



## **Proposal of the European Ombudsman for a solution in case 1616/2016/MDC (Confidential) on the alleged failure by Frontex to make public Serious Incident Reports concerning Frontex or joint operations in Bulgaria**

Solution - 16/12/2016

**Case 1616/2016/MDC - Opened on 16/12/2016 - Decision on 17/11/2017 - Institution concerned** European Border and Coast Guard Agency (Frontex) ( Solution achieved ) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

### **The background to the complaint**

- 1.** The complainant is a journalist who has written about EU border issues, and in particular the work of the European Border and Coast Guard Agency (Frontex) for some years.
- 2.** On 27 September 2016, he requested Frontex to give him public access to all Serious Incident Reports relating to Frontex operations or joint operations that took place in Bulgaria between 1 January 2015 and 30 September 2016. A Serious Incident is defined by Frontex as an event or occurrence, whether it be natural or caused by human action, which may affect, or be relevant to a Frontex mission or its image, or the safety and security of the participants on the mission. It includes violations of Fundamental Rights, EU law, international laws related to access to international protection and the Frontex Code of Conduct. Serious Incident Reports are collected and analysed by a Frontex Situation Centre.
- 3.** The Public Access to Documents Office of Frontex replied to the complainant on 18 October 2016 by granting him partial access to 21 Serious Incident Reports relating to a Frontex joint operation entitled 'Flexible Operational Activities'.
- 4.** The complainant then informed Frontex that Frontex had more than one joint operation in Bulgaria in 2015 and 2016. He thus asked whether there were more Serious Incident Reports, for instance relating to joint operation 'Poseidon Land'.
- 5.** The Public Access to Documents Office of Frontex replied on 24 October 2016. It stated that two Serious Incident Reports had been left out unintentionally. It granted him partial access to these reports on 28 October 2016.
- 6.** On 24 October 2016, the complainant informed Frontex that a Frontex press officer had told him of three instances of summary deportations of refugees from Bulgaria and four



instances of theft from refugees by Bulgarian police in 2015. He asked why he had not been given any Serious Incident Reports for these events.

**7.** On 26 October 2016, Frontex replied that it had found a few more Serious Incident Reports and that he would receive them some days later.

**8.** On 28 October 2016, the Public Access to Documents Office granted the complainant partial access to seven more Serious Incident Reports (including the two mentioned in paragraph 5 above) which dealt with fundamental rights violations and/or breaches of the Frontex Code of Conduct.

**9.** On that same day, the complainant sought a review of the way his request had been handled by submitting a so-called confirmatory application. He asked Frontex to justify all the redactions made in the Serious Incident Reports, many of which concern debriefing interviews with migrants. He argued that the contents of a debriefing interview do not necessarily need to be censored out of a Serious Incident Report. He added that on other occasions, Frontex had not redacted such interviews.

**10.** The complainant lodged his complaint with the Ombudsman soon after making his confirmatory application, on 2 November 2016.

**11.** On 22 November 2016, Frontex replied to the confirmatory application. It confirmed its initial decision.

**12.** The Ombudsman makes the following observations as regards the redactions in the disclosed documents.

Redacted information - first set of documents (released on 17 October 2016)

**13.** The name of the 'reporting person' and of the person who last modified the Serious Incident Report was blanked out from each Serious Incident Report. Frontex stated that this was necessary to protect the privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data (see Article 4(1)(b) [2] of Regulation 1049/2001 [3]). 15 of the 21 Serious Incident Reports included in the first set of documents did not contain any other redactions (none of these 15 Serious Incident Reports related to human rights violations).

**14.** In the unnumbered Serious Incident Report dated **1 October 2015** (entitled 'Alleged violation of Fundamental Rights'), an interview with a migrant was redacted in its entirety on the basis of the need to protect the purpose of inspections, investigations and audits (see the third indent of Article 4(2) [4] of Regulation 1049/2001). Frontex justified the redaction by stating that "*the non-disclosed text contains details that allegedly constitute a violation of fundamental rights. The situation was communicated to the competent national authorities for further investigation. Disclosure of such information would undermine the purpose of national investigation procedures regarding this incident.*"



**15.** In Serious Incident Report **453** (entitled 'Misbehaviour of the Migration officer in detention centre of Elhovo'), an interview with a migrant was redacted in its entirety, again on the basis of the third indent of Article 4(2) of Regulation 1049/2001. Frontex stated that the non-disclosed text contained sensitive information regarding the alleged use of violence. When explaining the redactions, Frontex gave similar reasons to those justifying the redactions made to the Serious Incident Report dated 1 October 2015.

**16.** In Serious Incident Report **226** (entitled 'Alleged violation of fundamental rights - unprocessed return'), an interview with a migrant was partially redacted. One sentence was redacted, again on the basis of the third indent of Article 4(2) of Regulation 1049/2001. A few other sentences were redacted on the basis of the need to protect public security (see first indent of Article 4(1)(a) [5] of Regulation 1049/2001). Frontex stated that "*the non-disclosed text contains sensitive information, in particular regarding actors involved, migration routes and modus operandi of criminal networks related to irregular migration. Disclosure of such information would harm the performance of future intelligence and operational tasks taking place at the related area and would facilitate performance of illegal activities such as human trafficking and drug smuggling, therefore it would harm the public interest as regards public security.*"

**17.** Unnumbered Serious Incident Report dated **16 October 2015** (title blanked out) was partially redacted, again on the basis of the third indent of Article 4(2) of Regulation 1049/2001. Frontex stated that "*all the blanked out parts in this document contain details of an alleged shooting. The situation was communicated to the competent national authorities for further investigation. Disclosure of such information would undermine the purpose of national investigation procedures regarding this incident.*"

**18.** Serious Incident Report **437** was entitled 'Stolen portable tactile cameras'. A part of the report containing information about the "*number and installation of technical equipment deployed in the operational area*" was redacted to protect public security (see first indent of Article 4(1)(a) of Regulation 1049/2001). Frontex stated that "*disclosing such information would be tantamount to disclosing weaknesses and strengths of the operations and opening way for abuse. The result of this will only be to hamper the course of ongoing and future similar operations, ultimately obstructing their purpose to counter and prevent cross-border criminality as well as to prevent unauthorised border crossings.*" Moreover, the name of a Frontex Coordination Officer who was informed of the Serious Incident Report was blanked out on the basis of Article 4(1)(b) of Regulation 1049/2001.

**19.** Serious Incident Report **435** was entitled 'Car accident - 4 FX GOs involved'. The name of an officer was blanked out on the basis of Article 4(1)(b) of Regulation 1049/2001. Moreover, a part of the report containing information about "*the number and shifts of human resources deployed in the operational area*" were redacted on the basis of the first indent of Article 4(1)(a) of Regulation 1049/2001 and for the same reasons as those given in the context of the redaction made to Serious Incident Report 437.

Redacted information - second set of documents (released on 28 October 2016)

**20.** The second set of documents was composed of six Serious Incident Reports containing



allegations of human rights violations and one Serious Incident Report containing an allegation of a breach of the Frontex Code of Conduct. The latter Serious Incident Report (unnumbered Serious Incident Report dated **13 February 2015**, entitled 'Alleged violation of Frontex Code of Conduct') was fully disclosed. It included information provided by a migrant during an interview.

**21.** Out of the six Serious Incident Reports containing allegations of human rights violations, four interviews with migrants were redacted in their entirety on the basis of the need to protect public security. The Serious Incident Reports in question were: unnumbered Serious Incident Report dated **12 May 2015** [6] entitled 'Alleged violation of Fundamental Rights'; unnumbered Serious Incident Report dated **13 March 2015** entitled 'Alleged violation of Fundamental Rights'; Serious Incident Report **15**, entitled 'SIR with suspected violation of fundamental rights/international protection obligations - BGR police allegedly brought migrants back to TUR'; Serious Incident Report **361** entitled 'Information obtained during an interview about alleged violation of Fundamental Rights'.

**22.** Frontex gave the following (identical) reasons for the redactions made to these four Serious Incident Reports: "*The text removed contains the information provided by a migrant during a debriefing interview.*

*Debriefing interviews carried out during Frontex coordinated Joint Operations aim at enhancing operational actions of Frontex and Member States through increased awareness and also at supporting criminal investigations in Member States by collecting relevant information on routes, modus operandi and involvement of facilitators and traffickers of human beings.*

*The collection of information is conducted with the consent of the migrant being interviewed on a voluntary and anonymous basis, built on trust and confidentiality between the Debriefing Experts and the migrants. The disclosure of information provided in confidence will harm the confidentiality of the information provided in interviews in general. It may indeed lead to the possible identification of individual migrants by specific criminals who have been facilitating the travel from the country of origin to the embarkation points and the sea crossing. In addition this can create a perception that participation in debriefing interviews may put at risk the interviewee or their relatives. Ultimately, migrants will not be willing to take part in debriefing interviews resulting in poorer/less information available as a basis for Frontex operational actions.*

*Lastly, disclosing the interviews is equivalent to the disclosure of operational information which is the base for the future joint operations which jeopardizes the implementation of the coming operational activities at the external borders.*

*The aforementioned risk is reasonably foreseeable and therefore, Frontex concluded that the disclosure of the required document undermines the protection of the public interest as regards public security.*

*Frontex also concluded that the interests protected by the right for public access to documents cannot undermine the public interest as regards the public security of the citizens living within the European Union.*



*In light of the above, access to this part of the document is refused pursuant to Article 4(1)(a) of Regulation No 1049/2001, as its disclosure would undermine the protection of the public interest as regards public security ."*

**23.** An interview with a migrant was redacted from another Serious Incident Report (unnumbered Serious Incident Report dated **13 January 2015** [7] and entitled 'Allegations on violation of Fundamental Rights'). The reasons given were to protect public security (Article 4(1)(a) of Regulation 1049/2001) and to protect the purpose of inspections, investigations and audits (see the third indent of Article 4(2) of Regulation 1049/2001). Frontex stated that according to the Serious Incident Report, a Member State would further investigate the allegation. Disclosing such information would thus undermine the purpose of the national investigation procedures regarding the serious incident.

**24.** Finally, some information in unnumbered Serious Incident Report dated **24 November 2014** [2015] , entitled 'SIR with suspected violation of fundamental rights', as well as information gathered from an interview with a migrant were redacted on the basis of the third indent of Article 4(2) of Regulation 1049/2001. Frontex stated "*all the parts removed from this document contain details that allegedly constitute a violation of fundamental rights. According to the report, the Member State would launch an investigation in to the facts of this case. Disclosing such information therefore would undermine the purpose of the national investigation procedures regarding this incident ."*

#### **The inquiry**

**25.** The Ombudsman opened an inquiry into the complaint and identified the following allegations:

1) Frontex consistently fails to identify the existence of all Serious Incident Reports in its possession concerning Frontex or joint operations in Bulgaria;

2) Frontex redacts the Serious Incident Reports it does identify in a manner which is not consistent with the exceptions set out in Regulation 1049/2001;

**26.** In the course of the inquiry, the Ombudsman duly considered the information provided in the complaint. In particular, she carried out a thorough analysis of the correspondence that had taken place between Frontex and the complainant before the complainant turned to the Ombudsman. The Ombudsman's office also carried out an inspection of the Frontex file concerning this case and held a meeting with Frontex (hereinafter, the 'meeting/inspection') in order to provide Frontex with the opportunity to clarify why it had initially failed to identify some Serious Incident Reports that fell under the complainant's request for public access to documents [8] . The Ombudsman's solution proposal takes into account the arguments and views put forward by the parties.

#### **Failure to identify Serious Incident Reports**

## Arguments presented to the Ombudsman

**27.** The complainant argues that Frontex released Serious Incident Reports involving



fundamental rights violations only when he presented evidence of their existence. He stated that this is not in line with EU law on transparency. He said that Frontex should disclose such Serious Incident Reports even if they are inconvenient or embarrassing.

**28.** During the meeting/inspection with Frontex, Frontex put forward a number of explanations for its initial failure to identify some Serious Incident Reports.

**29.** First, Frontex stated that the complainant's request for access to documents was not easy to handle because it did not concern specific operations, but rather any operation in Bulgaria. In this context, Frontex noted that the IT tool in which it records Serious Incident Reports, that is, the Joint Operation Reporting Application ('JORA') does not include a 'search by keywords' option. Thus, every operation involving Bulgaria had to be searched manually to reply to the complainant's request. The staff member who carried out the search had to read through each Serious Incident Report concerning every operation involving Bulgaria in order to identify whether the incident had occurred in (or concerned) Bulgaria (since joint operations often cover a number of countries [9]). Thus, the IT system used made it hard to identify every single relevant Serious Incident Report. The risk of human error was high. Moreover, the strict deadlines imposed by the rules governing access to documents applications (which Frontex has never missed, according to Frontex) also contributed to the omissions. Frontex stated that it is currently considering whether it would be possible to introduce a 'search by keywords' into JORA. This would require an indexing tool, which takes time to develop. If implemented, such changes will probably come into effect at the end of 2017 at the earliest.

**30.** Second, at the time when the complainant's application was being processed, Frontex had not yet adopted the Executive Director's Decision of 3 November 2016, No. 2016/119, on the Transparency Office and on instructions for handling applications for public access to documents. Prior to the adoption of that decision, different staff members would carry out the search necessary to reply to requests, such as the complainant's. Who did the work depended on who was on duty at the Frontex Situation Centre when the task would have been assigned. In this case, the staff member who was asked to search for the Serious Incident Reports for the complainant had been recently recruited and this was his first access to documents request. Frontex pointed out that by virtue of the new Decision, dedicated transparency case-handlers have now been appointed within each Unit. This will, Frontex states, ensure expertise and consistency.

**31.** Frontex also provided an explanation for the divergent information which the complainant received from its different services. Frontex pointed out that the request for information the complainant sent to the Press Office was a request for replies to certain questions concerning occurrences on the Bulgarian-Turkish border. It was, therefore, not identical to the access to documents request made to the Public Access to Documents Office of Frontex. The two requests were dealt with by different persons and a different search was involved. The Public Access to Documents Office asked the Frontex Situation Centre to prepare the Serious Incident Reports falling under the complainant's request. The Press Office, on the other hand, requested information both from the Frontex Situation Centre and the Fundamental Rights Officer [10]. Frontex stated that the Press Office obtains information



from different sources, not necessarily solely from Serious Incident Reports.

**32.** Once the Press Office realised that the complainant had received divergent information from the two offices, it called a meeting with the Public Access to Documents Office to find out why this had happened. The missing documents were identified and were sent to the complainant on 28 October 2016. Frontex apologised to the complainant for having omitted these documents. During an internal meeting, the units involved in this case agreed to communicate better amongst themselves in future.

**33.** Finally, Frontex pointed out that it is true that, in this case, mistakes were made. However, Frontex was not trying to hide any information. If that had been the case, the Press Office would also have hidden that information. According to Frontex, it is obvious that the failure to identify all the relevant Serious Incident Reports was the result of a technical issue and human error when processing a request which presented them with some challenges.

## The Ombudsman's preliminary assessment leading to the solution proposal

**34.** The Ombudsman notes that the allegation under consideration stems from a concern, which is shared by many EU citizens, that fundamental rights violations need to be identified and dealt with. Frontex is obliged to record the serious incident reports it receives and to inform the national authorities concerned thereof. The Ombudsman applauds Frontex for taking this obligation very seriously. This, together with the complaints mechanism recently set up by Frontex, shows that Frontex is concerned about the need to safeguard fundamental rights. The Ombudsman is encouraged by the fact that the Frontex recording system appears to be comprehensive.

**35.** Although it is important to have such a system in place, it is equally essential that the public trust it. If, when asked to release certain serious incident reports, Frontex fails to identify all the serious incident reports requested, the public's trust in the system risks being undermined. The public may suspect, as the complainant did, that Frontex prefers to hide human rights violations, rather than to deal with them. The public may also go on to conclude that, after all, Frontex is not overly concerned about the need to safeguard fundamental rights. This is why it is important that Frontex shows that that it is transparent.

**36.** The Ombudsman understands why the circumstances of this case led the complainant to suspect that Frontex had deliberately withheld documents from him. It is true that had the complainant not known about the existence of the missing documents, their omission would probably have gone unnoticed. Nevertheless, the Ombudsman considers that Frontex has, in the context of the inquiry, provided plausible explanations for the errors that occurred. Importantly, Frontex demonstrated that it did not omit some of the requested documents because it wanted to hide embarrassing information. Rather, the omission was the result of simple human error combined with a somewhat inadequate IT search system. The Ombudsman also recognises that as soon as Frontex became aware of the errors, it held meetings to discover why these errors had occurred and took steps to remedy them.





Moreover, it apologised to the complainant for having initially left out some documents. It quickly provided him with (redacted versions of) the missing documents, even before the complainant lodged his complaint with the Ombudsman.

**37.** This case has, however, highlighted organisational and technical deficiencies in the searches which Frontex carries out to respond to requests for public access to documents which present them with certain challenges. These organisational and technical deficiencies need to be addressed.

**38.** The newly established Transparency Office, which coordinates an internal network of case handlers who handle access to documents applications concerning their thematic field, is thus a step in the right direction. During the meeting/inspection, Frontex stated that the Transparency Office has organised training sessions for the transparency case-handlers and will organise additional training sessions should the need arise. The Ombudsman applauds these initiatives and hopes that the importance of carrying out thorough searches will be highlighted in future training sessions.

**39.** The Ombudsman notes that Frontex has acknowledged the need to improve the search system within JORA and is currently considering the possibility of performing a 'search by keywords' within JORA. The Ombudsman takes the view that such a 'search by keywords' is essential. It would not only save time but also reduce the risk of human error. **Frontex should therefore take steps to develop the required indexing tool, as well as any other tool necessary for allowing such a search to take place, as soon as possible .**

**40.** During the meeting/inspection, Frontex also stated that it is currently considering the possibility of automating the processing of access to documents requests by means of a document management system. Such a system would save time. In view of the tight deadlines imposed by the access to documents Regulation 1049/2001, the development of an IT tool that helps to save time should be encouraged.

**41.** Finally, the Ombudsman points out that during the meeting/inspection, when the Ombudsman's representatives were inspecting documents in the Situation Centre on screen together with a Frontex representative, who was manually retrieving one document after another, it was discovered that there were a further five Serious Incident Reports which, although they fell under the complainant's request for access to documents, had not been previously identified [11] . Four out of these five Serious Incident Reports have a different format from that of all the others, which may explain why they were not identified. None of these five Serious Incident Reports contains allegations of violations of fundamental rights.

**42. The Ombudsman considers that Frontex should disclose these documents (in full or, if necessary, partially) to the complainant without delay .** She therefore makes a corresponding proposal for a solution below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

**Redaction of Serious Incident Reports in a manner which is not consistent with the exceptions set out in Regulation 1049/2001**





## Arguments presented to the Ombudsman

**43.** In his complaint to the Ombudsman, the **complainant** stated that all the fundamental rights violations documented in the second set of Serious Incident Reports sent to him were revealed in the course of interviews of refugees by Frontex employees. The Public Access to Documents Office of Frontex redacted these interviews in their entirety, arguing that information from debriefing interviews falls under the exceptions laid down in Regulation 1049/2001.

**44.** The complainant said that in his experience, every time a refugee debriefing interview is mentioned in a Serious Incident Report, this is because it contains allegations of fundamental rights violations or breaches of the Frontex Code of Conduct. He thus contended that Frontex made heavy redactions to the interviews because it wished to hide embarrassing information.

**45. Frontex** stated that its policy concerning access to documents is to disclose as many documents as possible and to redact as little as possible.

**46.** With regard to the documents redacted by Frontex in this case, the Ombudsman's inquiry team asked Frontex to explain in what way certain extracts from interviews, such as those parts describing how many hours the migrants would have spent walking, could identify the migrants. Frontex replied that such information, taken on its own, would probably not identify migrants, especially as long as information about the operational area, migrants' routes and the location of checks is not released. However, caution must be exercised because, often, smugglers or facilitators would form part of the group of migrants. They may easily recognise an incident from otherwise insignificant details. This could be detrimental to the interviewed migrant or his/her family (as the smugglers could take reprisals against them for providing information to Frontex). Moreover, if information about the hours spent walking, for example, were disclosed, whereas other parts were to be redacted, that information would appear to be meaningless.

**47.** The Ombudsman's inquiry team also asked Frontex to explain whether, before invoking the exception under the third indent of Article 4(2) of Regulation 1049/2001 (concerning the protection of the purpose of investigations), Frontex had liaised with the national authorities to determine whether the investigations they were carrying out in response to Serious Incident Reports were still ongoing or had been closed. Frontex replied that, normally, the national authorities do not keep Frontex informed about the closure of national investigations. In this case, after receiving the complainant's application, Frontex did contact the national authorities to ask them whether the relevant investigations were still ongoing. However, the national authorities replied after the deadline for replying to the confirmatory application had expired. Those replies are therefore irrelevant to the Ombudsman's review of the decision taken on the confirmatory application.

Section 1.01 The Ombudsman's preliminary assessment leading to the solution proposal

**48.** As the Ombudsman has often stressed, in view of the objectives pursued by Regulation



1049/2001, in particular the aim of ensuring the widest possible access to documents held by the EU institutions [12], any exceptions to this principle have to be interpreted narrowly [13]. Furthermore, the principle of proportionality requires that exceptions to the general rule, that access must be given, remain within the limits of what is appropriate and necessary for protecting the defined objective public and private interests which are set out in those exceptions [14].

**49.** According to settled case-law, the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception: such application may be justified only if access to that document could **specifically and effectively undermine the protected interest**. Moreover, **the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable**. It is up to the institution concerned to weigh the specific interest which must be protected through non-disclosure of part of the requested document against the general interest in the entire document being made accessible [15].

**50.** The Ombudsman understands that the complainant does not contest the redactions which Frontex made to the requested documents on the basis of Article 4(1)(b) of Regulation 1049/2001, relating to the protection of personal data. She will therefore not comment on those redactions.

**51.** As regards the redactions made on the basis of the third indent of Article 4(2) of Regulation 1049/2001, relating to the protection of the purpose of investigations, the Ombudsman notes that at the end of unnumbered Serious Incident Report dated **24 November 2014** [2015], it is stated that "*the Bulgarian Border Police will not continue with further investigations.*" The Ombudsman considers that, unless some other body was also carrying out investigations into the incident reported in this Serious Incident Report, Frontex was not entitled to invoke the exception to disclosure envisaged by the third indent of Article 4(2) of Regulation 1049/2001 to refuse disclosure of the redacted parts of this document. **Therefore, unless Frontex identifies another exception to disclosure that was applicable to this document at the time when it refused disclosure of the redacted parts, it should grant the complainant full access to it.**

**52.** With regard to the other documents [16] redacted on the basis of the third indent of Article 4(2) of Regulation 1049/2001, the Ombudsman has carefully considered all the redactions made. She has concluded that they are justified and not excessive. The redacted parts constitute evidence either of acts which amount to violations of human rights or of criminal acts. The Ombudsman considers that, if such evidence were to be made public prior to the conclusion of the national investigations, there is a reasonably foreseeable risk that the proceedings against the alleged perpetrators would be compromised and, therefore, that the completion of the investigations would be endangered [17]. This would not serve the important need of protecting fundamental rights. The complainant has not demonstrated the existence of an overriding public interest in the disclosure of the redacted parts. Nor has the Ombudsman been able to identify a public interest that overrides the interest in protecting the purpose of the ongoing investigations. Moreover, at the relevant time, Frontex had no information at its disposal that could have led it to conclude that the investigations



were no longer ongoing.

**53.** The Ombudsman considers that although these redactions are justified, the explanations given by Frontex for the redactions do not always satisfy the requirements imposed by the Court of Justice of the European Union for the exception to apply, outlined in paragraph 49 above [18]. **In future, Frontex should better explain the redactions/non-disclosure it makes on the basis of the third indent of Article 4(2) of Regulation 1049/2001.** It should explain in what way disclosure of a document or of certain redacted parts thereof would specifically and effectively undermine the protection of the purpose of an ongoing investigation. An explanation such as the one which the Ombudsman has given in the preceding paragraph would suffice.

**54.** As regards the redactions made on the basis of the first indent of Article 4(1)(a) of Regulation 1049/2001, relating to the protection of public security, the Ombudsman points out that, unlike the exception relating to the protection of the purpose of investigations, the exception concerning the protection of public security is not subject to an 'overriding public interest' test. Moreover, the Court of Justice of the European Union has recognised the wide discretion enjoyed by the institutions in areas covered by the mandatory exceptions to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001 [19].

**55.** Frontex however remains obliged to explain how disclosure of the requested documents could specifically and actually undermine the public interest as regards public security and to show that the risk of the interest being undermined is reasonably foreseeable and not purely hypothetical [20].

**56.** The Ombudsman has carefully assessed the explanations which Frontex gave for non-disclosure, on the basis of the first indent of Article 4(1)(a) of Regulation 1049/2001, of the redacted parts of the concerned Serious Incident Reports. Frontex has given specific and cogent reasons for the redactions.

**57.** The Ombudsman notes that, in relation to the first set of documents, Frontex seems to have carried out an individual assessment of each document and has **carefully** redacted the parts which could undermine public security. However, with regard to the second set, although Frontex gave a long list of (convincing) reasons for refusing full access to the requested documents on the basis of the first indent of Article 4(1)(a) of Regulation 1049/2001, it does not seem to have carried out an individual assessment of the documents. It appears to have decided that, where human rights violations were alleged, the entire interview was to be blanked out. Therefore, with regard to the second set of documents, Frontex seems to have applied a presumption that interviews with migrants are not to be disclosed, instead of carrying out an individual assessment of each interview. The Ombudsman does not consider that Frontex could apply such a presumption.

**58.** Moreover, the Ombudsman sees an inconsistency in Frontex's approach. For instance, part of an interview with a migrant reported in Serious Incident Report 226 (included in the first set), was disclosed. On the other hand, parts of the interview reported in unnumbered Serious Incident Report dated 12 May 2015 (included in the second set) contains similar



information to that contained in the non-redacted parts of the interview included in Serious Incident Report 226. Furthermore, the “Assessment” section of unnumbered Serious Incident Report dated 12 May 2015, which was not redacted, includes information which is derived from the fully redacted interview. It would therefore appear that disclosure of the statements from the interview which reflect what is stated in the “Assessment” section would not undermine public security.

**59.** It appears to the Ombudsman that the following Serious Incident Reports were also redacted excessively: unnumbered Serious Incident Report dated **13 March 2015** , Serious Incident Report **15** , and Serious Incident Report **361** . It appears to the Ombudsman that not every single sentence that has been redacted would undermine public security if made public. The Ombudsman recognises the wide discretion enjoyed by Frontex in deciding which parts of the concerned Serious Incident Reports should be redacted on the basis of the first indent of Article 4(1)(a) of Regulation 1049/2001. However, she considers that the excessive redactions constitute a manifest error of assessment, which she invites Frontex to correct.

**60.** The complainant has stated that he is already in possession of the non-redacted version of unnumbered Serious Incident Report dated 12 May 2015, since Frontex mistakenly sent it to him in the context of a different access to documents request. Therefore, the Ombudsman proposes no further action in respect of that document. On the other hand, Frontex should reassess the redactions it made to the Serious Incident Reports mentioned in the preceding paragraph with a view to granting further partial access to them.

**61.** When reassessing the redactions, Frontex should ensure that all the redactions it makes are indeed necessary in order to protect public security. It should bear in mind that information should be disclosed if there is no justification for its non-disclosure under Regulation 1049/2001. In other words, if there is a justified fear that releasing the documents in their entirety might lead to the identification of those migrants who assisted Frontex (thus leaving them and their families’ open to reprisals), Frontex still needs to examine if partial access could be given to each Serious Incident Report (with certain key identifying information redacted).

**62.** The Ombudsman therefore makes a proposal for a solution, in accordance with Article 3(5) of the Statute of the European Ombudsman concerning the **excessive redactions made to unnumbered Serious Incident Report dated 24 November 2014 [2015] [21] , unnumbered Serious Incident Report dated 13 March 2015, Serious Incident Report 15, and Serious Incident Report 361 [22] .**

#### **The proposal for a solution**

**Taking into account the above findings, the Ombudsman proposes that Frontex:**

**(i) disclose to the complainant, in full or, if necessary, partially, the Serious Incident Reports whose existence was discovered during the Ombudsman’s meeting/inspection. Such disclosure should take place without delay;**



**(ii) take steps to develop, as soon as possible, tools which allow for a smoother identification of documents, such as the tools required to carry out a 'search by keywords' within JORA;**

**(iii) make a commitment to better explain any redactions/non-disclosure it will make in future on the basis of the third indent of Article 4(2) of Regulation 1049/2001;**

**(iv) reassess the redactions it made to unnumbered Serious Incident Report dated 24 November 2014 [2015], unnumbered Serious Incident Report dated 13 March 2015, Serious Incident Report 15, and Serious Incident Report 361, with a view to granting further partial access to them.**

Emily O'Reilly

European Ombudsman

Strasbourg, 16/05/2017

[1] 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.

[2] Article 4(1)(b) of Regulation 1049/2001 provides: " 1. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

...

*(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."*

[3] Frontex gave the following reason for this type of redaction: " *The non-disclosed text contains the name of an actor participating in Frontex activities. The disclosure of such information would undermine the protection of the privacy and integrity of the person concerned and constitute a violation of EU laws regarding the protection of personal data ."*

[4] The third indent of Article 4(2) of Regulation 1049/2001 provides: " 2. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

...

*- the purpose of inspections, investigations and audits,*



*unless there is an overriding public interest in disclosure."*

[5] The first indent of Article 4(1)(a) of Regulation 1049/2001 provides: " 1. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

*(a) the public interest as regards:*

*- public security,*

*..."*

[6] The complainant also sent the Ombudsman the non-redacted version of this Serious Incident Report. He explained that, in the context of a different access to documents request, he was erroneously given this document with no redactions.

[7] This Serious Incident Report relates to Joint Operation Focal Points 2014 land extension (operational area of former JO Poseidon 2014 land) and was one of the two Serious Incident Reports which the Public Access to Documents Office had left out unintentionally.

[8] When opening the inquiry, the Ombudsman informed Frontex that during the inspection, her inquiry team wished to hear Frontex on the following issues:

*" 1. How does Frontex carry out its task of identifying the documents which fall under a request for access to documents?*

*2. In its e-mail of 28 October 2016 to the complainant, Frontex stated "technical issues related to [its] search system" led to the failure to identify a number of documents. What were these technical issues and what has Frontex done to solve them?"*

[9] Moreover, within each Serious Incident Report, it is not sufficient to search for the terms "Bulgaria" or "BGR" since, sometimes, it is just the names of towns or other geographical locations (not the name/abbreviation of the country) that are mentioned.

[10] Frontex's representatives explained that when human rights violations are reported in a Serious Incident Report, the Coordinator for Serious Incident Reports proposes that the Serious Incident Report be sent to Frontex' Fundamental Rights Officer. In this case, the officer sent information to the Press Office.

[11] These were: (i) Unnumbered Serious Incident Report dated 28 July 2015; (ii) Serious Incident Report 330; (iii) Serious Incident Report 395; (iv) Serious Incident Report 409; and (v) Unnumbered Serious Incident Report dated 25 March 2015.

[12] Article 1(a) of Regulation 1049/2001. Regulation 1049/2001 is applicable to Frontex by virtue of Article 74 of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing



Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ 2016, L 251, p. 1.

[13] Judgment of the Court of Justice of 18 December 2007, *Sweden v Commission*, C-64/05 P, ECLI:EU:C:2007:802, paragraph 66 and judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05 P, ECLI:EU:C:2007:75, paragraph 63.

[14] Judgment of the Court of Justice of 6 December 2001, *Council v Hautala*, C-353/99 P, ECLI:EU:C:2001:661, paragraph 28.

[15] Judgment of the Court of Justice of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, ECLI:EU:C:2013:671, paragraph 11.

[16] Unnumbered Serious Incident Report dated 1 October 2015, Serious Incident Report 453, Serious Incident Report 226, unnumbered Serious Incident Report dated 16 October 2015 and unnumbered Serious Incident Report dated 13 January 2015.

[17] See, for instance, the judgment of the General Court of 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04, ECLI:EU:T:2006:190, paragraphs 105 and 109.

[18] See also the Ombudsman's Draft Recommendation in Case 257/2013/OV, paragraph 41: "*... it is not sufficient to state that an investigation was ongoing at the relevant time. It is also necessary to determine whether disclosure of the requested documents would, given their specific content, undermine the purpose of that ongoing investigation.*"

[19] See judgment of the General Court of 26 April 2005, *Sison v Council*, T-110/03, T-150/03 and T-405/03, ECLI:EU:T:2005:143, paragraphs 46 and 47 (upheld on appeal C-266/05 P); and judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P, ECLI:EU:C:2014:2039, paragraph 63.

[20] See judgment in *Council v in 't Veld*, C-350/12 P, cited above, ECLI:EU:C:2014:2039, paragraphs 52 and 64.

[21] See paragraph 51 above.

[22] See paragraph 59 above.