FRONTEX
EUROPEAN BORDER AND COAST GUARD AGENCY

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,

With reference to your letter of 16 September 2022 as regards your own-initiative inquiry OI/4/2022/PB on "How the European Border and Coast Guard Agency (Frontex) deals with requests for public access to documents", please find enclosed the follow-up letter containing the specific paragraphs, in full, from the case law that Frontex was referring to in its initial reply of 5 August 2022.

Frontex remains at your disposal for any further information you may require.

Yours sincerely,

Electronically signed

[redacted]
Executive Director ad interim

Annex:
Frontex follow-up letter (Ref.No: ICO/EO-SC-200/2022/01)

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ANNEX

1. *On the "[l]ate registration of requests for public access to documents"*

As recognized in the case law of the Court of Justice of the European Union[1] (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 to 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.

Following from Cases T-392/07 and C-127/13 P (Guido Strack v European Commission cases), the institution concerned is able to engage in negotiations with an applicant in order to find a mutually agreed fair solution:

Case C-127/13 P Guido Strack v European Commission

"26 In the case of an application relating to a very long document or to a very large number of documents an extension of 15 working days of the time-limit laid down in Article 8(1) of that regulation is authorised in exceptional cases. Although, in such a case, ***Article 6(3) allows the institution concerned to find a fair solution with the applicant seeking access to documents in its possession, that solution can concern only the content or the number of documents applied for****."*

Case T-392/07 Guido Strack v European Commission

"45 The General Court has already had occasion to specify that account should be taken of ***the possibility that an applicant may submit****, on the basis of this regulation,* ***a request requiring a workload which could very substantially paralyze the proper functioning of the institution*** *to which this request is addressed. The General Court considered that,* ***in such a case, the institution's right to seek a 'fair settlement'*** *with the claimant, pursuant to Article 6(3) of Regulation No*

[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*

1049/2001, reflected the possibility to take into account, even if in a particularly limited way, ***the need to reconcile the interests of the claimant and those of good administration****. The General Court concluded that an institution must therefore retain the possibility of* ***balancing, on the one hand, the interest of public access to documents and, on the other hand, the workload which would ensue therefrom****, in these particular cases, to preserve the interests of good administration (judgments of the General Court of 13 April 2005, Verein für Konsumenteninformation v Commission, T-2/03, ECR p. II-1121, paragraphs 101 and 102 , and of 10 September 2008, Williams v Commission, T-42/05, not published in the ECR, paragraph 85)."*Case T-344/08, EnBW Energie Baden-Württemberg v Commission*

"105. Thirdly, it should be recalled that, ***where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents*** *referred to in the request,* ***it is obliged to try to consult with the applicant*** *in order, on the one hand****, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous*** *than a concrete, individual examination of the documents. Since a right of access to documents is the principle, the institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access (VKI, paragraph 28 above, paragraph 114)."*

Therefore, the negotiation strives to ensure a balance between the institution's administrative burden and the applicant's widest possible access to documents, whilst respecting his/her rights to seek legal remedies, as no statutory deadlines are yet triggered.

The reference to 'jurisprudence' from the second paragraph of our reply letter refers, as well, to the abovementioned cases of Guido Stack v European Commission, specifically to the fact that after registration, no deviations from the timelines are allowed as to not jeopardize applicant's right to institute court proceedings. Thus, those first two references are interconnected and are treated jointly:

Case C-127/13 P Guido Strack v European Commission

*"28. Thus, an institution may, in exceptional circumstances, refuse access to certain documents on the ground that the workload relating to their disclosure would be disproportionate as compared to the objectives set by the application for access to those documents. However****, reliance on the principle of proportionality cannot allow the time-limits laid down by Regulation No 1049/2001 to be changed without creating a situation of legal uncertainty****."*

Case T-392/07 Guido Strack v European Commission

"47 Finally, the General Court has already had occasion to specify ***that the fact of having concluded a fair settlement,*** *pursuant to Article 6(3) of Regulation No 1049/2001****, cannot affect the time limit for lodging an appeal against a final decision*** *(Williams v Commission, paragraph 45 above, paragraph 60)."*

"50 It is therefore apparent from the evidence in the file that the contacts between the Commission and the applicant ***did not result in an arrangement*** *within the meaning of Article 6(3) of Regulation No 1049/2001,* ***as regards the time limits for processing access requests****.*

51 However, Regulation No 1049/2001 contains ***no provision expressly allowing the institution, in the absence of an equitable arrangement with the claimant, to suspend the time limits provided***

for in Articles 7 and 8 *of that regulation, even if the proposal of that institution would be reasonable in the present case, having regard, in particular, to the importance of the workload. Furthermore, Regulation No 1049/2001 expressly provided for the possibility that a request for access could relate to a very large number of documents, since its Article 7(3) and its Article 8(2) provide that the respective processing times for initial applications and confirmatory applications may be extended on an exceptional basis, for example when the application concerns a very long document or a very large number of documents."*

In the light of the above case law of the CJEU, Frontex states that since the negotiations with the applicants cannot affect the statutory timelines, and the statutory timelines are triggered by the registration of the applications, it is clear that the negotiations with the applicants are to be conducted in the short period between receiving an application/acknowledging its receipt and its formal registration.

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.

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 CJEU[2], 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 nature[3].

In footnote 2 we make reference to the act of balancing the interest of the applicant for access against the workload resulting from the processing of the application, introduced in the above-

[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*

mentioned Cases T-392/07 and C-127/13 P and additionally highlighted in Case T-136/15 (Evropaïki Dynamiki v European Parliament). The Judgement in Case C-127/13 P indicates that an institution may unilaterally refuse access based on a disproportionate workload relating to the disclosure. Frontex favours seeking a fair solution with the applicant instead of a unilateral access refusal due to workload considerations, as finding a fair solution with the applicant has proven fruitful for serving applicants' interests.

Case C-127/13 P Guido Strack v European Commission

"26 In the case of an application relating to a very long document or to a very large number of documents an extension of 15 working days of the time-limit laid down in Article 8(1) of that regulation is authorised in exceptional cases. Although, in such a case, ***Article 6(3) allows the institution concerned to find a fair solution with the applicant seeking access to documents in its possession, that solution can concern only the content or the number of documents applied for****.*

27 That finding cannot be undermined by the Commission's argument relating to the possibility for the institutions to reconcile the interests of an applicant for access to documents in their possession with the interest of good administration. It is true, as stated in paragraph 30 of the judgment in Council v Hautala (C-353/99 P, EU:C:2001:661), that it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is applied or in which the number of passages to be censured would involve an inappropriate administrative burden, ***balance the interest of the applicant for access against the workload resulting from the processing of the application for access in order to safeguard the interests of good administration.***

28 Thus, ***an institution may, in exceptional circumstances, refuse access to certain documents on the ground that the workload relating to their disclosure would be disproportionate as compared to the objectives set by the application for access to those documents****. However, reliance on the principle of proportionality* ***cannot allow the time-limits laid down by Regulation No 1049/2001 to be changed without creating a situation of legal uncertainty****."*

Case T-136/15 Evropaïki Dynamiki v European Parliament

"82 It follows that ***the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work*** *(judgment of 13 April 2005, Verein für Konsumenteninformation v Commission, T 2/03, EU:T:2005:125, paragraph 115).*

83 In the light of the case-law cited in paragraphs 78 to 82 above, it is appropriate to ascertain whether, in the present case, ***three cumulative conditions*** *are met, namely, firstly, whether the workload represented by the specific, individual examination of the documents requested is unreasonable, secondly, whether the Parliament has attempted to consult with the applicant and, thirdly, whether it has genuinely investigated all other conceivable options to a specific, individual examination of the documents requested."*

"102. It follows from the foregoing that, in the very particular circumstances of the present case, ***in light of the amount of work entailed, the proposal made by the Parliament and the applicant's attitude, the Parliament was entitled to claim an unreasonable burden of work*** *in refusing to make a specific, individual examination of all the documents requested* ***without being required, in the absence of other conceivable options, to set out in detail, in its decision, the reasons for which those other options would also mean an unreasonable workload."***

In footnote 3 we highlight the idea that the workload related to a case results from, in addition to the number and scope of the documents, as well their nature and the required depth of the examination, as recognized in:

Case T-2/03 Verein für Konsumenteninformation v Commission

"111 Sixthly, the amount of ***work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature.*** *Consequently, the need to undertake a concrete, individual examination of very numerous documents does not, on its own, provide any indication of the amount of work entailed in processing a request for access, since that amount of work also depends on the required depth of that examination."*

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 "[s]suspension of statutory deadlines"

According to Article 6(1) of Regulation (EC) No 1049/2001 "[a]pplications 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 obtain[4].

In footnote 4, we bring forward the Opinion of Advocate General Boke on Case C-491-15 P, in which precision of a request is considered the precondition to accessing the documents sought:

Opinion of Advocate General Bobek delivered on 21 September 2016 on Case C-491/15 P

"37 First, ***access is conditional upon the filing of a precise request****. In general,* ***it is for the applicant to identify the precise 'document'*** *that he or she wishes to obtain. That requirement derives from Article 6(1) and Article 6(2) of the regulation. Pursuant to those provisions, applications for access to a document shall be made 'in a sufficiently precise manner to enable the institution to identify the document …* ***If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so****, for example, by providing information on the use of the public registers of documents'."*

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 "[l]ate registration

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

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 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 1049/2001[5].

The jurisprudence referenced in the above paragraph (footnote 5) provides that the concerned institution to which an insufficiently precise application has been made, must contact the applicant as to clarify the information requested:

Case T-300/10, Internationaler Hilfsfonds eV v European Commission

"84 Thus, it is clear from the wording of that provision, and in particular from the use of the verbs 'ask' and 'assist', that ***the mere finding that the application for access was insufficiently precise, whatever the reasons, must lead the addressee institution to make contact with the applicant in order to define as closely as possible the documents requested.*** *It is thus a provision which, in the area of public access to documents, constitutes the formal transcription of the principle of sound administration, which is one of the guarantees afforded by the EU legal order in administrative procedures (Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, paragraph 107). The duty of assistance is thus fundamental to ensure the effectiveness of the right of access defined by Regulation No 1049/2001."*

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 recognises[6] that the wording of Article 6(2) of Regulation (EC) No 1049/2001 implies that an applicant has a right to clarify an application.

Following European Ombudsman recommendations referenced in footnote 6, Frontex, when processing a request, takes due account of clarifications made by the applicant:

European Ombudsman Recommendation, case 1527/2020/DL

"18. The EU rules on public access to documents provide ***that if an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant*** *in doing so.*

[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)*

19. The wording of this provision implies that ***an applicant has a right to clarify an application. It is also implicit in that provision that an institution is required to take due account of any clarifications*** *made by the applicant in the course of the procedure."*

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.