation 1049/2011.
2. The Agency should remove from its Decision implementing Regulation 1049/2001 statements relating to the “specific requirements of Frontex”, as these may constitute an additional ground to exceptions for access to documents beyond what is set out in Regulation 1049/2001.

³ See the previous footnote for the text of Article 2.

⁴ It should be noted that the Management Board states “an identity document”, when it should say “a copy of an identity document”.

⁵ Article 5(1)(c) of the GDPR: “Personal data shall be: ...adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’). This is repeated in Article 4(1)(c) of Regulation 2018/1725, applicable to the processing of personal data by Union institutions, bodies, offices and agencies.

3. The Agency should ensure its meet the obligation to publish an annual report on access to documents, including the number of requests received and processed, information on the grounds for refusals, and the number of sensitive documents held by the Agency which are not published in the register.
4. The Agency should widen the personal scope of application of the 2016 Management Board Decision to allow, without exception, applications from natural and legal persons outside the EU and Schengen Associated Countries. At the very least, it should be required to publish its procedures for taking the “case-by-case decisions” referred to in the Management Board Decision regarding the acceptance or refusal of requests for access to documents.
5. The Agency abolish the requirement for individuals requesting access to documents to provide an identity document or “proof of registered office along with the proof of the bond between the individual presenting the application and the legal person”, unless it can demonstrate the necessity and proportionality of doing so. If it can do so, it must provide a secure means for transmitting the documentation requested to the Agency.