



FRONTEx

EUROPEAN BORDER AND COAST GUARD AGENCY

Your ref.: Complaint 1497/2024/ACB

Ms Rosita Hickey
Director of Inquiries
European Ombudsman

Warsaw, 16 September 2024

Subject: Frontex's additional views in case 1497/2024/ACB on the European Border and Coast Guard Agency's (Frontex) refusal to provide public access to two opinions of its Fundamental Rights Officer.

Dear Ms Hickey,

In response to your letter of 14 August 2024 regarding complaint Ref. 1497/2024/ACB, please find herewith Frontex's additional views explaining why the Agency had to invoke the exceptions pertaining to the protection of the internal decision-making process and the protection of the public interest as regards public security¹ in its decision to refuse public access under the complainant's initial application PAD-2023-00240 and confirmatory application PAD-2023-00300. I am convinced that the present elaboration will demonstrate Frontex's commitment to providing the fullest possible effect to the right of public access to documents.

Preliminary remarks

Prior to addressing the grounds for non-disclosure, let me please provide you with general clarifications regarding the access Decisions subject to your inquiry. In particular, Frontex would like to note that as part of the processing of the complainant's initial public access to document application, the Agency identified two documents, namely 1) *Opinion by the Fundamental Rights Officer: Bulgaria - on the fundamental rights situation in Frontex operational areas* (hereinafter: *FRO Opinion on Bulgaria*) and 2) *Fundamental Rights Officer Opinion Addressing Underreporting and Protecting Reporting Persons* (hereinafter: *FRO Opinion on underreporting*). Following the recommendations provided by the Frontex Fundamental Rights Office, which is the originator of the documents at issue, at the initial application stage, it was concluded that access to both opinions must be barred as their respective prevailing share of content pertained to comprehensive information whose disclosure would foreseeably seriously undermine internal decision-making processes regarding current and future activities of Frontex in addition to undermining the protection of the public interest as regards public security as laid down in Article 4(3) and Article 4(1)(a) first indent of Regulation (EC) 1049/2001 respectively. No overriding public interest that is objective and general in nature and not indistinguishable from individual or private interests for the release of these documents was ascertainable.

The complainant subsequently submitted a confirmatory application, in response to which Frontex conducted a renewed, concrete and individual assessment of the documents in close cooperation with the Fundamental Rights Office. It led the Agency to the conclusion that in addition to information whose

¹ Pursuant to Article 4(1)(a) first indent, respectively Article 4(3) of 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).

disclosure would undermine the protection of the public interest as regards public security, i.e. details pertaining to the modus operandi of law enforcement officials and cooperation with Member States identified at the initial stage, the documents also feature details of ongoing operational activities, the number and profile of Human Resources, the operational area, law enforcement reporting tools and sensitive operational information crucial for situational awareness at the external borders of the European Union, falling under the same protected interest referred to in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001. Consequently, Frontex amended its position to refuse access to the documents in question by reconsidering, as elaborated in Frontex's confirmatory application and in here, the factual situation at hand and the reasonably foreseeably detrimental impact on the work of the Frontex Fundamental Rights Office and Frontex's operational activities in the field.

At this point, let me please recall that the principle of transparency and the rights of individuals to access documents of European Union bodies under Article 15 of the Treaty on the Functioning of the European Union (TFEU²) and Article 42 of the Charter of Fundamental Rights of the European Union³ as implemented by Regulation (EC) No 1049/2001 and reflected in Article 114 of the European Border and Coast Guard Regulation⁴ is not limitless. Recital (11) of Regulation (EC) No 1049/2001 stresses the need to balance transparency with the need to protect certain public and private interests, as specified in Article 4 of Regulation (EC) No 1049/2001. The absolute exceptions set out in Article 4(1) of Regulation (EC) No 1049/2001 "are framed in mandatory terms"⁵ and oblige EU institutions "to refuse access to documents falling under any of those exceptions once the relevant circumstances are shown to exist."⁶ For relative exceptions, the need for protection of the interests under Article 4(3) of Regulation (EC) No 1049/2001 must be balanced against the public interest in disclosure.

As the exceptions under Article 4 of Regulation (EC) No 1049/2001 derogate from the principle of the widest possible public access to documents, Frontex interprets and applies them strictly. This strict approach in applying those exceptions was demonstrated in the detailed reasons provided in Frontex's Decisions PAD-2024-00240 and PAD-2024-00300 to withhold the documents concerned. Nevertheless, pursuant to well-established case-law, "the principle of strict construction does not, in respect of the public-interest exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, preclude the institution concerned from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision [...]."⁷ The Court held that "the particularly sensitive and essential nature of the public interests concerned, combined with the fact that access must be refused by the institution, under Article 4(1)(a) of Regulation No 1049/2001 if disclosure of a document to the public undermined those interests, conferred on the decision which must thus be adopted by the institution a complex and delicate nature calling for the exercise of particular care and that [...] such a decision therefore required a margin of appreciation."⁸

Accordingly, Frontex, when considering a refusal of access to documents whose disclosure would undermine the protection of the public interest as regards public security as laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001, enjoys wide discretion for the purpose of determining⁹ whether such disclosure to the public would undermine the interests protected by that provision. This also applies for the exception under Article 4(3) of Regulation (EC) No 1049/2001, when Frontex is not acting in a legislative capacity, as explained in Decision PAD-2024-00300 and further elaborated in here.

² Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47).

³ Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

⁴ Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ L 295, 14.11.2019, p. 1).

⁵ Case T-166/19 *Marco Bronckers v European Commission*, ECLI:EU:T:2020:557, para. 35.

⁶ Ibid.

⁷ Judgment of 27 November 2019 in case T-31/18 *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, EU:T:2019:65, para. 65 and the case-law cited.

⁸ Case C-266/05 *P Sison v Council*, EU:C:2007:75, para 35, Case T-851/16 *Access Info Europe v Commission*, EU:T:2018:69, para 38, Case T-31/18 *Luisa Izuzquiza, Arne Semsrott v European Border and Coast Guard Agency (Frontex)*, ECLI:EU:T:2019:815, para 64.

⁹ Case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, para 65.

Internal decision-making

Turning to the substantive grounds of Frontex's refusal of access in the present case, please allow me to first discuss the application of the protection of internal decision-making as developed in Article 4(3) of Regulation (EC) No 1049/2001 as the principal protected interest which prevents public disclosure of both opinions at issue. I strongly believe that Frontex in its decision PAD-2024-00240 and PAD-2024-00300 provided ample reasons to allow the complainant to understand why the documents at issue must be withheld. Please note that both documents were drawn up for internal use and contain contentious opinions developed as part of hitherto ongoing deliberations and, with regard to the *FRO Opinion on Bulgaria*, preliminary consultations within Frontex and the Chief Directorate of the Bulgarian Border Police. Public disclosure would reveal contentious positions of the Frontex Fundamental Rights Office and Frontex senior management, partially also making explicit references to the cooperation with Member States and Third Parties. Moreover, the modalities of the implementation of the recommendations contained in the *FRO Opinion on Bulgaria* are the subject of an ongoing internal decision-making process within Frontex as defined by Article 4 of Regulation (EU) 2019/1896, including ongoing deliberations and preliminary consultations between Frontex and the Chief Directorate of the Bulgarian Border Police. In parallel, an ongoing decision-making process within the Agency as defined by Art. 5 of Regulation (EU) 2019/1896 is presently taking place internally and coordinated at Frontex-level as regards the implementation of the recommendations contained in the *FRO Opinion on Bulgaria*.

With regard to the *FRO Opinion on underreporting*, please note that the document was drawn up for internal use in order to inform two processes related to encouraging the reporting of and protecting those who report fundamental rights violations. Specifically, the Opinion aimed at:

- providing feedback to the deliberations within the Frontex Management Board about approaches and measures of Host and Home Member States and Third Countries; and
- triggering discussions inside the Agency about new structures, systems and measures required to be introduced internally.

At this point it is essential to note that the Frontex Management Board has partly addressed the issue in its June 2024 *Conclusions of the Management Board on Ensuring National Authorities' Active Support and Cooperation in Serious Incident Investigations Conducted by Frontex' Fundamental Rights Office*¹⁰. However, fundamental aspects of Member States' and Third Countries' responses recommended in the document, can only be addressed once Frontex undertakes a procedural or operational change on its end. The internal issuing of the *FRO Opinion on underreporting* triggered an internal discussion in the Agency, which led to the Agency's Executive Director's response in a letter addressed to the Fundamental Rights Officer on 20 March 2024, discussing the measures proposed by the Fundamental Rights Office. In March and April 2024, the Agency's Fundamental Rights Office discussed the practical implementation of the *Opinion on underreporting* with an external expert who was identified and recommended by the Executive Director. On 5 July 2024 the Agency's Fundamental Rights Officer received feedback of the Operations Directorate to the measures proposed in the *FRO Opinion on Underreporting*. The above-presented chronology of actions clearly illustrates that the discussions and consultations inside the Agency were ongoing at the time of Decisions PAD-2024-00240 and PAD-2024-00300 and continue to be subject of internal debate. Currently, Frontex is in the process of drafting an Action Point List, i.e. an action plan including practical measures the Agency should implement to increase reporting and protection of those reporting fundamental rights violations. Once finalized, this document will be submitted to the Executive Director for his decision and implementation across the Agency and operations. This process, which involves the Frontex Fundamental Rights Office, Executive Director and the Operations Directorate, is expected to conclude later in Autumn 2024. As Frontex already explained to the complainant in Decisions PAD-2024-00240 and PAD-2024-00300, the recommendations in the document were drafted based on the collection of operational experiences and analyses by the Agency and are interrelated, as elaborated below. Partial

¹⁰ Available at: <https://www.frontex.europa.eu/media-centre/news/management-board-updates/management-board-conclusions-serious-incident-mechanism-and-fundamental-rights-kWJ3fS> (accessed on 11 September 2024)

disclosure of the document would enable undue public pressure and premature conclusions as to the scope and content of the recommendations.

Taking into account the above deliberations, while Frontex acknowledges that the mere complexity of the decision-making process at issue does not, in itself, constitute a particular reason to conclude that disclosure of would seriously undermine that process¹¹, (a partial) release at the time of the Decisions PAD-2024-00240 and PAD-2024-00300, would seriously undermine the Agency's decision-making process and ultimately negate the very purpose of both *Opinions*. The disclosure of the contentious elements in question, in particular related to the details of incident reporting mechanism and opinions on Member State policies of a sensitive, operational nature would seriously undermine the decision-making process by leading the respective authors of the passages to take that risk of disclosure into account in the future, to the point when they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the passages being exposed to risk¹².

We would like to assure you that once the ongoing internal decision-making processes are concluded, the Agency is ready to re-consider the (partial) public disclosure of the documents. Please note that an earlier contentious opinion of Frontex's Fundamental Rights Officer concerning Greece - "*FRO Opinion on Greece April 2022*", which was the subject of the European Ombudsman inquiry 1885/2023/ACB and to which the applicant refers in their arguments - was partially released only two years after its initial drafting, i.e. at a time when publicly disclosing the document *inter alia* no longer seriously undermined the internal decision-making process. Due to the comparable nature of the present *FRO Opinion on Bulgaria*, Frontex may accordingly re-examine providing access to this document at a stage when such disclosure would not seriously undermine the ongoing decision-making processes and other protected interests. With regard to the *FRO Opinion on underreporting*, as the decision-making process is expected to finalise by the end of Autumn 2024 with a conclusive document to be issued on the subject, Frontex may also reconsider providing access to this hitherto nascent document.

Public Security and International Relations

Please allow me to also provide further insight into Frontex's application of the protection of the public interest as regards public security under Article 4(1)(a) of Regulation No 1049/2001. At the onset, I would like to note that the reasons provided in its decisions PAD-2023-00240 and PAD-2024-00300 already provided sufficient information to allow the complainant to understand the reasons why access to the requested documents had to be refused.¹³ Moreover, as recognised by settled case-law, there are limitations to the level of detail of the reasons that can be provided for invoking exceptions to public access to documents without jeopardizing that the interests, which the exceptions are specifically designed to protect, are undermined by de facto revealing the contents of the documents "and thereby depriving the exception of its very purpose"¹⁴. In this regard, the Decisions following the initial and confirmatory applications explained, to the extent possible, the reasonably foreseeable, and not purely hypothetical, risk of disclosure of the withheld elements, which would seriously undermine the interests protected by the invoked exceptions under Article 4 of Regulation (EC) No 1049/2001 and which thus had to be refused within the wide discretion accorded to Frontex for the application of that exception¹⁵.

In regard to the foreseeability of risk, having to explain that the risk for public security is "reasonably foreseeable" is a prognosis which amounts to a plausibility test, which takes into account that it is inherent to the protection of the public interest as regards public security that the obligation to provide reasons should not be detrimental to said interest. The risk and the reasons given in Decision PAD-2024-00300 and

¹¹ Judgment of 14 September 2022 in joined cases T-371/20 and T-554/20, *Pollinis France v European Commission*, para. 116 et seq.

¹² Cf. Judgment of 9 September 2008 in case T-403/05, *MyTravel v Commission*, para 52.

¹³ Judgment of the General Court of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, para. 110.

¹⁴ Judgment of 26 April 2005 in case T-110/03, *Sison v Council*, para. 84; Case T-851/16 *Access Info Europe v European Commission* [2018] ECR II- ECLI:EU:T:2018:69, para. 122; Judgment of 25 April 2007 in case T-264/04, *WWF European Policy Programme v Council*, para.37

¹⁵ Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEX)*, para 74.

further elaborated here, are by no means “purely hypothetical”. The case-law¹⁶ accepts, by adding the specification “purely”, that a prognosis with respect to a risk to undermine the public interest as regards public security remains - and can only remain - a prognosis, as long as it is not “purely”, and thus not “entirely”, hypothetical.

I would in particular like to emphasise again that providing public access to the documents at issue would result in comprehensive, actionable operational pieces of information contained therein becoming publicly available not only to *bona fide* applicants, but also to criminal networks involved in migrant smuggling and trafficking of human beings, thereby being able to obtain an insight into the number and profile of deployed officers in the operational area by Frontex and Member States, details of the operational area of Frontex-coordinated operational activities, as well as the modus operandi of law enforcement officials performing border control and coast guard duties. Specifically, the *FRO Opinion on Bulgaria* contains very sensitive pieces of information regarding the ongoing operation *Joint Operation Bulgaria 2024* (hereinafter: *JO Bulgaria 2024*), in particular regarding operational planning and evaluation of shortcomings. These details by themselves - but especially in combination with other sources - would allow such networks to adapt their modus operandi accordingly in order to circumvent border surveillance in current and future operations or to inflict harm on officials and assets¹⁷. Details of the operational area of Frontex and Member States (Bulgaria) operations, the number and profile of deployed officers and the modus operandi of law enforcement officials deployed are significant constituents for preventing and combatting cross-border crime including human smuggling and trafficking in human beings. Since both *Opinions* concern ongoing operational activities, an insight into these elements would with a very significant degree of certitude enable criminals to disrupt operational activities aimed at preventing criminal activities, in particular by enabling criminals to intercept information transmitted, to avoid controls aimed at preventing unlawful access to borders, to target and inflict harm on deployed personnel and assets, or to otherwise exploit this knowledge to the detriment of public security. This information, especially in combination with other sources, would facilitate access to the location of the reporting entities and provide a detailed insight into their movement patterns and mechanisms, which would pose a significant risk of attack to deployed officers and assets.¹⁸ Moreover, since the documents constitute condensed actionable information that form the basis for the short- and long-term calibration of operational activities, disclosure of these elements permits to anticipate operational activities and hamper Frontex’s future operations with ascertainable likelihood.

Let me turn now to the *FRO Opinion on Bulgaria*, which features Frontex’s own, contentious assessment of the current policies of the national government of a Member State from the perspective of fundamental rights observance. In this regard, public disclosure of the document containing this nascent, unilateral perspective would result in foreseeably undermining the operational cooperation with the Member State aimed *inter alia* at curbing cross-border crime, thus significantly jeopardising public security, as the process of protecting a sphere of mutual trust between Bulgaria and Frontex would be seriously threatened. Consequently, there is an ascertainable likelihood that the cooperation with Bulgarian authorities in the framework of the current *JO Bulgaria 2024* and possible future *joint operations* would be deteriorated, undermining the attainment of operational objectives *inter alia* aimed at combatting cross-border crime.

With regard to the application of Article 4(1)(a) third indent of Regulation (EC) No 1049/2001, which Frontex had to apply following a renewed appraisal pursuant to the present inquiry, please note that cooperation, respectively engagement with third countries is crucial for Frontex on a variety of levels for the security of the European Union’s external borders and thus for Frontex in the fulfilment of its mandate, as explained in the legend provided to you. The non-disclosed elements include references to the modus operandi, analyses and assessments of this cooperation, respectively engagement as well as on the current situation regarding border security measures and return activities applied in a third country. The release of such information would ultimately impede the collaboration, respectively engagement, between

¹⁶ Case T-852/16 *Access Info Europe v European Commission* [2018] ECR II-ECLI:EU:T:2018:71, para 40.

¹⁷ Judgment of 27 November 2019 in case T-31/18, *Izuzquiza and Semsrott v European Border and Coast Guard Agency (FRONTEx)*, para 73.

¹⁸ Judgment of 12 July 2001 in case T-204/99, *Mattila v Council and Commission*, para. 73.

Frontex, Member States and third countries with regard to operational activities for the security of the European Union's external borders and thus for Frontex in the fulfilment of its mandate.

As held by the court, the way in which third countries' authorities perceive decisions of the EU institutions is a relevant factor for the purpose of applying this exception, i.e. it is a component of international relations¹⁹. The unilateral disclosure of the elements in question must thus be refused as such would jeopardise the mutual trust of all parties, which is an essential prerequisite for establishing international relations, respectively for engaging, with third countries. Once the relationship between Frontex and a third country is impaired, it is foreseeable that this and also other third countries will refrain from cooperating with Frontex, respectively that a form of engagement of Frontex with these countries will no longer be possible. Consequently²⁰, access to this information has to be refused not only because its disclosure would result in jeopardizing the ongoing and future international cooperation, respectively engagement, with the third country mentioned in the document but also because it would impact the currently ongoing and future engagement with other third countries and international organisations thus undermining the protection of the public interest as regards international relations as stipulated in Article 4(1)(a) third indent of Regulation (EC) No 1049/2001. I would here once again like to underline that when examining a refusal to grant access to documents whose disclosure would undermine the protection of a public interest as laid down in Article 4(1)(a) of Regulation (EC) No 1049/2001, institutions enjoy wide discretion for the purpose of determining²¹ whether such disclosure to the public would undermine the interests protected by that provision.

Overriding public interest

Turning to the matter of the existence of an overriding public interest, which is to be ascertained exclusively for the application of the relative exception of the protection of internal decision-making as discussed earlier in here, the complainant claims that there is an overriding public interest in disclosure of the documents requested in the applications subject to the present inquiry. As mentioned in Frontex's reply letters Ref. PAD-2024-00240 and PAD-2024-00300 and further elaborated here, the documents include comprehensive information which, if disclosed, would seriously undermine several of the protected interests under Article 4 of Regulation (EC) No 1049/2001 and a substantial share of the redacted elements are protected by the absolute exception as per Article 4(1)(a) of Regulation (EC) No 1049/2001, for which an overriding public interest test cannot be applied. The remaining redactions that Frontex had to apply pertain to information whose disclosure would seriously undermine the protection of decision-making processes pursuant to Article 4(3) of Regulation (EC) No 1049/2001, as explained in both replies to the complainant. As highlighted in the preceding sections, I would like to re-emphasize that Frontex here does not act in a legislative context²³ and that therefore a higher threshold to prove the existence of an overriding public interest exists²⁴, which must be proven by the applicant²⁵ by reference to specific circumstances to justify the disclosure of the documents concerned²⁶.

The complainant's position brought forward at the confirmatory stage that the disclosure of the Opinions *"would contribute to conferring greater legitimacy on the institutions and would increase EU citizens'*

¹⁹ Judgment of 25 November 2020 in case T-166/19, *Bronckers v European Commission*, para. 61.

²⁰ Judgment of 25 April 2007 in case T-264/04, *WWF European Policy Programme v Council*, para. 37-41; Judgment of 25 November 2020 in case T-166/19, *Bronckers v European Commission*, para. 60.

²¹ Judgment of 3 July 2014 in case C-350/12P, *Council v. In't Veld*, para. 63; Judgment of 1 February 2007 in case C-266/05 P, *Sison v Council*, para. 34.

²³ Judgment of 1 July 2008 in case C-39/05 P and C-52/05 P, *Sweden & Turco v Council*, para. 46.

²⁴ Judgment of 14 November 2013 in case C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, para. 93.

²⁵ Judgment of 2 October 2014 in case C-127/13, *Strack v Commission*, para. 128.

²⁶ Judgment of 14 November 2013 in case C-514/11 P and C-605/11 P *LPN and Finland v Commission*, para. 94.

confidence in those institutions by making it possible to have an open debate on the points where there was a divergence of opinion regarding” is too general²⁷ to establish that an overriding public interest prevails, which would oblige the Agency to disclose the documents containing Frontex’s positions and opinions on contentious issues, which are presently being formed and which require special protection²⁸. Nor can the Agency recognise the existence of overriding public interest in disclosure of the *Opinions* expressed by the complainant’s statement that “*Frontex has previously disregarded the FRO’s repeated warnings*” or assertions of an unrelated nature that “*the FRO’s Opinion on such an important matter has not, to my knowledge, been shared with the European Parliament’s Civil Liberties Committee*”, in particular at the current level of advancement of decision-making process for which the documents at issue are fundamental. The release of these elements at the present stage would severely impair the sphere of trust in which both documents are provided and thereby compromise the very purpose of the respective *Opinions*.

Consequently, public disclosure of the documents at issue in their entirety is prevented by the fact that those documents contain opinions for internal use and forming part of wider deliberations and preliminary consultations within the Agency and with Third Parties, which require special protection in accordance with Regulation (EC) No 1049/2001, as developed earlier in here. Frontex’s invoking of Article 4(3) of Regulation (EC) No 1049/2001 to protect the possibility to express views independently within the Agency in fact helps to encourage internal discussions with a view to improving the functioning of the Agency and contributing to the smooth running of the decision-making process.

Partial access

It follows from Article 4(6) of Regulation (EC) No 1049/2001 that the significant number of elements in both documents falling under Article 4(1)(a) and Article 4(3) of Regulation (EC) No 1049/2001 led Frontex to the conclusion that a deviation from the principle laid down in Article 4(6) of Regulation (EC) No 1049/2001 was necessary at the time of the Decisions. Moreover, in examining the possibility of partial disclosure enshrined in Article 4(6) of Regulation (EC) No 1049/2001, Frontex, in its service to the public, is equally obliged to adhere to principles of transparency and to the principle of sound administration. Owing to the specific circumstances of the documents in question at the time of the applications, it was deemed that the release of short, extremely fragmented parts of the document at issue would not be in line with the latter principle²⁹. At the same time, despite the complainant’s public access to documents applications concerning only two documents, it was not exclusively administrative reasons that required the restriction of partial access as this consideration was combined with the fact that a “partial access would be meaningless because the parts of the documents that could be disclosed would be largely unintelligible and of no use”³⁰.

Moreover, partial disclosure of fragmented pieces of these documents would lead to misinterpretation of their actual meaning as they should be read and considered in their entirety. Partial disclosure of the *Opinions* would consequently enable undue public pressure and premature conclusions, specifically as to the scope and content of the recommendations part of the documents. This in turn would seriously undermine both Frontex’s and Chief Directorate of the Bulgarian Border Police’s decision-making process, as explained earlier in here.

Notwithstanding these considerations, disclosure of the parts of the documents not covered by the exceptions under Article 4 of Regulation (EC) No 1049/2001 was reassessed as part of the complainant’s confirmatory application. In doing so, account was also taken of the fact that no essential content of the requested information, which constitute contentious opinions and operational recommendations of high

²⁷ Judgment of 11 July 2018 in case T-643/13, *Rogesa v Commission*, para. 107; Judgment of 9 October 2018 in case T-634/17, *Pint v Commission*, para. 56.

²⁸ Judgment of 21 July 2011 in case C-506/08, *Sweden v MyTravel and Commission*, para. 79.

²⁹ Case C-353/99 P *Council of the European Union v Heidi Hautala* [2001] ECR I-9565, para. 3.

³⁰ Judgment of 12 July 2001 in case T-204/99, *Olli Matilla v Council*, para. 69; Judgment of 20 March 2014 in case T-181/10, *Reagens v Commission*, paras 172-175.

sensitivity, has already been made public³¹, including in the *serious incident reports* released under various public access to documents applications referred to by the complainant. Therefore, public access to the document without any of its content, i.e. without the detailed information access to which has to be refused pursuant to Article 4(1)(a) and Article 4(3) of Regulation (EC) No 1049/2001, was refused.

Conclusion

The purpose of Regulation (EC) No 1049/2001 is to give the general public a right of access to documents. Consequently, irrespective of their intended use, the document at issue, if made available to one person, would have an *erga omnes* effect as it subsequently enters the public domain. While Frontex is strongly committed to granting the widest possible public access to documents, public disclosure of both *Opinions of the Fundamental Rights Officer* would seriously undermine the protection of interests referred to in Article 4(3) and Article 4(1)(a) of Regulation (EC) No 1049/2001. Due to the highly sensitive nature of the documents and the internal decision-making process pending with no overriding public interest ascertainable, a deviation from the principle of providing partial access was necessary in this specific case.

We stand ready to provide any further information that are required.

Yours sincerely,

Electronically signed


Head of Inspection and Control Office

³¹ Judgement of 30 January 2008 in case T-380/04, *Terezakis v Commission*, paras 100-101; Judgment of 13 March 2019 in case T-730/16, *Espirito Santo Financial Group v ECB*, paras 127 et. seq.