

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

In January 2020, the European Border and Coast Guard Agency (Frontex) launched its own internal portal for dealing with access to documents requests. Ever since, Frontex has forced all citizens who wish to file an access to documents request to Frontex to use this internal portal - even if citizens express an explicit will to use e-mail or civil society portals (such as FragDenStaat.de and AsktheEU.org) as preferred means for communicating with the agency with regards to their requests.

In addition to this, Frontex's matches the forceful use of its platform with a series of policies which, when implemented together with the centralised use of the agency's own platform as the single medium for filing access to documents requests, impede, obstructs and/or deters citizens from requesting documents from the agency, and therefore from exercising their fundamental right.

It should be stressed that the Ombudsman's decision on this case will not only set guidelines for the use of online portals by Frontex, but also on all EU access to documents portals in the making, especially the Commission Portal that is developed at the moment.

If the Ombudsman decides to set up discussion calls with Frontex over this matter, the complainants respectfully request to be invited to the calls as well.

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

Frontex's decision to centralise the exercise of the right of access to EU documents via their own internal platform only, coupled with a series of restrictive measures on how the agency manages access to documents requests, amounts to a violation of Article 1 and Article 10 of Regulation 1049/2001. It also contravenes Article 1 of the Treaty on the European Union.

### 1. Frontex is acting in violation of Article 1 of the Treaty on the European Union

As it is stated in recitals 1 and 2 of Regulation 1049/2001: "*The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.*"

*"Openness (...) guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness 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.”*

In January 2020, Frontex launched a new internal portal for dealing with access to documents requests filed to the agency. Since the portal was launched, Frontex has ceased to accept the use e-mail or online civil society portals such as AsktheEU.org or FragdenStaat.de as valid means for dealing with requests.

While Frontex does register access to documents requests filed through online portals, they do not facilitate their answers or any documents disclosed via these online portals or e-mail. Instead, Frontex posts all correspondence related to the request (acknowledgements, registration, responses and requests for clarifications) in their own internal system, and sends requesters a link and a series of access codes that they can use to enter the Frontex platform. Requesters are therefore forced to log into the platform if they wish to retrieve or review any information or update regarding their request.

Once inside the platform, requesters face a series of additional difficulties (further detailed in Annex 1), including:

- The link and access codes provided by the agency have an expiration date (of 15 working days, as established by Frontex), after which requesters are no longer able to access their request logs, nor any documents disclosed as a result of their request.
- If documents have been disclosed, Frontex includes in its response letter a copyright disclaimer which prohibits the requester to use or distribute the disclosed document without prior consent of the agency.
- Once Frontex has issued its response to the request, it will consider the process as “Closed”. From that moment onwards, the portal disables the possibility of sending any further messages - including requests for clarification - to Frontex; if requesters want to appeal a refusal, they must restart the process (as opposed to being allowed to post an appeal in response to Frontex’s refusal).

The conditions described above - which include Frontex’s refusal to comply with requesters explicit preferences, as well as setting in place a series of obstacles that make it hard to obtain documents, and then prohibits the use of those documents - amount to the creation of a hostile environment for the exercise of the fundamental right of access to EU documents.

Furthermore, these measures are in diametric opposition to the principle of openness as enshrined in the EU Treaty and the EU Charter of Fundamental Rights.

## 2. Frontex is acting in violation of Article 1 of Regulation 1049/2001

These measures also contravene the very purpose of Regulation 1049/2001, which is described in Article 1 of the regulation:

*“(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as ‘the institutions’) documents provided for in Article 255 of the EC Treaty in such a way as **to ensure the widest possible access to documents,***

(b) to establish rules ensuring the **easiest possible exercise of this right**, and  
(c) to promote **good administrative practice** on access to documents.”

#### I. Widest possible access

The forceful centralisation of all access to documents requests via an internal platform can in no way be considered as ensuring “the widest possible access to documents”; a principle which, at the very least, should entail giving requesters the option to request documents through their preferred means of communication.

To this regard, it is worth noting that the Frontex platform shields the requesting process from the public view (and therefore impedes public scrutiny). Making this non-public platform the only possible way of requesting documents undoubtedly makes the quest for transparency a truly opaque process, thus distancing Frontex from the principle of widest possible access and the “fullest possible effect to the right of public access to documents”, as enshrined in recital 4 of Regulation 1049/2001.

As it has been recognised by the European Ombudsman, “The institution should always take steps to fulfil its obligation to give the fullest possible effect to the right of access and take into account the public interest in the wider disclosure of documents requested.” In effect, the very nature of the Frontex portal, coupled with the obligation to use it as the only possible medium for requesting documents, is not a step towards granting the fullest possible access, but rather the contrary.

Furthermore, the policies accompanying the forceful use of Frontex’s internal platform as described in Annex 1, impose a series of limitations to the availability of information released by Frontex, and prohibits the use and circulation of documents released through requests.

These policies and decisions on how to deal with and process access to documents requests, when implemented in a coordinated manner, directly contravene Article 1 of Regulation 1049/2001.

#### II. Easiest possible exercise of the right

Frontex’s forceful use of their own platform also contravenes the agency’s obligation to ensure the easiest possible exercise of this right. Not only the agency deliberately ignores requesters explicitly stated preferences regarding how they would like to exercise their right, but the only alternative they offer (the Frontex platform) can hardly qualify as an easy mean to exercise this right.

For the purpose of this complaint, we consulted with a series of researchers, journalists and academics whose work has a strong focus on EU migration and border control policies and EU Home Affairs, and who therefore, occasionally or frequently, file or would wish to file access to documents requests to Frontex.

An academic whose research focuses on the EU border control regime told us: “Regarding Frontex’s internal portal, I feel I might need to think twice before submitting another FOI request for two reasons. (...) I’ve experienced many technical difficulties with the use of tokens and captcha codes, especially when following the European Ombudsman’s ruling, I

asked for communication to take place through the asktheeu.org platform. I found the whole process both time-consuming and stressful, and I would argue it acts as a disincentive for citizens submitting FOI requests. Frontex should not assume that all claimants are experienced/expert IT users. In that respect platforms such as asktheeu.org were much more accessible.”

A journalist reporting for international media on EU migration-related issues stated: “It absolutely has a chilling effect on my ability to request and makes communication more burdensome. The online platform also makes it so it’s nearly impossible to ask clarifying questions regarding requests and the process, which goes against both the spirit and letter of 1049/2001.”

Another journalist reporting for EU media and covering EU Home Affairs described the many obstacles faced when requesting documents from Frontex as “a realisation that these tactics are designed to keep information from going public.”

This sentiment was echoed by the same academic cited above, who described Frontex’s new portal as “the latest move by Frontex – like the change in copyright policy last year - to impede access to information and avoid transparency and accountability. I think it’s not a coincidence that it comes soon after some investigations very critical to the fundamental rights record of Frontex which used internal documents released through FOI requests.”

In light of these testimonies, it is important to recall the Ombudsman’s own wording on this matter: “It is important that citizens do not feel that an institution is putting unnecessary obstacles in the way of their exercising their fundamental right of public access to documents.”

Indeed, the fact that Frontex is forcing citizens to use their portal without allowing for alternatives and without giving any reasons to do so, coupled with the many technical difficulties and obstacles requesters face when making use of the portal, translate into a blatant feeling that the agency is, quite simply, obstaculising the exercise of the right.

The series of obstacles faced by requesters in the process of trying to request documents directly contravene the principle of easiest possible access.

On the contrary, however, it is worth noting that the Ombudsman has stated that “Portals such as fragdenstaat.de and AsktheEU.eu have been developed to facilitate citizens’ requests for public access to documents in pursuance of this fundamental right.”

### III. Good administrative practice

In her assessment of case 104/2020/EWM, the European Ombudsman issued the following guidance as to how Frontex should deal with requests for access to documents: “Where an applicant has specifically stated that this is their preferred medium for receiving the response to their request and any documents to which public access is granted, institutions should comply with that request **unless there is very good reason (which should be explained)** for them not to do so. **This is a matter of good administration** as well as a means of complying with the legal obligation to give the widest possible public access.”

Since the Ombudsman issued this guidance, requesters have followed the Ombudsman's suggestion that they should explicitly state which is their preferred medium for receiving a response to their requests. Online platform FragDenStaat.de even included pre-formulated language stating this preference for all requests filed to Frontex so that individual requesters using this platform would not have to elaborate the wording themselves.

To date, Frontex has not once respected requesters explicitly stated preferences regarding their requests. When asked to provide an explanation as to why these preferences are being overruled, Frontex has not once provided reasons.

In the words of the European Ombudsman, to either comply with requesters explicitly stated preferences or to provide reasons not to do so is a matter of good administration. By refusing to do either, Frontex is acting in violation of Article 1 of Regulation 1049/2001.

### 3. Frontex is acting in violation of Article 10 of Regulation 1049/2001

Article 10 of Regulation 1049/2001 states that EU institutions shall supply documents "with full regard to the applicant's preference".

As stated above, Frontex has repeatedly ignored requesters' preferences when they expressed that they would like to receive not only Frontex's responses, but any document released in response to their request, via platforms such as AsktheEU.org and FragDenStaat.de.

While the agency has now, in response to Ombudsman case 104/2020/EWM, agreed to register requests filed via online platforms, it is still refusing to provide its responses and any documents via these platforms. As a result, Frontex is acting in violation of Article 10 of Regulation 1049/2001.

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

Frontex should stop forcing citizens to use the agency's internal access to documents platform as the exclusive medium for filing requests - especially if citizens explicitly state that they would prefer to use e-mail or civil society platforms as mediums for requesting documents from Frontex.

This should include not only registering requests filed via e-mail or online platforms, but also using these mediums to send any communication (acknowledgments, requests for clarifications, deadline extensions and replies) and any document released in response to requests.

Frontex should acknowledge and respect that it is the citizen, not the agency, who better knows and understands what the "easiest possible exercise of the right" looks like in

practice. This is due to the fact that citizens are the ones who *exercise* the right, while the agency's role should be to *comply* with its obligation to *facilitate* this exercise.

Imposing a medium against the will of the requester contravenes the very purpose of Regulation 1049/2001, and therefore Frontex must cease its current behaviour.

However, citizens should still have the choice, would they be willing to do so, to file requests using the Frontex platform. In these cases, Frontex should:

- Clarify exactly what data will be collected, processed and stored in regards to the requester's use of this platform and any activity (such as logging in, downloading files or logging out) requesters carry out while interacting with the platform.
- Make all links and access codes for each request permanently available, giving requesters the freedom to access replies and documents released in the timeframes they consider most suitable.
- Allow requesters to post responses and appeals following their initial request log, even if Frontex considers a case is closed.

For all requests filed through whatever medium, Frontex should retract its copyright notice which deliberately gives the impression that copyright law prohibits the redistribution of the documents received, although in most cases the legal requirements for copyright protection of the document do not exist, or at least statutory copyright limitations allow redistribution.

Instead, Frontex should adopt a policy on the re-use of its documents in line with the European Commission's.

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

Yes. Frontex has repeatedly been asked to send responses to requests, as well as any document released, via platforms such as AsktheEU.org and FragDenStaat.de and not via its own internal platform. Frontex has invariably ignored these demands.

Frontex has been asked to provide reasons as to why it is choosing to ignore these demands. Frontex has never provided any reasons to back its decision.

# Annex 1

The following document lists a series of technical and accompanying obstacles to the exercise of the right of access, embedded in and implemented along with, respectively, Frontex's internal access to documents platform. They are all highly questionable in view of the right to effective access to EU documents, as laid down in European law.

Each of these obstacles represent a single, additional difficulty that requesters come across when trying to access Frontex documents. When implemented in a coordinated way, as it is currently done by Frontex, the exercise of the right of access becomes severely obstructed.

The fact that Frontex now channels all access to documents requests through the agency's internal platform means requesters are now forced to encounter these obstacles; since requesters are not allowed to use e-mail or civil society platforms, which would de facto allow them to circumvent these difficulties, their exercise of the fundamental right of access to EU documents becomes more difficult and sometimes impossible.

Frontex's new approach to access to documents requests therefore creates a hostile environment for the exercise of the right of access, constituting a violation of Article 1 and 10 of Regulation 1049/2001, and Article 1 of the Treaty on the European Union.

## I. Obstacles of a technical nature, embedded in Frontex's portal

- a) Correspondence with Frontex, along with any documents released as a result of the request, are only available for a limited number of days - imposed by Frontex - after which they cease to be available to the requester.

Access to the Frontex platform is granted via a link and a series of access codes, including: the requester's e-mail address, a token, and a case ID. These login details are, according to Frontex, "valid for 15 working days" only.<sup>1</sup>

This unilateral and arbitrary restriction of the availability of correspondence regarding an access to documents request lacks any legal basis whatsoever, and has not been justified as necessary by Frontex in any way. It is hard to imagine what benefit Frontex could extract by disabling the access codes to either a closed or ongoing access to documents request - and yet it is obvious that this does cause many inconveniences for requesters.

On the one hand, it creates added difficulties for requesters who, for a period over 15 working days, for whatever reason (this could include the requester being on vacation or on leave; or not having access to an internet connexion for a given period), are not able to log into their request. Furthermore, it creates an additional and unjustified burden for requesters who, under this new system, are obliged to check their request correspondence within the time limit imposed by the authority; or who need to contact the authority again (and potentially restart the request) after their login details expire and they are not able to read the response or access any disclosed documents.

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<sup>1</sup> <https://fragdenstaat.de/anfrage/access-to-documents-data/#nachricht-492420>

The disappearance of correspondence and disclosed documents also creates unnecessary and potentially serious obstacles for researchers, journalists or any citizen or organisation aiming to use the request process as a basis for complaints, court cases, research, or any other use that likely requires preparation time exceeding 15 working days.

To this regard, it is important to highlight that this restriction is uniquely linked to Frontex's centralised use of its own access to document portal. Since all correspondence and documents released are hosted within the agency's own internal system, they are able to impose such limitations to the availability of information; a decision that, when using e-mail or civil society platforms as mediums for filing requests, lies only with the requester and never with the EU authority.

This transfer of decision-making power from the requester to the EU authority de facto curtails the conditions in which requesters can exercise their right of access to EU documents, and hence is directly opposed to the principles laid out in Article 1 of Regulation 1049/2001.

- b) The Frontex platform does not allow requesters to file requests for clarification, follow-ups or appeals regarding their requests

Once Frontex has delivered its letter of response - along with any documents disclosed - the agency will unilaterally consider the request process as closed, thus disabling the option to send a message or a response.

From this moment on, requesters are no longer allowed to use this channel to further communicate with the agency with regards to their requests. This includes the impossibility of asking for clarification, sending a notice in case there is a problem with any of the attachments, sending follow-ups, or even filing appeals.

This creates an extra layer of difficulty when trying to exercise the right of access to EU documents by imposing an unnecessary burden on the requester, who then needs to find an alternative (and additional) way of communicating with the agency in case it needs to do so.

It also contravenes the agency's obligation to ensure "*the easiest possible exercise of this right*" as established in Article 1 of Regulation 1049/2001.

The alternative would be rather simple: Frontex shouldn't disable the message box that requesters can use to communicate with the agency in the process of dealing with requests, even if an answer has already been provided.

- c) There is a lack of transparency on what data Frontex is collecting, processing and storing in regards to the use of its platform.

Upon using Frontex's access to documents portal, the agency does not state anywhere what sort of information it is collecting, processing and storing in regards to requesters' use of the platform. This uncertainty creates a chilling effect among potential users of the platform, given that Frontex technically does have the possibility of monitoring and tracking the access

to and use of its platform, even from server logs. It has to be stressed that this is a fundamental problem that cannot be solved with additional information, but only with the possibility of using other communication channels than Frontex' platform.

It is needless to say that the mere thought of a law enforcement agency monitoring the practical exercise of a fundamental right can - and will - deter citizens from requesting Frontex documents. This is evermore worrying given that this portal is the only medium available to citizens who wish to request Frontex documents, but cannot decide to use other alternatives (such as e-mail or public FOI platforms) which they might perceive as less invasive of their privacy.

To this regard, it is important to note that Frontex should not be able to monitor or track requesters' access to the platform (logging in and logging out), or any activity within the platform (downloading of files or reading of messages). Frontex should not collect, process and/or store any data in regards to requesters' use of its internal platform, and should make this clear in its platform's landing page via a privacy notice or disclaimer.

## II. Accompanying obstacles, implemented along with Frontex's portal

- a) Frontex prohibits the distribution and public use of documents released via access to documents requests through a restrictive copyright notice it includes in its response letters

In its responses to access to documents requests, Frontex includes the following copyright notice by default and without stating any legal basis:

*"Kindly be reminded that the copyright of the document/s rests with Frontex and making this/these work/s, available to third parties in this or another form without prior authorisation of Frontex is prohibited."*

The practice of including a copyright notice limiting the use and circulation of Frontex documents was introduced by the agency in 2016. At the time, Frontex inserted in its replies the following, more ambiguous language:

*"I would also like to remind you that the copyright of the document rests with Frontex and that the existing rules on copyrights may limit your rights to reproduce or exploit the released documents."*<sup>2</sup>

In January 2019, Frontex rephrased their copyright notice, introducing the currently used language which explicitly prohibits distribution and public use of the documents obtained via access to documents requests due to copyright law.<sup>3</sup>

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<sup>2</sup> The first publicly available reply from Frontex including this copyright notice is dated 1 February 2016.

[https://www.asktheeu.org/en/request/2502/response/8802/attach/7/01.02.2016%20Veronica%20Peretti.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/2502/response/8802/attach/7/01.02.2016%20Veronica%20Peretti.pdf?cookie_passthrough=1)

<sup>3</sup> The first publicly available reply from Frontex containing the rephrased, more restrictive language, is dated 16 January 2019.

In general, messages and documents sent by Frontex in response to access to documents requests are not covered by copyright protection because such documents regularly are not an '*author's own intellectual creation*' (cf. for the established jurisprudence the ECJ judgment of 16 July 2009 - C-5/08, ECLI:EU:C:2009:465 - *Infopaq International*).

According to the ECJ, this is especially true for purely informative documents, the content of which is essentially determined by the information contained in them. In these cases, the information and its expression in the documents are characterised solely by their technical function (ECJ judgment of 29 July 2019 - C-469/17 - *Militärische Lageberichte*).

Furthermore, it must be noted that the European Commission in May 2019 adopted a Creative Commons Attribution 4.0 International licence<sup>4</sup> in order to "make it even easier for citizens and businesses to access and reuse the information the institution makes publicly available online".

The then-Commissioner for Education, Culture, Youth and Sport, Tibor Navracsics, stated: "We want to share our knowledge as openly and effectively as possible. This means that we need to reduce technological and legal barriers and put in place terms of reuse that are clear and easy to comply with."<sup>5</sup>

In this regard, Frontex is not only falling behind the standard set by the European Commission, but also the minimum standards the EU has created for Member States when it comes to copyright (Directive 2001/29/EC) and the re-use of public sector information (Directive (EU) 2019/1024).

Art. 5 (3) of Directive 2001/29/EC establishes exceptions and limitations to copyright in the following cases:

*"reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;*

*quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;"*

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[https://www.asktheeu.org/en/request/6104/response/19985/attach/2/Nohr%20Fj%20toft%20Trym%2016.01.2019.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/6104/response/19985/attach/2/Nohr%20Fj%20toft%20Trym%2016.01.2019.pdf?cookie_passthrough=1)

<sup>4</sup> <https://ec.europa.eu/transparency/regdoc/rep/3/2019/EN/C-2019-1655-F1-EN-MAIN-PART-1.PDF>

<sup>5</sup> <https://ec.europa.eu/jrc/en/news/commission-makes-it-even-easier-citizens-reuse-all-information-it-publishes-online>

Recital 14 of Directive (EU) 2019/1024 states:

*“Allowing the re-use of documents held by a public sector body adds value for the benefit of re-users, end users and society in general and in many cases for the benefit of the public sector body itself, by promoting transparency and accountability”*

Frontex’s current copyright disclaimer not only falls short of such standards - it is diametric opposition to the EU’s efforts to promote the re-use of public sector information for the benefits of society. It also therefore violates the principle of widest possible access, as laid out in Regulation 1049/2001.