

Your ref.: Complaint 344/2023/PVV

Ms Rosita Hickey

Director of Inquiries

European Ombudsman

Subject: How the European Border and Coast Guard Agency (Frontex) dealt with a request for public access to documents concerning social media monitoring (your references: PAD-2022-00375 and PAD-2022-00431)

Dear Ms Hickey,

With reference to your request of 28 February 2023 related to complaint 344/2023/PVV, I would like to provide you with Frontex's additional views further explaining why the Agency had to invoke the exceptions as already explained in Decisions PAD-2022-00375 and PAD-2022-00431 as well as in regard to additional documents identified as part of the confirmatory procedure.

1. Additional views on the exceptions that Frontex had to invoke

1.1 The protection of the public interest as regards public security

"[G]iven that the documents concern the Agency's 'plans' for developing social media monitoring capabilities - rather than ongoing operational activities - it seems that the Agency has opted for an excessively broad application of the exceptions under Article 4, particularly concerning 'public security'"¹

Frontex disagrees that it had an 'excessively broad application' of the public security exception. The identified documents, which concern social media monitoring, are part of projects that are partly still ongoing,² respectively projects that were/are temporarily suspended due to an EDPS investigation, which is ongoing. In any case, Article 4(2) third indent of Regulation (EC) No 1049/2001 protects the purpose of inspections.

While all of the projects are/were taking place in different operational theatres where Frontex and Member States operations are ongoing, the documents contained numerous pieces of information of a general operational nature. In particular, these documents contained information on the aspects of law enforcement activities which do only change marginally over the years and whose release would undermine the public interest of public security as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001³ independent of the social media monitoring project.

¹ Frontex considered all arguments brought forward in document "COMPLAINT_202300344_20230220_123809.pdf"

² Cf. as outlined inter alia in document "20190606_EDPS...".

³ 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)

This information thus pertained on the one hand to mandated operational activities of Member States, EU-actors as well as other international counterparts, and on the other hand to commenced and interrupted social media monitoring activities. As a consequence, these documents are of a sensitive nature, regardless of the implementation of the social media monitoring project at the point in time when the Decisions were rendered.

Such documents, contain, *inter alia*, information which would undermine the protection of the public interest as regards public security, specifically information relating to:

- the operational area
- modus operandi of law enforcement;
- details crucial for situational awareness at the external borders of the EU;
- means of communication used by law enforcement officials;
- number and profiles of officers deployed; details of operational areas;
- assets deployed in the operational area and
- reporting tools and methods used by law enforcement officials.

Public security as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 is thus a multidimensional exception and the Agency has no administrative discretion whether or not to bar access to the numerous elements falling under this exception but has to deny access (“[t]he institutions shall refuse access”). The notions discussed in this regard in Judgment of 27 November 2019 in case T-31/18 (*Izuzquiza and Semsrott v European Border and Coast Guard Agency*), are of particular importance also for the case at hand. In particular, the judgment recognizes that Frontex enjoys a wide discretion for the purpose of determining⁴ whether disclosure to the public would undermine the interests protected by this exception. Frontex explained in detail in its Decisions PAD-2022-00375 and PAD-2022-00431 why it had to invoke this and other exceptions, which permit the complainant “to understand the reasons why access to the information requested.”⁵ Frontex would also like to recall that while it had provided detailed justifications in this regard both at the initial and confirmatory stage, this duty finds its limits in having not to be as detailed as to deprive the justifications of their very purpose.⁶ As Frontex thus provided ample explanations on the causality between releasing a certain element contained in the document and the harm to the protected interests in Article 4 of Regulation (EC) No 1049/2001, this is to be distinguished from the fact that the complainant does not agree with them. Reference is thus again be made to the wide discretion Frontex enjoys in determining the applicability of the exceptions under Article 4(1)(a) of Regulation (EC) No 1049/2001, and Frontex balancing of the fundamental right of public access to documents with other protected - public - interests, including those of other actors such as Member States, other EU agencies and international partners.

Consequently, Frontex maintains that the justifications, and particularly concerning public security, were rightfully invoked.

1.2 The protection of the public interest as regards international relations

“[W]ith regards to the ‘international relations’ exception, Frontex has failed to respond satisfactorily to my argument that it has wrongly involved this exception which relates to third countries only; the documents I requested pertain to exchanges with Europol; it is therefore unclear in what sense ‘negotiations’ with ‘third countries’ are at stake in this case”

In its reconsideration at the confirmatory stage, Frontex explained to the complainant that four of the five documents identified at the initial state contained information relating to international relations as laid down in Article 4(1)(a) third indent of Regulation (EC) No 1049/2001. In particular, these documents - which were exchanges between Frontex and Europol -, referred to positions of the EU concerning certain third countries. In other words, their disclosure would bear consequences on the cooperation between Frontex, Europol other EU entities and Member States

⁴ Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency* (FRONTEX), para 65.

⁵ Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency* (FRONTEX), para. 110.

⁶ Judgment of 26 April 2005 in case T-110/03, *Sison v Council*, para. 84

with the countries concerned and with other third countries in the future. The delicate nature of international relations, where trust, once jeopardized is difficult to be restored, requires a special duty of care. Consequently, releasing these pieces of information contained in these documents would, with a foreseeably likelihood, be detrimental to maintaining and establishing a meaningful cooperation and engagement in this regard.

Thus, also here Frontex was compelled not to release this information as to protect and maintain these relations for itself and its partners.

1.3 Widest possible access and partial access

“Frontex has failed to fulfil its obligations under Regulation (EC) No 1049/2001 to provide the widest possible access to the requested documents”

“Frontex has failed to comply with its obligations under Article 4(6) to provide at least partial access to the identified documents, positing a false equivalence between the interest in public access to the documents (a fundamental right) with the public interest in good administration (i.e. that the process of manual redaction would pose a “disproportionate” administrative burden). Given the relatively low number of documents concerned, and given that any deviation from the principle of granting the widest possible access to documents can only entertained by EU institutions in “exceptional” cases, the Agency has wrongfully denied (partial) access to some of these documents.”

Frontex granted partial access to 32 of the 50 documents identified at confirmatory stage. In its consideration whether partial access was possible, Frontex assessed whether exceptions had to be applied (further to public security, these were international relations, the protection of: the purpose of investigations, legal advice, ongoing decision-making processes as well as negotiations with Europol) and gave access to the pieces of information not affected by such exceptions, therefore complying with the principle to provide the widest possible access and the other considerations in Article 1(a) of Regulation (EC) No 1049/2001.

Regarding the 18 non-disclosed documents, and as explained to the complainant in the Decisions, Frontex analyzed the documents at stake and their content, with the decisive factor being the number of elements to be redacted in each document and the information “left” in the documents after such. While balancing all interests, the applicability of the absolute exceptions of public interest (regarding public security and international relations), in addition to the relative exceptions, led Frontex to the conclusion that a deviation from the principle of providing partial access as laid down in Article 4(6) of Regulation (EC) No 1049/2001 was necessary, particularly as public administrations are equally obliged to adhere to the principles of transparency and to the principle of sound administration. Therefore, releasing those highly redacted documents with fragmented information would have not conveyed any information to the complainant. Hence, it was concluded, as explained in the Decisions that “the administrative burden of blanking out the parts that may not be [disclosed,] proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required”⁷, combined with the fact that a “partial access would be meaningless because the parts of the documents that could be disclosed would be of no use”⁸ made partial access not possible.

1.4 Overriding public interest and alleged non-addressing concerns about non-compliance with EU data protection laws

“Frontex has failed to duly consider and respond to the specific arguments I had made for an ‘overriding’ public interest in disclosure of documents pertaining to its plans for developing ‘social media monitoring’ (SMM) capabilities.”

⁷ Applicable also in regard to Regulation (EC) No 1049/2001: Judgment of 7 February 2002 in case T-211/00, *Kuijter v Council*, para. 57.

⁸ Judgment of 12 July 2001 in case T-204/99, *Olli Matilla v Council*, para. 69.

“Frontex has failed to address the credible and serious concerns I have raised about possible noncompliance of the Agency's planned SMM capabilities with EU data protection laws, and therefore the necessity for EU citizens to be able to scrutinise these plans”

The applicability of one exception alone suffices for a refusal of access - in particular if numerous elements fall under the multidimensional scope of Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 in addition to Article 4(1)(a) third indent of Regulation (EC) No 1049/2001 as explained above.⁹ It has to be added that the exceptions do not have to be applied cumulatively and thus the applicability of one exception is sufficient to justify non-access. Moreover, in the event that exceptions are applicable, especially absolute exceptions, the examination of relative exceptions can “take a back seat”, as due to existence of an absolute exception, an overriding public interest cannot exist - in any case, the examination whether an overriding public interest can be dispensed with.¹⁰ If, therefore, such an absolute exception is applicable, it would not be possible to prove such an interest.

Frontex considered the complainant's arguments in its Decision PAD-2022-00431 and addressed them - the fact that the complainant does not agree with these arguments, like above, has to be distinguished from the allegation that “Frontex has failed to duly consider and respond to” them. Further to its reply in Decision PAD-2022-00431, Frontex would like to stress that reconsiderations of its position are limited to the areas specified in Article 7(2) of Regulation (EC) No 1049/2001 and an alleged “non-compliance ... with EU data protection laws” is not included in these reasons for which a confirmatory application may be submitted. Furthermore, we recall:

- Circumstances justifying such an overriding public interest must be presented by the applicant. A statement of purely general considerations is not sufficient to demonstrate that an overriding public interest outweighs the reasons for refusing to disclose the documents in question as was elaborated in Decision PAD-2022-00431.
- The complainant's wish to verify himself compliance with Union law on the basis of the requested documents is not sufficient for proving such interest as the CJEU emphasized in its established case law and elaborated in Decision PAD-2022-00431.

In its Decisions, Frontex examined, *ex-officio*, the overriding public interest regarding the protection of personal data as enshrined in Article 8 of the Charter of Fundamental Rights of the European Union¹¹ based on the complainant's arguments. Due to their generic nature, the fact that a relative exception, where such overriding public interest is to be analyzed, was only applicable to one document identified at initial stage (page 9 of Decision PAD-2022-00431), whereas the majority of this document was out of scope, this examination could not lead to another outcome as expressed on 15 December 2022.

The same holds true for the three additional documents identified as part of the examination of the confirmatory application, where in addition to Article 4(3) of Regulation (EC) No 1049/2001, numerous elements were identified, that, if released, would undermine the protection of:

- legal advice within the meaning of Article 4(2) second indent of Regulation (EC) No 1049/2001; and
- the purpose of investigations as laid down in Article 4(2) third indent of Regulation (EC) No 1049/2001.

Here again, Frontex cannot see an overriding public interest as the protection of legal advice and in particular the purpose of investigations cannot be overridden by an overriding public interest and in any case, the applicant's arguments as brought forward cannot be followed.

2 Identification of new documents at confirmatory stage

“It is worth noting also that, in its initial reply, Frontex wrongly identified only 5 documents as failing within the scope of the request; it was only after I had requested the Agency to conduct a renewed search that, suddenly, the Agency was able to identify another 50 documents. This raises serious concerns about how the Agency conducts searches for relevant documents.”

⁹ ECLI:EU:T:2000:209, *Denkavit Nederland v Kommission*, para. 50.

¹⁰ ECLI:EU:T:2020:557 *Bronckers v Commission*, para. 166.

¹¹ As emphasized *inter alia* in the Judgment of 4 May 2012 in case T-529/09, *In 't Veld v Council*, paras 90 to 101.

In the onset, Frontex would like to note that as part of a confirmatory application, a thorough search is undertaken again to ensure that all documents are identified and to ensure that the widest possible number of documents can be ascertained and appraised. In this regard, Frontex goes beyond the requirements of Article 7(2) Regulation (EC) No 1049/2001 and accepts confirmatory applications also in case of that full access was granted at the initial stage, so as to not disadvantage an applicant concerning the number of documents identified. While such, i.e. Frontex having missed documents at the initial stage, occurred only in very few cases among the 469 applications received in 2022, this additional search to be conducted as part of the two-stage administrative procedure ensures that applicants are able to enjoy to the fullest their right to public access to documents.

In line with this, further documents were ascertained on the confirmatory level. This stems from the nature of this project, which changed ownership between different Frontex entities on different occasions and the new owners were initially not aware of another sources where the remaining documents could be identified. In particular, the initial project manager had left Frontex before the application was received and the standard and routine search conducted did initially not include this database. The change of ownership and decentralization implied an extra challenge when retrieving the documents by the owner-originators.

Thus, Frontex complied with its obligation to reassess its position, therefore fulfilling the complainant's right to obtain a reassessment. Especially, reconducting an in-depth search that allowed the identification of further documents cannot be held against Frontex, as through this, a consideration of the widest possible number of documents is ensured.

3 Creation of list of documents

"The Agency should, in line with elementary principles of transparency, disclose a complete list of documents it had identified as falling within the scope of the request (incl. the additional documents it had identified following the confirmatory application) - listing the name of the document, date, reference number, and number of pages."

Frontex cannot recognize such obligation for the case at hand, which would *de facto* constitute a wish for the creation of a new document, in the established case law of CJEU - this was already explained in Decision PAD-2022-00431. The complainant linked his alleged right to such document to

Frontex's duty to assist the applicant in requesting documents that it holds, which extends to the confirmatory application stage. Conversely, by failing to disclose this information, the institution has undermined the right of the applicant, enshrined in Article 7(2) of the Regulation, to submit an informed appeal against the Agency's decision to refuse access to these documents¹²

However, as stated in Decision PAD-2022-00431¹³ such assistance - within the meaning of Article 6(2) and (4) of of Regulation (EC) No 1049/2001 - was also not called for. Furthermore, the fact that the complainant was able to submit appeals to Frontex - as confirmatory application - and now to the European Ombudsman showed that the complainant was not deprived of any of his rights.

Frontex therefore stresses again that demanding the creation of a new document under "Part 5 - What, in your view, should the institution or body do to put things right?" goes beyond the remit of the appeal procedure with the European Ombudsman - and the CJEU - under Article 8(1) of Regulation (EC) No 1049/2001, which is limited to "the event of a total or partial refusal."

¹² The quote and Frontex addressing this point on page 10 of Decision PAD-2022-00431.

¹³ Cf. page 10 of Decision PAD-2022-00431.

4 Conclusion

In sum, Frontex cannot follow the complainant's arguments, and the renewed review of the documents showed that additional exceptions are applicable to these documents.

We stand ready to provide the European Ombudsman any further information that are required and again express our gratitude for the possibility to provide these additional views.

Yours sincerely,

Electronically signed


 *Inspection and Control Office*