

Mr/Ms Luisa Izuzquiza

Mr/Ms Arne Semsrott

Email: [REDACTED]

Our ref: DCGO/TO/PAD-2022-00194
Initial application: TO/PAD-2022-00152

Warsaw, 8 July 2022

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

Dear Mr/Ms Izuzquiza, dear Mr/Ms Arne Semsrott,

In reference to your confirmatory application registered on 31 May 2022 in which you confirmed your initial application to which Frontex had replied on 23 May and in which you applied for

- all letters, e-mails, and/or documents containing Fabrice Leggeri's resignation

I note that the time limit has been extended by 15 working days on 22 June 2022¹, and I also note your arguments in your confirmatory application

On 29 April 2022, we filed an access to documents request for "all letters, e-mails, and/or documents of any containing Fabrice Leggeri's resignation." After some back and forth regarding the precise wording of the request, on 10 May 2022, Frontex registered and started processing our request for "all letters, e-mails, and/or documents containing Fabrice Leggeri's resignation."

On 23 May 2022, Frontex responded to our access to documents request, stating "Please be informed that the "all letters, e-mails, and/or documents containing Fabrice Leggeri's resignation" do/does not constitute documents/a document within the meaning of Article 3(a) of Regulation (EC) No 1049/2001; therefore, no such document is held."

To this extent, we argue that Frontex's statement is fundamentally flawed, both in its factual and legal dimensions. At a factual level, there is little to no room for discussion on whether "letters, e-mails, and/or documents" constitute a document. To this extent and in particular, we would like to point to Frontex's attention that, even if we were to disregard the first two examples provided in our wording ("letters" and "e-mails"), our request specifically asked for "documents". It is a matter of fact that "documents" constitute documents. In consequence, Frontex's statement that our request, which specifically asked for "documents", does not constitute documents, is fundamentally - undeniably - flawed at a factual level.

When it comes to the legal dimension of Frontex's response, Article 3(a) of Regulation 1049/2001 states "'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;". To this regard, it is once again undeniable that "letters, e-mails, and/or

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).

documents" constitute "content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)".

In this particular case, our initial request asked for "all letters, e-mails, and/or documents of any containing Fabrice Leggeri's resignation." The fact that letters, e-mails, or any other document would need to "contain" a resignation in order to fall under the scope of our request, de facto make these documents "content whatever its medium", thus documents as per Article 3(a) of Regulation 1049/2001.

It is also a matter of fact that the resignation of an EU agency's Executive Director concerns "a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility".

The Frontex Management Board is, according to Article 100(1) of Regulation 2019/1896, "responsible for taking the strategic decisions of the Agency". Whether to accept or not the resignation of the agency's Executive Director is a decision which, undeniably and in fact empirically, falls within this mandate, thus falling "within the institution's sphere of responsibility". For this reason, any letter, e-mail or document containing the resignation of an agency's Executive Director concerns "decisions falling within the institution's sphere of responsibility".

In consequence, Frontex's statement that our request for access to documents "do/does not constitute documents/a document within the meaning of Article 3(a) of Regulation (EC) No 1049/2001", is fundamentally - undeniably - flawed at a legal level, too. We therefore call on Frontex to correct its initial statement and provide the requested documents in full.

Primarily, as the scope of your application is accessory to the quality of the document of "Fabrice Leggeri's resignation", Frontex maintains that "all letters, e-mails, and/or documents containing Fabrice Leggeri's resignation" do not constitute a document/documents within the meaning of Article 3(a) in conjunction with Article 2(3) of Regulation (EC) No 1049/2001.² This is because "Fabrice Leggeri's resignation" is a unilateral declaration of intent which has to be received by the addressee, i.e. Frontex. The question of "Whether to accept or not the resignation of the agency's Executive Director is a decision which, undeniably and in fact empirically, falls within this mandate..." therefore does not follow from such a declaration.

Furthermore, such declaration of any staff member which, again, concerns a personal employment relationship, does not qualify as a document as it does not pertain to the "policies, activities and decisions falling within the institution's sphere of responsibility" within the meaning of Article 3(a) of Regulation (EC) No 1049/2001. In particular, this declaration does not relate to:

- a policy, as it regulates an individual employment relationship;
- a decision, as no decision whether to "accept or not" has to be made;
- an activity in the meaning of this article in conjunction with Article 2(3) of Regulation (EC) No 1049/2001, as the individual occupying the post of executive director has to be distinguished from the office of executive director which is now being exercised on an *ad interim* basis by a different person.

Furthermore, even if the two materials containing "Fabrice Leggeri's resignation" were to be considered documents within the meaning of Regulation (EC) No 1049/2001, quod non, their release would not be

² 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).

possible as they pertain to an ongoing decision-making process and disclosing them would seriously undermine such internal processes. The ongoing discussions taking place within Frontex and under its auspices and involving numerous stakeholders require special protection. Namely, disclosing the documents would reveal negotiation positions of the stakeholders, which would erode the mutual trust among all participants. Such information would enable third parties to draw preliminary conclusions and thus, hamper these ongoing processes. As 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 is ascertainable in the present case, they cannot be released based on Article 4(3) of Regulation (EC) No 1049/2001.

In addition, they contain personal data, such as names of individuals and/or characteristic features which could lead to the identification of individuals. The 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.

As a consequence, if they constituted documents, their partial release 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 elements would be disproportionate to the interest in the disclosure exercise itself, while the released documents would not convey any informative value due to their significantly reduced form. Consequently, a partial disclosure of the materials at issue would have to be refused.

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,

[Decision signed electronically]

Head of the Transparency Office