



REPORT ON THE MEETING OF THE EUROPEAN OMBUDSMAN'S INQUIRY TEAM WITH FRONTEX REPRESENTATIVES

COMPLAINT: 1939/2020/MAS

Case title: How the European Border and Coast Guard Agency (Frontex) dealt with an application for access to a list of e-mails that Frontex sent to journalists

Date: Friday, 29 January 2021; 11:30 to 12:45h

Location: Remote meeting via WebEx

Present

European Border and Coast Guard Agency (Frontex)

Head of Inspection and Control Office

Senior Legal Officer

Assistant Legal Officer

Legal Interim Assistant

Legal Trainee

Media and Public Relation Office Assistant

European Ombudsman

Markus Spoerer, Inquiries Officer

Peter Bonnor, Principal Legal Officer

Inquiries Trainee

Background

The meeting was held in the context of an inquiry into how the European Border and Coast Guard Agency (Frontex) dealt with an application for public access¹ to a list of e-mails that Frontex had allegedly sent to journalists informing them of errors in their reporting and documents about how these e-mails were created. Frontex had replied to the complainant's initial application for public access to documents by stating that a *list* of such e-mails did not exist.

The Ombudsman's inquiry team asked Frontex to provide information on the following issues:

¹ See Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council, and Commission documents, <http://data.europa.eu/eli/reg/2001/1049/oj>. Article 114 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, <http://data.europa.eu/eli/reg/2019/1896/oj>, establishes that Frontex is subject to Regulation 1049/2001.

1. Whether Frontex holds documents falling within the scope of the complainant's application.
2. How Frontex ensures that all documents relevant to an application for public access to documents are found within its system.
3. Whether Frontex properly notified its initial reply to the complainant.

Information provided by Frontex

The Frontex representatives presented a **timeline** of the events leading to the complaint (see Annex 1).

The Frontex representatives then addressed the **questions** brought forward by the European Ombudsman's inquiry team.

1. On whether Frontex holds documents that fall within the scope of the complainant's application

Frontex had informed the complainant that it does not hold any documents corresponding to his application.

The European Ombudsman's inquiry team, which had found an email online in which Frontex identifies what it sees as errors in a journalist's reporting², asked the Frontex representatives whether this or similar emails had been identified and considered for public access. The Frontex representatives stated that they had effectively identified and considered this e-mail along with other such e-mails, but they did not find them to fall within the scope of the complainant's application nor did Frontex expressly inform the complainant about the existence of the emails. They argued that these e-mails did not form part of the application, which was made in German and which Frontex translated as follows:

*I would like a **list** of these emails with such requests for correction, complaints about the reporting or similar concerns, as well as any internal documents (memos, letters, drafts, notes, minutes, emails) **about** how these emails were created, designed or sent and evaluated. [emphasis added] [...]*

This application also extends to such information that is not considered "important" or subject to archiving under EU archiving rules, including in particular emails that are still in the mailbox of the account press@frontex.europa.eu.

Consequently, the Frontex representatives pointed out that, in their understanding, the German wording is clear and Frontex considered that the complainant did not make an application for access to the e-mails as such, but to a list of e-mails and to internal documents about how these emails were created. They explained that they understood the word "information" in the second paragraph to also refer to the lists and to internal documents describing - how these emails were created in the form of emails still in the mailbox of the

² <https://correctiv.org/aktuelles/2019/08/15/frontex-hat-uns-geschrieben-wir-haben-geantwortet/>

mentioned account. They further stated their understanding that the scope of the initial application to Frontex - was different from the scope of the complaint to the European Ombudsman, as the latter is focussed on the concrete emails sent.

The Frontex representatives said that they assist applicants and seek clarifications on imprecise applications when such assistance is required. They explained that the complainant had already submitted a number of applications for public access to documents to Frontex in German and English in the past. Taking into account the complainant's experience, combined with the fact that the complainant formulated the application in German and in a precise manner, Frontex did not find it necessary to clarify further the scope of the application with the complainant, as it was found to be sufficiently clear and precise.

The European Ombudsman's inquiry team asked whether Frontex has any written records, as described by the complainant in his application, of the above issues having been discussed (minutes of meetings or similar). The Frontex representatives said they did not.

The Frontex representatives confirmed that Frontex plans to retain the versions held of the abovementioned e-mail along with other such e-mails . The European Ombudsman's inquiry team understood that the complainant could therefore submit a new an application for access to the actual e-mails held by Frontex. It would then be for Frontex to assess whether the documents identified could be disclosed in light of the relevant provisions of Regulation (EC) No 1049/2001.

2. On how Frontex ensures that all documents relevant to a request for public access to documents are found within its system

The Frontex representatives explained how Frontex performs searches for documents in its system and ensures that all available documents pertaining to an application for public access to documents are identified. In particular, they informed the European Ombudsman's inquiry team that an improved search tool was implemented following the European Ombudsman's [proposal for a solution](#) in complaint 1616/2016/MDC.

The Frontex representatives explained that all case-handlers dealing with applications for public access to documents in Frontex are thoroughly trained on the procedural and legal requirements³ regarding the implementation of this fundamental right and on the necessity for in-depth searches for documents and are familiar with the scope and application of Regulation (EC) No 1049/2001, all based on the guidance provided by decisions of the supervisory bodies.

3. On whether Frontex properly notified its initial reply to the complainant

The complainant had submitted a confirmatory application questioning Frontex's decision that no documents held as formulated in his initial application for access. Frontex considered that the confirmatory application was inadmissible because it was submitted a long time after

³ Also with regard to the judgment of the CJEU of 11 January 2017 in case [C-491/15 P](#), *Typke v Commission*.

the applicable legal deadline. The complainant, however, took the view that he had not been in a position to adhere to that deadline because Frontex had not properly notified him of its decision on his initial application.

The complainant claimed that he did not have access to Frontex's initial reply to his application in February 2020. He claims that he only accessed the initial reply when Frontex uploaded it again into its system, in October 2020. He then submitted a confirmatory application.⁴ He further claimed that Frontex did not process this confirmatory application.

The Frontex representatives confirmed that the reply to the complainant's initial application for access to documents had been uploaded into Frontex's portal for public access to documents on 6 February 2020 and was accessible there for 15 working days. They said that it can be seen on FragDenStaat that a message containing login data was sent ⁵ It was made accessible again on 23 October 2020 for 15 working days. The Frontex representatives said that they had informed the complainant about their view that the latter had not reinstated the timelines of Regulation (EC) No 1049/2001. Frontex's IT staff verified that the reply could be accessed and downloaded via the Frontex portal for public access to documents during both periods.

The Frontex representatives further explained that, in line with data protection obligations, Frontex does not keep records of how applicants use and access the portal. Therefore, Frontex cannot verify whether the complainant actually accessed Frontex's reply when it was first uploaded in Frontex's portal for public access to documents and a message about this upload had been sent to the complainant by e-mail. ... The Frontex representatives held that Frontex considers any message –including replies - within the meaning of Regulation (EC) No 1049/2001 to have been received by an applicant if it has entered the sphere of influence of the applicant in such a way that knowledge of it is to be expected under regular circumstances. Consequently, Frontex considers documents to be notified when they are uploaded in Frontex's portal for public access to documents, which occurs simultaneously with sending the log-in data to an applicant by e-mail. Frontex considers that the electronic transmission through Frontex's portal for public access to documents enables Frontex to prove dispatch and to detect possible notification errors. The Frontex representatives said that this enables Frontex to establish accurately when a reply reaches the addressee.⁶ They said that in this specific case, this is evident in the complainant's IT system.⁷ They further said that no errors occurred in any of the 266 cases processed in 2020. Frontex considers that the fact that a link concerning the registration of the case had been sent through the

⁴ Under Article 7(2) of Regulation 1049/2001.

⁵ All notifications are visible at: <https://fragdenstaat.de/anfrage/e-mails-der-pressestelle-von-frontex/>

⁶ The Frontex representatives referred in this regard to the Judgment of the General Court of 8 October 2008 in case T-411/06, *Sogelma v EAR*, para. 78.

⁷ The Frontex representatives referred to the Judgment of the General Court of 8 October 2008 in case T-167/10, *Evropaiki Dynamiki v Commission*, para. 49.

portal on 16 January 2020⁸ and another link had been sent through the portal on 6 February 2020⁹ containing the access information to the reply to be sufficient. Frontex considers that ordinary letters would be considered as notified once they have been dispatched. Through Frontex's portal for public access to documents, any transmission error of the notification would have been spotted. The Frontex representatives recalled that, while a notification would have taken place once a decision had been brought on its way to reach the sphere of influence of an applicant and is thus similar to a normal letter, Frontex uses a secure link through which it can be ensured that a communication is received¹⁰. Frontex considers that this link is similar to registered letters used by some EU institutions and that these physical letters would, similar to the link or an email containing the reply as an attachment, also only contain the respective decision "inside". The Frontex representatives said that, while the link and the email both require to be opened to access the document transmitted by these means by an EU institution, a decision contained in an envelope would also only be accessible and visible after having acknowledged receipt by signing for the registered letter and opening the envelope.

As a supplementary argument, the Frontex representatives referred to the notion contained in Article 41(2) of the German Administrative Procedure Act, about electronic notifications executed in Germany¹¹, which reads:

(2) A written administrative act shall be deemed notified on the third day after posting if posted to an address within Germany, and an administrative act sent electronically shall be deemed notified on the third day after sending. This shall not apply if the administrative act was not received or was received at a later date; in case of doubt the authority must prove the receipt of the administrative act and the date of receipt.

The Frontex representatives said that they had no doubt that the notification took place on 6 February 2020 as this is also evidenced in FragDenStaat. They said that, following the European Ombudsman's communication of 24 January 2020 to the complainant "that Frontex informed you on 16 January 2020 that your application submitted via fragdenstaat.de is covered by Regulation 1049/2001 and that Frontex has started processing your application" (to which the complainant replied to the European Ombudsman on the same date that "Frontex only sent me only a login link for its website that is valid for 15 working days"), the European Ombudsman did not address this reply in her decision 104/2020/EWM of 20 February 2020. The Frontex representatives further said that in its confirmatory application, the complainant did also not bring forward a doubt about the receipt of the link on 6 February 2020. In addition, he stated on 23 February 2020 that "In any case, the link you sent me is not valid anymore". The Frontex representatives said that the link enabled access to the entire application including reply letter until 27 February 2020, i.e. 15 days as of the notification date 6 February 2020. Finally the Frontex representatives stressed that in his complaint to the European Ombudsman, the complainant stated: "However, it did not send me an answer,

⁸ Recorded on 16 January 2020 at 8:15 h at <https://fragdenstaat.de/anfrage/e-mails-der-pressestelle-von-frontex/>

⁹ Recorded on 6 February 2020 at 17:49 h at <https://fragdenstaat.de/anfrage/e-mails-der-pressestelle-von-frontex/>

¹⁰ As evidenced *in concreto*: 6 February 2020, 17:49 h: <https://fragdenstaat.de/anfrage/e-mails-der-pressestelle-von-frontex/>

¹¹ Where the complainant holds a correspondence address indicated in the footer of his initial application of 15 January 2020.

but only a link to its portal, which I could not access.” The said that, consequently, the complainant did not bring forward any doubt in regard to the receipt of the link or that the notification had not taken place.

In addition, the Frontex representatives said that the European Ombudsman did not consider the alleged non-receipt, set out in paragraphs 6 and 8 of her decision 104/2020/EWM of 20 February 2020, and the fact that the European Ombudsman found that “*Frontex has settled the complaint by processing the complainant’s request for public access to documents*”, that is that Frontex had registered the case on 16 January 2020, shows that the European Ombudsman should not inquire into this complaint. They said that, as the European Ombudsman did not contest the link to the registration of an application, the same must be valid for Frontex’s link to the decision of 6 February 2020 as both constitute communications within the meaning of paragraph 8 of decision 104/2020/EWM. Finally, they recalled that the decision was taken, and the link was sent on 6 February 2020, 14 days before the European Ombudsman’s decision 104/2020/EWM of 20 February 2020.

The Frontex representatives concluded that Frontex’s use of its portal for public access to documents was permissible according to the Ombudsman’s decision 104/2020/EWM. They said that Frontex’s portal for public access to documents had no malfunctions and that any problem encountered by the complainant lays in his sphere of influence. To this regard, the Frontex representatives recalled their statements made in the course of the European Ombudsman’s inquiry in the joint complaints 1261/2020/MAS and 1361/2020/MAS. Frontex concluded that the receipt of the notification of the reply to the initial application occurred on 6 February 2020 and - in the alternative - at the latest on the third day after sending to be calculated based on the German Administrative Procedure Act. In sum, the Frontex representatives clarified that the complainant’s confirmatory application was dismissed as inadmissible because Frontex considered that due to the reply of 6 February 2020, it had been submitted after the end of the legal time limit foreseen by Regulation (EC) No 1049/2001.¹² They stated that Frontex cannot register confirmatory applications within the meaning of Article 8(1) of Regulation (EC) No 1049/2001 after the 15-day time limit of Article 7(2) of Regulation (EC) No 1049/2001 has ended. Therefore, Frontex had to dismiss the confirmatory application as being statutory barred and thus inadmissible. The Frontex representatives said that this would preclude the European Ombudsman’s inquiry based on the respective provisions of Regulation (EC) No 1049/2001.¹³

Considerations on admissibility of the European Ombudsman’s inquiry

¹² Article 7(2) of Regulation (EC) No 1049/2001 foresees a time limit of 15 working days to make a confirmatory application.

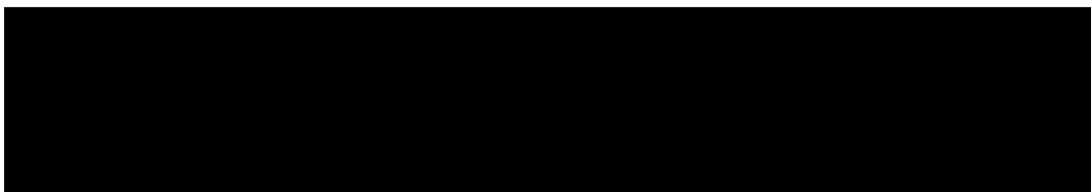
¹³ Further argumentation to this regard can be found in Annex 2.

The Frontex representatives asked for the **considerations on the admissibility** of the inquiry based on Regulation (EC) No 1049/2001 to be recorded. These considerations are set out in **annex 2** to this report.

Conclusion

Before ending the meeting, the European Ombudsman's inquiry team explained that the Frontex representatives would have the opportunity to review the meeting report before it would be sent to the complainant for comments. The European Ombudsman's inquiry team asked Frontex to signal any confidential information in the report, adding that such information would not be shared with the complainant without Frontex's prior agreement.

Brussels, 16 April 2021



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Annex 1: Timeline presented by Frontex

According to the Frontex representatives, the timeline was as follows:

15 Jan 2020: Following the complainant's application sent by email, Frontex referred the complainant to Frontex's portal for public access applications. The complainant filed a complaint regarding the use of Frontex's portal for public access to documents with the European Ombudsman (case 104/2020/EWM).

16 Jan 2020: Frontex registered the initial application submitted on 15 Jan 2020 (PAD-2020-0003): The complainant applied for: "I would like a list of these emails with such requests for correction, complaints about the reporting or similar concerns, as well as any internal documents (memos, letters, drafts, notes, minutes, emails) about how these emails were created, designed or sent and evaluated."

24 Jan 2020: The European Ombudsman informed the complainant that, based on the information in the platform FragdenStaat, it seems that the difficulties of submitting his application had been resolved. Furthermore, the European Ombudsman noted: "Against this backdrop, I would be grateful whether you could indicate how I should proceed with your complaint."

24 Jan 2020: The complainant informed the European Ombudsman: "Frontex has only sent me a login link for its website, which is only valid for 15 days. There is more data to enter there before I can read a substantive response. Frontex can track when and how often I log in. I assume that these barriers are not compatible with the requirements of 1049/2001. Frontex should reply to me in an email as usual."

6 Feb 2020: Frontex replied to the complainant's application through its portal for public access to documents.

20 Feb 2020: The European Ombudsman issued decision 104/2020/EWM, without addressing the complainant's concern re the link as the complainant had expressed on 24 Jan 2020.

23 Feb 2020: The complainant asked Frontex: "please send to me the response to my application on "E-Mails der Pressestelle von Frontex [#174257]" by e-mail as the Ombudsman has decided you are obliged to. In any case, the link you sent me is not valid anymore.

2 Mar 2020: Further to the complainant's query, Frontex stated that the reply to this initial application had been sent on 6 Feb 2020¹⁴.

23 Oct 2020: The complainant asked Frontex about the status of his application. On the same day Frontex provided a new link to the entire application, stating that this would not reinstate the timelines.

¹⁴ As evidenced here: <https://fragdenstaat.de/anfrage/e-mails-der-pressestelle-von-frontex/>

25 Oct 2020: *The complainant disputed that the case file contained the reply to this application registered on 16 Jan 2020.*

28 Oct 2020: *Frontex verified and informed the complainant by email that the links sent on 6 Feb 2020 and 23 Oct 2020 enabled access to the entire and that the reply of 6 Feb 2020 was included therein.*

29 Oct 2020: *The complainant filed an application for reconsideration (“confirmatory application”), PAD-2020-00196, by email.*

5 Nov 2020: *Frontex dismissed confirmatory application PAD-2020-00196 as inadmissible due to the expiration of the statutory deadlines of Regulation (EC) No 1049/2001.*

6 Nov 2020: *The complainant filed an appeal with the European Ombudsman, stating: “Frontex believes it sent me a reply to my application on 6 February and does not recognise my confirmatory application. However, it did not send me an answer, but only a link to its portal, which I could not access. It was only in October that I was able to access the portal after asking again. Regardless, Frontex’s substantive response is wrong. I asked for emails it had sent to journalists. Frontex said it had sent no such emails. However, I have received via Twitter proof that there was at least one and know of others. So obviously Frontex has given false information.”*

Annex 2: Frontex comments on the admissibility of the inquiry

The Frontex representatives stated their awareness that, as inter alia laid down in its decision 1302/2009/TS of 15 December 2010, the European Ombudsman is of the opinion that it is possible to submit a confirmatory application at any time subsequent to the expiry of the prescribed time limits set out in Article 7(1) and (3).

As was shown in the above timeline and further explained under question 3, the Frontex representatives held that Frontex did not fail to reply to the complainant's application PAD-2020-0003 within the time-limit prescribed by Regulation (EC) No 1049/2001. Moreover, Frontex contests the admissibility of this procedure under Regulation (EC) No 1049/2001 as Article 7(4) of this regulation has to be read in light of the overall consideration of legal certainty and in particular with its Article 7(2). Frontex understands that, by this wide interpretation, the European Ombudsman wants to enable an applicant to

“choose, for an undetermined period of time, to await a decision in relation to an initial application. Thus, the time limits set out in Article 7 must be understood to be mechanisms which empower applicants to choose one of the following options:

1) to make confirmatory applications at any time after the time limits set out in Article 7 have expired;

or alternatively,

2) await a decision on the initial application.”

However, the Frontex representatives were of the opinion that such a wide interpretation would mean that an applicant who did not – or claims not to have - received a reply would not be subject to a time limit and in a better position than an applicant who received, especially, a total refusal.¹⁵ Hence, an applicant could – in extreme cases - wait years to file a confirmatory application in case of an alleged non-receipt of the initial application and thus circumvent the time limits to submit an appeal to European Ombudsman or to the other supervisory body: CJEU as laid down in Article 8 of Regulation (EC) No 1049/2001. As Article 8(3) of Regulation (EC) No 1049/2001 lays down the applicable time limits in the treaty to seek redress from the European Ombudsman or the CJEU for cases in which no reply to a confirmatory application is received. Time limits must hence also apply in case no reply has been received concerning an initial application.

Furthermore, the Frontex representatives questioned whether the rationale to “2) await a decision on the initial application” would indeed reinstate the timelines of Article 7(2) of Regulation (EC) No

¹⁵ As is shown in an earlier draft of the regulation: “Failure to respond within the required time period shall constitute a negative response.” (Article 5(4) of Document A5-0318/2000 Proposition de règlement du Parlement européen et du Conseil relatif à l'accès du public aux documents du Parlement européen, du Conseil et de la Commission (COM(2000) 30 - C5-0057/2000 - 2000/0032(COD)).

1049/2001 in case of a partial or full refusal and thus keep an applicant in the limbo without legal certainty. Even if one would see an encouragement in this reading that the EU institution should reply to an initial application even if such is out of time, such encouragement could not be seen as overriding the common interest in legal certainty, which is de facto also achieved through the non-reply.

In addition, this would cause legal uncertainty for the EU entity as, e.g. even if a reply fully denying access had been received within the timelines, an applicant could allege that no reply had been received and file a confirmatory application months after the legally prescribed and expected reply date - 15/max 30 days after registration - and therefore de facto circumvent Article 7(2) of Regulation (EC) No 1049/2001. As the European Ombudsman has held in No 1.5 of his decision in Case 2196/2006/(SAB)ID2196/2006/(SAB)ID of 14 November 2007, a “lack of reply constitutes a negative decision., Consequently, it would not be comprehensible to put an applicant who has – in particular allegedly - not received a reply in a better position than an applicant who received a negative reply within the prescribed deadline. The legal deadlines of Regulation (EC) 1049/2001 are clear and the facts are thus known after no-reply has been received: an applicant can therefore be expected to undertake “the appropriate administrative approaches to the institutions and bodies concerned”, which should be considered in reconciling the applicable EU secondary-law timelines. It has further to be noted that, as outlined above, the European Ombudsman is not the only entity where redress can be sought: based on Article 8(1) and (3) of Regulation (EC) No 1049/2001 also the CJEU can be appealed to. The Frontex representatives are of the opinion that reading an unlimited timeframe to file a confirmatory application into Article 7(4) of Regulation (EC) No 1049/2001 would be difficult to reconcile with the EC Treaty provisions and the procedural framework governing judicial proceedings before the CJEU as the unlimited admissibility of a confirmatory application in such case could eventually open the door for court proceedings years after the – allegedly - non-replied initial application. Thus, an intrinsic link between the remedies under Article 8 and Article 7(4) of Regulation (EC) No 1049/2001 exists.

Based on these arguments and due to the fact that Article 8(3) of Regulation (EC) No 1049/2001 foresees a deadline – “under the relevant provisions of the EC Treaty” – in case that no reply was received within the 15 day deadline, the Frontex representatives held that Article 7(4) of Regulation (EC) No 1049/2001 is also subject to the statutory deadlines of Regulation (EC) No 1049/2001. A 15-day deadline is thus to be read-into Article 7(4), for example in conjunction with Article 7(2) of Regulation (EC) No 1049/2001¹⁶ of Regulation (EC) No 1049/2001 as an unwritten constituent fact..

Consequently, the Frontex representatives consider that the right to file a confirmatory application in case of a non-receipt of the decision regarding the initial application must be subject to the 15-working days deadline. If no such confirmatory application has been received as of 15 working days as of the due date after registration of an initial application, the registration of a confirmatory application

¹⁶ Footnote 7 of the Decision of the European Ombudsman closing his inquiry into complaint 1013/2012/(AR)MHZ against the European Commission of 18 April 2013: “In sum, the Ombudsman considered that it would be too formalistic to require the complainant to renew his confirmatory application once he did submit such an application within the deadline established in Article 7(4) read in conjunction with Article 7(2) of Regulation 1049/2001. [...]”

within the meaning of Article 8(1) of Regulation (EC) No 1049/2001 and submitted at a later stage is not possible. If no registration of the confirmatory application is possible, no analysis by an EU institution regarding the merits which could give rise to a European Ombudsman procedure based on Article 8(1) of Regulation (EC) No 1049/2001 is possible. Nor is a European Ombudsman procedure based on Article 8(3) of Regulation (EC) No 1049/2001 possible as in both cases the delay caused by an applicant falls short of having undertaken appropriate administrative approaches. Otherwise, no legal certainty would exist for the applicants and the EU institution alike in such cases.

The Frontex representatives recalled, as stated above in the timeline and in the main text, that the complainant was notified in due time concerning his initial application:

- regarding the registration on 16 January 2020; and

- about the reply on 6 February 2020.

Similarly, he was notified through the Frontex portal for public access to documents about the dismissal of his confirmatory application as being inadmissible. This was notified to the applicant through the Frontex portal as well, which the complainant has equally received and based on which he pursued his coplaint to to the European Ombudsman... .

The Frontex representatives concluded that, as a notification took place and a reply to the initial application was provided within the statutory deadline, Article 7(4) of Regulation (EC) No 1049/2001 is not applicable and the timelines of Article 7(2) of Regulation (EC) No 1049/2001 apply. Based on this, the confirmatory application submitted nearly nine months after the decision of the initial application is not admissible, which precludes a European Ombudsman procedure based solely on Regulation (EC) No 1049/2001, as the applicant did not undertake the appropriate administrative approaches to Frontex. This was of course without prejudice to the European Ombudsman's right to open inquiries based on its governance framework.