

Ms Emily O'Reilly
European Ombudsman

Your ref: Strategic initiative SI/4/2021/TE
Our ref: ICO/MIJU/7109a/2021
Please quote when replying.

Warsaw, 15 November 2021

Subject: Frontex's reply as regards strategic initiative SI/4/2021/TE

Dear Ms O'Reilly,

With reference to your strategic initiative SI/4/2021/TE on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity, I would like to provide you with Frontex's reply and its Appendixes (4) to the questions addressed by you.

Yours sincerely,



Fabrice Leggeri
Executive Director

Enclosure

Frontex's reply to the strategic initiative SI/4/2021/TE on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity

Frontex reply to European Ombudsman strategic initiative - SI/4/2021/TE

Subject: EO Strategic initiative SI/4/2021/TE on how EU institutions, bodies, offices and agencies record text and instant messages sent/received by staff members in their professional capacity

ANNEX

1) On the applicable rules

- a) Does Frontex's record management decision cover text and instant messages, sent or received through professional and/or personal devices?***

The Records Management Policy which is now being finalised does not cover text and instant messages.

- b) Does Frontex's record management decision set out criteria/principles for the recording of text and instant messages?***

The Records Management Policy which is now being finalised does not set criteria/principles for the recording of text and instant messages.

- c) Does Frontex's record management decision set out how text and instant messages should be recorded by staff members?***

The Records Management Policy which is now being finalised does not set out how text and instant messages should be recorded.

Please provide us with the relevant provisions of your record management decision.

N/A

2) On the implementation of the applicable rules:

- a) How is the record management decision, as regards text and instant messaging, implemented? For example, has Frontex issued relevant guidelines to staff or does it provide training on this matter to staff?***

N/A

- b) In practice, has Frontex recorded text and instant messages? If so, could Frontex please provide examples?***

Yes, Frontex has records of text messages and instant messages. Text messages are related with specific SAR cases. Records of instant messages are kept in order to support the Aerial Surveillance Logs. These records refer to messages exchanged between the European Monitoring Team and the Sensor operators on board of Frontex aerial assets as well as ground control stations. These messages contain highly sensitive operational information/instructions.

Additionally, since the start of the Webex run events we usually save chats of the official meetings with MS in our folders - there is such option in Webex - so that to incorporate the relevant comments to the minutes.

- c) *Has Frontex already received requests for public access to text and/or instant messages, under Regulation 1049/2001, or has Frontex identified text and/or instant messages as falling within the scope of an access to documents request? If so, could Frontex please give examples?*

Yes, Frontex has received such requests pertaining to documents held - in concreto: WhatsApp messages regarding search and rescue operations, which were held on mobile devices of staff members. As an example, please find attached Frontex's reply to this request and a document (for your consideration only - Appendix 1 and 2), redacted in line with Article 4 of Regulation (EC) No 1049/2001 making reference to the aforementioned messages.

- d) *When receiving public access requests which cover, explicitly or implicitly, text and/or instant messages, how does Frontex search for relevant 'documents'? Has Frontex put mechanisms in place (for instance, guidelines or instructions) to assist staff in searching for such 'documents'?*

Please provide us with the relevant documents.

The Transparency Office processes applications for public access to documents on behalf of Frontex as laid down in the attached decisions of the Management Board (25/2016 - Appendix 3) and the Executive Director (R-ED-2019-192 - for your consideration only - Appendix 4). Upon receipt of an application, the Transparency Office contacts all relevant business units probably holding the documents covered by the application. Frontex staff, and in particular those dealing with applications for public access to documents in all business units are constantly trained on the requirements of Regulation (EC) No 1049/2001 and new developments based on European Ombudsman decisions and CJEU jurisprudence, including on the scope of a "document" and the necessity to conduct a comprehensive and thorough search within the meaning of Regulation (EC) No 1049/2001.

MANAGEMENT BOARD DECISION No 25/2016

of 21 September 2016

adopting practical arrangements regarding public access to the documents held by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the “Agency”).

THE MANAGEMENT BOARD

Having regard to the Frontex Regulation¹, and in particular to Article 28 thereof,

Whereas:

- (1) Article 1 of the Treaty on European Union (hereinafter referred to as “TEU”) enshrines the concept of openness, stating that decisions are taken as openly and as closely as possible to the citizen.
- (2) The concept of openness enables the administration to enjoy greater legitimacy and to be more effective and more accountable. It also contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the TEU, developed in Article 15(3) of the Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”), and in Article 42 of the Charter of Fundamental Rights of the European Union on access to documents.
- (3) Regulation (EC) No 1049/2001 of 30 May 2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents defines the general principles and limits governing the right of access to European Parliament, Council and Commission documents.
- (4) In accordance with Article 28(1) of the Frontex Regulation, the Agency is subject to the Regulation when handling applications for access to documents held by it.
- (5) In principle, all documents should be accessible to the public. However, certain public and private interests are to be protected by way of exceptions, where necessary, and, in particular, the protection of personal data should be taken into account.
- (6) In order to safeguard the ability to carry out its tasks, special attention should be paid to the specific requirements of Frontex as a specialized practitioner body tasked with improving the integrated management of the external borders of the Member States of the European Union. Therefore, full account of the sensitive nature of tasks carried out by Frontex, in particular in relation to the coordination of operational activities at external borders and border-related data should be taken into due consideration.
- (7) A two-stage administrative procedure applies, with the additional possibility of court proceedings or complaints to the European Ombudsman.

¹ Regulation (EC) No. 2007/2004 of the Council of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 349, 25.11.2004, p. 1), as last amended.

(8) The Agency takes the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under the Regulation.

(9) The principle of loyal cooperation governs the relations between the European Union Member States and the European Union bodies and notably in the context of consultation, prior agreement or consent.

(10) The changes introduced in the Agency's organizational structure and the experience acquired since the adoption of the Decision of the Management Board No. 3/2014 require the revision of the existing rules.

HAS DECIDED AS FOLLOWS:

Chapter I General provisions

Article 1 **Purpose**

The purpose of this Decision is to lay down the practical arrangements for the application of the Regulation as regards documents held by the Agency, in such a way as to ensure good administrative practices and high standards of public access to documents, taking into account the specific nature of the Agency and its mandate.

Further details concerning the allocation of work within the Agency pursuant to this Decision are adopted by a decision of the Executive Director.

Article 2 **Definitions**

For the purpose of this Decision:

- a) "Transparency Office" means the entity embedded within the Legal Affairs Unit of Corporate Governance, performing tasks of a cross-divisional nature, in charge of processing public access to documents applications and coordinating the internal network of case handlers.
- b) "Holder" means the Unit/the Head of Unit or other entity that holds the document requested.
- c) "Document" means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the Agency's sphere of responsibility. Personal notes, sketches, notations, private emails and other items of a similar nature are not deemed documents.
- d) "Transparency case-handler" means a person appointed by a decision of the Executive Director to be part of a cross-divisional network within the Agency, coordinated by the Head of Transparency Office; those persons are hereinafter referred to as "case-handlers". They are in charge of handling public access to documents applications in their thematic field under the joint instructions of their Head of Unit and the Head of Transparency Office.
- e) "Regulation" means Regulation (EC) No 1049/2001 of 30 May 2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.



Article 3
Beneficiaries

1. Any citizen of the European Union or of a Schengen Associated Country and any natural or legal person residing or having its registered office in an EU Member State or in a Schengen Associated Country, has the right of access to documents as set out in Article 4 subject to the principles, conditions and limits defined by the Regulation and this Decision.
2. On a case-by-case decision, the Agency may, subject to the same principles, conditions and limits set forth in the Regulation, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State or in a Schengen Associated Country.

Article 4
Scope

This Decision applies to all documents drawn up or received by the Agency, and in its possession, concerning a matter related to the policies, activities and decisions falling within its area of responsibility.

Article 5
Applications

1. The right of access to documents is exercised through an application without the obligation to state any reasons. The right of access includes the rights of consultation and/or reproduction, and information as to the documents' existence and content.
2. Applications for access to documents are made in writing, preferably in electronic form. They are addressed to the email address: pad@frontex.europa.eu or alternatively frontex@frontex.europa.eu.
3. All initial applications must be accompanied by an identity document or, in the case of legal persons, the proof of registered office along with the proof of the bond between the individual presenting the application and the legal person.
4. All applications must enable the Agency to identify the document. If an application is imprecise, the Agency invites the applicant to provide additional information to clarify the application.
5. In the event of an application relating to a very long document or to a very large number of documents, the Agency may confer with the applicant informally, with a view to finding a fair solution.

Article 6
Registration and deadline

1. Only applications presented in compliance with Article 5 are registered and further processed.
 2. As soon as the application is registered, an acknowledgement of receipt is sent to the applicant.
 3. Within fifteen (15) working days, the Agency notifies the applicant of its decision. This deadline runs from the next working day following registration.
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4. In case of imprecise applications, referred to in Article 5(4), the deadline runs from the next working day following the reception by the Agency of the additional information necessary to identify the document(s) in question.

5. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the deadline may be extended by fifteen (15) working days, provided that the applicant is notified in advance and that the reasons are given.

6. Failure by the Agency to notify the applicant of its decision to an initial application within the prescribed deadline entitles the applicant to make a confirmatory application. Failure to notify the applicant of its decision regarding a confirmatory application entitles the applicant to institute court proceedings against the Agency/to make a complaint to the European Ombudsman.

Chapter II Procedure

Article 7 **Processing of initial applications**

1. For the processing of initial applications the Executive Director assigns the responsibility to the Head of Transparency Office in compliance with this Decision and in compliance with the provisions of the decision of the Executive Director referred to in Article 1.

2. The Transparency Office makes a pre-screening of the initial application to assess whether it can be handled without consultations. In the case of simple requests, the Transparency Office proceeds without consultation to grant full access, partial access only or refuse access to the document(s) requested. In this case, the Holder is informed of the action taken.

3. Where consultations are needed, the Transparency Office forwards the initial application to the Holder. The latter is fully responsible for handling the request in accordance with this Decision.

4. Upon receipt of an application, the Holder immediately assesses whether the work to be performed is complex or refers to a very long document or a very large number of documents, or whether further clarification of the application is required.

5. In case of a request for a very long document or a very large number of documents, the Holder, together with the Transparency Office, confers with the applicant to find a fair solution in accordance with Article 5(5).

6. In case of a complex request or a request for a very long document or a very large number of documents, the Holder may ask the Transparency Office to notify the applicant of the extension of the time limit by fifteen (15) working days providing the necessary justifications.

7. In case of an imprecise application, the Holder notifies the applicant to clarify it by providing additional information, in accordance with Article 5(4).

8. Within eight (8) working days from the day that the Transparency Office forwards the application to the Holder, the latter informs the Transparency Office in writing of its assessment on whether to:

- a) Grant full access;



- b) Grant partial access only - The Holder indicates the exact excerpts in the requested document(s) which in his view should not be disclosed, along with the justifications;
 - c) Refuse access - The Holder indicates the justifications.
9. The Transparency Office together with the Holder verifies that the reasons provided are correct and in compliance with the exceptions laid down in Article 4 of the Regulation².
10. The Holder then prepares, in a non-editable format, the document(s) for which partial access only is to be granted by blanking out the excerpts not to be disclosed and providing the necessary justifications.
11. The Transparency Office notifies in writing the applicant of the decision. In case of:
- a) Full access: the notification is accompanied by the requested document(s).
 - b) Partial access only: the notification is accompanied by the documents edited by the Holder with the non-disclosed parts blanked out and the corresponding justifications pursuant to the exceptions laid down in Article 4 of the Regulation.
 - c) Refusal: the notification provides a justification pursuant to the exceptions laid down in Article 4 of the Regulation.
12. In cases of partial access only or refusal, the notification contains information on the ways of redress.

² [...]

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

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

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

[...]

Article 8
Processing of confirmatory applications

1. For the processing of confirmatory applications, the Executive Director may assign certain tasks to a Director, in compliance with this Decision and in compliance with the provisions of the decision of Executive Director referred to in Article 1.

Other provisions related to initial applications, mentioned in Article 7, apply *mutatis mutandis* to confirmatory applications.

2. The Transparency Office is responsible for examining the confirmatory application. The provisions set out in Article 6 on the deadline and on its extension, apply.

3. In the event that the Transparency Office proposes to disclose a document or excerpts of a document to which access was refused or for which only partial access was granted after an initial application, it will inform the Holder of the document.

Article 9
Form of access

1. Documents the access to which has been granted are sent preferably by email. If documents are voluminous or difficult to handle, the applicant may be invited to consult the documents at the Agency's Headquarters; that consultation is free of charge. The Agency does not reimburse any costs (for instance travel expenses) associated to that consultation.

2. If the document is already public, the notification consists of the publication reference and/or the place where the document is available.

3. If the volume of the documents requested exceeds fifty (50) pages in total, the applicant may be asked to pay a fee in accordance with the Regulation. The amount of the fee and its processing are decided by decision of the Executive Director. The applicant is informed by the Transparency Office of the amount due as soon as the number of pages is calculated by the Holder.

4. The Agency may postpone the disclosure of the document(s) until the fee has been paid by the applicant and received by the Agency.

5. Documents are supplied in an existing version or format.

Article 10
Documents originating from a third party

1. In case of an application for access to a document held by the Agency but which originates fully or partially from a third party (e.g. EU Member State, EU body, Third Country authority), the Holder consults the third party in accordance with Article 4(4) of the Regulation, unless it is clear that the document must or must not be granted.

2. The document may be granted without consulting the third-party, *inter alia*, when:

- a) The document requested has already been disclosed either by its author or under the Regulation or similar provisions; or
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b) The respective third party has given its prior agreement for full access.

3. When consulting the third party, the Agency sets a time limit not longer than five (5) working days in which the third party must provide a reply. In the absence of an answer by the third party within the prescribed period, or if the third party is untraceable, the Agency proceeds with the application in accordance with Article 4 of the Regulation.

4. If the Agency intends to grant access to a document originating from a third party against the will of this third party, it informs the third party concerned on the grounds for the disclosure of the document.

Article 11

Treatment of sensitive documents

1. Sensitive documents are documents, classified as “TOP SECRET”, “SECRET”, “CONFIDENTIAL”, OR “RESTRICTED”, which protect the essential interests of the European Union or one or more of its Member States in the areas covered by Article 4(1)(a) of the Regulation, notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in this Decision are handled only by staff members assigned to do so by the Holder or the relevant Director. Staff members assigned must additionally be among those that fulfil the prerequisites of accessing sensitive documents pursuant to the Agency’s internal security rules.

3. Access to a document the content of which partially contains sensitive information may be granted by the Agency provided that the parts containing the sensitive information have been blanked out.

4. Reasons for granting partial access only or refusing access to a sensitive document are given on the basis of the exceptions listed in Article 4 of the Regulation. If it proves that access to the requested document cannot be refused on the basis of these exceptions, the Holder handling the application informs the Security Officer of the Agency that the document is to be declassified by the Agency. The Security Officer is responsible for this process.

5. Sensitive non-classified documents in the Agency are marked “LIMITED”, are subject to the provisions of this Decision, and are treated in accordance with the applicable Security Notice.

Article 12

Minutes of the Management Board

1. The Secretariat of the Management Board prepares a public version of the minutes of the Management Board meeting and presents it to the Chairperson of the Management Board for approval.

2. This public version contains the main outcome of the meeting, the list of participants and the list of items debated and approved unless indicated otherwise by the Management Board.

3. When preparing the public version, the obligation of professional secrecy as provided for in Article 339 of the TFEU is fully respected.

4. The public version is accessible on the Agency’s website.

Article 13
Documents held by the EU Member States

Documents originating from the Agency held by the EU Member States are dealt with in accordance with Article 5 of the Regulation.

Chapter III
Final provisions

Article 14
Transparency Office

1. Transparency Office means the entity embedded within the Legal Affairs Unit of Corporate Governance, performing tasks of a cross-divisional nature, in charge of processing public access to documents applications and coordinating the internal network of case handlers.
2. For public access to documents matters, case-handlers take instructions from the Head of Transparency Office. Once a year the Head of Transparency Office informs each case-handler's reporting officer about his/her performance when carrying out duties related to public access to documents.
3. The Executive Director appoints case handlers among the Agency's statutory staff, upon proposal of the Directors.

Article 15
Information

The Agency informs the public on its website of the rights they enjoy under the Regulation and in accordance with this Decision.

Article 16
Reproduction of documents

This Decision is without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit disclosed documents.

Article 17
Annual Report

The Agency includes in its Annual Report the number of applications handled during the previous year, the number of cases in which it refused to grant access to documents, together with the reasons for such refusals and the number of sensitive documents not recorded in the public register.



Article 18
Processing of personal data

Personal data transmitted by the applicant on his/her identity is processed in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Article 19
Requests for information

Transparency Office forwards to the Press Office the requests which are not applications for public access to documents but requests for information.

Article 20
Repeal

Management Board Decision No 3/2014 of 19 February 2014 is hereby repealed.

Article 21
Entry into force

This Decision enters into force on the day following the date of its adoption.

Done by written procedure, 21 September 2016

For the Management Board

[signed]

Marko Gašperlin
Chairperson

