

Decision on how the European Border and Coast Guard Agency (Frontex) dealt with a request for public access to correspondence with journalists (case 1939/2020/ABZ)

Decision

Case 1939/2020/ABZ - Opened on 18/12/2020 - Decision on 14/07/2021 - Institution concerned European Border and Coast Guard Agency (Solution achieved) |

The case concerned a request for public access to e-mails sent by the European Border and Coast Guard Agency (Frontex) to journalists, asking them to make corrections in their reporting on Frontex's work. Frontex had informed the complainant that it did not hold the documents requested. Frontex also refused to process the complainant's request that it review its decision, on the grounds that it had been made outside the statutory deadline.

The Ombudsman proposed to Frontex as a solution that it process, as a new request, the complainant's request for review. While Frontex agreed to the solution proposal, the complainant - in the meantime - submitted a new request for access to documents with a broader scope.

Given that Frontex is now processing the complainant's request, the Ombudsman closed the inquiry. To help avoid this type of situation in the future, the Ombudsman also encouraged Frontex to improve its communication with applicants who seek access to documents, by asking them to clarify their requests, where necessary, and assisting them in doing so.

Background to the complaint

1. The complainant had learned that at least one journalist had received an email [1] from the European Border and Coast Agency (Frontex), in which it asked him to make corrections in his reporting concerning Frontex's work. Therefore, in January 2020, the complainant submitted [2] a request for public access to documents [3] to Frontex, asking it to provide:

"A list of e-mails that were sent from the e-mail account press@frontex.europa.eu to journalists and in which Frontex criticised their reporting or asked them to make corrections, as well as all internal documents showing how these e-mails were created, designed, sent and evaluated."



2. In January 2020, Frontex sent an e-mail in which it indicated that it had logged the complainant's request via the online portal it has in place for access to document requests. It provided him with a link and login data to access this. On 6 February 2020, Frontex replied to the complainant's request through the portal.

3. The complainant replied, asking Frontex to provide a reply by e-mail instead of uploading it to the portal. He also informed Frontex that the link it had provided was not accessible. Frontex replied that it had already sent its reply to the complainant's request via the portal.

4. In October 2020, the complainant asked Frontex by e-mail for an update on his request. Frontex resent its initial reply in the portal and provided the complainant with a link and login data. The complainant accessed the portal and consulted the reply, which stated that Frontex did not possess any document falling within the scope of the complainant's request.

5. On 29 October 2020, the complainant asked Frontex to review its decision (by making what is known as a 'confirmatory application'). He specified that his request concerned *all e-mails* sent to journalists who had expressed critical views on Frontex's work. He argued that at least one such e-mail was publicly available and asked Frontex to search its records for other such emails.

6. Frontex informed the complainant that it would not process his confirmatory application, as it had not been made within 15 working days of its initial decision on his request. [4]

7. Dissatisfied with Frontex's reply, the complainant turned to the Ombudsman in November 2020.

Inquiry

8. The Ombudsman opened an inquiry and held a meeting with Frontex representatives.

9. The Ombudsman's inquiry examined whether the way in which Frontex notified the complainant about its initial reply was adequate, and whether it holds documents falling within the scope of the complainant's request. It also assessed how Frontex ensures that it identifies all documents relevant to a request for public access to documents.

10. The Ombudsman is conducting a separate inquiry into whether Frontex should reply by e-mail, rather than via the portal, if so requested. [5] Thus, this aspect of the complaint was not a part of this inquiry.

Scope of the access request

11. In the course of the inquiry, the Ombudsman examined how Frontex ensures that it identifies all documents relevant to a request for public access.



12. Frontex stated that it had put in place an improved search tool for documents following the Ombudsman's proposal for a solution in case 1616/2016/MDC [6] . It confirmed that its staff dealing with access to documents requests are thoroughly trained on the scope and application of the rules on public access to documents.

13. Concerning the complainant's access request, Frontex explained that it did not have ' *a list of e-mails* ' , as requested by the complainant. However, it confirmed that it does hold copies of e-mails related to the subject matter of the complainant's request.

14. Based on the complainant's confirmatory application, in which he clarified that his request concerned " *all correspondence (...) sent to journalists (...)* " , it became clear that the complainant was seeking access to the e-mails, rather than a list of them.

The Ombudsman's proposal for a solution

15. The Ombudsman made a solution proposal [7] , asking Frontex to register the complainant's confirmatory application as a new request for access, and to process it according to the EU's rules on public access to documents.

16. Frontex accepted the solution proposed by the Ombudsman and agreed to process the complainant's request for public access to the e-mails in question. [8] As the complainant had, in the meantime, submitted a new access request, Frontex also sought to clarify the scope of the complainant's request.

17. The complainant welcomed the Ombudsman's solution proposal and clarified with Frontex the scope of his new access request.

The Ombudsman's assessment after the proposal for a solution

18. The Ombudsman welcomes the fact that Frontex accepted her proposal for a solution, and has now started processing the complainant's access request.

19. She takes this opportunity to recall that the EU's rules on public access to documents [9] state that, if a request for access is not sufficiently precise, the institution should ask the applicant to clarify the request and should assist the applicant in doing so. According to EU case-law [10] , an institution has a duty to indicate the documents in its possession that are similar to those referred to in the access request or which are likely to contain some or all of the information sought by the applicant.

20. In light of the above, the Ombudsman regrets that her intervention was needed before a solution could be found. To help avoid this in the future, the Ombudsman encourages Frontex to



improve how it communicates with individuals seeking public access to its documents, by asking them to clarify their requests and assisting them in doing so.

Conclusion

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

Frontex has accepted the Ombudsman's proposal for a solution, and started to process the complainant's access request.

The complainant and Frontex will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 14/07/2021

[1] A copy of that e-mail can be found here:

<https://correctiv.org/aktuelles/2019/08/15/frontex-hat-uns-geschrieben-wir-haben-geantwortet/> [Link].

[2] The complainant's access request was submitted via *FragDenStaat.de* , a civil society platform for public access to documents. The request can be found at:

<https://fragdenstaat.de/anfrage/e-mails-der-pressestelle-von-frontex/> [Link].

[3] Under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents: <http://data.europa.eu/eli/reg/2001/1049/oj> [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].

[4] Article 7(2) of Regulation (EC) 1049/2001.

[5] See joint cases 1261/2020/PB and 1361/2020/PB: <https://europa.eu/!TH36DK> [Link]

[6] Ombudsman's proposal for a solution in case 1616/2016/MDC:

<https://www.ombudsman.europa.eu/en/solution/en/86210> [Link]

[7] The full text of the Ombudsman's proposal for a solution is available at:

<https://www.ombudsman.europa.eu/en/solution/en/144220> [Link]

[8] 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/144221> [Link]

[9] In accordance with Article 6(2) of Regulation (EC) 1049/2001.

[10] Judgment of the General Court of 26 October 2011, T-436/09, *Dufour v ECB*, paragraphs 30-31:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=111823&pageIndex=0&doclang=EN&mode=lst&d>
[Link].