

Your ref.: Complaint 344/2023/PVV

To
Rosita Hickey
Director of Inquiries
European Ombudsman

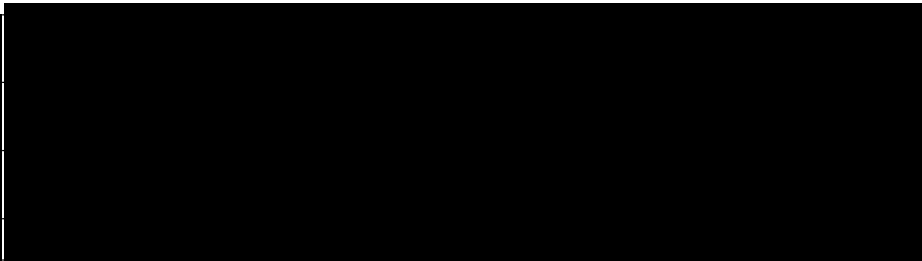
Subject: Follow-up to your correspondence of 12 June 2023 concerning “How the European Border and Coast Guard Agency (Frontex) dealt with a request for public access to documents concerning social media monitoring (your references: PAD-2022-00375 and PAD-2022-00431)”

Dear Ms Hickey,

In reply to your questions in the annex to your correspondence of 12 June 2023 related to Complaint 344/2023/PVV, please find below Frontex answers:

(i) PUBLIC SECURITY

Regarding the following documents:

The EU institutions, bodies, offices and agencies (IBOAs) have a wide discretion when it comes to the public security exception under Regulation 1049/2001. However, IBOAs are required to demonstrate a ‘specific and actual risk’. As it is not readily clear how disclosure of the above documents would specifically and actually risk undermining public security, could Frontex please explain this in more detail?

FRONTEx REPLY

Further to the explanations concerning the materialization and causality of the risks as explained in the replies to the initial and confirmatory applications, these documents contained information revealing, inter alia how Frontex fulfils security-sensitive tasks in exercising its mandate. In particular, the documents referred to monitoring activities of open-source information used for the agency’s risk analysis according to art. 29 of the European Border and Coast Guard Regulation¹ (EBCG Regulation) and subsequently to the conception and formulation of operational responses. Both pieces of information about the risk analysis model and the specific operational measures can be used by human smugglers, traffickers in human beings and criminal organizations

¹ Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p.1).

(henceforth: criminal organizations) to minimize the risk of detection at the EU external borders, thus rendering border control measures ineffective.

The documents also contain information about the process of collecting operational personal data related to suspects of cross-border crime that Frontex can share with Europol, in accordance with art 90 of the EBCG Regulation. Here, too, criminal organizations, in particular human smugglers and traffickers in human beings, who often use social media publicly to solicit “customers” would change their modus operandi and avoid certain information channels and media avoid detections if they are aware of the modus operandi and Frontex activities.

In addition, the documents contain information regarding EUROSUR² services and the specific tools with which Frontex supports the Member States in the detection, prevention and interception of unauthorised border crossings and cross-border crime.

In sum, the documents include information which, if disclosed, would undermine the protection of the public interest as regards public security, as it would hamper the capability of Frontex, Europol, and Member States’ authorities to efficiently prevent, detect, and combat cross-border crime. As we have stated in the additional views, independent of the SMM concept, 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 1049/2001.

This threat to the protected interest of art. 4(1)(a) first indent of Regulation (EC) No 1049/2001 is exacerbated by the fact that criminal organizations carry out reconnaissance operations against security measures, including spying out information channels and surveillance measures of the security authorities in the EU and Member States - the information contained in these documents is key to these endeavours.

Frontex would like to stress again that these pieces of information are contained in a condensed, comprehensive, and very detailed manner and, if divulged to the public would have revealed the modus operandi of law enforcement officials, including reporting tools and methods they rely on. This information would permit criminal organizations to use this information to their advantage and modify their criminal activities in such a way as to avoid being detected by law enforcement.

As explained to us since the reply to the initial application and recognized in your question, the wide discretion that Frontex enjoys when determining whether disclosure of information would undermine public security (especially when combined with other information already publicly available) is shown in the settled case law.³ This risk to the public interest is indeed reasonably foreseeable and not purely hypothetical⁴ as elaborated since the onset, and prevailed when balancing the right of the applicant to access the documents, against the protected interest of public security.

In this regard, Frontex would like to highlight that the case-law⁵ 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.

(ii) INSTITUTION’S DECISION-MAKING PROCESS

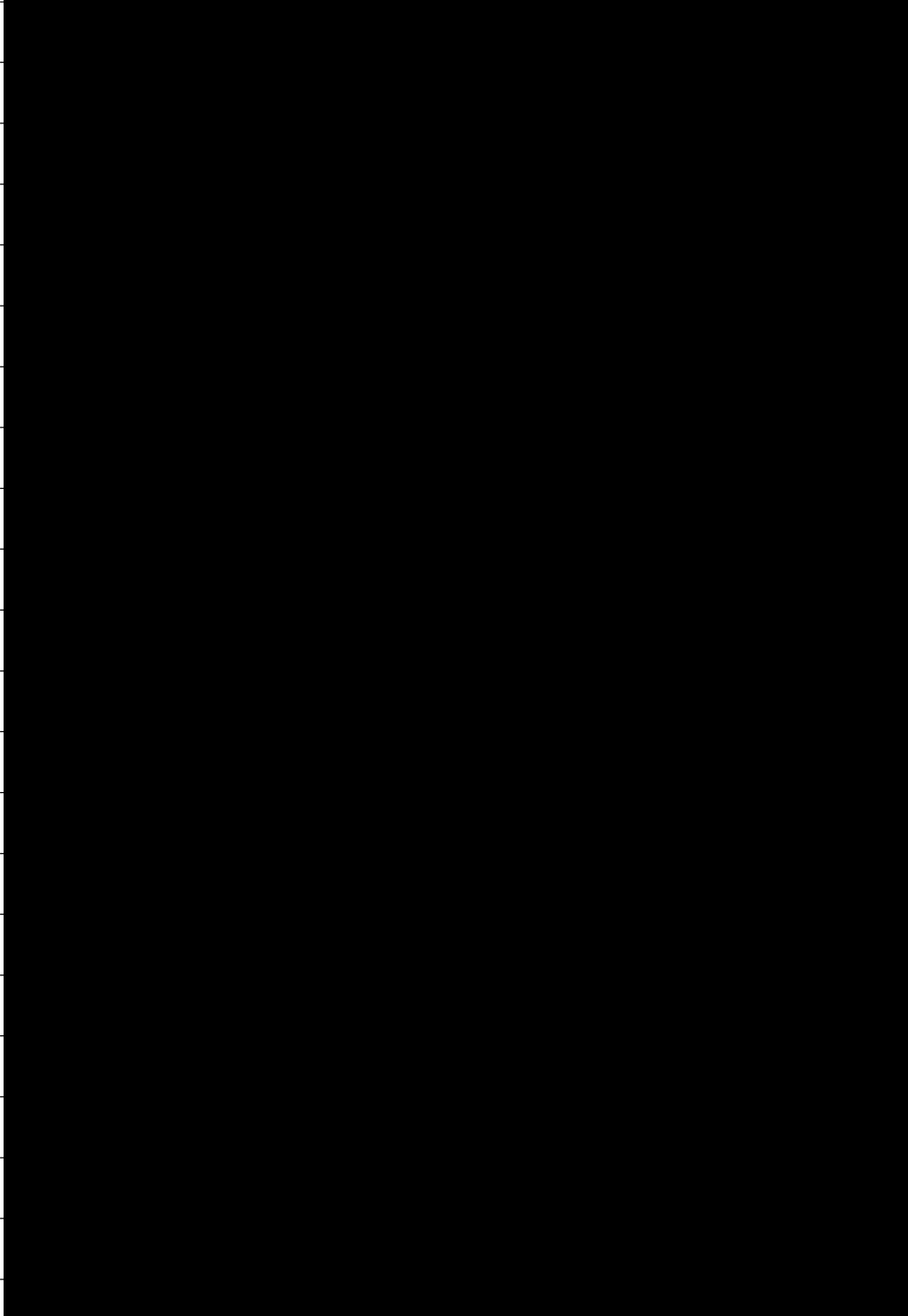
Regarding the following documents:

² The European Border Surveillance system (EUROSUR) is a framework for information exchange and cooperation between Member States and Frontex to improve situational awareness and increase reaction capability at the external borders.

³ Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEx)*, para 65

⁴ Case T-211/00 *Kuijter v Council* [2002] ECR II-485, paragraphs 55 and 56

⁵ Case T852/16 *Access Info Europe v European- Commission* [2018] ECR II-ECLI:EU:T:2018:71, para 40.

- How would Frontex's internal decision-making be seriously and specifically harmed by disclosing the above documents?

FRONTEX REPLY

To respond to this question, Frontex needs to elaborate on the background and history of this particular decision-making process.

According to art. 86 of the EBCG Regulation "*the Management Board shall adopt internal rules on the application of Regulation (EU) 2018/1725 (Data Protection Regulation) by the Agency*". In December 2021, the Frontex Management Board ('MB') adopted Decisions 68 and 69 which established the applicable framework for Frontex to process personal data according to art. 87 ("*Purposes of processing of personal data*") of the EBCG Regulation.

The Social Media Monitoring ('SMM') concept provided the implementation of activities that required such processing of personal data in accordance with said art. 87 and, consequently, was relying and dependant on the MB Decisions 68 and 69. In June 2022, the European Data Protection Supervisor ('EDPS') issued two negative opinions regarding Decisions 68 and 69, and requested Frontex to re-draft the decisions to ensure compliance with the Data Protection Regulation. Therefore, Frontex decided to suspend the implementation of the SMM concept until the two MB decisions would be re-drafted and consulted with the EDPS. Depending on the new scope of the redrafted MB decisions and the outcome of consultation with the EDPS, Frontex would reconsider on how to go about the SMM concept.

Additionally, at the time of submission of the application for public access to documents, the SMM concept note was simply a draft document prepared by leading business units but was not fully consulted and endorsed by different Frontex entities and the executive management.

It is therefore the reasons obliging Frontex to invoke art.4(3) of Regulation (EC) No 1049/2001 were two-fold: The SMM concept note was still in the drafting stage and after the suspension of the implementation of MB Decisions 68 and 69, the decision on how to go about the SMM concept was put on hold while being discussed. Due to the relevance of this topic not least for criminal networks, divulging the documents would have deprived Frontex of its space to think.

- Has Frontex assessed whether there is an overriding public interest in disclosure and, if so, how?

FRONTEX REPLY

In the case at hand no overriding public interest could be ascertained as the undisclosed information was protected not only by Art.4(3) of Regulation (EC) No 1049/2001 but in addition, by the absolute exception under Art.4(1)(a) first indent of Regulation (EC) No 1049/2001 relating to the protection of the public interest as regards public security.

As Frontex stressed again as part of our additional views, exceptions do not have to be applied cumulatively; the applicability of one exception suffices to justify non-access. Moreover, in the event that an absolute exception is already applicable, an overriding public interest test cannot lead to the determination that such interest exists.

Secondly, circumstances justifying such an overriding public interest must be presented by the applicant, which according to the settled case-law, "*[a]n overriding public interest must however be objective and general in nature and must not be indistinguishable from individual or private interests*"⁶.

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, nor is the complainant's wish to verify himself compliance with Union law on the basis of the requested documents sufficient for establishing such interest, as Frontex explained in its replies

(iii) PURPOSE OF INVESTIGATIONS

Regarding the following documents:

⁶ Case T 451/15, AlzChem AG vs EC of 7 September 2017, Para 72

The inquiry team would appreciate an exchange on the following questions:

- What is the state of play and exact scope of the EDPS investigation?

FRONTEX REPLY

Without prejudice to the authority of the EDPS in this regard and the distinctive roles to be exercised by the EDPS and the European Ombudsman in regard to questions pertaining to data protection, it is important to clarify that in this case pertaining to public access to documents, the “EDPS investigation” is not referring to the use of investigative powers by the EDPS according to Article 57(1)(f) of the Data Protection Regulation⁷. The reference to “investigation” is therefore 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. As the exception of art. 4(2) third indent of Regulation (EC) No 1049/2001 protects the “purpose” of such investigation, a IBOA has to invoke it even if the particular investigation is completed as long as this purpose is not achieved:

Without there being any need to identify an exhaustive definition of ‘investigation’, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation (Z-331/15 P, Schlyter v Commission, para 46 et seq.)

The aim of the exception in question, as is clear from its wording, is not to protect the investigations as such, but rather their purpose (...). It is for that reason that various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been completed. (T-36/04, API v Commission, para. 133)

On 7 June 2022, the EDPS adopted two opinions regarding MB Decisions 68 and 69, requesting Frontex to amend them to ensure full compliance with the Data Protection Regulation. The EDPS also recommended Frontex to provide documentary evidence of the implementation of the recommendations within three months, i.e. by 7 September 2022. Frontex commenced redrafting in September 2022, based on the Implementation Plan detailing specific actions agreed upon within the Agency. The SMM concept implied the processing of personal data and its transmission to Europol, and was therefore dependent on the MB Decisions 68 and 69 which established precisely the rules to be observed by Frontex when conducting personal data processing activities according to art. 87 (“Purposes of processing of personal data”) of the EBCG Regulation.

⁷ 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

Furthermore, in September 2022, the EDPS announced an audit of Frontex focussing on the collection and processing of personal data. The scope of the audit included aspects related to risk analyses and the processing of personal data for the purposes of identifying suspects of cross-border crime - i.e. operational personal data. The audit visit took place on 5 and 6 October 2022. When Frontex received the application for public access to documents, this procedure was ongoing. Frontex received the EDPS audit report on 24 May 2023.

The audit report, and particularly its recommendations therein, impact the redrafting of the MB Decisions 68 and 69, which is currently ongoing and to be concluded, the result of which was initially been foreseen to be consulted with the EDPS in August 2023. While this deadline has been extended, Frontex envisages to share with the EDPS in July 2023 draft proposals in this regard.

- What documents are part of the EDPS investigation?

FRONTEX REPLY

The EDPS opinions pertained to the two Frontex Management Board decisions regarding data protection implementing rules, which the EDPS analysed as to take a decision on their compliance with the Data Protection Regulation:

- MANAGEMENT BOARD DECISION 68/2021 of 21 December 2021 adopting the rules on processing personal data by the Agency
- MANAGEMENT BOARD DECISION 69/2021 of 21 December 2021 adopting the rules on processing operational personal data by the Agency

The EDPS audit pertained to documents related to debriefing interviews, digital personal data processing and related training materials, as explained above.

- How would disclosure specifically undermine the protection of the purpose of the EDPS investigation?

FRONTEX REPLY

Since the SMM concept directly involved data protection processing activities by Frontex and Europol, the opinions resulted in the suspension of its implementation, pending the amendment of MB Decisions 68 and 69. Frontex considered that releasing such information regarding a draft concept would undermine Frontex effective implementation of the EDPS recommendations as well as the EDPS monitoring of this implementation. As a consequence, divulging these documents to the public would have been counter to protecting the purpose of investigations within the meaning of art. 4(2) third indent of Regulation (EC) No 1049/2001 as *“various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been completed”* (T-36/04, API v Commission, para. 133).

Frontex would like to recall that this exception is only one that had to be invoked for these documents.

- Has Frontex assessed whether there is an overriding public interest in disclosure and, if so, how?

FRONTEX REPLY

As shown above, the existence of applicable absolute exceptions to be invoked under Article 4(1) of Regulation (EC) No 1049/2001 cannot be overridden by a public interest, in particular if either

no such interest has been brought forward by the applicant or such forebringing does not meet the requirements of such test.

(iv) OTHER

Regarding the following documents:

The inquiry team noted a number of inconsistent redactions.

FRONTEX REPLY

These documents are short emails regarding the dissemination of the meeting report between Frontex and Europol, and the dissemination of the SMM concept note, respectively. No inconsistencies in redactions have been identified. The majority of the redactions concerned personal data. We remain at your disposal should you want to address any particular aspects/redactions.

Regarding the following documents:

Due to a technical issue, the inquiry team could not see what justifications to refuse access were invoked for the above documents. Could Frontex please explain what exceptions it considers to apply to these documents and whether it considered partial access?

FRONTEX REPLY

The documents are two Power Point presentations that could not be released to the applicant. The entirety of the documents was deemed as too sensitive and thus redacted due to information being protected by the following exceptions:

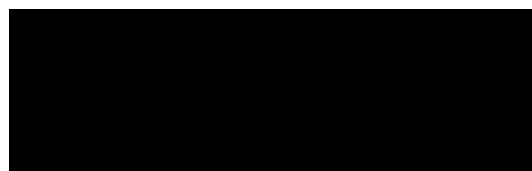
- [REDACTED] *Not to be released: Sensitive operational information + Reporting tools and methods, as previously elaborated.*
- [REDACTED] *Ongoing decision-making processes + Ongoing investigations, as previously elaborated. No overriding public interest that is objective and general in nature and not indistinguishable from individual or private interests for the release of this document was ascertainable.*

A partial release of the documents could not be undertaken as their redaction would be disproportionate in relation to the parts that are eligible for disclosure as the released documents would not convey any informative value due to their significantly reduced form.

The documents were converted from PPT to PDF format and made available to you on 24 July 2023

Frontex stands ready to clarify any further queries you may have.

Yours sincerely,

A large black rectangular redaction box covering the signature area.


 *Inspection and Control Office*