

Your ref. FO case 344/2023/PVV

Ms Emily O'Reilly
European Ombudsman

Warsaw, 2 July 2024

Subject: Frontex's reply as regards the proposal for a solution on how the European Border and Coast Guard Agency (Frontex) dealt with a request for public access to documents concerning social media monitoring (SMM) related to migration routes

Dear Ms O'Reilly,

Thank you for your letter of 30 April 2024 and your suggestion, which Frontex welcomes. I would also like to thank your inquiry team, with whom Frontex was able to exchange additional, confidential views during the meeting held in July 2023 on how the exceptions that had to be invoked apply specifically to some of the documents in question.

I am pleased to inform you that providing wider access to the documents at issue is possible in this case now. Having thoroughly reviewed your proposal, please find [herewith the link](#) to the documents for your kind reference and release to the applicant. These documents are accompanied by [REDACTED]
[REDACTED] a list of identified documents, prepared to the extent possible without undermining the interests to be protected.

Frontex is strongly committed to giving the fullest possible effect to the fundamental right of access to documents as laid down in Regulation (EC) No 1049/2001¹, as evidenced by the fact that partial access to 18² out of 23 previously non-disclosed documents, as well as wider access to six³ out of 32 already partially disclosed documents is provided.

The five remaining non-disclosed documents, which all originate from third parties, include four documents constituting security alerts, whose release would detrimentally impact the protection of the public interest as regards public security which you have confirmed⁴. Having reconsidered⁵ the applicability of the international relations exception pursuant to Article 4(1)(a) third indent of Regulation (EC) No 1049/2001, Frontex maintains that public disclosure of these four documents is prevented by the significant number of elements of the documents falling under Article 4(1)(a) first indent in particular, sensitive operational information, reporting tools and methods

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 Document no. 1 of the "Initial application - non-disclosed documents" as well as documents no. 2 - 18 of the "Confirmatory application - non-disclosed documents" as per the annexed List.

³ Document no. 1, 5, 6, 15, 20, 32 of the "Confirmatory application - partially disclosed documents" as per the annexed List.

⁴ Para 32 of your Proposal for a solution, 30 April 2024.

⁵ The same reconsideration applies in relation to Document no. 6 of the "Confirmatory application - non-disclosed documents" as per the annexed List, to which partial access is hereby provided.

used by law enforcement officials and number and profile of human resources - and Article 4(1)(b) (personal data) of Regulation (EC) No 1049/2001 [REDACTED] Access to one remaining third-party document cannot be provided as it constitutes sensitive operational information and details of the reporting tools and methods used by law enforcement officials [REDACTED]. It follows that the redaction of the information in question required pursuant to Article 4(1)(a) and (b) of Regulation (EC) No 1049/2001 would make these documents largely unintelligible, thus preventing their partial disclosure as it would involve an inappropriate administrative burden and as such undermine the principle of sound administration⁶.

As noted in your Proposal⁷, since the opening of your inquiry Frontex has redrafted and adopted two Management Board (MB) Decisions⁸ concerning the processing of (non)operational personal data. As elaborated in its intermediary replies, Frontex decided to suspend the implementation of the Social Media Monitoring (SMM) concept until the conclusion of the redrafting of the preceding two MB decisions, following an opinion of the European Data Protection Supervisor (EDPS) dated 7 June 2022 to amend MB Decisions 68/2021 and 69/2021 respectively. The Agency has now aligned its rules accordingly and consequently wider access is possible at the present stage without undermining ongoing decision-making processes, within the meaning of Article 4(3) of Regulation (EC) No 1049/2001, and the purpose of investigations⁹, within the meaning of Article 4(2) third indent of Regulation (EC) No 1049/2001, as regards the redrafting of these internal rules.

At the same time, the SMM project's preparatory work is currently pending, with certain sections of the documents at issue containing nascent proposals prepared by the leading business units, which have not been fully consulted and endorsed by all relevant Frontex entities and the executive management. As elaborated in its intermediary replies and during the meeting with your inquiry team, in particular due to the relevance of these activities not least for criminal networks, divulging these limited sections would deprive Frontex of its space to think and jeopardize the ongoing negotiations taking place between Frontex, the European Commission and other Justice and Home Affairs agencies.

Please allow me to underscore that the Agency does not act in a legislative context¹⁰ and that therefore a higher threshold to prove the existence of an overriding public interest exists,¹¹ which has to be proven by the applicant¹² by reference to specific circumstances to justify the disclosure of the elements concerned.¹³ Although the possible existence of an overriding public interest does not need to be examined when one or more absolute exceptions are invoked¹⁴, the general assertions made by the complainant cannot provide an appropriate basis for establishing that

⁶ similar to what was confirmed in the most recent judgment in this regard: Judgment of 24 April 2024 in case T-205/22 Naass and Sea-Watch v Frontex ECLI:EU:T:2024:266.

⁷ Para 38.

⁸ Management Board Decision 4/2024 adopting the general rules on the application of the data protection regulation by the Agency, available at: <https://prd.frontex.europa.eu/document/management-board-decision-4-2024-adopting-the-general-rules-on-the-application-of-the-data-protection-regulation-by-the-agency/> and Management Board Decision 5/2024 on adopting the rules on processing operational personal data by the Agency, available at: <https://prd.frontex.europa.eu/document/management-board-decision-5-2024-on-adopting-the-rules-on-processing-operational-personal-data-by-the-agency/>

⁹ As elaborated in its intermediary reply, the "investigation" is not referring to the use of investigative powers by the EDPS according to Article 57(1)(f) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. The reference to "investigation" is to be understood within its meaning under Regulation (EC) No 1049/2001, constituting a structured and formalised procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position.

¹⁰ Judgment of 1 July 2008 in case C-39/05 P and C-52/05 P, Sweden & Turco v Council, para. 46. Judgment

¹¹ Judgment of 14 November 2013 in case C-514/11 P and C-605/11 P, LPN and Finland v Commission, para. 93.

¹² Judgment of 2 October 2014 in case C-127/13, Strack v Commission, para. 128.

¹³ Judgment of 14 November 2013 LPN and Finland v Commission, C-514/11 P and C-605/11 P, para. 94

¹⁴ Judgment of 25 November 2020 in case T-166/19 Marco Bronckers v European Commission, para. 74.

the principle of transparency is especially pressing and capable of prevailing over the reasons justifying the refusal to disclose the remaining elements in question¹⁵.

Frontex agrees to share the information contained in your solution proposal as well as in this reply with the complainant.

I remain at your disposal for any further information.

Yours sincerely,

Electronically signed

Hans Leijtens
Executive Director



¹⁵ Judgment of 14 November 2013 in case C-514/11 P and C-605/11 P, LPN and Finland v Commission, para. 93.



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ANNEX 1

LIST OF IDENTIFIED DOCUMENTS

Initial application - non-disclosed documents:

1. BN Strategic high-level meeting with Europol 05-04-2022 – Now partially disclosed
2. *Text removed - Sensitive Operational Information 1 – Non-disclosed 3rd party document*
3. *Text removed Sensitive Operational Information 2 – Non-disclosed 3rd party document*
4. *Text removed Sensitive Operational Information 3 – Non-disclosed 3rd party document*
5. *Text removed - Sensitive Operational Information 4 – Non-disclosed 3rd party document*

Confirmatory application - partially disclosed documents:

1. PARTIALLY RELEASED - BN Synergies in situational awareness
2. PARTIALLY RELEASED - DED IM Daily Files 11.05 Wednesday
3. PARTIALLY RELEASED - Europol-Frontex Management Meeting 4-5 April_meeting
4. PARTIALLY RELEASED - Final Agenda for Europol-Frontex Management meeting – 5 April 2022
5. PARTIALLY RELEASED - Frontex social media monitoring
6. PARTIALLY RELEASED - FW Request for information
7. PARTIALLY RELEASED - FW_ Executive Management Briefing 16_05 – Agenda
8. PARTIALLY RELEASED - FW_ Executive Management Briefing topic proposal
9. PARTIALLY RELEASED - FW_ Social Media Monitoring Meeting - MAY 11
10. PARTIALLY RELEASED - FW_ visit to Europol - draft meeting report
11. PARTIALLY RELEASED - RE_Europol-Request access to Europol documents
12. PARTIALLY RELEASED - PAD FW Concept note on Social Media Monitoring (3)
13. PARTIALLY RELEASED - PAD FW Concept note on Social Media Monitoring (7)
14. PARTIALLY RELEASED - PAD FW EXTERNAL RE Social Media Monitoring (8)
15. PARTIALLY RELEASED - PAD FW EXTERNAL RE Social Media Monitoring
16. PARTIALLY RELEASED - PAD FW Outcome of the meeting with DSAM HoEAU DED-IM and HoMPR on social media monitoring (1)
17. PARTIALLY RELEASED - PAD FW Social Media Monitoring (activities) by Frontex (3)
18. PARTIALLY RELEASED - PAD FW Social Media Monitoring (activities) by Frontex (4)
19. PARTIALLY RELEASED - PAD FW Social Media Monitoring (activities) by Frontex (5)
20. PARTIALLY RELEASED - PAD FW Social media monitoring meeting with DSAM - notes (1)
21. PARTIALLY RELEASED - PAD RE Concept note on Social Media Monitoring (1)
22. PARTIALLY RELEASED - PAD RE Concept note on Social Media Monitoring (2)
23. PARTIALLY RELEASED - PAD RE Concept note on Social Media Monitoring
24. PARTIALLY RELEASED - PAD RE Meeting on OSINT and social media monitoring in SAMD
25. PARTIALLY RELEASED - PAD RE Outcome of the meeting with DSAM HoEAU DED-IM and HoMPR on social media monitoring
26. PARTIALLY RELEASED - PAD RE Social media monitoring - state of play and proposed way forward
27. PARTIALLY RELEASED - PAD RE Social Media Monitoring (activities) by Frontex (1)
28. PARTIALLY RELEASED - PAD RE Social Media Monitoring (activities) by Frontex (2)
29. PARTIALLY RELEASED - PAD RE Social Media Monitoring (activities) by Frontex (3)
30. PARTIALLY RELEASED - PAD RE Social Media Monitoring (activities) by Frontex
31. PARTIALLY RELEASED - Transmission slip - SMM Concept note_RAU
32. PARTIALLY RELEASED PAD FW Concept note on Social Media Monitoring

Confirmatory application – non-disclosed

1. 20190606_EDPS Not to be released – Non-disclosed 3rd party document
2. Notes from SMM meeting with HoUs and DSAM 19.01.22
3. OSINT.SOCMINT in SAMD
4. SMM Concept note_v3.1_RAU
5. SMM questionnaire for Frontex Bus
6. Ares(2022)5933854 Illegal immigration From Lebanese Ports Into Europe.
7. BN Exchange of information and personal data
8. DRAFT_Reply to MEP Saskia Bricmont - 23 Sept 2022_LEG_and_RAU_edited-PMA
9. FOR APPROVAL 0302 PM - not to release
10. FW EXTERNAL RE Social Media Monitoring
11. FW_ Outcome of Europol DED-O visit 23_03_2022
12. FW_ Visit to Europol HQ - 5 April 2022
13. MB69_implementation_project_for ED
14. Outcome of the EUROPOL visit 23.03.2022_
15. Proposed roadmap SMM
16. RE Human trafficking - denunciation letter
17. Concept note on Social Media Monitoring
18. SMM Concept note_v3.1_RAU