

Ms Lucia Gennari

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Our ref: CGO/LPU/5323b/2018

(initial: CGO/LPU/5323a/2018)

Please quote when replying.

Warsaw, ²³April 2018

Request for Frontex document - confirmatory application

Dear Ms Gennari,

With reference to your confirmatory application of 10 April 2018, registered on 10 April 2018, in which you confirmed your initial application of 7 March 2018 to which we replied on 27 March 2018, where you applied for access to

[...] documents which contain the following information: Themis operational plan and further explained how this new operation will concretely work: i.e. which are the states involved, the composition of the European Border and Coast Guard teams, which kind of tasks will be assigned to the teams, their responsibilities, if it's possible the chain of command, where the teams will operate exactly, which resources, instruments and technical equipment are or will be deployed, detailed description of the modus operandi and aims of the operation,

I note your arguments and each of them I will address below.

1. *[...] the motivation provided concerning the possibility to apply to my request art. 4(1)a Reg. 1049/2001 has to be considered insufficient. The mere reference to the fact that the Themis operation is "ongoing" can't justify by itself a rejection of the refusal without any further and deeper explanation also regarding the different elements of the FOIA request (which are the states involved, the composition of the European Border and Coast Guard teams, which kind of tasks will be assigned to the teams, their responsibilities, if it's possible the chain of command, where the teams will operate exactly, which resources, instruments and technical equipment are or will be deployed, detailed description of the modus operandi and aims of the operation).*

As explained in our reply to the initial application, Joint Operation Themis is currently assisting Italy in border control activities. The detailed documents you applied for in regard to the participating countries and the European Border and Coast Guard teams would be tantamount to disclosing the weaknesses and strengths of the ongoing operation and exposing law enforcement officials, their working methods, reporting patterns and assets in the ongoing Joint Operation Themis and future operations to security risks, as it would deprive the ongoing operation of any strategy and element of surprise during border surveillance, and would open the way for abuse by criminal networks.

As a result, the course of ongoing and future similar operations would be hampered, ultimately defeating their purpose to counter and prevent cross-border criminality as well as prevent unauthorized border crossings. Furthermore, there exists an ascertainable risk that these pieces of information would not theoretically, but effectively benefit the smuggling networks who would change their modus operandi accordingly, thus putting the life of migrants in danger. Therefore, the efforts carried out by the European Union and Member States to curtail criminal activities would be impaired. In light of the

above, the protection of the public interest as regards public security in the sense of the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001¹ would be undermined.

2. *The published informations indicated in Frontex reply are extremely generic and can't fulfill the purpose of Reg. 1049/01 which, in whereas n. 2 underlines that "Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union".*

In its Recitals, Regulation (EC) No 1049/2001 reemphasized the principle of transparency and the rights of individuals to access documents of EU bodies as laid down in both Article 15 of the Treaty on the Functioning of the European Union (TFEU) and Article 42 of the Charter of Fundamental Rights of the EU and that generally all documents of the institutions should be accessible to the public. However, in Recital 11, it also highlights the limits of such rights, which need to be balanced with the aim to protect certain public and private interests, as specified in Article 4 of Regulation (EC) No 1049/2001. The exception referred to under your first point, public interest as regards public security in the sense of the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, constitutes such an absolute exception. We have balanced the transparency requirement, which is reemphasized in Article 74 of the European Border and Coast Guard Regulation², with the need to protect security requirements of the European Union. As has been outlined in our reply to your initial application and above, the fight against terrorism or organized crime as protected under this exception did not permit us to disclose the Operational Plan. However, based on each application for access to Frontex documents, we reappraise the public security needs and we have released documents in this regard when those security considerations had changed.³

3. *Furthermore whereas n. 7 prescribes that "the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules". This last sentence can't for sure lead to the annihilation of the previous one. Neither the reference to art. 4(1)a can determine a total rejection of the FOIA request.*

Also in reply to this argument, I would like to reemphasize that an individual examination led us to the conclusion that the release of the Operational Plan at this point in time is not possible as the Agency is not only obliged to adhere to transparency principles but also to the principle of sound administration in its service to the public. In this regard, the release of only fragmented parts, the reading of which would be meaningless, was considered as not being in line with the latter principle as the administrative burden necessary for identifying releasable parts would be disproportionate in this case. Consequently, it was not possible for us to enable you partial access.

4. *In the present case a short video and a few generic lines on Frontex website cannot satisfy the rights of Eu citizens descending from Reg. 1049/2001 regarding the Agency's activities.*

By publishing information on our activities on our website, we give credit to the fact that the principle of transparency also a pro-active component as enshrined in Recital 55 of the European Border and Coast Guard Regulation, requiring Frontex to "make public information on all of its activities". This legislative objective is translated as a task in Articles 8(3) and 74(2) of the European Border and Coast Guard Regulation. When doing so, Frontex balances the possibility to pro-actively inform the public with

¹ 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).

² Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1).

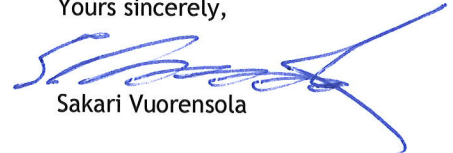
³ See only: https://www.asktheeu.org/en/request/triton_operational_plan#incoming-8676.

operational security considerations and if such entices requests for further documents or information, we will follow-up individually and on a case by case basis. In this regard, I would also like to draw your attention to the possibility to approach our media and public relations team for assistance in retrieving specific pieces of information that would be helpful for you.

In light of all above, I uphold the decision of the initial application and confirm our initial decision.

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

Yours sincerely,



Sakari Vuorensola

Director of Corporate Governance

