

Mr/Ms Marie Naass

Email: [REDACTED]

Our ref: DGSC/TO/PAD-2021-00350
Initial application: TO/PAD-2021-00300

Warsaw, 7 February 2022

Your application for access to European Border and Coast Guard Agency (Frontex) documents - confirmatory application

Dear Mr/Ms Naass,

This Decision is in reference to your confirmatory application registered on 14 December 2021, for which the time-limit has been extended by 15 working days on 19 January 2022¹, and in which you requested a reconsideration of the reply of 1 December 2021. In your initial application you had applied for

1. *all Serious Incident Reports for 30 July 2021 with regards to your aerial operation in the Central Mediterranean Sea on July 30th 2021,*
2. *the ICC Daily report in connection to your aerial operation in the Central Mediterranean Sea for July 30th 2021*
3. *JCB Minutes from July 30th 2021*
4. *the Daily reporting package for July 30th 2021*
5. *all communication exchanged among the Fundamental Rights Officer and the Executive Director regarding any incidents having taken place on 30 July 2021 and in relation to your aerial operation in the Central Mediterranean*
6. *all other internal Frontex communication (between any and all units or staff) regarding your aerial operation in the Central Mediterranean Sea on 30 July 2021*
7. *all communication exchanged between Frontex and the Libyan authorities, Frontex and the Italian authorities and Frontex and the Maltese authorities in relation to your aerial operation in the Central Mediterranean Sea on July 30th 2021*
8. *all pictures and videos related to your aerial operation in the Central Mediterranean Sea on July 30th 2021*
9. *the list of all available documents related to your aerial operation in the Central Mediterranean Sea on July 30th 2021*

as further clarified by you:

¹ In accordance with Article 8(2) of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

I confirm that the request for access to the JCB Minutes from July 30th 2021 and the Daily reporting package for July 30th 2021 refer to your aerial operation in the Central Mediterranean Sea on July 30th 2021.

I note your arguments in your confirmatory application

I am filing this confirmatory application in relation to my access to document request “request according to EU regulation 1049/2001” with the Case ID PAD-2021-00300.

The request:

On 21 October 2021, I requested a series of documents regarding Frontex’s aerial operation on 30 July 2021 in the Central Mediterranean. The documents included the (1) Serious Incident Reports, (2) ICC Daily report, (3) JCB Minutes, (4) Daily reporting package, (5) Communication of the Fundamental Rights Officer and the Executive Director regarding any incident having taken place on the outlined date, (6) all other internal Frontex communication related to its operation on that date, (7) all communication of Frontex with the Libyan, Italian and Maltese authorities, (8) footage related to the aerial operation in the Central Mediterranean Sea and (9) list of all available documents related to your air operation in the Central Mediterranean Sea on July 30th 2021. All of the requests were formulated in a sufficiently precise manner, and there is no suggestion to the contrary.

On 3 November 2021, Frontex registered the application.

On 25 November 2021, Frontex extended the time limit by 15 working days.

Frontex’s Response:

On December 1st 2021, Frontex denied access to the documents and footage identified after my request. In its response letter, Frontex states not to hold documents for (1), (5) and (9). While regarding (2), (3), (4), (6), (7) a total of 71 documents referring to the requested date and location, and in regard to (8), two documents and raw data was identified. Frontex states that “access to these documents has to be refused” on the basis that:

“the disclosure would undermine the protection of privacy and the integrity of the individual“ - in the sense of Article 4(1)(b) of Regulation (EC) No 1049/2001.

« disclosing such information () would enable third parties, e.g. by combining this information with other sources, to draw conclusions regarding usual positions and movement patterns. () This would ultimately obstruct the purpose of such operations: to counter and prevent cross-border crime and unauthorized border crossing » - in the sense of Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

« Disclosing such information would be tantamount to disclosing the weaknesses and strengths of operations and pose a risk to their effectiveness. As a result, the course of ongoing and future similar operations would be hampered, ultimately defeating their purpose to counter and prevent cross-border crime and unauthorized border crossings » - in the sense of Article 4(1)(a) first indent of Regulation (EC) 1049/2001.

“The disclosure () would undermine the protection of the public interest as regards public security within the meaning of Article 4(1) (a) first indent of Regulation (EC) 1049/2001.

disclosure would jeopardize the implementation of ongoing and future operations, and thus facilitate irregular migration, trafficking in human beings and terrorism as the effectiveness of law enforcement measures would be significantly reduced.” - in the sense of Article 4(1)(a) first indent of Regulation (EC) 1049/2001.

A partial release of the documents was also denied, as “their redaction would be disproportionate in relation to the parts that are eligible for disclosure, simultaneously undermining the principle of sound administration. More specifically, the administrative

burden necessary to identify and redact the releasable elements would be disproportionate to the interest in the disclosure exercise itself”.

Grounds of Objection :

I consider that Frontex’s refusal to provide access to the documents required is unlawful for the following reasons :

Ground 1. Frontex’s reliance upon «public security» is insufficiently particularized and inconsistent with case law of the CJEU.

In its response letter, Frontex argues that disclosing information regarding the technical equipment would “open way for abuse, as numbers, types and specifications of equipment used are indicative of similar equipment used for succeeding years. Releasing such information would thus benefit criminal networks, enabling them to change their modus operandi and, consequently, result in hampering the course of ongoing and future operations of a similar nature.”

Furthermore, the disclosure of “information regarding the numbers of officers deployed in the operational area” () [would] be tantamount to disclosing the weaknesses and strengths of operations and pose a risk to their security.”

Finally, disclosing information “related to reporting tools and methods used by law enforcement officials used to conduct border control tasks and counter criminal activities [] would jeopardize the implementation of ongoing and future operations, and thus facilitate irregular migration, trafficking in human beings and terrorism as the effectiveness of law enforcement measures would be significantly reduced.”

There is no alleged threat to public security resulting from the disclosure of the documents.

First, it is unclear and not defined what “reporting tools and methods” Frontex refers to.

Secondly and in any event, Frontex does not prove how the disclosure of the information “regarding the technical deployment”, “regarding the numbers of officers deployed” and “related to reporting tools and methods” would concretely jeopardize future operations. Instead, Frontex only mentions this possibility without providing concrete arguments.

Third, according current rulings of the CJEU, Frontex is required to explain how the alleged risk to public security is “foreseeable and not purely hypothetical”. In none of the three requests Frontex proved these requirements to be fulfilled.

Ground 2. Frontex’s refusal amounts a blanket refusal - that is illegal.

In total, Frontex identified 73 documents and raw data linked to the request of the ICC Daily Report, the JCB Minutes, the Daily Reporting Package, internal communication, communication with Libyan, Italian and Maltese authorities and the footage.

Of course, it is given that these documents have different degree of security sensitivity. Nevertheless, Frontex knowingly denied access to any of the documents and thus, exercised a “blanket refusal” that is, according to the CJEU, unlawful.

The CJEU’s ruling states that disclosure of information must be examined on a case-by-case basis considering that (1) there is no general presumption of non-disclosure regarding documents; and (2) the mere fact that a document is related to a sensitive area of EU work does not make the documents sensitive per se. A blanket refusal of an entire category of documents is unlawful and contravenes the principle of “widest possible access” that is enshrined in Regulation 1049/2001.

Notwithstanding, Frontex did a blanket refusal in denying access to 73 documents and raw data without analyzing on a case-by-case basis whether these documents would actually be sensitive enough that the access to the whole documents should be denied.

Ground 3. Frontex is bound by EU law to publish comprehensive information regarding its ongoing operations.

Article 114 (2) of Regulation 2019/1896 provides: “The Agency [Frontex] shall communicate on matters falling within the scope of its tasks on its own initiative. It shall make public () comprehensive information on past and current joint operations (). It shall do so without revealing operational information which, if made public, would jeopardise attainment of the objectives of operations.”

If some operational information - under certain proved circumstances - cannot be published doesn't entitle Frontex to refuse any access to operational information linked to ongoing operations. Instead, Frontex is bound to communicate about them and only under some proved exceptions and in a limited scope, renounce to reveal operational information.

Ground 4. Frontex's failure to provide partial disclosure is unlawful Article 4 (6) of Regulation 1049/2001 provides: “If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.”

In the line of the principle of widest possible access, Frontex should have considered a partial access to information.

However, Frontex alleged that partial access cannot be allowed “as their redaction would be disproportional in relation to the parts that are eligible for disclosure, simultaneously undermining the principle of sound administration.”

Following the article 4(6) of Regulation 1049/2001, Frontex should not operate any “proportionality” “in relation to the parts that are eligible for disclosure” to consider the partial release of documents. Frontex wrongly applied the law and thus, wrongfully denied a partial release of the documents.

Ground 5. Frontex omitted the existence of a public interest in the disclosure of the requested documents.

In order to deny the release of the requested documents, Frontex argued that “the administrative burden necessary to identify and redact the releasable elements would be disproportionate to the interest in the disclosure exercise itself”.

In fact, this statement is wrong. The documents requested are likely to contain information on Frontex's involvement in pullbacks by the so-called Libyan Coast Guard to Libya and hence, human rights violations. European politicians have called several times for the Frontex Executive Director to resign over allegations of fundamental rights violations. One cannot argue that the disclosure of the documents is not of public interest: there is a manifest public interest to publish the requested documents and inform about any complicity of an European agency in the commission of human rights violations.

For these reasons, I consider that Frontex is legally obliged to provide me with the requested documents.

Your Arguments under Ground 1

In regard to your argument that “Frontex's reliance upon «public security» is insufficiently particularized”, Frontex has examined all documents individually and found that the number of elements falling under those exceptions, as explained in our decision of 1 December 2021, had to lead to a total refusing the access to the requested documents. The particularization thus formed the basis for the decision in reply to your initial application.

I cannot support your claim it “is unclear and not defined what “reporting tools and methods””. Frontex refers to as the reply of 1 December 2021 already contained ample information to allow you “to

understand the reasons why access to the information requested”² had to be refused. Further to what has been explained in Frontex’ reply to your initial application, the information contained in the documents would provide an insight into reporting tools used by law enforcement officials to combat cross-border crime including human smuggling and trafficking in human beings. This insight would enable criminals to understand the reporting patterns, routines and tools used to transmit information regarding such activities. Through this knowledge, criminals which would have the possibility e.g. by disrupting the flow of information on criminal activities or intercepting information so transmitted to avoid border controls and other law enforcement actions or to otherwise exploit this knowledge to the detriment of public security.

Information in regard to reporting tools and mechanisms would also enable the identification of the reporting entities and to establish their movement patterns and mechanisms. Such information, which in this regard is also linked to “technical equipment deployed in the operational area” as explained on 1 December 2021, by itself - but especially in combination with other sources - would allow criminals to adapt their modus operandi accordingly in order to circumvent border surveillance in current and future operations or to inflict harm on officials and assets.³ Further information cannot be provided without jeopardising that the interests, which the exception under Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 is specifically designed to protect, are undermined by de facto revealing the contents of the documents and thereby depriving the exception of its very purpose.⁴

In regard to your argument

Secondly and in any event, Frontex does not prove how the disclosure of the information “regarding the technical deployment”, “regarding the numbers of officers deployed” and “related to reporting tools and methods”

and the alleged lack of foreseeability of the risk, again, the information provided to you in reply to your initial application and elaborated herein regarding reporting tools and mechanisms holds true in addition to technical equipment deployed - thus not “regarding the technical deployment” - also concerning information regarding the number and profiles of officers deployed in the operational area.

Furthermore, since Frontex operations entail a certain degree of continuity, which can be easily inferred e.g. from open-source information, revealing the requested information would with ascertainable likelihood affect the effectivity of ongoing and future operations in the same area.

Finally, Frontex, when considering a refusal to grant access to a document whose disclosure would undermine the protection of the public interest as regards public security as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001, enjoys a wide discretion for the purpose of determining⁵ whether such disclosure to the public would undermine the interests protected by that provision.

² Judgment of 27 November 2019 in case T-31/18, Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX), para. 110.

³ Judgment of 27 November 2019 in case T-31/18, Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX), para. 73.

⁴ Judgment of 7 February 2018 in case T-851/16, Access Info Europe v European Commission, para. 122.

⁵ Judgment of 27 November 2019 in case T-31/18, Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX), para 65.

The reasons provided on 1 December 2021 and further elaborated in here in regard to these interests clearly show that there is a foreseeable, and not merely hypothetical, risk to public security in regard to them. It is thus that justifies invoking these exceptions in regard to Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 within the wide discretion which is accorded to Frontex for the application of that exception.⁶

Your Arguments under Ground 2

In regard to your arguments under Ground 2, reference is to be made again to the reply of 1 December 2021 and to the considerations under Ground 1. Like in all applications requiring an individual assessment of each document and piece of information contained therein, all 73 documents and the raw data underwent such examination and were deemed non-releasable.

Your Arguments under Ground 3

Please note that the reconsideration under Article 7(2) of Regulation (EC) No 1049/2001 is limited to the scope of Article 7(1) of Regulation (EC) No 1049/2001. Furthermore, you did not bring forward any arguments as stated in Ground 3 in your initial application.

While there thus exists no legal obligation to consider this point, it might be nevertheless helpful to explain the overall legal context.

Frontex is under a legal obligation to make public comprehensive information regarding its ongoing operations and Article 114 (2) of Regulation 2019/1896⁷ provides:

The Agency [Frontex] shall communicate on matters falling within the scope of its tasks on its own initiative. It shall make public (...) comprehensive information on past and current joint operations (...). It shall do so without revealing operational information which, if made public, would jeopardise attainment of the objectives of operations.

Yet, this proactive communication obligation, stemming from the currently in-force Regulation (EC) 2019/18961, has to be distinguished from the obligations under Regulation (EC) No 1049/2001 and, as stated above, is not subject to a review under Article 7(2) of the latter. I further recall the judgment of 27 November 2019 in Case T-31/18, in which the Court held in regard to Article 74(2) of the preceding Regulation, which to a large extent has the same wording and obligation as Article 114(2) of Regulation (EC) 2019/1896:

In that regard, it must be observed that, although Frontex is required under Article 8(3) and Article 74(2) of Regulation 2016/1624 to communicate with the public on matters falling within the scope

⁶ Cf. Judgment of the General Court of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEx)*, para 74.

⁷ Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

*of its tasks, it cannot reveal operational information which would jeopardise attainment of the objective of those operations.*⁸

Similar to Article 74(2) of the predecessor Regulation, communications initiated on its own initiative under Article 114(2) of Regulation (EU) 2019/1896 are not subject to the framework governing public access to documents as laid down in Regulation (EC) No 1049/2001 and any publications under Article 114(2) of Regulation (EU) 2019/1896 would not be “setting a precedent that would require [Frontex] to communicate information which it believes puts public security at risk.”⁹ Albeit not recognizing a legal obligation, Frontex can thus not agree with your arguments based on this different legal framework.

Your Arguments under Grounds 4 and 5

Concerning your Grounds 4 and 5, which will be addressed together, reference is again be made to the information contained under Ground 1 supplementing Frontex reply of 1 December 2021.

First, addressing your arguments in Ground 5 that

In order to deny the release of the requested documents, Frontex argued that “the administrative burden necessary to identify and redact the releasable elements would be disproportionate to the interest in the disclosure exercise itself”.

In fact, this statement is wrong. The documents requested are likely to contain information on Frontex’s involvement in pullbacks by the so-called Libyan Coast Guard to Libya and hence, human rights violations. European politicians have called several times for the Frontex Executive Director to resign over allegations of fundamental rights violations. One cannot argue that the disclosure of the documents is not of public interest: there is a manifest public interest to publish the requested documents and inform about any complicity of an European agency in the commission of human rights violations.

please note that the vast majority of the elements in the documents you apply for fall under Article 4(1)(a) and (b) of Regulation (EC) No 1049/2001, which are not subject to an overriding public interest test. Only in regard to the one document identified under point 3 of your initial application, in addition an exception under Article 4(3) of Regulation (EC) No 1049/2001 had to be invoked, which is subject to such test. For this, it has to be emphasized that Frontex does not act in a legislative context and that therefore a high threshold to prove the existence of an overriding public interest for those elements of the one document, that indeed fall under Article 4(3) of Regulation (EC) No 1049/2001 exists.¹⁰ This has to be proven by the applicant.¹¹ Your statement that “[t]he documents requested are likely to contain information” and your general reference to “there is a manifest public interest to publish the requested

⁸ Judgment of 27 November 2019 in case T-31/18, Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEx), para. 91

⁹ Judgment of 27 November 2019 in case T-31/18, Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEx), para. 93.

¹⁰ Judgment of 14 November 2013 in case C-514/11 P and C-605/11 P, LPN and Finland v Commission, para. 93.

¹¹ Judgment of 2 October 2014 in case C-127/13, Strack v Commission, para. 128.

documents and inform about any complicity of an European agency in the commission of human rights violations.” Are however not sufficient to meet this requirement.¹²

Coming now to your Grounds 4 and 5 of and the alleged wrong interpretation of Article 4(6) of Regulation (EC) No 1049/2001. A partial release of documents under Article 4(6) of Regulation (EC) No 1049/2001 is to be examined separately¹³ from the constituting elements of Article 4(1)(a) first indent, (b) and (3) of Regulation (EC) No 1049/2001, which Frontex had to apply. Also, the independent examination under Article 4(6) of Regulation (EC) No 1049/2001, subsequent to determination of the applicability of these exceptions, is not subject to an overriding public interest test. Further to the independent examination under Article 4(6) of Regulation (EC) No 1049/2001, the number of elements in the documents falling under Article 4(1)(a) first indent, (b) and (3) of Regulation (EC) No 1049/2001 led Frontex already on 1 December 2021 to the conclusion that a deviation from the principle laid down in Article 4(6) of Regulation (EC) No 1049/2001 was necessary. In doing so, Frontex rightly balanced all interests and concluded “the administrative burden of blanking out the parts that may not be [disclosed,] proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required”.¹⁴ This consideration is combined with the fact that a “partial access would be meaningless because the parts of the documents that could be disclosed would be of no use”¹⁵.

Therefore, and as already stated in our reply of 1 December 2021, no partial access within the meaning of Article 4(6) of Regulation (EC) No 1049/2001 is possible.

Consequently, Frontex upholds the Decision of 1 December 2021.

In accordance with Article 8(1) of Regulation (EC) No 1049/2001, you are entitled to institute court proceedings and/or make a complaint to the European Ombudsman under the relevant provisions of the Treaty on the Functioning of the European Union.

Yours sincerely,

[decision signed electronically]

Head of the Transparency Office

¹² Judgment of 9 October 2018 in case T-634/17, *Pint v Commission*, para. 56.

¹³ Judgment of 13 January 2011 in case T-362/08, *IFAW Internationaler Tierschutz-Fonds v Commission*, para. 148.

¹⁴ Applicable also to Regulation (EC) No 1049/2001: Judgment of 7 February 2002 in case T-211/00, *Kuijjer v Council*, para. 57.

¹⁵ Judgment of 12 July 2001 in case T-204/99, *Olli Matilla v Council*, para. 69