Európai Ombudsman

Az Európai Határ- és Partvédelmi Ügynökség (Frontex) nyilvános dokumentumtárára vonatkozó 2273/2019/MIG sz. ügyben hozott határozat

Határozat
Ügy 2273/2019/MIG - **Vizsgálat megindítása** 12/03/2020 - **Határozat** 03/02/2021 - **Érintett intézmények** Európai Határ- és Partvédelmi Ügynökség (Nem történt hivatali visszásság) | Európai Határ- és Partvédelmi Ügynökség (Megvalósított megoldás) |

Az ügy az Európai Határ- és Partvédelmi Ügynökség (Frontex) nyilvános dokumentumtárára vonatkozott. A panaszos felvette a kapcsolatot a Frontexszel és azt állította, hogy a Frontex dokumentumtára nem felel meg a dokumentumokhoz való nyilvános hozzáférésre vonatkozó uniós szabályoknak, és hogy a Frontex a nyilvános hozzáférésről szóló éves jelentéseiben nem szerepeltetett az érzékeny dokumentumokra vonatkozó információkat. A panaszos kifogásolta továbbá a Frontex azon politikáját, amely szerint a nem uniós lakosok rendes körülmények között nem jogosultak arra, hogy a dokumentumokhoz nyilvános hozzáférést kérjenek. A Frontex válaszolt a panaszosnak, azonban nem vállalta, hogy változtatásokat hajt végre.

Az ombudsman elismerte a Frontexnek a dokumentumtár létrehozásával kapcsolatos múltbeli erőfeszítéseit és tudomásul vette annak sajátos jellemzőit, azonban látott még teret a javulásra. Ezért azt javasolta, hogy a Frontex bizonyos elveknek megfelelően aktualizálja dokumentumtárát. Azt is javasolta, hogy a Frontex tegye közzé a birtokában levő, az alkalmazandó szabályok által előírtaknak megfelelően a dokumentumtárban nem szereplő érzékeny dokumentumok számát.

A Frontex egyetértett az ombudsman javaslatával és vázolta, hogy milyen lépéseket kíván tenni a javaslat rövid-, közép- és hosszú távú végrehajtása érdekében. Az ombudsman üdvözölte a Frontex azon döntését, hogy elfogadta megoldási javaslatát, és mivel nem állapított meg hivatali visszásságot a nem uniós lakosok hozzáférés iránti kérelmeinek a Frontex általi kezelését illetően sem, lezárta a vizsgálatot.

Background to the complaint

1. EU rules on public access to documents [1] require EU institutions to maintain a register of publicly accessible documents and to report on public access to documents. [2]

2. The complainant, a non-profit organisation, considered that the European Border and Coast Guard Agency (Frontex) does not comply with its obligations under these rules. It contacted Frontex, asking it (i) to establish a public register of documents, (ii) to include information about sensitive documents in its annual reports on public access, and (iii) to accept requests for public access to documents also from non-EU citizens not residing in the EU (in particular asylum seekers or refugees that have been affected by Frontex's activities).

3. Frontex commented on the issues raised and reassured the complainant that it regularly reviews its working methods. However, it did not commit to making any changes.

4. In December 2019, the complainant turned to the Ombudsman.

5. In the course of the inquiry, the Ombudsman's inquiry team met with Frontex representatives to discuss the issues raised by the complainant. The Ombudsman then made a proposal for a solution concerning the first two aspects of the complaint.

Register of documents

The Ombudsman's proposal for a solution

6. The Ombudsman took note of Frontex's past efforts towards establishing a register of documents as well as the agency's distinct characteristics. However, she considered that the EU institutions should apply certain principles to their registers of documents, to ensure good administrative practice and that their register is adequate.

7. First, the Ombudsman took the view that the register should be user-friendly . It should be as easy as possible for individuals to navigate through the register and identify specific documents they may want to access. This includes having a dedicated webpage for the register.

8. Second, the Ombudsman considered that the register should be complete , meaning that all documents concerning the institution's core activities should be recorded individually. In addition, the register should at least refer to the existence of other types of documents not listed. This also implies that no documents should be excluded from the register automatically.

9. Third, the Ombudsman found that the register should be maintained in a timely manner , requiring updates on a very regular basis.

10. The Ombudsman therefore made the following proposal for a solution:

Frontex should update its register of documents, taking into account the principles of good administrative practice set out in the proposal for a solution. [3]

11. In light of the Ombudsman's proposal, Frontex has set out a number of steps it intends to

take to implement the proposal in the short, medium and long term. [4]

12. Frontex aims to take stock of all important documents it holds, to start developing a dedicated register of documents webpage, and to collect feedback from other EU agencies, by the end of February 2021.

13. In the course of 2021, Frontex plans to decide which documents or categories of documents to include in its register, to develop a search engine for its register and to put in place a system to enable the structured and systematic recording of documents in the register.

14. Frontex also said that it will soon be switching to a new document management system, which will facilitate the recording and publication of documents in its public register. This includes documents that Frontex discloses in reply to requests for public access, which it will make proactively available in future.

15. The complainant welcomed the Ombudsman's proposal as well as Frontex's reply, and stressed the importance of a complete register of documents, given its purpose to facilitate the public's right of access to documents. The complainant also called on Frontex to take a broad and non-restrictive approach to the proactive publication of documents.

The Ombudsman's assessment after the proposal for a solution

16. The Ombudsman considers that Frontex has followed her proposal for a solution by setting out clear steps that it will take to establish a proper register of documents, including an indicative time line.

17. The Ombudsman welcomes Frontex's positive response to her solution and considers that this aspect of the complaint has been resolved.

Number of sensitive documents

The Ombudsman's proposal for a solution

18. The Ombudsman found that Frontex is legally required to report annually on the number of sensitive documents it holds that are not recorded in its register of documents. [5] She noted that Frontex did not include this number in its most recent report covering the year 2019.

19. The Ombudsman therefore made the following proposal for a solution:

Frontex should in future, and as far as possible for 2019, publish the number of sensitive documents it holds that are not included in its register of documents.

20. In its reply, Frontex stated that it will publish the number of sensitive documents it holds that are not included in its register in its upcoming Consolidated Annual Activity Report of 2020. Frontex also promised to publish the relevant number for the year 2019 on its website.

The Ombudsman's assessment after the proposal for a solution

21. The Ombudsman considers that Frontex has followed her proposal for a solution by committing to publish the number of sensitive documents it holds that are not included in its register of documents.

22. The Ombudsman welcomes Frontex's positive response to her solution and considers that this aspect of the complaint has been resolved.

Right of non-EU residents to request access to documents

Arguments presented to the Ombudsman

23. The complainant argued that Frontex should accept, as a rule and not as an exception, requests for public access to documents from persons not residing in the EU/Schengen area, as they are affected most significantly by Frontex's decisions/actions. Frontex should follow the example of other EU agencies, such as Europol, which do not differentiate between residents and non-residents when dealing with public access requests. [6] The complainant added that Frontex does not have a policy that sets out the basis for determining whether requests by non-residents are admissible. As a result, decisions on such requests risk being arbitrary and lacking transparency.

24. Frontex contended that, while EU rules on public access to documents allow EU institutions to accept access requests from non-EU residents, there is no obligation to do so. An institution thus does not have to justify why it does not make use of this option.

25. Frontex added that it receives few requests for public access from non-EU countries, and that it always assesses the merits of such requests.

The Ombudsman's assessment

26. According to the EU rules on public access to documents, any EU citizen and any person residing in a Member State has the right to request public access to a document held by an EU institution. [7] In addition, the institutions *"may"* grant access to documents to persons not

residing within the EU. [8]

27. This means that EU institutions are not obliged to accept requests for public access to documents from non-EU citizens residing outside the EU. Rather, it is at the discretion of each EU institution to decide whether to extend the right to request public access to such individuals.

28. According to Frontex's implementing rules on public access, it may *"on a case-by-case decision"* , grant access to documents also to non-EU residents. [9] Thus, in exercising its discretion, Frontex has decided to extend the right of public access to the documents it holds to non-EU residents on a case-by-case basis.

29. While it is commendable that some other EU institutions have a practice of generally accepting requests for public access from non-EU countries, there is no legal obligation to do so. Each institution exercises its discretion individually and independently, and thus in the manner it deems appropriate. Frontex is therefore justified to decide, on a case-by-case basis, whether to accept access requests from non-EU residents. Its statement that it receives few requests for public access from non-EU countries, and that it always assesses the merits of such requests, seems to constitute a reasonable approach.

Conclusions

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

The European Border and Coast Guard Agency has accepted the Ombudsman's proposal for a solution to update its public register of documents, and to publish the number of sensitive documents it holds that are not included in its register.

There was no maladministration by Frontex in how it handles requests for access from non-EU citizens not residing in the EU, in that it deals with such requests on a case-by-case basis.

The complainant and Frontex will be informed of this decision **.**

Emily O'Reilly European Ombudsman

Strasbourg, 03/02/2021

[1] Regulation 1049/2001 regarding 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].

[2] Pursuant to Articles 11 and 17 of Regulation 1049/2001.

[3] The full text of the Ombudsman's proposal for a solution is available at: https://www.ombudsman.europa.eu/en/solution/en/137293 [Link].

[4] 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/135911 [Link].

[5] Article 17(1) of Regulation 1049/2001. See also Management Board Decision No 25/2016

adopting practical arrangements regarding public access to the documents held by Frontex, available at:
https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2016/MB_Decision_25_2016_on_adopting_practica
[Link].

[6] The complainant highlighted Europol's implementing rules that set out that non-EU residents *"shall enjoy the right of access to Europol documents on the same terms."* See Article 2 of the Decision of the Management Board of Europol laying down the rules for applying Regulation 1049/2001 with regard to Europol documents, available at:
https://www.europol.europa.eu/sites/default/files/documents/decision_of_the_mb_rules_applying_reg_1049_2001.p
[Link].

[7] Article 2(1) of Regulation 1049/2001. (The right of public access also applies to legal persons, such as companies or civil society organisations that have their registered office in a Member State.)

[8] Under Article 2(2) of Regulation 1049/2001.

[9] Article 3(2) of Management Board Decision No 25/2016.