

Our internal ref. ICO/EO-SC-200/2022/01

Your ref. OI/4/2022/PB

Ms Emily O'Reilly
European Ombudsman

Subject: How the European Border and Coast Guard Agency (Frontex) deals with requests for public access to documents

Dear Ms O'Reilly,

Thank you for your letter of 15 July 2022 regarding your own-initiative inquiry OI/4/2022/PB concerning the “*Late registration of requests for public access to documents*” and “*Suspension of statutory deadlines*”.

Frontex herewith outlines the opinion that its practices of (1) finding fair solutions with applicants for broad requests, instead of pursuing a unilateral narrowing down of such requests, and (2) of seeking clarifications for insufficiently precise requests are in line with Regulation (EC) No 1049/2001 and ultimately serve the interests of applicants.

1. On the “*Late registration of requests for public access to documents*”

As recognized in the case law of the Court of Justice of the European Union¹ (CJEU), an application for public access to documents can only be formally registered by the receiving institution once a mutually acceptable solution has formally been found and consented by the applicant. More specifically, the term “fair solution” in Article 6(3) of Regulation (EC) No 1049/2001 indicates that at this stage of the processing, i.e. prior to the registration of the application, such a fair solution has to be based on a common understanding.

This is in contrast to a later stage in the process, where jurisprudence points out that in order to ensure that an applicant is not infringed of his/her possibility to avail him/herself of legal remedies, in particular proceedings before the CJEU and the European Ombudsman, no deviation from the timelines, in particular of Article 8 of Regulation (EC) No 1049/2001, is possible as otherwise this right could be jeopardized through this delay in replying. This protection of an applicant is not necessary nor legally required before the timelines are running. Furthermore, once the timelines stipulated in Articles 7 or 8 of Regulation (EC) No 1049/2001 are running, and after having exhausted all means to find a compromise during which the timelines continue to run, the institution is permitted to unilaterally declare a solution, i.e. to unilaterally narrow down the application. The eventual solution, i.e. a unilateral narrowing down, cannot be considered as fair at this point in time as it would not permit a meaningful cooperation to find such a solution.

¹ Cf. references to the several pieces of jurisprudence in Decision in case 1398/2013/ANA on the European Commission's refusal to give access to documents relating to the US Foreign Account Tax Compliance Act ('FATCA'), paras. 15 et. seq

In fact, the wording of Article 7 of Regulation (EC) No 1049/2001 supports this interpretation: Article 7(1) of Regulation (EC) No 1049/2001 distinguishes between (i) acknowledging receipt of an application (sentence 2), and (ii) the “registration” of an application (sentence 3). Only the latter triggers the 15-day timeline to reply and all other timelines stipulated in Articles 7 and 8 of Regulation (EC) No 1049/2001.

Frontex is thus of the opinion that at this point of the application process, i.e. the period between acknowledgement of receipt of an application and the registration of an application, a registration may only occur once a commonly acceptable fair solution - as indicated in the case law referenced above - and according to which an applicant has to contribute to, has been found jointly. This ensures a fair and transparent solution, permitting both sides to contribute to the finding of such solution while adhering to the principle that the applicant’s rights to - eventually - institute court proceedings or to make a complaint to the European Ombudsman, are not compromised.

The foregoing interpretation of Article 7 clearly must have been the legislator’s intention, as otherwise no specific distinction between acknowledging receipt and registration would have been made in this particular provision. Furthermore, finding a fair solution within the meaning of Article 6(3) of Regulation (EC) No 1049/2001 after acknowledging receipt does not disadvantage an applicant in any way given that no statutory timelines are triggered yet. In its approach, Frontex ensures the equal treatment of all already existing applications and balances the interest of the applicant for access against the workload resulting from the processing of the application, which can influence the equal treatment of all existent applications. While such balance is widely recognized in the jurisprudence of the CJEU², the amount of work entailed in considering an application depends not only on the number of documents pertaining to the application and their volume, but also on their nature³.

In summary, Frontex acknowledges and starts handling applications the very same day of receipt of an application or, at the latest, the following day. This does not trigger the application time-limits foreseen by Articles 7 and 8 of Regulation (EC) No 1049/2001. With the view of finding a commonly acceptable fair solution in exceptional cases where the request concerns a large number of documents, Frontex invites applicants to suggest their preferred way forward while at the same time offering possible solutions for the consideration of the applicant. As soon as a commonly acceptable solution is found, Frontex registers an application, and with it, the time-limits start running. Taking into the account the above, there is no such situation of a “late registration” of requests for public access to documents.

2. On the “Suspension of statutory deadlines”

According to Article 6(1) of Regulation (EC) No 1049/2001 “*applications for access to a document shall be made [...] in a sufficiently precise manner to enable the institution to identify the document*”. It follows from this article that the handling of an application and ultimately access to documents is conditional upon the filing of a precise request, and it is for the applicant to identify the ‘precise’ document he or she wishes to obtain⁴.

Since precision is a pre-requisite for the handling of an application by the institution concerned and ultimately to access document(s), the deadlines provided for in Article 7 and 8 of Regulation (EC) No 1049/2001 are not applicable until the moment when the access to document application is clear and precise enough to enable Frontex to ascertain the documents requested and, eventually, make a decision regarding access to such document(s). As explained in the previous point regarding the “*Late registration of requests*”, once the timelines of Articles 7 or 8 of Regulation (EC) No 1049/2001 are running, and a request remains imprecise, the institution is permitted to unilaterally declare a solution, i.e. not processing the request or refusing the access to document(s) due to the fact that Frontex is not provided with the necessary information to identify such document(s). Temporarily putting on hold the timelines in the context of an application thus serves the sole purpose of obtaining clarifications from the applicant without which the application would not be processable. Frontex is of the opinion that the

² Cf. *Strack v Commission* (2014), paras. 26 et seq., *Evropaïki Dynamiki v European Parliament* (2017), paras. 82 et seq.

³ Cf. *Verein für Konsumenteninformation v Commission* (2005), para. 111

⁴ Cf. Para. 37 of the Opinion of Advocate General Bobek delivered on 21 September 2016 on Case C-491/15 P

alternative of not processing or rejecting applications due to a lack of clarity or precision is an obstacle to openness and fair treatment of an applicant. In fact, Frontex is of the opinion that its approach ultimately ensures that the right of access to documents is upheld.

As recognized in jurisprudence, and as envisioned in Article 6(2) of Regulation (EC) No 1049/2001, the mere finding that the application for access was imprecise must lead the addressed institution to make contact with the applicant in order to define as precisely and closely as possible the documents requested. Thus, a provision in the area of public access to documents constitutes the formal transcription of the principle of sound administration and of the duty of assistance, fundamental to ensure the effectiveness of the right of access defined by Regulation (EC) No 1049/2001⁵. In addition to assisting the applicant in clarifying requests that are imprecise to enable the identification of documents, Frontex continues to take due account of further clarifications made by the applicant in the course of the process and recognises⁶ that the wording of Article 6(2) of Regulation (EC) No 1049/2001 implies that an applicant has a right to clarify an application. Once the applicant provides the necessary clarifications to enable the identification of document(s), at this very moment, the statutory timelines are triggered and start to run. All of the above is part of due process in handling an application for access to documents. As a consequence, temporarily putting on hold the timelines of an application is ultimately in the interest of the applicant.

Frontex stands ready to clarify any further queries you may have.

Yours sincerely,

Electronically signed

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*Deputy Executive Director for Information Management and Processes
Deputising for the Executive Director ad interim*

⁵ Cf. para. 84 Case T-300/10, *Internationaler Hilfsfonds eV v European Commission*

⁶ Cf. *European Ombudsman Recommendation on the European Commission's refusal to grant public access to documents concerning compliance with biofuels sustainability criteria under the Renewable Energy Directive (case 1527/2020/DL)*