

Your ref. Case 1129/2023/OAM

Ms Emily O'Reilly
European Ombudsman

Subject: Frontex' Opinion on the Recommendation on the refusal by the European Border and Coast Guard Agency (Frontex) to provide lists of documents it identifies as falling within the scope of the requests for public access to documents (EO Case 1129/2023/OAM)

Dear Ms O'Reilly,

Thank you for your recommendations of 15 February 2024, which I welcome, and which are useful to enhance and further strengthen Frontex practices of handling applications for public access to documents (PAD).

As I have stated previously, Frontex is firmly committed to giving the fullest possible effect to the right of PAD as laid down in Regulation (EC) No 1049/2001¹ and is constantly reviewing its practices in the view of best practices and the interpretations of the legal framework provided by the Court of Justice of the European Union (the Court).

I would like to reiterate Frontex's position, as elaborated and communicated to you in our letter of 18 October 2023², that our current practice is in full alignment with Regulation (EC) No 1049/2001 and the case-law of the Court. Frontex understands that the *Campbell* judgment³ cannot be interpreted as stipulating a universal obligation for institutions to generically provide all applicants in response to all initial PAD applications with a list identifying the documents falling within the scope of the application.

I welcome the distinction made in your letter between an obligation that may originate from the legal framework, and your consistently taken view that providing a list of identified documents is a matter of good administration, e.g. as to enable applicants to submit confirmatory applications. In this context, and not as an obligation stemming from the *Campbell* judgment, Frontex will consider where deemed necessary and possible without undermining the essential interest(s) to be protected - on a case-by-case basis and in addition to the identification of the number of documents and to providing detailed justifications - to detail the name of the documents concerned to further enhance applicants' ability to make an effective and informed appeal, either as a confirmatory application or through further legal remedies.

Please let me refer you to the Annex that comprehensively elaborates on these considerations and provides a detailed opinion on your arguments and recommendations.

I am confident that Frontex's reconsidered approach constitutes a solution which equally respects the jurisprudence of the Court and alleviates your and the complainant's concerns in regard to the principle of good administration.

Yours sincerely,

Electronically signed

Hans Leijten
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).

² See point 1 of the Annex to Frontex's reply concerning the refusal to provide lists of documents identified as falling within the scope of requests for public access to documents of 18 October 2023.

³ Judgment of 28 May 2020 in case T-701/18, *Campbell v European Commission*.

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ANNEX

Frontex upholds its understanding, communicated to the European Ombudsman (EO) in the reply letter of 18 October 2023, that neither Regulation (EC) No 1049/2001¹ nor the *Campbell* judgment² provide a legal obligation to systematically provide a list of documents which fall within the scope of all access to documents requests.

Frontex maintains its position that the current practice of providing the number of identified documents in combination with detailed reasons, on a case-by-case basis, for how disclosure would specifically undermine the protected interests under Article 4 of Regulation (EC) No 1049/2001 when required to opt for a full non-disclosure or partial release fully enables an applicant to make an effective and informed appeal. This practice has been previously upheld by the Court³ and fulfils both the necessary procedural and substantive requirements, including enabling the Court to exercise its power of review.

Frontex also notes that the EO does not provide comprehensive legal argumentation to substantiate the claim that the *Campbell* judgment stipulates the systematic, universal obligation to provide lists, and instead primarily relies on the important notion of *good administration*. In this regard, Frontex deems it necessary to make the following observations and remarks in relation to the EO recommendation of 15 February 2024.

1. Legal obligation under the framework of Regulation (EC) No 1049/2001

In paragraph 16, the EO argues that the Court held, in paragraph 44 of the *Campbell* judgment, that the application of a general presumption of confidentiality does not exempt an EU institution from its duty to identify the documents falling *within the scope of a request* and from providing the requester with the list of *those documents*. Frontex understands that the EO expands the necessity to provide lists from cases in which a general presumption of confidentiality has been applied, as was the case in this judgment, to include all cases of PAD where no access to a document could be provided.

Frontex considers that this interpretation does not correctly reflect the text and intention of the judgment as stated in paragraph 44 in the *Campbell* judgment:

[M]ore 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* [emphases added].

It is thus clear that the Court, when indicating that an applicant should be provided with a list of “those documents”, refers precisely to the documents which have been identified as covered by the general presumption of confidentiality and not to any document/s falling within the scope of the request. As

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 28 May 2020 in case T-701/18, *Campbell v European Commission*.

³ Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard* paras 74, 107-110

Frontex pointed out in its reply of 18 October 2023, this reading reflects the rationale of the Court namely that the provision of such lists serves the purpose of enabling the applicant to argue that documents requested are not covered by the general presumption of confidentiality and thus being able to rebut the application of such presumption.⁴ Moreover, the Court's use of the term "more generally" in the above cited paragraph is to be read in conjunction with the preceding paragraph where it referred to the judgment *AlzChem v Commission*⁵, which dealt with the invoking of a general presumption of confidentiality when assessing a request for PAD relating in particular to a procedure reviewing State aid - one of the areas identified by the Court, where a general presumption of confidentiality can be invoked. The generality of the subsequent paragraph 44 thus refers to the obligations stemming from the application of general presumptions of confidentiality and not to obligations in the assessment of any request for PAD.

In addition to the unambiguous wording of paragraph 44, the Court makes a clear distinction between identifying the documents falling within the request of access to documents and the identification or "classification" of those documents into categories according to their "common characteristics, their same nature or their belonging to the same file"⁶. The former being a prerequisite for the latter, and both being necessary to correctly apply a general presumption of confidentiality.⁷ As the Court concludes:

[I]n order to apply the presumption [...] the Commission was required, first of all, to identify in the contested decision the documents covered by the request for access, then to classify them by category or as part of a particular administrative file and, finally, to find that they were part of an EU Pilot procedure, hence permitting it to apply a general presumption.⁸

Frontex understands that this reasoning recognises that a request for PAD may be broad in scope and also include documents not belonging to a specific category or administrative file covered by a general presumption of confidentiality. In this light, the specific terms of paragraph 44, which must be read within the broader context of the judgment, which refers to the specific case of an application for PAD to documents falling under a general presumption of confidentiality, refer unmistakably to the classification of the identified documents. Therefore, this paragraph and the judgment as a whole cannot be understood as referring to a general obligation to provide a list of documents outside the application of a general presumption of confidentiality.

In sum, Frontex cannot identify in the *Campbell* judgment an intention of the Court to prescribe a general obligation to provide a list of identified documents in all requests for PAD. Notably, the Commission showed that the Court has previously validated not providing a list of documents in a case concerning the application of a general presumption of confidentiality⁹. Instead of referring to a general obligation, which applies regardless of the specific case at hand, the Court indicated that the necessity to provide a list of documents is to be assessed on a case-by-case basis considering the applicant's ability to rebut the application of a general presumption of confidentiality based on the wording of the request itself¹⁰. This judgment thus shows that the Court does not even require the provision of such list for all general presumptions of confidentiality. The more so it is therefore reasonable to argue that for applications where no such presumption is to be invoked, the Court could have clarified such a duty to provide a list of documents falling within the scope of any request for PAD at this juncture.

Frontex also notes that the complainant argued, as reflected in paragraph 10 of your recommendations, that the *Campbell* judgment indicated that the obligation of providing a list of the documents in scope applies *even* in cases where a general presumption of confidentiality is relied on. Frontex cannot deduce such meaning from the Court's reasoning. The complainant's interpretation puts the obligation to provide a list on the same level of jurisprudential recognition as the duty to carry out an individual

⁴ Judgment of 28 May 2020 in case T-701/18, *Campbell v European Commission*, para 42 and 46.

⁵ Judgment of 13 March 2019 in case C-666/17, *AlzChem v European Commission*.

⁶ Judgment of 28 May 2020 in case T-701/18, *Campbell v European Commission*, para 45. f

⁷ *ibid*, paras 45, 54.

⁸ *Ibid*, para 63.

⁹ *Ibid*, para 61, referring to Judgment of 25 March 2014 in case T-456/13, *Sea Handling v European Commission*.

¹⁰ Judgment of 25 March 2014 in case T-456/13, *Sea Handling v European Commission*, para 93.

examination of each document. If this was a correct assumption, it would necessarily imply that the Court relies on a previously well-established obligation. However, neither the complainant, the EO, nor the Court itself refers to any other case-law establishing such an obligation or duty. Frontex has not been able to identify case-law supporting your understanding in this regard and our previous paragraph demonstrates the opposite.

In the absence of further arguments that such a systematic obligation could stem from Regulation (EC) No 1049/2001, *quod non*, Frontex understands that the EO concurs with our assessment in this regard, as elaborated in the reply letter of 18 October 2023.

Against this background, in particular the lack of a clear legal basis to establish the contrary, Frontex maintains its position as detailed in its reply letter of 18 October 2023 that the *Campbell* judgment only sets out an obligation for instances in which a general presumption of confidentiality has been applied and where not providing such lists would make the presumption irrefutable.

2. Provision of lists as a matter of good administration

Frontex understands that the EO, by prefacing paragraph 17 of the recommendation with “[i]n any case”, makes a clear distinction between any obligation that may stem from the legal framework and a practice that she considers as good administration. In other words, Frontex considers that the EO acknowledges that the provision of a list of documents identified as falling within the scope of a request for access to documents as good administration regardless of whether such an obligation is stipulated in Regulation (EC) No 1049/2001 or through interpretation of the case-law of the Court.

While Frontex cannot agree with EO’s interpretation of the *Campbell* judgment, as elaborated, it welcomes this recognition of a separation between statutory requirements and good administrative practices. It is Frontex’s understanding that part of the mandate of the EO is to promote efficient and transparent administrative practices even where such practices are not explicitly and firmly supported by the intention of the legislator or the interpretation of the Court and thus going beyond the law.

Even if Frontex cannot recognise a legal obligation of providing a list of documents for all PAD requests, and as such cannot agree that its practice amounts to maladministration, Frontex acknowledges the duty and discretion of the EO to pursue this recommendation and other inquires in the interest of good administration and to serve the democratic functioning of the EU through this interpretation of the EO’s mandate.

In light of the this and based on the understanding that a provision of lists is a practice adopted by some institutions and agencies, Frontex will reconsider its practices of systematically refusing to provide lists of documents identified as falling within the scope of a PAD request.

In line with the Court’s case-law on the statement of reasons under Article 296 TFEU - namely that the reasoning for the adoption of a measure must be clear for the addressee to ascertain the reasons for it and that the requirements to be satisfied by the statement of reasons depend on all the circumstances of each case¹¹ - Frontex understands that the provision of a list may in some instances fulfil a function in this regard. While falling short of a general statutory obligation, the provision of a list of documents identified as falling within the scope of PAD request may, in those instances, satisfy the requirement to provide an adequate statement of reasons to applicants.

On this basis, and not as an obligation stemming from the *Campbell* judgment, Frontex will consider where deemed necessary - on a case-by-case basis and in addition to the identification of the number of documents and the provision of detailed justifications - to detail the name of the documents concerned in order to further enhance applicants’ ability to make an effective and informed appeal, either as a confirmatory application or further legal remedies.

¹¹ See *inter alia* Judgment of 24 April 2024 in case T-205/22, *Marie Naass and Sea-Watch eV v European Border and Coast Guard Agency (Frontex)*, para 44; Judgment of 23 July 2023 in case T-377/21, *Eurecna SpA, v European Commission para 21 and case law cited.*

3. Conclusion

Frontex cannot agree with the EO's interpretation of and reliance on the *Campbell* judgment to argue for the existence of a legal obligation to provide for all requests for access to documents a list with the documents falling within the scope of said request. In this regard, Frontex does not share the view of the EO that its practices amount to maladministration. Frontex maintains that its practice is fully aligned with the legal framework as interpreted by the Court.

In light of the EO's understanding that the provision of a list constitutes good administration, Frontex will on a case-by-case basis, when needed to ensure an applicant's ability to make an effective and informed appeal, detail the name of the documents identified as falling within the scope of the request.