Europeiska ombudsmannen

Beslut om Europeiska gräns- och kustbevakningsbyråns (Frontex) vägran att ge allmänheten tillgång till handlingar om en sök- och räddningsinsats (ärende 1610/2021/MIG)

Beslut
Ärende 1610/2021/MIG - **Undersökning inledd den** 16/09/2021 - **Beslut den** 31/01/2022 - **Berörda institutioner** Europeiska gräns- och kustbevakningsbyrån (Inget administrativt missförhållande upptäckt) |

Den klagande begärde tillgång till handlingar om en sök- och räddningsinsats som Europeiska gräns- och kustbevakningsbyrån (Frontex) genomförde i Medelhavet i maj 2021. Frontex identifierade 13 handlingar som omfattades av begäran men vägrade att ge tillgång till dem. I samband med detta åberopade Frontex ett undantag inom ramen för EU-reglerna om allmänhetens tillgång till handlingar, för att skydda allmän säkerhet.

Ombudsmannens utredare tog del av handlingarna i fråga och konstaterade att Frontex beslut att vägra tillgång inte var uppenbart felaktigt, eftersom EU-institutionerna har stor handlingsfrihet om de anser att den allmänna säkerheten äventyras. Det som emellertid inte stod klart var varför vissa fotografier i handlingarna inte kunde offentliggöras. Ombudsmannen konstaterade därför att Frontex skulle kunna ompröva sitt beslut vad gäller dessa fotografier.

Som en reaktion på detta förslag gav Frontex större tillgång till de aktuella fotografierna, vilka den klagande ansåg vara användbara. Ombudsmannen välkomnande Frontex beslut att använda sitt handlingsutrymme till förmån för större öppenhet och insyn på detta mycket viktiga område.

Vad gäller de förfarandemässiga aspekterna av ärendet konstaterade ombudsmannen att Frontex hade hållit de föreskrivna tidsfristerna för att behandla begäran, samtidigt som byrån hade gett den klagande heltäckande icke-konfidentiell information om den aktuella insatsen.

Ombudsmannen avslutade undersökningen eftersom inget administrativt missförhållande förelåg och lovordade samtidigt Frontex för att byrån hade godtagit hennes förslag.

Background to the complaint

1. In February 2018, the European Border and Coast Guard Agency (Frontex) launched 'Joint Operation Themis', supporting the Italian authorities with border control, surveillance, and search and rescue (SAR) in the Central Mediterranean Sea. [1] In May 2021, in the context of this joint operation, an SAR operation was carried out to assist a small fiberglass boat with nine passengers, which had been identified as being in danger at sea.

2. In August 2021, the complainant, an investigative journalist, asked Frontex for public access [2] to all documents related to the SAR operation, specifically (i) the report on the operation, *including possible photographic material* , as well as any document containing (ii) the geographical coordinates and a detailed timeline of the operation, and (iii) information on the port of landing of the nine passengers

3. Frontex identified 13 documents as falling under the request but refused to grant access to them. In doing so, it invoked an exception under the EU's rules on public access to documents, arguing that disclosure could undermine the protection of the public interest as regards public security [3] .

4. The complainant requested that Frontex review its decision (making a 'confirmatory application'). In his application, he asked that, should it maintain its decisions to refuse access, Frontex provide him with certain information, including a list of the 13 identified documents.

5. On 10 September 2021, Frontex confirmed its decision to refuse access to the documents it had identified, but told the complainant that its media and public relations office would reply to his request for information.

6. Dissatisfied with Frontex's confirmatory decision, the complainant turned to the Ombudsman.

The inquiry

7. The Ombudsman opened an inquiry into the complainant's position that Frontex was wrong to refuse access to the documents at issue.

8. In the course of the inquiry, the Ombudsman received Frontex's reply on the complaint as well as a copy of Frontex's media and public relations office's reply to the complainant. The Ombudsman inquiry team also inspected the documents at issue in the complainant's access request.

Arguments presented

9. Frontex stated that the documents contain sensitive operational information concerning an ongoing operation, including information on the type and capability of the equipment used. Disclosing this information could benefit criminal networks, as knowledge of this information would enable them to *" to draw conclusions regarding usual positions and movement patterns"*

and *"to change their modus operandi and consequently result in hampering the course of ongoing and future similar operations, which would put the lives of migrants in danger."*

10. Frontex also said that the documents contain information on the amount of staff deployed and their profiles. Disclosing this information could reveal the weaknesses and strengths of Frontex's operations and thus affect their effectiveness.

11. Frontex concluded that disclosing the documents would undermine the purpose of Joint Operation Themis, namely *"to counter and prevent cross-border crime and unauthorized border crossings".*

12. The **complainant** took the view that the coordinates of the SAR operation and the information regarding the port of landing of the migrants concerned (points (ii) and (iii) of his access request) should not fall into the categories of information that Frontex considers could not be disclosed. The complainant thus asked Frontex to share that information, if it maintained its decision to refuse access to the documents at issue.

13. The complainant also requested general information on Joint Operation Themis.

14. On 28 September 2021, Frontex's media and public relations office provided the complainant with a description of the identified documents and with information on Joint Operation Themis, including on the participants. It also provided a detailed description of the SAR operation at issue, including some of the specific information sought by the complainant.

The Ombudsman's assessment

15. Having reviewed the documents at issue, the Ombudsman can verify that they are operational reports and exchanges drawn up in the context of Joint Operation Themis and that they contain the information described by Frontex. However, given that the complainant has asked for documents related to a specific SAR operation only, these documents appear to fall largely outside the scope of the complainant's access request.

16. Regarding those parts of the documents that can be considered to be covered by the access request, it should be noted that the EU institutions and agencies enjoy a wide margin of discretion when determining whether disclosing a document would undermine the public interest as regards public security. [4]

17. As such, the Ombudsman's inquiry aimed to assess if Frontex followed the procedural rules, accurately described the facts, and provided reasons for its refusal, as well as to assess if there was a manifest error in its assessment.

18. In justifying its decision to invoke the exception and withhold access, Frontex argued that the operational information contained in the documents could be exploited by criminal networks, thus jeopardising Joint Operation Themis.

19. In a similar case [5] , the General Court recognised that disclosing information on the equipment used in a joint operation led by Frontex could indeed undermine public security. In particular, the court found it plausible and foreseeable that traffickers might use such information to track and/or attack the entities involved, endangering crews and equipment. [6] In the same ruling, the court also noted that the joint operation concerned was still ongoing and thus that the identified risks continued to exist. [7]

20. The information at issue in this case is of the same nature. Besides details on the equipment deployed in Joint Operation Themis, it concerns information on the staff involved, the geographical area of the operation and other operational details. Given the purpose of Joint Operation Themis, namely " *to counter and prevent cross-border crime and unauthorized border crossings"* , Frontex position that disclosing this information would undermine the operation and thus undermine public security cannot be seen as manifestly wrong.

21. Having said that, it was not clear (from the perspective of an outside observer) why disclosing certain photographs of the boat that was the subject of the SAR operation would pose a particular risk to public security. These photographs appeared to have been taken from afar and to not show any equipment or staff involved in Joint Operation Themis. They also did not seem to allow for the identification of the passengers on the boat.

22. Given that the complainant had explicitly asked for possible photographic material, the Ombudsman therefore made a suggestion to Frontex, noting that Frontex could consider disclosing those photographs, subject to any necessary redactions.

23. Frontex accepted this suggestion. It reconsidered its decision in relation to those photographs and, following an additional assessment by operational staff, disclosed the photographs, redacting limited geographical and personal data.

24. The complainant welcomed this step.

25. The Ombudsman commends Frontex for its receptiveness and for its decision to exercise its discretion in favour of greater openness and transparency in an area that is of particular importance.

26. As regards the procedural aspects of the case, the Ombudsman's inquiry did not identify any shortcomings in how Frontex dealt with this case from a procedural point of view. Specifically, Frontex assessed each of the documents individually, described the content of the documents accurately and provided detailed reasons as to why it considered that the documents could not be disclosed. Frontex also replied to the complainant within the prescribed time limits [8] .

27. In addition, Frontex has provided the complainant with information on the nature of the documents and has addressed the questions that he raised in his confirmatory application, to the extent it deemed possible. The Ombudsman thus considers that Frontex has acted

reasonably.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [9] :

There was no maladministration by Frontex. Frontex also agreed to the Ombudsman's suggestion on one aspect of the case.

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

Rosita Hickey Director of Inquiries

Strasbourg, 31/01/2022

[1] See https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/ [Länk]

[2] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049 [Länk], 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 [Länk].

[3] In accordance with Article 4(1)(a), first indent of Regulation 1049/2001.

[4] See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission* , T-644/16: http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=lst&dir [Länk].

[5] Judgment of the General Court of 27 November 2021, *Izuzquiza, Semsrott v Frontex* , T-13/18: https://curia.europa.eu/juris/document/document.jsf?text=&docid=221083&pageIndex=0&doclang=EN&mode=lst&d [Länk].

[6] Ibid, paragraphs 72ff.

[7] Ibid, paragraphs 76ff.

[8] See Articles 7 and 8 of Regulation 1049/2001.

[9] This complaint has been dealt with under delegated case handling, in accordance with the Decision of the European Ombudsman adopting Implementing Provisions [Länk].