

Statewatch complaint against Frontex, filed with the European Ombudsman on 16 December 2019

Against which European Union (EU) institution or body do you wish to complain?

European Border and Coast Guard Agency (Frontex)

What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

This complaint concerns four points:

1. Frontex does not maintain a public register of documents, as required by Article 11 of Regulation 1049/2001.
2. The agency has not included in its annual reports for 2017 and 2018 a section on access to documents detailing the number of requests the received and the outcome of those requests, nor do its annual reports detail the number of sensitive documents held by the agency.
3. The agency unfairly excludes non-EU nationals from the scope of its access to documents rules.
4. The requirement that each individual making a request for access to documents provide a copy of an identity document is disproportionate.

What do you consider that the EU institution or body has done wrong?

1. Frontex does not maintain a public register of documents, as required by Article 11 of Regulation 1049/2001.

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, which was introduced following an inquiry by the Ombudsman (OI/13/2012/MHZ). Following the inquiry, Frontex committed to revising its Management Board Decision so as to include a requirement to establish and maintain a public register.

That Decision was then replaced by a revised Management Board Decision in 2016, which contains no reference to a register of documents in accordance with Article 11 of Regulation 1049/2011.

While the agency does publish a number of documents on its website, this cannot be considered the same thing as maintaining a comprehensive public register. The agency is thus in breach of the obligation to “provide public access to a register of documents.”

2. The agency has not included in its annual reports for 2017 and 2018 a section on access to documents detailing the number of requests received and the outcome of those requests. The agency has previously included such sections in its annual reports, although these have omitted information on the number of sensitive documents held by the agency.

By failing to publish a report on access to documents in 2017 and 2018; 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.

3. The agency unfairly excludes non-EU nationals from the scope of its access to documents rules.

Article 3(2) of the Management Board Decision on access to documents says that "on a case-by-case decision, the Agency may... 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."

The exclusion of non-EU nationals not residing in the EU is permitted by Regulation 1049/2001. However, 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. This is particularly so given that, under the recent revision of its founding Regulation, Frontex will be increasing its activities in third countries.

Furthermore, there is no information on how such "case-by-case" decisions are made; nor is there a requirement to inform persons of the reasons why their requests have been turned down. The limited personal scope of application applied by Frontex should be removed in favour of allowing requests from any natural or legal person residing anywhere in the world.

4. The requirement that each individual making a request for access to documents provide a copy of an identity document is disproportionate.

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."

In correspondence, the agency informed us that it also accepts "a qualified e-signature in line with the eDIAS Regulation in order to verify eligibility," instead of a passport, driving licence or ID card. Nevertheless, these requirements are disproportionate.

The European Ombudsman has argued the same the decision in case 682/2014/JF: "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."

These requirements may also exclude individuals eligible to make a request for access to documents to Frontex from doing so (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). Furthermore, the agency requests that individuals transmit a copy of an identification document over standard email. This 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.

What, in your view, should the institution or body do to put things right?

Frontex should:

1. Establish and maintain a public register of documents, as required by Regulation 1049/2001.
2. Ensure that its annual reports include sections on access to documents and the number of sensitive documents held by the agency.
3. Revise its rules implementing Regulation 1049/2001 so as to ensure the rules on access to documents apply to all natural and legal persons, not just EU citizens or those residing in the EU.
4. Abolish the requirement to provide an identity document or other form of identification when filing a request for access to documents.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify and submit copies of the relevant correspondence)

See correspondence attached.

If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable

Has the object of your complaint already been settled by a court or is it pending before a court?