

Decision in case 2067/2020/MIG on the European Border and Coast Guard Agency's (Frontex) handling of multiple requests for public access to documents made by a single applicant

Decision

Case 2067/2020/MIG - Opened on 22/01/2021 - Decision on 16/06/2021 - Institution concerned European Border and Coast Guard Agency (Solution achieved) |

The case concerned how the European Border and Coast Guard Agency (Frontex) handled multiple requests for public access to documents made by a single applicant. Frontex considered that the scope of the complainant's multiple requests, which had been made in close temporal proximity, was too extensive to be processed in parallel. It therefore proposed, as a fair solution, to put them in a queue and process them in turn. The complainant did not agree to this approach.

The Ombudsman noted that it was not clear how extensive the scope of the complainant's requests was and how much work it would entail to assess whether the documents concerned can be released. She proposed that Frontex should immediately recommence processing the complainant's access requests, beginning with the most urgent one, as indicated by the complainant during the inquiry. She also proposed that Frontex provide the complainant with a list of all documents at issue to enable him to determine the priority of each request.

Frontex accepted the Ombudsman's proposal and provided the complainant with a reply to the indicated access request shortly thereafter.

The Ombudsman welcomed Frontex's response to her proposal for a solution and closed the case, calling on Frontex to make every effort to ensure that the complainant's access requests are now dealt with quickly. The Ombudsman also encourages Frontex, in an effort to avoid delays, to improve its communication with applicants when attempting to find a fair solution on how to process extensive requests.

Background to the complaint

1. The complainant is a journalist investigating how the European Border and Coast Guard Agency (Frontex) and Member States guard the European external border. [1] In the context of



his work, the complainant has made eight requests [2] for public access to documents to Frontex in the period from September to December 2020.

2. After submitting his second access request on 26 October 2020, the complainant was informed by Frontex that his first request was being handled and that this second request would be considered only after the conclusion of the first request. Frontex then registered and started processing the complainant's second access request on 13 November 2020, after it had replied to his first access request.

3. On 29 November 2020, the complainant made another five requests for public access to Frontex. In light of the complainant's previous request, which was still pending, and the global scope of his new access requests, Frontex proposed to put these requests in a queue and to process them consecutively, after the conclusion of the pending request.

4. Dissatisfied with Frontex's refusal to deal with his multiple requests for public access to documents in parallel, the complainant turned to the Ombudsman.

5. One day later, on 4 December 2020, Frontex replied to the complainant's second access request made in October 2020. Frontex then continued to engage with the complainant in the attempt to obtain his consent to the proposed approach to apply a "queuing mechanism" to his remaining access requests. However, the complainant did not accept this approach but narrowed down the scope of one of his access requests instead. Frontex and the complainant could subsequently not find an agreement and stopped communicating.

6. On 7 December 2020, the complainant made another request for public access to documents to Frontex, which Frontex also proposed to put in a queue.

The inquiry

7. The Ombudsman opened an inquiry into Frontex's handling of the complainant's requests for public access to documents.

8. In the course of the inquiry, the Ombudsman asked Frontex to reply to a number of questions, to obtain a better understanding of how Frontex deals with multiple access to documents requests made by a single applicant. [3] She subsequently received Frontex's reply [4] and the complainant's comments in response to Frontex's reply.

Arguments presented to the Ombudsman

By Frontex

9. Frontex explained that, in 2020, it had received a significantly high number of access requests (266) and that, during the period in which the complainant had made the access requests at issue, about 60 considerably complex access requests from other applicants were pending simultaneously at any given time. Frontex added that of the three staff members



dealing with such requests, one had been absent for parts of the period in question.

10. Frontex argued that the overall scope of the access requests made by the complainant was too wide to be processed simultaneously. Frontex had therefore attempted to find a commonly acceptable fair solution, suggesting that the requests be put in a queue and processed in turn. However, the complainant had not agreed to this approach. While he narrowed down the scope of one of his requests, he did not propose a solution concerning his remaining access requests.

11. Frontex said that, generally, its approach to put an applicant's multiple access requests made in close temporal proximity in a queue and to deal with them consecutively was based on the EU's rules on public access to documents [5] that allow institutions to seek a fair solution if the scope of an access request is particularly wide. Frontex also referred to case law of the EU Court and to a decision taken by the Ombudsman in a similar case. [6]

12. Frontex stated that the application of a "queuing mechanism" was just one possibility of a fair solution. The overarching aim of this approach was to ensure an equal treatment of all applicants, taking into account the scope and administrative workload of an applicant's access request on the one hand and the pending access requests of other applicants on the other hand. If the queuing mechanism is applied, Frontex always invites the applicant concerned to indicate the preferred order in which the requests should be processed, which they can change at any time.

13. Finally, Frontex said that, when applying the queuing mechanism, it constantly reassesses the situation, and starts dealing with requests that have been put in a queue as soon as possible.

By the complainant

14. The complainant said that he would like to receive replies to his access requests in a timely manner. The fact that his multiple requests to Frontex had been extremely delayed was jeopardising his work as a journalist.

15. The complainant considered that the number of public access requests that Frontex receives annually seemed comparatively low and that, in any event, Frontex could employ more staff to handle the increasing number of requests.

16. The complainant also contended that Frontex's approach to decide whether to put an access request in a queue seemed arbitrary, since there were no (written) rules in this regard, and no supervision or possibility to appeal existed.

17. The complainant considered that Frontex had not genuinely tried to find a commonly acceptable fair solution as it had offered only a single option, namely to put his access requests in a queue.

18. The complainant also argued that Frontex had never mentioned the number of documents concerned or that they were too numerous or too broad in scope. Therefore, he said, it seemed as if Frontex had never looked into the individual requests but had decided that it could not deal



with them simultaneously regardless of their scope. The complainant was concerned that Frontex's assessment had not been objective.

The Ombudsman's proposal for a solution

19. The Ombudsman noted that it was not clear how many documents the complainant's access requests concern, how large each document is, and how much work it would entail to assess whether they can be released. Nor was it clear what Frontex's capacities were at any given time. However, it appeared that the complainant's access requests concerned a significant number of documents. Given that they were made in close temporal proximity, the Ombudsman took the view that it was reasonable to consider them as one access request concerning a very large number of documents [7] .

20. The Ombudsman thus welcomed the fact that Frontex, as it considered that it could not deal with the complainant's access request within the prescribed time limits, had attempted to engage with the complainant to find a fair solution. However, she noted that the communication between Frontex and the complainant had broken down and that Frontex had therefore put on hold the six remaining access requests that the complainant had made.

21. The Ombudsman stressed that requests for public access need to be dealt with promptly. She therefore sought a rapid solution to this case. To this end, she made the following proposal for a solution:

Frontex should immediately recommence processing the complainant's six access requests, beginning with the request the complainant had indicated as the most urgent in the course of the inquiry.

In addition, Frontex should, in order to enable the complainant to determine the priority of each request, provide the complainant with a list of all documents at issue in his six access requests, detailing the title, date, number of pages and reference of each document. [8]

22. Frontex welcomed the Ombudsman's proposal for a solution. [9] It provided a list of the documents concerned, which the Ombudsman shared with the complainant, and recommenced processing the complainant's access requests, beginning with the most urgent one to which it replied shortly thereafter.

23. Frontex also promised that it would continuously reassess its workload and its capacities to speed up the processing of the complainant's remaining access requests wherever possible. It stressed that the complainant was free to re-determine his preferred order of requests at any time.

24. The complainant also welcomed the solution proposed by the Ombudsman although he signalled certain concerns in relation to what he saw as delays incurred.



The Ombudsman's assessment after the proposal for a solution

25. The EU rules on public access to documents set out that, if an access request relates *“to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.”* [10]

26. According to settled case law, this right to seek a fair solution *“reflects the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to reconcile the interests of the applicant with those of good administration”*. [11] An institution must therefore *“retain the right, in particular [in] cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration.”* [12] Thus, *“an institution may, in exceptional circumstances, refuse access to certain documents on the ground that the workload relating to their disclosure would be disproportionate (...)”* [13] In other words, exceptionally, an institution may refuse access to documents on the basis that the processing of a request would entail an excessive administrative burden.

27. In light of this, as previously held by the Ombudsman, [14] it can, in principle, be reasonable for an institution to consider a single applicant's multiple access requests, each relating to several documents, as one request relating to a very large number of documents, if the requests are being made in close temporal proximity. Otherwise, applicants could easily circumvent the rules that provide for exceptions in cases where access to a very long document or to a very large number of documents is requested.

28. According to the list of documents provided by Frontex, the combined scope of the complainant's six pending access requests concerned more than 2 500 documents (around 1 900 of which had been previously disclosed to other applicants). Given this volume, the Ombudsman's finds that it was reasonable for Frontex to consider the complainant's multiple requests as one request relating to a very large number of documents.

29. In addition, if, in light of such circumstances, an institution considers that it cannot deal with the respective access request within the prescribed time limit, the application of a queuing mechanism can be considered a viable instrument to ensure that as many applicants as possible can exercise their right of public access to documents and all applicants are treated fairly and equally.

30. However, the application of such a queuing mechanism must comply with certain principles.

31. A queuing mechanism should not be applied automatically to every case of multiple requests made by the same applicant in close temporal proximity. Rather, the institution concerned should apply such a mechanism in exceptional circumstances only, for example,



when otherwise the high workload due to access requests would jeopardise its core business or its ability to deal with the access requests of other applicants.

32. Nor should an institution apply such a mechanism in a discriminatory manner. Rather, a queuing mechanism should be applied to all applicants equally, irrespective of who they are or why they seek access.

33. In addition, the institution concerned should give reasons in each case as to why it considers the application of a queuing mechanism necessary and appropriate and it should properly inform applicants about how it will deal with their access requests, if put in a queue. The institution should also allow applicants to (re-)determine in which order their multiple access requests are processed and inform them accordingly.

34. The institution concerned should then continuously reassess its workload with a view to processing each request put in a queue as swiftly as possible.

35. In case applicants do not agree to the queuing of their access requests, the institution should also inform them about the possibility to propose an alternative solution.

36. Applicants for public access to documents are often not familiar with the applicable rules and how they are interpreted by the EU court. The Ombudsman therefore considers that, where an institution takes an approach that is exceptional, it is of utmost importance to ensure that the applicant understands why it is taking such an approach and what this entails. Otherwise there is a risk that they will not accept the solution proposed by the institution. For their part, applicants in such cases should also engage with an institution in a constructive way.

37. The Ombudsman welcomes the positive response to her proposal for a solution. Given that a solution with which both, Frontex and the complainant, seem satisfied has now been found, she considers that the complaint has been resolved. However, the Ombudsman regrets that her intervention was required before a solution could be agreed on which led to a significant delay. She therefore calls on Frontex to make every effort to ensure that the complainant's access requests are now dealt with quickly. To avoid similar situations in future, the Ombudsman also encourages Frontex to improve its communication with applicants where it invokes Article 6(3) of Regulation 1049/2001, with a view to finding a fair solution swiftly.

38. Finally, the Ombudsman notes that, in the context of a recent inquiry, [15] Frontex committed to update its public 'register of documents' and to publish proactively documents it discloses in reply to requests for public access. She considers this to be an important step towards greater transparency that will also facilitate Frontex's processing of requests for public access to documents.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusions:



Frontex has accepted the Ombudsman's proposal for a solution by recommencing processing the complainant's access requests and by providing a list of the documents at issue.

The complainant and Frontex will be informed of this decision .

Rosita Hickey Director of Inquiries

Strasbourg, 16/06/2021

[1] See, for example, article dated 23 October 2020:

<https://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign> [Link].

[2] Under Regulation 1049/2001 on public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> [Link], 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> [Link].

[3] The full text of the Ombudsman's letter to Frontex is available at: <https://europa.eu/!fH83hf> [Link].

[4] The full text of Frontex's reply to the Ombudsman's letter is available at: <https://europa.eu/!rh86ug> [Link].

[5] Namely on Article 15(1) and Article 6(3) of Regulation 1049/2001. Article 15(1) stipulates that "[t]he institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation." Article 6(3) stipulates that "[i]n the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution."

[6] In its correspondence with the complainant, Frontex had referred to EU case law on Article 6(3) of Regulation 1049/2001, for example to the judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, paragraph 26 et seq:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=158192&pageIndex=0&doclang=EN&mode=lst&d> [Link]. In its reply to the Ombudsman, Frontex also referred to the Ombudsman's decision in case 1608/2017/MIG on the European Medicines Agency's handling of multiple requests for public access to documents made by a single applicant and its extension of deadlines, available



at: <https://europa.eu/!qw38dH> [Link].

[7] In accordance with Article 6(3) of Regulation 1049/2001.

[8] The full text of the Ombudsman's proposal for a solution is available at:
<https://www.ombudsman.europa.eu/en/solution/en/143116> [Link].

[9] The full text of Frontex's reply to the Ombudsman's proposal for a solution is available at:

<https://www.ombudsman.europa.eu/en/correspondence/en/143117> [Link].

[10] Article 6(3) of Regulation 1049/2001.

[11] See judgments of the Court of First Instance of 13 April 2005, *VKI v Commission*, T-2/03, paragraph 101, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=60314&pageIndex=0&doclang=EN&mode=lst&dir>
[Link], and of 10 September 2008, *Williams v Commission*, T-42/05, paragraphs 85f, available
at:
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=67848&pageIndex=0&doclang=EN&mode=lst&dir>
[Link].

[12] *VKI*, para 102.

[13] Judgment of the Court of 2 October 2014, *Strack v Commission*, C-127/13 P, para 28 (see footnote 6).

[14] See the Ombudsman's decision in case 1608/2017/MIG, see footnote 6.

[15] Inquiry in case 2273/2019/MIG on the European Border and Coast Guard Agency's
(Frontex) public

register of documents, case page available at: <https://europa.eu/!BW96mQ> [Link].