*Your ref. Complaint 1129/2023/OAM*

**Ms Emily O'Reilly**
European Ombudsman

**Subject: Frontex's reply concerning the refusal to provide lists of documents identified as falling within the scope of requests for public access to documents**

Dear Ms O'Reilly,

Thank you for your letter of 20 July 2023 and the invitation therein to elaborate on Frontex's position regarding the requirement to provide a list of documents identified as falling within the scope of requests for public access to documents (PAD). I welcome the opportunity to address the arguments raised by the complainant and to explain Frontex's position as regards the legal basis of its approach.

Frontex understands that the complainant, in substance, considers that Frontex has a legal obligation under Regulation (EC) No 1049/2001[1] and the jurisprudence of the Court of Justice of the European Union to provide lists of identified documents to all applicants in response to all initial PAD requests. By failing to do so, the complainant alleges that Frontex carries out maladministration, which undermines an applicant's right to submit an effective and informed appeal.

Frontex does not follow the arguments brought forward by the complainant and must respectfully disagree with the assertion that Frontex's practices amount to maladministration.

Frontex finds it impossible to recognise a legal obligation which would entail a duty to list the identified documents falling within the scope of all initial application under Regulation (EC) No 1049/2001. The case-law that the complainant refers to has only limited applicability and relates to instances where a general presumption of confidentiality has been applied, in which case not providing such lists would make the presumption irrefutable.

In all instances of partial or full refusal of access, Frontex's practice of always providing the number of identified documents along with detailed reasons for how disclosure would undermine the protected interests under Article 4 of Regulation (EC) No 1049/2001 fully allows the applicant to make an effective and informed appeal. Moreover, Frontex has no obligation to create a document, which does not exist, for the purpose of granting access to documents under Regulation (EC) No 1049/2001.

Please let me refer to the enclosed technical Annex prepared by my staff, which comprehensively addresses the complainant's arguments and the legal basis of Frontex's approach. Frontex stands ready to provide you any further information deemed useful, and I again express my gratitude for the possibility to exchange views on the allegations raised.

Yours sincerely,

*Electronically signed*

Hans Leijtens
Executive Director

[1] Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

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# ANNEX

## 1. The legal basis under the framework of Regulation (EC) No 1049/2001[1]

Regulation (EC) No 1049/2001 provides in clear terms which statutory obligations an institution has in relation to providing a reply to a request for public access to documents (PAD). Article 7(1) of said Regulation states that an institution "*shall either grant access to the document requested … or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application*". Similarly, in case of a confirmatory application and when an institution refuses access in total or partially, it shall reply in writing and state the reasons for refusal and inform applicants of the available legal remedies, as per Article 8(1) of Regulation (EC) No 1049/2001.

It thus follows that Frontex has the following obligations in this regard: a) to provide a written reply b) to state the reasons for non-disclosure and c) to inform the applicant of his/her right to submit a confirmatory application or inform on the available legal remedies.

The general obligation to state these reasons stems from Article 296 of the Treaty of the Functioning of the European Union[2]. The Court has held that:

> [A]ccording to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the EU judicature to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case.[3]

As regards the obligation to state reasons under Regulation (EC) No 1049/2001, it is well-established by the Court that where an EU institution, body, office or agency that has received a request for access to a document but refuses to grant access on the basis of one of the exceptions laid down in Article 4 of Regulation 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical[4].

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[1] Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).
[2] Judgment of 19 November 2014 in case T-223/12, *Ioannis v European Centre for Disease Prevention and Control* para 19.
[3] ibid para 20.
[4] Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard* para 62.

Frontex would like to emphasise that it always provides the number of identified documents as well as detailed reasons on a case-by-case basis for how disclosure would undermine the protected interests under Article 4 when required to opt for full non-disclosure or partial release, a practice which has been previously upheld by the Court as fulfilling both the necessary procedural and substantive requirements, including enabling the Court to exercise its power of review, detailed above.[5] In its initial PAD decisions, Frontex provides all applicants with ample information to allow them "to understand the reasons why access to the information requested"[6] had to be refused. In doing so, Frontex needs to ensure that the interests, which the exceptions are specifically designed to protect, are not undermined by de facto revealing the contents of the documents "and thereby depriving the exception of its very purpose"[7].

As regards the foreseeability, the requirement to explain that the risk to an interest protected by Article 4 of Regulation (EC) No 1049/2001 is "reasonably foreseeable" is a prognosis which amounts to a plausibility test, which takes into account that it is inherent to the protection of certain interests - notably of the protection of the public interest as regards public security, which Frontex frequently has to apply due to the nature of its activities and documents held, that the obligation to provide reasons should not be detrimental to said interest. The risk and thus the reasons given in initial Frontex PAD replies, are by no means "purely hypothetical". The case-law[8] thereby accepts, by way of the adjective "purely", that a prognosis with respect to a risk to undermine public security remains – and can only remain – a prognosis, as long as it is not "purely", and thus not "entirely", hypothetical.

In your letter[9] you refer to a previous European Ombudsman Decision, namely case 1278/2022/JK, which states that "[t]he Ombudsman considers that it is a matter of good administration to provide applicants with a list of the documents identified as falling within the scope of a public access request, unless the very disclosure of the list undermines the interest(s) to be protected" [10]. This quote refers, in turn, to paragraph 44 of case T-701/18 *Campbell v European Commission*[11]. Frontex notes that the applicant relies, in a similar manner, on this case to underpin the argument that Frontex is obliged to provide a list containing certain details of non-disclosed documents. Paragraph 44 of said judgement states:

> More generally, although the application of a general presumption of confidentiality permits the institution to dispense with carrying out an individual examination of each document, it cannot, however, exempt it from indicating to the applicant which documents it identified as being part of a file covered by that presumption and from providing him or her with the list of those documents.[12]

This paragraph clearly indicates that the obligation to provide such lists is *only* applicable where the institution has applied a general presumption of confidentiality. Consequently, this paragraph cannot be read in isolation as introducing a general obligation to provide a list of documents identified within

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[5] ibid para 74 and paras 107-110.
[6] ibid para 110.
[7] Judgment of 7 February 2018 in case T-851/16, *Access Info Europe v European Commission* para 122.
[8] Judgment of 7 February 2018 in case T-852/16, *Access Info Europe v European Commission* para 40.
[9] Your letter of 20 July 2023.
[10] Decision by the European Ombudsman on the European Securities and Markets Authority's refusal to give public access to exchanges with the European Commission on the preparation of 'equivalence decisions' in relation to the United Kingdom (Case 1278/2022/JK), 19 June 2023 para 34.
[11] Judgment of 28 May 2020 in case T-701/18, *Campbell v European Commission*.
[12] ibid para 44.

the scope of PAD requests. Instead, the paragraph needs to be read in its wider context and especially in conjunction with paragraphs 42, 46 and 62 of said Judgment. As explained by the Court, the provision of such lists serves the purpose of enabling the applicant to argue that documents requested are not covered by the general presumption and thus being able to rebut the application of such presumption.[13] The ability of an applicant to engage in such rebuttal, i.e. to make an informed and effective appeal, in these instances, however, also depends on other circumstances that must be assessed on a case-by-case basis. Thus, the application of a general presumption of confidentiality does not *per se* require the institution to provide the applicant with a list of the documents identified as falling within the scope. Significantly, as the Court held, it may already be possible for the applicant to be able to effectively argue against the application of a general presumption based solely on the wording of the request for access and what types of documents were sought.[14]

It is clear from the above, and even more so once read together with paragraphs 28 to 30 of *Campbell v Commission*, that the Court has recognised that by applying a general presumption of confidentiality to a category of documents, it is justified for the institution to derogate from the obligation to provide specific and actual explanations on how access to those documents would undermine the interests sought to be protected, as no individual examination of the documents is required. In these instances, an obligation to individually examine all documents would defeat the purpose of applying a presumption in the first place and would not enable to institution to reply in a "global manner" [15]. In other words, applying the general presumption alleviates the obligation to provide, in the written reply, detailed reasons for the non-disclosure of each individual document as otherwise stipulated in Article 7(1) of Regulation (EC) No 1049/2001.

This rationale supports Frontex's understanding that the reasons provided to applicants in all cases of total or partial refusal of access allow applicants to make an effective and informed appeal, either as a confirmatory application or relying on available legal remedies. In the absence of these reasons, which are not necessary to provide when applying a general presumption, a list of the identified documents replaces this function and may provide a possibility for the applicant to, on appeal, rebut the decision of the institution. It should thus be highlighted that it cannot be determined in generic and absolute terms whether the obligation to state reasons has been fulfilled, thus enabling the applicant to make an effective and informed appeal, or whether a list must be provided in this regard. In other words, a case-by-case analysis is always a necessity, taking into account several factors in relation to the particular application in question.

It follows from the Court's reasoning above, on which the complainant relies, that whenever a general presumption is *not* relied upon, and when an individual assessment of the documents has been done and detailed reasons as to how the disclosure of the documents would specifically and actually undermine a protected interest under Regulation (EC) No 1049/2001 have been provided by the concerned institution,

[13] ibid paras 42 and 46.
[14] ibid para 62.
[15] ibid para 40.

there is neither a need, nor an obligation to provide such a list to enable applicants to make an effective and informed appeal. The statement of reasons for non-disclosure following an individual assessment of documents and the provision of a list of identified documents in cases where a non-disclosure decision rests on a general presumption not requiring an individual examination of the documents concerned, serve the same purpose. As such, they are not foreseen to be provided together in the same written reply to an application for PAD.

Based on the aforementioned, Frontex cannot follow the complainant's argument that a legal obligation stems from either Regulation (EC) No 1049/2001 or the jurisprudence of the Court to generically provide all applicants in response to all initial applications with a list identifying the documents falling within the scope of the application. Frontex contends that its practice, which is based on the circumstances of each case at hand, of always providing the number of identified documents and elaborating which exceptions are applicable together with detailed justifications to that effect is in accordance with the applicable PAD framework. Frontex thus cannot agree with the complainant's allegations that its practices amount to maladministration and undermine the applicant's ability to make an effective and informed appeal.

In your letter of 20 July 2023, you indicate that it is a matter of good administration to provide applicants with a list of the documents identified as falling within the scope of a PAD request, referencing the Ombudsman Decision 1278/2022/JK[16]. In the case leading to this Decision, the European Securities and Markets Authority (ESMA) considered that it was under no legal obligation to provide such a list. In paragraph 34 of your Decision, in a direct reply to the assessment by ESMA, you did not object to this statement and instead referred to it is a matter of good administration, which is different from the notion of a legal obligation. Frontex notes that there was no maladministration finding in that case, and instead, as part of a suggestion for improvement, EMSA was asked "in those instances where a list of identified documents cannot be provided, that the documents are described in such a way as to enable the applicant to understand the number and nature of the documents at stake."[17]

Frontex thus understands your position to also be in line with Frontex's approach as you a) do not explicitly recognise a legal obligation, b) do not require institutions to provide a list to all applicants in response to all initial applications, and c) recognise that the important element is to enable the applicant to understand the number and nature of the documents at stake. Frontex would like to reiterate here that it always provides the number of identified documents and detailed explanations for the non-disclosure of documents, which enable the applicant to understand the nature of the documents concerned and make informed and effective appeals.

**2. <u>The provision of a list constitutes the creation of a new document</u>**

Frontex would like to recall that the complainant contends that Frontex's assertion that the provision of a list constitutes – in fact - the creation of a new document is "misleading" and that such reasoning is

[16] Decision by the European Ombudsman on the European Securities and Markets Authority's refusal to give public access to exchanges with the European Commission on the preparation of 'equivalence decisions' in relation to the United Kingdom (Case 1278/2022/JK), 19 June 2023 para 33.
[17] ibid.

"absurd". Moreover, according to the complainant such lists should be part of the written reply. Frontex would like to elaborate on its understanding in this regard.

The provision of a list as part of a release of documents under Regulation (EC) No 1049/2001, can only be considered as either a) forming part of the written reply, which Frontex and other institutions are obliged to create under Article 7(1), or b) being defined as a document within the meaning of Article 3(a) and 2(3) of Regulation (EC) No 1049/2001.

The distinction between providing a reply letter and creating a new document can be readily illustrated. For example, following a request for PAD, an applicant may receive a reply letter from an institution in which detailed reasons are provided for the full non-disclosure of 20 documents in accordance with Article 7(1) of Regulation (EC) No 1049/2001. The same applicant may then submit a new application (or a confirmatory application) requesting the list of the 20 non-disclosed documents specifying e.g. the titles, archive numbers, and date of the documents concerned. In order to provide such a list, it would require the compilation of information contained in the 20 documents into a new stand-alone document. As part of the disclosure, the newly created document would not form part of the written reply letter itself but instead of the act of granting access to the requested document, as clearly distinguished in Article 7(1) of Regulation (EC) No 1049/2001 (see above). In other words, in order for the institution to provide access to the requested document, it would first be required to create the document at issue and then grant access to it.

In certain circumstances, as elaborated under point 1 above, the provision of such list would form part of the reply letter. In all other circumstances, the list would need to be considered as a disclosed document in order to fall within the remit of Regulation (EC) No 1049/2001. In these cases, the inclusion of a list when granting access would need to constitute the *de facto* creation of a new document.

The Court has made it abundantly clear that the right of access to documents applies only to existing documents in the possession of the institution concerned[18] and Regulation (EC) No 1049/2001 cannot be relied upon to oblige an institution to create a document which does not exist, even if that document were based on information already appearing in existing documents held by it[19].

Moreover, the Court has established that the duty of assistance within the meaning of Article 6(2) of Regulation (EC) No 1049/2001, does not oblige an institution to create a document for which it has been asked to grant access but which does not exist[20].

Therefore, Frontex does not recognise the alleged "absurdity" of the assertion that, in circumstances which do not oblige the Agency to provide a list of identified documents as part of its reply letter, the provision of such lists constitutes the creation of a new document in accordance with Regulation (EC) No 1049/2001 and well-established case-law.

## 3. Conclusion

Frontex finds it impossible to recognise a legal obligation which would entail a duty to list the identified documents falling within the scope of a request for PAD in all initial application under Regulation (EC)

[18] Judgment of 2 October 2014 in case C-127/13, *Strack v Commission*, para 38
[19] Judgment of 11 January 2017 in case C-491/15 P, *Typke v Commission*, para 31.
[20] ibid para 46.

No 1049/2001. The case-law that the complainant refers to in this regard has only limited applicability as it relates to instances in which a general presumption of confidentiality has been applied and where not providing such lists would make the presumption irrefutable. In all instances of partial or full refusal of access, Frontex's practice of always providing the number of identified documents along with detailed reasons, determined on a case-by-case basis, for how disclosure would undermine the protected interests under Article 4 of Regulation (EC) No 1049/2001 fully allows the applicant to make an effective and informed appeal. Moreover, Frontex has no obligation to create a document which does not exist for the purpose of granting access to documents under Regulation (EC) No 1049/2001.

Frontex does not follow the arguments brought forward by the complainant to the European Ombudsman and must respectfully disagree with the assertion that Frontex's practices amount to maladministration and undermine applicants' right to submit an effective and informed appeal.