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European Ombudsman

# Proposal

## of the European Ombudsman for a solution in case 2273/2019/MIG on the European Border and Coast Guard Agency's (Frontex) public register of documents

Made in accordance with Article 3(5) of the Statute of the European Ombudsman<sup>1</sup>

### Background to the complaint

1. EU citizens and residents and legal persons with a registered office in the EU have the right to access documents<sup>2</sup> held by the EU institutions, bodies, offices and agencies ('the EU institutions').
2. EU rules on public access to documents<sup>3</sup> require the EU institutions to carry out their tasks as openly and transparently as possible. This includes providing public access to a 'register of documents' and reporting on public access to documents.<sup>4</sup>
3. The complainant, a non-profit organisation, considered that the European Border and Coast Guard Agency (Frontex) does not comply with its obligations under the EU's rules on public access to documents.
4. In March 2019, the complainant contacted Frontex, asking it (i) to establish a public register of documents, (ii) to include information about sensitive documents in its annual reports on public access, and (iii) to accept requests for public access to documents also from non-EU citizens that are not resident in the EU (in particular asylum seekers or refugees that have been affected by Frontex's activities).

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<sup>1</sup> Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

<sup>2</sup> Pursuant to Article 42 of the Charter of Fundamental Rights of the European Union: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT> and Article 15(3) of the Treaty on the Functioning of the European Union (TFEU).

<sup>3</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>, applicable to Frontex pursuant to Article 114(1) of Regulation 2019/1896 on the European Border and Coast Guard: <https://eur-lex.europa.eu/eli/reg/2019/1896/oj>.

<sup>4</sup> Pursuant to Articles 11 and 17 of Regulation 1049/2001.



5. Frontex thanked the complainant for sharing its views and commented on the issues raised. However, it did not commit to make any changes.

6. In May 2019, the complainant contacted Frontex again, reiterating its concerns.

7. Frontex replied, reassuring the complainant that it regularly reviews its working methods, taking into account EU case-law, decisions by the European Ombudsman and the best practices of other EU institutions.

8. Dissatisfied with Frontex's replies, the complainant turned to the Ombudsman in December 2019.

## The inquiry

9. The Ombudsman opened an inquiry into Frontex's:

- 1) failure to maintain a public register of documents;
- 2) failure to list in its annual report on public access to documents the number of sensitive documents it holds that are not included in its register of documents; and
- 3) refusal to accept requests for public access to documents from non-EU citizens that do not reside in the EU.

10. In the course of the inquiry, the Ombudsman's inquiry team met with Frontex representatives to discuss the issues raised by the complainant. The Ombudsman drew up a meeting report, which was shared with the complainant, and, subsequently, received the complainant's comments on the meeting report.

11. This proposal for a solution concerns the first two aspects of the complaint. The third aspect is not covered by this solution proposal and will be dealt with at a later stage.

## Register of documents

### Arguments presented

12. The complainant stated that Frontex did not maintain a register of documents, as required under the EU's rules on public access to documents.

13. Frontex argued that it makes available on its website a significant number of documents.<sup>5</sup>

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<sup>5</sup> Most notably, under the recently added 'key documents' section: <https://frontex.europa.eu/about-frontex/key-documents/>.



**14.** The complainant contended that proactively releasing documents was not the same as maintaining a register of documents.

**15.** During the inquiry, Frontex explained the different types of information and documents that it makes available on its website, namely under:

- ) Publications<sup>6</sup>,
- ) Consultative Forum<sup>7</sup>,
- ) Non-EU countries<sup>8</sup>,
- ) Types of operations<sup>9</sup>,
- ) Migratory Map<sup>10</sup>, and
- ) Public Access to Documents Registry<sup>11</sup>, where it publishes documents which it released following requests for public access.

**16.** Frontex added that it was constantly increasing the number of documents on its website and that, if individuals had problems finding a document, it would assist them as best it could.

**17.** Frontex said that it decides on a case-by-case basis whether a document is suitable to be published proactively. However, it does not include in its register any documents that it deems should not be disclosed<sup>12</sup> under the EU's rules on public access to documents.

**18.** Frontex also stated that, in light of its increased tasks following the latest update of its mandate<sup>13</sup>, and the sharp increase in requests for public access it is receiving, it does not have sufficient resources to centralise its register and to make more documents proactively available.

**19.** The complainant argued that, according to the EU's rules on public access to documents, Frontex is required to maintain a single, centralised register. In the complainant's view, Frontex's practice does not fulfil the legal requirements. The complainant also considered that Frontex's 'Public Access to Documents Registry' is incomplete, as it contains only eight documents.

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<sup>6</sup> <https://frontex.europa.eu/publications/?category=general>

<sup>7</sup> <https://frontex.europa.eu/fundamental-rights/consultative-forum/documents/>

<sup>8</sup> <https://frontex.europa.eu/partners/non-eu-countries/>

<sup>9</sup> <https://frontex.europa.eu/operations/types-of-operations/>

<sup>10</sup> <https://frontex.europa.eu/along-eu-borders/migratory-map/>

<sup>11</sup> <https://frontex.europa.eu/contact/public-access-to-documents-registry/?category=fundamental-rights-officer-work-plan>

<sup>12</sup> Article 4 of Regulation 1049/2001 on public access to EU documents, sets out a series of exceptions, based on which EU institutions can refuse to disclose documents. These include the protection of public security, defence and military matters, international relations, financial or monetary policy, private data and internal decision-making processes.

<sup>13</sup> Regulation 2019/1896 (see footnote 3).



## The Ombudsman's assessment

**20.** Transparency and openness are the cornerstones of democratic societies such as the EU<sup>14</sup>, enabling citizens to participate in decision-making and safeguarding the legitimacy, effectiveness and accountability of public administrations.<sup>15</sup>

**21.** The Ombudsman notes that Frontex has made a significant number of documents proactively available on its website and commends Frontex for its efforts towards establishing a register of documents since the Ombudsman's 2012 own-initiative inquiry into this matter<sup>16</sup> was closed.

**22.** While the EU's rules on public access to documents (Regulation 1049/2001) oblige institutions to establish a register, the Ombudsman notes that it was not the legislator's intention that *every* document included in an institution's register should be published proactively. Nor was the register intended to be a record of all documents that have been released following requests for public access (though publishing such documents is a commendable practice). Rather, the purpose of the register of documents is "*to make citizens' rights under [Regulation 1049/2001] effective*"<sup>17</sup> and "*to make it easier for citizens to exercise their rights*"<sup>18</sup>. In other words, the register of documents should **enable individuals to identify documents to which they may want to request public access.**

**23.** The Ombudsman considers that it greatly facilitates individuals exercising their right of access if they can adequately inform themselves about the documents that exist. It is therefore key that the EU institutions make sure that the public can find out what documents they hold.

**24.** While Regulation 1049/2001 applies to *all* documents in the possession of the EU institutions, the Ombudsman notes that the EU's rules on public access were drawn up two decades ago. Many EU institutions, including Frontex, did not exist back then. In addition, the digitalisation of society has transformed how organisations work and communicate. These circumstances have to be taken into account when interpreting the EU's rules on public access to documents.

**25.** The Ombudsman also notes that each EU institution is different, and has to align its approach to a public register of documents with its distinct characteristics. For example, 'justice and home affairs agencies' such as Frontex operate in particularly sensitive areas. It is thus inherent in the nature of its work that some documents it holds may be too sensitive even to be mentioned in a register, as disclosing their very existence could risk undermining a protected public interest.

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<sup>14</sup> The EU Treaties establish the principle that the EU institutions should take decisions as transparently as possible. Article 1 of the Treaty on European Union, Article 15 of the Treaty on the Functioning of the European Union.

<sup>15</sup> See preamble (2) of Regulation 1049/2001.

<sup>16</sup> The decision closing own-initiative inquiry OI/13/2012/MHZ (Visit to the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union - Frontex) is available at: <https://www.ombudsman.europa.eu/en/decision/en/51885>.

<sup>17</sup> Article 11(1) of Regulation 1049/2001.

<sup>18</sup> Preamble (14) of Regulation 1049/2001.



**26.** However, the Ombudsman considers that all EU institutions should apply certain principles to their respective register of documents, so as to ensure good administrative practice and thus to ensure that their register is adequate. These include the following principles:

**27.** To make it as easy as possible for individuals to navigate through the register and to identify specific documents to which they may want to obtain access, the register of documents should be user-friendly. This includes having a dedicated public register webpage. If there are several locations where information/documents can be found, the layout of the register should be explained and links to the different sections should be provided. In general, the register should allow individuals to get an overview of the (kind of) documents that are held by the institution concerned.

**28.** The register of documents should be complete. This means that all documents concerning the core activities of the institution concerned – such as legislative documents and documents concerning its decisions, strategy, and policy – should be recorded individually (if not published proactively<sup>19</sup>). For other types of documents, the register should refer to their existence, at the very least by listing categories of documents, if they are not recorded individually. This concerns, for example, staff-related documents, such as personnel files, or documents concerning the management of an institution's premises.

**29.** Maintaining a complete register of documents also means that institutions should not *automatically* exclude documents, simply because they consider that the *content* of those documents should not be disclosed. While documents do not need to be recorded in the register if *disclosing their very existence* could very likely risk undermining any protected public interest, the institution should assess on a case-by-case basis whether it is indeed justified not to list such a document or categories of documents.

**30.** The Ombudsman also considers that the register of documents should be maintained in a timely manner. To this end, the public register needs to be updated on a very regular basis.

**31.** As regards possible budgetary constraints, the Ombudsman understands that the maintenance of a register of documents may entail the allocation of resources. However, this is a matter which Frontex could decide to raise with the Budgetary Authority, if necessary.

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<sup>19</sup> The EU institutions are required “as far as possible, [to] make documents directly accessible to the public.” This concerns first and foremost legislative documents and documents relating to the development of policy or strategy (see Article 12 of Regulation 1049/2001). Regarding Frontex, see also Article 114 of Regulation 2019/1896.



## Number of sensitive documents

### Arguments presented

**32.** The complainant noted that, in the past, Frontex had not provided information on the number of sensitive documents that it holds but which are not listed in its register of documents.

**33.** During the inquiry, Frontex indicated that this information would be included in its 'annual activity report' in 2019, which the complainant welcomed.

### The Ombudsman's assessment

**34.** The applicable rules require Frontex to report annually on the number of sensitive documents it holds that are not recorded in its register of documents.<sup>20</sup>

**35.** The Ombudsman notes that Frontex did not include this number in its most recent report covering the year 2019, as announced during the meeting with her inquiry team. The Ombudsman will therefore make a corresponding proposal for a solution below.

### The proposal for a solution

**Based on the above findings, the Ombudsman proposes that Frontex should**

- 1) update its register of documents, taking into account the principles of good administrative practice set out in paragraphs 26 to 30 above, and**
- 2) in future, and as far as possible for 2019, publish the number of sensitive documents it holds that are not included in its register of documents.**

Emily O'Reilly  
European Ombudsman

Strasbourg, 07/10/2020

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<sup>20</sup> Article 17(1) of Regulation 1049/2001. See also Management Board Decision No 25/2016 adopting practical arrangements regarding public access to the documents held by Frontex, available at: <https://frontex.europa.eu/about-frontex/key-documents/?category=management-board-decisions>.