

Mr Arne Semsrott

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Our ref: DCGO/TO/PAD-2021-00074
Initial application: TO/PAD-2020-00179

Warsaw, 19 April 2021

Your application for access to European Border and Coast Guard Agency (Frontex) documents - confirmatory application

Dear Mr Semsrott,

In reference to your confirmatory application registered on 4 March 2021, for which the time limit has been extended by 15 working days on 24 March 2021¹, in which you confirmed your initial application registered on 22 January 2021, to which Frontex had replied on 8 February 2021 and in which you applied for:

Sämtliche Gutachten, die Frontex in Bezug auf die Frage hat anfertigen lassen, ob es Waffen und Munition beschaffen darf. Es existieren dazu mindestens zwei Gutachten.

Thus

All expert opinions ordered by Frontex in relation to the procurement of arms and ammunition. There are at least two expert opinions.

I note your arguments in your confirmatory application:

All expert opinions ordered by Frontex in relation to the procurement of arms and ammunition. The request and all subsequent information can be found at <https://eur02.safelinks.protection.outlook.com/?url=https%3A%2F%2Ffragdenstaat.de%2Fanfrage%2Fgutachten-zu-anschaffungen-von-waffen-und-munition%2F&data=04%7C01%7Cpad%40frontex.europa.eu%7C9300c61efe3e4e5e889608d8dcedd7be%7C1a17d6bf51554e22bf292ba5da77f037%7C0%7C637502261381951214%7CUnknown%7CTWFpbGZsb3d8eyJWljojMC4wLjAwMDAiLCJQJjoiV2luMzliLCJBTiI6IjEhaWwiLCJXVCi6Mn0%3D%7C1000&sddata=XQ4J%2BtxmmBRp%2BMnJRaMwPKkEHrMDsnqfnln5B9%2BOG8%3D&reserved=0>

The request was formulated in a sufficiently precise manner, and there is no suggestion to the contrary.

My request was registered on 22 January 2021.

On 8 February 2021, by letter with reference TO/PAD-2020-0017, Frontex identified five documents falling under the scope of my request, denying access to them under Article 4(2) first indent and (3) of Regulation (EC) No 1049/2001.

¹ In accordance with Article 8(2) 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).

Frontex justifies its refusal by stating that the documents “contain information regarding currently ongoing decision-making processes” that require “special protection”.

Frontex also argues that disclosing four of the five documents would undermine the protection of commercial interests of legal persons. According to Frontex, a partial release of the documents could not be undertaken.

I consider that Frontex’s refusal to provide access to the documents requested is misconceived, for the following reasons.

Ground 1. Frontex did not explain how commercial interests would be undermined

Frontex states that disclosure of four of the five documents would reveal “economic information on the competences and know-how and other commercial interests of current and future market actors”. The disclosure of this information “would undermine the protection of commercial interests of legal persons”.

First, information on the competences and know-how of market actors are not protected by Regulation 1049/2001. Only specific commercial interests are.

Second, Frontex has not specified which kind of commercial interests would be revealed and which current and future market actors would be affected by this. It is unclear how information from evaluations on the legality of weapons would affect actors that are currently not even active in a market. This lack of precision contravenes Frontex’s obligation to explain how disclosure would “specifically and actually” undermine the commercial interests protected.

Third, Frontex is required, in accordance with the established case law of the CJEU, to explain how the purported risk to commercial interests is “foreseeable and not purely hypothetical”. It has failed even to particularise the nature of the purported risk or the legal persons affected by the risk, much less to establish that it reaches the threshold of “foreseeable and not purely hypothetical”.

Ground 2. Decision-making processes are not protected per se

The Regulation’s 1049/2001 explicit goal is to improve the transparency of the decision-making process. In this spirit, the Court of Justice of the European Union has held that the preliminary nature of documents that relate to a decision-making process does not in itself justify the application of the exception laid down in Article 4(3) of Regulation 1049/2001.

The Court has also held that the fact that no agreement has yet been reached on the issues being debated does not therefore establish that the decision-making process is undermined by disclosure.

To this regard, Frontex’s assertion that release of the requested documents would “hamper the ongoing and future” negotiations is a broad claim that does not offer substantial proof as to how the decision-making process would be seriously and foreseeably undermined. It follows that, in absence of such proof, Frontex’s argument that disclosure would “erode the mutual trust among the participants” remains purely hypothetical and unfounded, especially because Frontex has not even stated which negotiations the documents relate to and who is participating in these negotiations. Frontex claims that “disclosing the redacted parts would reveal negotiation positions of the stakeholders” when it has not redacted any part of a document, but denied access to them as a whole.

Ground 3. Frontex’s failure to provide partial disclosure is unlawful

Article 4 (6) of Regulation 1049/2001 provides: “If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.”

As highlighted above, the proposition that the totality or even a substantial part of the five documents requested relates to ongoing decision-making processes or commercial interests is not sustainable. Partial disclosure must therefore be considered, consistently with the provisions of Article 4(6) of Regulation 1049/2001 and the principle of widest possible access.

Frontex alleges that partial access cannot be granted to the requested documents “as their redaction would be disproportional in relation to the parts that are eligible for disclosure, simultaneously undermining the principle of sound administration.” This is inconsistent with the terms of Article 4(6), which provides that the scope of disclosure is determined with reference to the exceptions laid out in Article 4, rather than a test of proportionality.

Ground 4. There is a clear public interest in the disclosure of the requested documents

Frontex alleges that “the administrative burden necessary to identify and redact the releasable materials would be disproportionate to the public interest in the disclosure exercise itself.” That assertion is false. The documents requested are likely to contain important legal arguments regarding the use of and conduct with lethal weapons. Their use is tightly linked to fundamental rights that constitute an essential pillar of the European legal order. There is a manifest public interest in transparency relating to the use of weapons by European Union officials. To date, there have been several media reports on this topic, for example EUObserver and Spiegel, as well as concerns being raised - including on a lack of transparency - by 40 Members of the European Parliament on this issue precisely. [1]

For these reasons, I consider that Frontex is legally obligated to provide the requested documents.

I also note that further to your clarifications, your application PAD-2020-00179 was registered on 22 January 2021. Concerning your **first argument regarding Ground 1**, four of the five documents you apply for contain, in addition to other pieces of information, information on competences and know-how of market actors within the meaning of Article 4(2) first indent of Regulation (EC) No 1049/2001, the disclosure of which is not possible as held by the General Court of the European Union in settled case law regarding similar documents.² In reply to your **second and third argument for this Ground**, on 15 February 2021 a procurement procedure for the acquisition of service weapons was launched³. Releasing the information contained in these documents, *inter alia* “relating to the organization”⁴ of Frontex and its considerations regarding this and future procurement procedures, would pose harm to the undistorted conduct of at least the currently ongoing procurement procedure⁵.

In regard to your reference under **Ground 2** to “the preliminary nature of the ongoing discussions” and your conclusion that such “did not in itself justify the application of the exception laid down in Article 4(3) of Regulation [(EC) No] 1049/2001”, kindly note that the respective judgment was passed in regard to legislative decision-making processes.⁶ The decision-making process of which all five documents you apply for form part is however of a different nature, and Frontex thus enjoys a wider margin of discretion.⁷ In addition, the documents - intended from the onset to analyse different angles regarding the procurement of weapons within Frontex’s mandate as laid down in Regulation (EU) 2019/1896⁸ - could therefore at no point in time be considered as being of a “preliminary nature” only. Due to the commencement of the procurement procedure, I also consider that the document, access to which was initially refused based on Article 4(3) of Regulation (EC) No 1049/2001, is now also linked to this procedure. Therefore, Article 4(2) first indent of Regulation (EC) No 1049/2001 is a further ground for refusal. As this procurement procedure, which followed the creation of the documents and is based thereon, is currently ongoing, their release would indeed seriously undermine the ongoing and future negotiations at least in regard to this procurement procedure, which constitutes an ongoing decision making process.

In your arguments concerning **Grounds 3 and 4**, you refer to “the administrative burden necessary to identify and redact the releasable materials would be disproportionate to the public interest in the disclosure exercise itself” and thus to the consideration whether in this case a deviation from the

² E.g. Judgment of 21 September 2016 in case T-363/14, *Secolux v Commission*, para. 53, et. seq.

³ <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=7863>.

⁴ Judgment of the General Court of 24 May 2011 in case T-109/05, *NLG v Commission*, para. 144.

⁵ Judgment of 29 January 2013 in cases T-339/10 and T-532/10, *Cosepuri v EFSA*, EU:T:2013:38, para. 101.

⁶ Judgment of 22 March 2011 in case T-233/09, *Access Info Europe v Council*, EU:T:2011:105, para. 76.

⁷ Judgment of 3 July 2014 in case C-350/12 P, *Council v. Van de Veldt*, ECLI:EU:C:2014:2039, para. 16.

⁸ Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

principle that partial access within the meaning of Article 4(6) of Regulation (EC) No 1049/2001 has to be granted must be considered. However, this is to be examined separately⁹ from the constituting elements of Article 4(2) first indent (re Ground 1) and 4(3) (re Ground 2) of Regulation (EC) No 1049/2001. The independent examination under Article 4(6) of Regulation (EC) No 1049/2001 is not subject to an “overriding public interest test”.

I will nevertheless consider your arguments also in light of the overriding public interest test of Article 4(2) first indent (re Ground 1) and 4(3) (re Ground 2) of Regulation (EC) No 1049/2001. You bring forward that “*The documents requested are likely to contain important legal arguments regarding the use of and conduct with lethal weapons. Their use is tightly linked to fundamental rights that constitute an essential pillar of the European legal order. There is a manifest public interest in transparency relating to the use of weapons by European Union officials.*” However, the documents refer solely to the possibility of purchasing, registering, and storing service weapons, including firearms, with a particular focus on issues related to the Republic of Poland.

Consequently, the scope of your application “... *ob es Waffen und Munition beschaffen darf*”, the actual content of the documents, and your arguments aimed at demonstrating an overriding public interest are not congruent and thus cannot justify disclosure¹⁰. This is further supported by the higher threshold shown in our arguments under Grounds 1 and 2¹¹ for proving an overriding public interest, which you did not provide under Grounds 1 and 2. In balancing all interests, the reference to an ongoing procurement procedure requires a derogation from the obligation to grant partial access¹² as “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”¹³ 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”¹⁴. Therefore, and as stated in our reply of 8 February 2021, no partial access within the meaning of Article 4(6) or Regulation (EC) No 1049/2001 is possible.

In sum, I uphold the decision as expressed regarding your initial application.

In accordance with Article 8(1) of Regulation (EC) No 1049/2001, you are entitled to institute court proceedings and/or make a complaint to the European Ombudsman under the relevant provisions of the Treaty on the Functioning of the European Union.

Yours sincerely,

[signed]

Hervé Caniard

Head of Transparency Office

⁹ Judgment of 13 January 2011 in case T-362/08, *IFAW Internationaler Tierschutz-Fonds v Commission*, para. 148.

¹⁰ Judgment of 14 November 2013 in case C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, para. 92, et seq.

¹¹ Judgment of the General Court of 22 May 2012 in case T-6/10, *Sviluppo Globale v Commission*, para. 86, et seq.

¹² Similar to Judgment of 26 March 2020 in case *ViaSat, Inc. v European Commission*, ECLI:EU:T:2020:123, para. 65.

¹³ Applicable also for Regulation (EC) No 1049/2001: Judgment of 7 February 2002 in case T-211/00, *Kuijjer v Council*, para. 57.

¹⁴ Judgment of 5 December 2018 in case T-875/16, *Falcon Technologies v Commission*, para. 103, et seq.