

8 July 2020

Reference: 2273/2019/MIG

Dear Ms O'Reilly,

Please find below our comments on the report of the meeting between the European Ombudsman and the European Border and Coast Guard Agency on 30 April 2020.

Public register of documents

According to the record of the meeting, Frontex representatives stated that the Agency does not have a written policy regarding its public register and that “until 2019, the Agency had not maintained a central public register.” The question here, then, is why has the Agency consistently failed to comply with EU law?

As we highlighted in our complaint, the Agency’s 2014 Management Board Decision on access to documents contained a requirement to establish a public register – a requirement which the Agency never met and which was removed from the subsequent Management Board Decision in 2016. In any case, neither of these decisions can supersede EU law, and the Agency should therefore long ago have met the requirements of Regulation 1049/2001. A renewed commitment from the Management Board to this goal would be welcome.

We would like to highlight that the Regulation requires “a register” and not multiple registers, as Frontex claims to be operating. It is true that there are a significant number of documents contained in various locations on its website. However, it is evident that this does not meet the legal requirement to establish a register listing, and wherever possible providing access to, each document held by the Agency.

We are aware of the ‘Public Access to Documents Registry’, although we were not entirely clear as to its purpose until reading the explanation provided in the meeting report. It appears this registry was set up following the CJEU decision in Case T-31/18, which confirmed that “Frontex did not maintain a register of documents”. While the inclusion on Frontex’s website of documents made accessible following public requests is clearly a beneficial development, the Registry as it stands is manifestly incomplete, containing just eight documents across five categories (as of the date of this letter).

As an organisation, we have received more documents than this from the Agency following a single access request. However, none of the documents we have received following any requests are listed in the registry. An even more striking example is provided by the ‘Frontex Public Register of Documents’ hosted by the *Organized Crime and Corruption Reporting Project*.¹ This contains over 1,000 documents made public by the agency, including material of clear public interest such as serious incident reports. Journalists and civil society

¹ <https://aleph.occrp.org/datasets/1330>

organisations should not have to compile such information themselves, when it has been provided by the Agency following citizens' requests.

While taking steps to increase transparency through the publication of a greater number of documents is important, the approach adopted does not facilitate citizens' access to information in the most straightforward way. In the long run, the inclusion of ever more documents in ever more categories and with no central search function may actually stymie that access. A single public register listing all documents held or received by the Agency is not only a binding legal requirement, but also the simplest and most effective way to fulfil citizens' rights to information. If the establishment of the 'Public Access to Documents Registry' was a response to the Case T-31/18, it is clearly an inadequate one.

Frontex also states that it is "considering further facilitating the access of the public to its documents." We would be grateful for further information on how the Agency plans to do so, in particular given the concerns we hold over its current approach. For example, the requirement to submit requests through the Agency's online 'portal', in reality, restricts the ability to make requests. In our correspondence with the Agency concerning particular access to documents requests we have also found their approach obstructive – for example, by demanding ever-more specific delimitation of the request, without offering any information or assistance as to what would be appropriate to ask for.

A pro-active approach to transparency would not only better facilitate citizens' rights to information, but would also reduce the workload that public requests for access to documents apparently cause the Agency. In this regard, the meeting report suggests that Frontex is prioritising its reinforced operational role over citizens' rights ("difficulties in terms of limited resources available for other (non-operational) purposes"). The right of access to documents is a fundamental right, set out in the Charter, and is non-negotiable. The onus is on the Agency to plan and budget accordingly to ensure that it can fulfil those rights.

Inclusion of information in annual reports

We welcome the plan to include in the 2019 Annual Activity Report information on the number of sensitive documents held by the Agency. This is a practice that, as is legally required, should be maintained in future years. However, this still leaves a number of previous years for which there is no such information available and we would appreciate a commitment from Frontex to rectify this problem.

Admissibility criteria for requests from non-EU citizens

The report of the meeting notes that Agency representatives consider there is "no need to extend further the personal scope of the right to access as Frontex hardly received any such requests from third countries," with the average amounting to one request annually. We would draw the opposite conclusion: if there are only a low number of requests, extending the personal scope of the right to access would cause little extra work for the Agency, whilst further facilitating the right of access to persons who are likely to be increasingly affected by the Agency's activities and operations.

As we highlighted in our original complaint, given the Agency's growing footprint in third countries, it is important that citizens of the countries where Frontex operates or with which it cooperates be granted the right to request access to documents. Furthermore, extending the right of access to non-EU citizens would obviate the current obligation to provide a copy of an identity document when filing a request for access to documents requests with the agency.

Requirement to provide an identity document when making a request

We note with disappointment that this issue was not raised by the Ombudsman in the meeting with Frontex representatives. Given that this practice raises a number of issues concerning citizens' rights related to access to documents, privacy and data protection, we urge the Ombudsman to discuss this issue with the agency.

We are aware that the Ombudsman has recently found in favour of Frontex's practice. However, we believe the most important precedent on this matter was set out in case 682/2014/JF, in which the Ombudsman found that a blanket requirement for the provision of identity documents was "disrespectful of citizens and their fundamental rights under the EU Charter."

We look forward to you raising these points with the agency in the course of your investigation.

Yours sincerely,

Chris Jones
Project Director