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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

2 May 2019

Dear Mr Caniard,

Thank you for your letter of 12 April. I am writing to ask you to clarify further some of the points you make in that letter with regard to some of the issues raised in our initial complaint.

1. A public register of documents

You rightly note that “Frontex has made an increasing number of documents available online” and that the Agency’s new website has allowed it to “considerably expand the amount of documents made available.” However, it must be emphasised that the public provision of documents produced by the Agency is not the same thing as maintaining a public register of documents, as required by Article 11 of Regulation 1049/2001.

In a previous complaint concerning the inadequacy of the register of documents maintained by the European Commission, the European Ombudsman stated:

“Article 11(1) of Regulation (EC) No 1049/2001... stipulates that each institution shall provide public access to a register of documents. References to documents shall be recorded in the register without delay. According to Article 11(2) of Regulation 1049/2001, for each document the register shall contain a reference number. In the Ombudsman's view, the register referred to in Article 11 can only achieve its aim “[t]o make citizens' rights under this Regulation effective” if it was as comprehensive as possible. The Commission has not disputed the complainant's statement that only a “fraction” of its documents is listed on its registers. In view of the above, the Ombudsman arrives at the conclusion that the Commission has failed to comply with

Article 11 of Regulation by omitting to include all relevant documents in its register of documents. This constitutes an instance of maladministration.”¹

As your letter highlights, Decisions taken by the Frontex Management Board cannot supersede secondary legislation such as Regulation 1049/2001. In this regard, while it is unfortunate that the 2016 Management Board Decision removed the reference to the requirement to set up a register of documents that was included in the 2014 Management Board Decision, the Agency is still obliged to establish such a register concerning all documents, within the meaning of Article 3(a) of Regulation 1049/2001, that are in the possession of the Agency.

We also feel it necessary to highlight a previous commitment made by Frontex. In response to a 2013 inquiry by the European Ombudsman, the Agency’s then-Executive Director, Ilkka Laitinen, said that:

“We have a mid-term plan to build a comprehensive document management system that would include, as one of its sub-components, a register. As the principle of transparency is of the utmost importance for Frontex, by the end of 2013 or beginning of 2014, we will be ready with a temporary solution, giving citizens a better overview of documents produced by the agency, thus improving the accessibility of documents in line with the Regulation 1049/2001.”²

The Agency has not so far met this commitment.

2. Requirement to produce annual reports on access to documents

Thank you for the reference to the Annual Activity Report 2017 containing the report on access to documents. There is another version of this report available on the Agency’s website, on which we based the claims in our original letter, that does not contain the report on access to documents.³

Nevertheless, we wish to re-state one of the points made in our original letter – that the Agency is obliged to include in its report on access to documents “the number of sensitive documents not recorded in the public register” (notwithstanding that the Agency has no public register). Until the Agency establishes a register, it seems it would be appropriate to include in the

¹ Decision of the European Ombudsman closing his inquiry into complaint 3208/2006/GG against the European Commission, <https://www.ombudsman.europa.eu/en/decision/en/3728>

² Follow-up given by Frontex following the European Ombudsman report - OI/13/2012/MHZ, <https://www.ombudsman.europa.eu/en/event-document/en/49630>

³ Annual Activity Report 2017, https://frontex.europa.eu/assets/Key_Documents/Annual_report/2017/Annual_Activity_report_2017.pdf

annual report on access to documents the number of sensitive documents in the Agency's possession.

3. Restrictive personal scope of application

You are of course right to say that an institution does not have to offer individuals who are citizens of or residing in third countries the possibility to make applications for access to documents. Nevertheless, as the 2016 Management Board Decision states, this option will be made available "on a case-by-case decision."

In this regard, as we argued in our previous letter:

"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."

We would like to underline that it is crucial that the agency provide for the broadest personal scope of application of rules on access to documents. It is non-EU nationals who are most significantly affected by Frontex's work, and this point extends to organisations registered in non-EU states that are concerned with the implementation and effects of EU migration and border management policies. In a context in which the Agency will be increasing its activities in third countries,⁴ broadening the scope of application of the rules on access to documents is of the utmost importance.

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

You highlight in your response that in place of an identity card, passport or residence permit, individuals making requests for access to documents also have the option of using "a qualified e-signature in line with the eDIAS Regulation in order to verify eligibility." We do not have access to data on the take-up or use of e-signatures across the EU, nor their use in requests for access to documents requests submitted by the Agency. However, we would consider it reasonable to assume that the majority of individuals making requests do not avail themselves

⁴ For example, with the opening of a "risk analysis cell" in Niger and the planned opening of other such cells in Ghana, Gambia, Senegal, Kenya, Nigeria, Guinea and Mali (<https://frontex.europa.eu/media-centre/news-release/frontex-opens-first-risk-analysis-cell-in-niger-HQIoKi>); or the through the signing of status agreements with Bosnia and Herzegovina, Montenegro and Serbia.

of this option and are thus asked to submit an identity document of some sort. If the Agency possesses data that suggests otherwise, we would be grateful if you could share it with us.

In any case, we maintain that the requirement to submit an identity document (or to use a qualified e-signature) is disproportionate. In this respect we would like to highlight a conclusion of the European Ombudsman in a case concerning the European Commission policy on access to documents (emphasis added):

*“The Ombudsman has fully supported the practice of verifying, on a case by case basis, the identity of persons making requests for public access to documents where there are any grounds for suspecting the exercise of that right is being abused. **However, to proceed on that basis in every case is disrespectful of citizens and their fundamental rights under the EU Charter.** The Ombudsman has in this inquiry provided advice about alternative working methods, and has done so in the exercise of her Treaty-based mandate to uncover maladministration and make recommendations with a view to putting an end to it. The Ombudsman deeply regrets that the European Commission has rebutted this advice, clearly implying that, as long as its systems and procedures are ‘legal’, it considers that there is no need to consider improvements for the benefit of citizens and in pursuance of the general principles of good administration.”⁵*

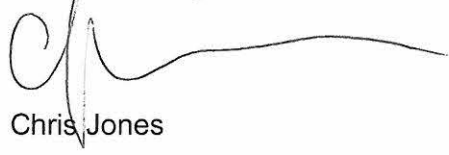
Furthermore, in the case of individuals unwilling or unable to obtain and use a qualified e-signature, we would like to point out that the requirement to provide a copy of an identity document may serve as a disincentive to those wishing to make a request. For example, notwithstanding the fact that the Agency processes personal data in line with Regulation 2018/1725, they may not be comfortable with sharing an identity document with a supranational agency. More importantly certain categories of individuals may be excluded altogether from exercising their rights, as it is entirely possible that an individual may not possess an identity document, despite being a citizen of an EU Member State. For example, in the UK, it was estimated in 2015 that 3.5 million people who are eligible to vote do not possess any officially-recognised form of photo identification.⁶

⁵ Decision in case 682/2014/JF on the European Commission's requirement that persons who ask for public access to documents provide their postal address, <https://www.ombudsman.europa.eu/en/decision/en/87636>

⁶ Electoral Commission, 'Delivering and costing a proof of identity scheme for polling station voters in Great Britain', December 2015, p.18, https://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/194719/Proof-of-identity-scheme-updated-March-2016.pdf

We await your response and look forward to hearing how and when the Agency intends to address these issues.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Chris Jones', with a long horizontal flourish extending to the right.

Chris Jones

Project Director