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Our ref: DCGO/TO/PAD-2021-00049  
Initial application: TO/PAD-2020-00223

Warsaw, 19 April 2021

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

Dear Mr Semsrott, dear Ms Izuzquiza,

In reference to your confirmatory application registered on 3 March 2021, for which the time limit has been extended by 15 working days on 24 March 2021<sup>1</sup>, in which you confirmed your initial application registered on 26 November 2020, to which Frontex had replied on 21 January 2021 and in which you applied for:

*Regarding the pushbacks in the Aegean involving Frontex, as reported by the Bellingcat and other media outlet articles:*

*For the incident of 28.04.2020, involving asset FSA OSPREY 1:*

- the Technical Equipment Mission Report;
- the ICC Daily report and/or JCB Minutes; and
- the Daily reporting package.

*For the incident of 04.06.2020, involving asset PRT CPB Nortada:*

- the Technical Equipment Mission Report;
- the ICC Daily report and/or JCB Minutes; and
- the Daily reporting package.

*For the incident of 05.06.2020, involving asset PRT CPB Nortada:*

- the Technical Equipment Mission Report;
- the ICC Daily report and/or JCB Minutes; and
- the Daily reporting package.

*For the incident of 08.06.2020, involving asset PRT CPB Nortada:*

- the Technical Equipment Mission Report;
- the ICC Daily report and/or JCB Minutes; and
- the Daily reporting package.

<sup>1</sup> 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).

*For the incident of 08.06.2020, involving asset PRT ROU CPV MAI 1103*

- *the Technical Equipment Mission Report;*
- *the ICC Daily report and/or JCB Minutes; and*
- *the Daily reporting package.*

*For the incident of 15.08.2020, involving asset ROU CPV MAI 1102:*

- *the Technical Equipment Mission Report;*
- *the ICC Daily report and/or JCB Minutes; and*
- *the Daily reporting package.*

*For the incident of 19.08.2020, involving asset PRT CPB Molivos:*

- *the Technical Equipment Mission Report;*
- *the ICC Daily report and/or JCB Minutes; and*
- *the Daily reporting package.*

I note your arguments in your confirmatory application

*On 16 November 2020, we filed an access to documents request for a series of Frontex reports “[r]egarding the pushbacks in the Aegean involving Frontex, as reported by the Bellingcat and other media outlet articles”. Our request identified a series of documents including the Technical Equipment Mission Report, the ICC Daily report and/or JCB Minutes, and the Daily Reporting Package corresponding to seven incidents for which the date and the name of the relevant Frontex asset were provided. All of the requests were formulated in a sufficiently precise manner, and there is no suggestion to the contrary.*

*On 26 November 2020 Frontex registered and started processing our application.*

*On 17 December 2020 Frontex requested a deadline extension under “Article 7(3)/Article 8(2)” of Regulation 1049/2001.*

*Frontex’s Response:*

*On 21 January 2021, Frontex provided its response, refusing access to the 30 documents identified after our request.*

*In its response letter, Frontex states that “access to the 30 documents identified must be refused” on the basis that they:*

*“refer to details of the operational area and thus cannot be released ...” and “contain detailed information related to reporting tools and methods used by law enforcement officials to conduct border control tasks and counter criminal activities.”*

*The response letter concludes that: “In sum, [the requested documents] relate to ongoing operations. (...) the disclosure of the documents in question would undermine the protection of the public interest as regards public security.” Access was accordingly refused on the purported basis of Article 4 (1)(a) of Regulation 1049/2001.*

*Frontex also states that: “A partial release of the document(s) could not be undertaken, as their redaction would be disproportional in relation to the parts that are eligible for disclosure, simultaneously undermining the principle of sound administration. More specifically, the administrative burden necessary to identify and redact the releasable materials would be disproportionate to the public interest in the disclosure exercise itself”.*

*Grounds of Objection:*

*We consider that Frontex's refusal to provide access to the documents requested is misconceived, for the following reasons.*

*Ground 1. Details of Frontex's "operational area" in the Aegean are already in the public domain*

*Frontex's refusal relies on the assertion that the documents requested "refer to details of the operational area".*

*Notwithstanding that Frontex fails to identify the nature of the relevant "details" to which it refers, detailed information relating to Frontex's operational area is in fact already in the public domain.*

*By way of example, a publicly available note dated 05/11/2020 from the Frontex Management Board meeting on 10 November 2020 (Reference: BMD/GRP-2018-00017/899751/2020) contains explanations and graphics with specific information relating to the Frontex "operational theatre". It follows that mere disclosure of the requested documents would not "undermine the protection of the public interest as regards public security" as alleged.*

*Ground 2. Frontex's reliance upon "public security" is insufficiently particularised and inconsistent with case law of the CJEU*

*In its response letter, Frontex alleges that the documents requested "contain detailed information related to reporting tools and methods used by law enforcement officials to conduct border control tasks and counter criminal activities. Its disclosure would jeopardize the implementation of ongoing and future operations, and thus facilitate irregular migration and trafficking in human beings as the effectiveness of law enforcement measures would be significantly reduced."*

*Frontex's reliance upon the alleged risk posed to public security as a result of disclosure of documents relating to "reporting tools" is ill-founded.*

*First, Frontex uses the term "reporting tools" vaguely without specifying the nature of the "reporting tools" to which it refers.*

*Second and in any event, Frontex fails to adequately explain how disclosure of these "reporting tools" would in fact jeopardize future operations (and, by extension, public security). It merely makes an assertion to that effect.*

*Third, Frontex is required, in accordance with the established case law of the CJEU, to explain how the purported risk to public security is "foreseeable and not purely hypothetical". It has failed even to particularise the nature of the purported risk, much less to establish that it reaches the threshold of "foreseeable and not purely hypothetical".*

*Ground 3. The scope of of the requested documents extends beyond matters relating to Frontex's "operational area" or "reporting tools". Blanket refusal on those grounds is accordingly unjustified.*

*The requested documents comprise Frontex's so-called Daily Reporting Package. According to Frontex [1], these documents constitute "[t]he available information to Frontex from the patrolling activities conducted within Joint Operations". In particular, the Daily Reporting Package consists of:*

*the ICC Daily report and/or JCB Minutes, which provide an "Operational overview on a daily basis, covering the last 24 hours"; the Technical Equipment Mission Report, which contains "Information about the activity performed by the aerial, maritime assets and TVV"; the Standard Patrolling Schedule; and the IO Daily Report.*

*These documents will inevitably contain a diverse range of information of varying degrees of sensitivity. By denying access to all 30 identified documents, Frontex is exercising a blanket refusal which is contrary to EU case law and the principle of EU transparency.*

*Whether the requested documents are suitable for disclosure must be examined on a case-by-case basis. The case law of the CJEU has established that: (1) there is no general presumption*

*of non-disclosure regarding documents; and (2) the mere fact that a document is related to a sensitive area of EU work does not make the documents sensitive per se. It follows that blanket refusal of an entire category of documents is unlawful and contravenes the principle of “widest possible access” as enshrined in Regulation 1049/2001.*

*It must also be noted that the requested documents were used as part of the agency’s Management Board internal assessment of the cases reported by media outlets Bellingcat, Der Spiegel and Lighthouse Reports.*

*As we can see from the disclosed Note from the Management Board, the requested documents are cited as the relevant documentation used to conduct this assessment.*

*It is therefore presumable, unless Frontex would state otherwise, that the requested documents contain relatively detailed descriptions of pushback incidents which - directly and indirectly - involve Frontex assets.*

*These documents, besides technical details regarding “reporting tools” and the “operational area”, contain important accounts of potential human rights violations at sea involving the agency’s deployed assets. Their disclosure is therefore crucial for the protection of human rights at the EU’s external borders, as well as for the principle of accountability, as enshrined in the EU treaties.*

*Ground 4. Frontex is under a legal obligation to make public comprehensive information regarding its ongoing operations*

*Article 114 (2) of Regulation 2019/1896 provides: “The Agency [Frontex] shall communicate on matters falling within the scope of its tasks on its own initiative. It shall make public (...) comprehensive information on past and current joint operations (...). It shall do so without revealing operational information which, if made public, would jeopardise attainment of the objectives of operations.”*

*It follows that Frontex is not entitled to refuse access to information simply because “In sum, they relate to ongoing operations”. The terms of Article 114(2) indicate that the mere fact that requested documents may relate to “ongoing operations” does not relieve the agency from its transparency obligations. Rather, Frontex is required to make public the relevant information without revealing sensitive details “which would jeopardise attainment of the objectives of operations”, i.e. provided that it can justify the refusal of relevant information on the basis of the exceptions provided in Article 4 of Regulation 1049/2001 and in compliance with EU case law.*

*Ground 5. Frontex’s failed 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 30 documents requested relates to Frontex’s “operational area” or “reporting tools” 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 6. There is an 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 accounts of conduct that could amount to grave human rights violations. Fundamental rights constitute an essential pillar of the European legal order: there is a manifest public interest in transparency relating to possible violations.*

*On 23 October 2020, media outlets including Bellingcat published information relating to pushbacks in the Greek-Turkish maritime border involving Frontex assets. Frontex's involvement in these and other alleged pushbacks has since become a matter of general public importance and the subject of political debate. The alleged failure of the agency's internal reporting system, which has raised questions over Frontex's compliance with its obligation to report wrongdoing and follow-up on these reports with relevant authorities, has become a matter of public concern.*

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

I also note the document entitled “note-frontex-management-board-meeting-10-november” you provided on 22 February 2021 concerning “the information requested by Frontex “in regard to ground 1” of our confirmatory application.”

Before addressing your arguments individually, please allow me to remind you that Frontex, when considering a refusal to access to a document which disclosure would undermine the protection of the public interest as regards public security as laid down in Article 4(1)(a) of Regulation No 1049/2001, enjoys a wide discretion for the purpose of determining<sup>2</sup> whether such disclosure to the public would undermine the interests protected by that provision. In our reply of 21 January 2021, we provided ample information to allow you “to understand the reasons why access to the information requested”<sup>3</sup> regarding these then ongoing operations was refused. In doing so, Frontex needs to ensure that the interests, which the exceptions are specifically designed to protect, are not undermined by *de facto* revealing the contents of the documents “and thereby depriving the exception of its very purpose”.<sup>4</sup> Finally, the documents you refer to relate to maritime operations. If the information contained therein were in the possession of the criminal gangs involved in migrant smuggling and trafficking of human beings, they would be able to obtain an insight into patrolling areas and schedules of the vessels, movement patterns, assets deployed and tools and methods applied by law enforcement officials in then ongoing and future operations. This information by itself - but especially in combination with other sources - would allow such gangs to adapt their modus operandi accordingly in order to circumvent border surveillance in current and future operations. Consequently, they would be able to cross the external border and irregularly enter the territory of an EU Member State<sup>5</sup>, thus creating a situation affecting public security in a reasonably foreseeable and not purely hypothetical manner.<sup>6</sup>

Concerning **Ground 1**, a document entitled BMD/GRP-2018-00017/899751/2020 was created for and releasable only to the Frontex Management Board for its meeting on 10 November 2020. Even if the document you submitted on 22 February 2021 was congruent with the said document, this would not result in the said document being in the public domain. And even if this was the case, Frontex, in order “to prevent exacerbation of the damage”<sup>7</sup> would have further grounds to invoke, as it already did in its reply of 21 January 2021, the different aspects of Article 4(1)(a) first indent of Regulation (EC) No 1049/2001. In the alternative, and following your argument that “detailed information relating to Frontex’s operational area is in fact already in the public domain”, Frontex took into account the nature and degree of detail of the information contained in the document you sent on 22 February 2021. Even

<sup>2</sup> 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 65.

<sup>3</sup> 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.

<sup>4</sup> Case T-851/16 *Access Info Europe v European Commission* [2018] ECR II- ECLI:EU:T:2018:69, para. 122.

<sup>5</sup> 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. 109.

<sup>6</sup> 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, *et seq.*

<sup>7</sup> Judgment of the Court of Justice of 7 June 2013 in case T-93/11, *Stichting Corporate Europe Observatory v Commission*, para. 64.

if this document addressed the same subject as the documents for which you applied, the “nature and degree of detail of the information contained”<sup>8</sup> in the document you sent differs from those of the documents you apply for. While I cannot comment on the accuracy of the document you sent in regard to these details, in any case your document and its content do not prejudice the legally required application of the exceptions regarding *inter alia* the details of the operational area. This also applies to the other exceptions referred to in our decision of 21 January 2021 and in Ground 3 below. Please note that - for the reasons outlined above - no further information regarding this exception can be provided. Concluding, I concur with the decision of 21 January 2021 in this regard.

Coming to your **Ground 2**, Frontex also had to refuse access to the documents as they contained detailed information regarding reporting tools and methods used by law enforcement officials to conduct border control tasks and counter criminal activities. While your arguments focus only on the reporting tools, this is only one, albeit equally important, element of our explanation. Reporting tools and methods used by law enforcement officials are central constituents in combatting, in the case of Frontex, cross-border crime including human smuggling and trafficking in human beings. Further to what has been explained in our reply to your initial application, an insight into reporting tools used by officials to combat these forms of criminal activities would enable criminals to know the reporting patterns and tools to transmit information regarding such activities, which would enable them e.g. to disrupt the reporting on criminal activities or, in particular by intercepting information transmitted, to avoid controls aimed at preventing unlawful access to the borders or to otherwise exploit this knowledge to the detriment of public security. This information would also facilitate the location of the reporting entities and understand their movement patterns and mechanisms, which would also pose a significant risk of attack to deployed officers and assets.<sup>9</sup> These points are even more relevant regarding the methods, procedures and processes, used by law enforcement officials to conduct border control tasks and counter criminal activities. I also refer you to my remarks in the second paragraph of this letter. For these reasons, no further information regarding this exception can be provided. Concluding, I concur with the decision of 21 January 2021 for this Ground.

With regard to your **Ground 3**, I concur with you that “[t]he scope of of the requested documents extends beyond matters relating to Frontex’s “operational area” or “reporting tools” as the renewed individual consideration of the 30 documents found that they also:

- contain detailed information on the means of communication used by law enforcement officials. The disclosure of the information contained therein would put law enforcement officials’ work in jeopardy and harm the course of future and ongoing operations aimed at curtailing the activities of organized criminal networks involved in human smuggling and trafficking in human beings. As the disclosure of this information would undermine the protection of the public interest as regards public security, access to the documents must be refused as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001;
- contain detailed information regarding the modus operandi of criminal networks involved in the smuggling of migrants and trafficking in human beings. Their disclosure would jeopardize the work of law enforcement officials and pose a hazard to the course of ongoing and future operations aimed at curtailing the activities of such networks, ultimately obstructing their purpose to counter and prevent cross-border crime as well as to prevent unauthorized border crossings. The disclosure would thus undermine the protection of the public interest as regards public security as laid down in Article 4(1)(a) first indent of Regulation (EC) 1049/2001;
- contain information regarding the number and profiles of officers deployed in the operational area. Disclosing such information contained in the documents would be tantamount to disclosing the weaknesses and strengths of Frontex operations and pose a risk to their effectiveness. As a result, the course of ongoing and future similar operations would be hampered, ultimately defeating their purpose to counter and prevent cross-border crime and unauthorized border crossings. Consequently, the disclosure of such information would

<sup>8</sup> Judgment of the Court of first Instance of 12 July 2001 in case T-204/99, *Mattila v Council and Commission*, para. 64.

<sup>9</sup> Judgment of the Court of first Instance of 12 July 2001 in case T-204/99, *Mattila v Council and Commission*, para. 73.

undermine the protection of the public interest as regards public security as laid down Article 4(1)(a) first indent of Regulation (EC) 1049/2001.

In addition, the documents contain personal data such as names of individuals and/or characteristic features which could lead to the identification of individuals. Its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data and therefore has to be precluded pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001.

Due to the number of elements relating to these exceptions, I do not agree with your allegation that a blanked approach for these 30 documents had been applied. In regard to your further argument that

*It must also be noted that the requested documents were used as part of the agency's Management Board internal assessment of the cases reported by media outlets Bellingcat, Der Spiegel and Lighthouse Reports.*

please note that access to internal documents by a statutory body of Frontex including the Management Board is not subject to, and also not relevant for, the considerations to be applied under Regulation (EC) 1049/2001 regarding public access to documents. Furthermore, your statement

*It is therefore presumable, unless Frontex would state otherwise, that the requested documents contain relatively detailed descriptions of pushback incidents which - directly and indirectly - involve Frontex assets.*

*These documents, besides technical details regarding "reporting tools" and the "operational area", contain important accounts of potential human rights violations at sea involving the agency's deployed assets. Their disclosure is therefore crucial for the protection of human rights at the EU's external borders, as well as for the principle of accountability, as enshrined in the EU treaties.*

does not relate to your request for a reconsideration of the decision concerning your initial application for public access to documents and can thus not be addressed as part of the second stage of this administrative procedure under Article 7(2) of Regulation (EC) No 1049/2001. Concluding, further to the findings as part of the renewed consideration of the 30 documents, I concur with the decision of 21 January 2021.

While I do also concur with you that "Frontex is under a legal obligation to make public comprehensive information regarding its ongoing operations" as you bring forward as **Ground 4**, I refer again to the judgment of 27 November 2019 in Case T-31/18, in which the Court held in regard to Article 74(2) of the Regulation preceding Regulation (EC) 2019/1896<sup>10</sup>, which to a large extent has the same wording and obligation as the current Article 114(2):

*In that regard, it must be observed that, although Frontex is required under Article 8(3) and Article 74(2) of Regulation 2016/1624 to communicate with the public on matters falling within the scope of its tasks, it cannot reveal operational information which would jeopardise attainment of the objective of those operations.<sup>11</sup>*

Similar to Article 74(2) of the predecessor Regulation, communications initiated on its own initiative under Article 114(2) of Regulation (EU) 2019/1896 are not subject to the framework governing public access to documents as laid down in Regulation (EC) No 1049/2001 and any publications under Article 114(2) of Regulation (EU) 2019/1896 would not be "setting a precedent that would require [Frontex] to communicate information which it believes puts public security at risk."<sup>12</sup>

In regard to your arguments concerning **Ground 5**, I would like to re-emphasize that our individual examination of the 30 documents in regard to Article 4(6) of Regulation (EC) No 1049/2001, which has to be examined separately from Article 4(1)(a) first indent of Regulation (EC) No 1049/2001<sup>13</sup>, resulted

<sup>10</sup> Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p. 1).

<sup>11</sup> 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. 91.

<sup>12</sup> 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. 93.

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

in the decision that a deviation from the principle laid down in Article 4(6) of Regulation (EC) No 1049/2001 was necessary. The number of elements falling under exceptions under Article 4(1)(a) first indent of Regulation (EC) No 1049/2001 - as referred to in the decision of 21 January 2021 and elaborated as part of your Ground 3 - in the 30 documents led us, while balancing all interests including data protection obligations, to decide against a partial release of the documents. This was and is motivated by “the administrative burden of blanking out the parts that may not be [disclosed, which] proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required”<sup>14</sup> 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”<sup>15</sup>. Therefore, and as already stated in our reply of 21 January 2021, no partial access within the meaning of Article 4(6) or Regulation (EC) No 1049/2001 is possible.

Noting your arguments regarding **Ground 6**, while the exceptions applicable to the 30 documents are absolute and not subject to an overriding public interest test, the above considerations did not enable us to grant partial access within the meaning of Article 4(6) of Regulation (EC) No 1049/2001, which is also not subject to such test.

Consequently, I uphold the decision as expressed regarding your initial application and amend it as stated above.

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

<sup>14</sup> Applicable also for Regulation (EC) No 1049/2001: Judgment of 7 February 2002 in case T-211/00, *Kuijjer v Council*, para. 57.

<sup>15</sup> Judgment of 5 December 2018 in case T-875/16, *Falcon Technologies v Commission*, para. 103, et seq.