

Helen Darbshire
Email: helen@access-info.org

Our ref: DCGO/TO/CMS-2019-00011-1260
Initial application: TO/CMS-2019-00010-0887

Warsaw, December 2019

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

Dear Ms Darbshire,

In reference to your confirmatory application registered on 3 December 2019 in which you confirmed your initial application registered on 23 October 2019, to which Frontex had replied on 15 November 2019 and in which you applied for

I am requesting a copy of all documents related to your policies and practices on the processing of exercising their right of access to EU documents (as set out in the treaties, TFEU Article 15, and elaborated in Regulation 1049/2001).

I am in particular interested in documents that:

- give guidance to Frontex officials on the processing of requests
- relate to the procedure for requesting IDs
- consider questions of data processing related to requests and requesters IDs
- guide Frontex officials on your copyright policy and how to explain it to requesters

I would prefer to receive these documents in a digital, machine-readable, format.

I note your arguments in your confirmatory application

1. *The fact that information was not provided to me in the format that I requested.*
 2. *To verify whether you have indeed provided me with all the relevant documents.*
- Please kindly pass this on to the person who reviews confirmatory applications.*

To recall, my request sought the following:

[A]ll documents related to your policies and practices on the processing of exercising their right of access to EU documents (as set out in the treaties, TFEU Article 15, and elaborated in Regulation 1049/2001).

I am in particular interested in documents that:

- give guidance to Frontex officials on the processing of requests
- relate to the procedure for requesting IDs
- consider questions of data processing related to requests and requesters IDs
- guide Frontex officials on your copyright policy and how to explain it to requesters

I stated clearly that I would prefer to receive these documents in a digital, machine-readable, format.

In your responses (two messages sent to AsktheEU.org) you provided me with:

Document #1 - A copy of the Frontex Management Board Decision No 25/2016 of 21 September 2016 adopting practical arrangements regarding public access to the documents held by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the “Agency”). This was provided in a scanned, non-machine-readable format.

Document #2 - In two PDFs the training materials provided at the ERA Seminar on Access to Documents in the EU and beyond, held in Brussels on 20-21 November 2019. These are in a scanned, non-machine-readable format.

Document #3 - A copy of the Decision of the Executive Director no R-ED-2017-62 on the Frontex Copyright Policy of 17/08/2017. This was provided in a scanned, non-machine-readable format.

I thank you for these documents. I ask that you consider this confirmatory on the following grounds:

1. Frontex should have provided me with the documents in a machine-readable format.

In my request, I specifically asked for the documents in a “digital, machine-readable, format” and yet you have not complied with this request, nor provided a justification as to why you have not done so.

The Regulation that establishes Frontex requires that “Regulation (EC) No 1049/2001 of the European Parliament and of the Council should apply to the Agency. The Agency should be as transparent as possible ...”

Regulation 1049/2001 specifically states, at Article 10(3) that “3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant’s preference.

The Frontex Management Board Decision, in Article 9 on Forms of Access, requires, at Article 9(5) that “Documents are supplied in an existing version or format.”

The European Treaties establish that “[g]eneral principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure” and that the legal provision in which this has been done is Regulation 1049/2001.

Frontex may not, therefore, impose any limitation on the right of access beyond those permitted by Regulation 1049/2001. Hence Article 9(3) of the Frontex Management Board Decision has to be read in the light of Regulation 1049/2001 and requires that the applicant’s preferences be taken into account.

Hence, you could and should have provided me with access to these documents in a machine readable version. This is particularly the case for Document #1, the Management Board Decision itself, which is in fact available in a machine-readable format on the Frontex website: <https://frontex.europa.eu/about-frontex/key-documents/?category=management-board-decisions>.

I believe that the ERA training documents are also available in a machine-readable format,

and I would imagine that document #3, the Frontex Copyright Policy is also available in that format.

I therefore ask that you review your response to my request and that you provide me with these document in a machine-readable version.

2. Other relevant documents have not been provided

By this confirmatory, I ask that you review whether all documents that fall under the scope of the request have been provided.

It is somewhat surprising to me that there are no other documents whatsoever relating to your access to documents policy, nor any internal guidance on how to process requests. I was looking for any documents relating to, for example, the formats in which you provide information, or how you deal with the policy of applying copyright. This could include documents such as, for example, emails clarifying the policy, or notes of meetings. I therefore would kindly ask that you double-check for the existence of other relevant documents.

With respect to my request for documents that consider questions of data processing related to requests and requesters IDs, it seems that there exists a document entitled Frontex interpretation of Article 5(3) of the Management Board Decision in light of Article 4(1)(c) of Regulation (EU) 2018/1725 on the processing of personal data and the ‘data minimisation’ principle. I would be grateful to receive this document - in machine-readable format - and any other relevant documents relating to your internal discussions on the question of requesting IDs from requesters.

Overall, I kindly request that you carry out a full check of all the relevant documents that might fall under the scope of my request.

With regard to your argument regarding your **point 1**, Frontex does not see a legal obligation to justify an alleged non-release in a machine readable format. Nevertheless, I like to stress that Article 9(5) of Management Board Decision No 25/2016 of 21 September 2016¹ is based on the hierarchically superior Article 10(3) of Regulation (EC) No 1049/2001². Article 10(3) of Regulation (EC) No 1049/2001 provides that documents “shall be provided in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant’s preference.”

Article 10(3) of Regulation (EC) No 1049/2001 forms part of Article 10, of which paragraph (1) stipulates that the documents are to be made available on the spot or by providing a copy, including where available, an electronic copy, according to the applicant’s preference. In regard to the format, the emphasis of Article 10 is thus on “electronic”. Furthermore, it is a copy that has to be made available electronically, hence no original has to be provided.

On a holistic point, Article 10 of Regulation (EC) No 1049/2001 has to be seen in the context of the entire Regulation and redactions required under its Article 4 would need to be applied to such copy

¹ Management Board Decision No 25/2016 of 21 September 2016 adopting practical arrangements regarding public access to the documents held by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (the “Agency”).

² 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 (OJ L 145, 31.5.2001, p. 43).

prior to its release. Even if such redactions were not applied, the documents at stake contain metadata, such as the personal data of natural persons. Recent incidents showed that printing and scanning are not only effective in ensuring that redactions obliged by Regulation (EC) No 1049/2001 are indeed protected, but they constitute also the most secure way to delete metadata from documents, such as the personal data of natural persons. Consequently, the term “existing version and format” has to be understood as existing after the measures required by Regulation (EC) No 1049/2001 were applied.

It was thus limitations that are laid down in Regulation (EC) No 1049/2001 itself, such as the protection of the redactions under its Article 4 and in particular the protection of the privacy and integrity of the individual in its Article 4(1)(b) that led to the application of these measures, when it made these documents available to electronically in an existing version and format. Consequently, Frontex does not see a limitation on your right to access that are not inherent in Regulation (EC) No 1049/2001. On a side note, Frontex would like to stress that following your remarks regarding the machine-readability, an optical character recognition software was applied to the “**ERA training documents**” and the “**Copyright Policy**”, rendering both documents machine-readable.

In regard to the “**Management Board Decision**”, Frontex has made a version available to you in a format existing after a previous release to the public. Indeed, said Management Board Decision is now also publicly available on <https://frontex.europa.eu/about-frontex/key-documents/?category=management-board-decisions&year=2016>. Therefore, access to this document is no longer governed by Regulation (EC) No 1049/2001.

In sum, I uphold the decision of 15 November 2019 regarding point 1.

With reference to your **point 2**, I want to stress again that the document “**Frontex interpretation of Article 5(3) of the Management Board Decision in light of Article 4(1)(c) of Regulation (EU) 2018/1725 on the processing of personal data and the ‘data minimisation’ principle**” has been shared with the body conducting an investigation in the sense of Article 4(2) third indent of Regulation (EC) No 1049/2001 and, as explained in our reply to your initial application, a disclosure is barred.

I note with concern that a third person not being party to this investigation is aware of the title of this document that is not to be disseminated beyond the permitted addressees.

The internal reconsideration showed that indeed one document (indicated as indent 2 “Presentation”) has not been made available to you as part of our reply to your initial application. This document, comprising of 28 pages, is herewith attached in the version existing after its redaction undertaken as explained in the reply to your initial application.

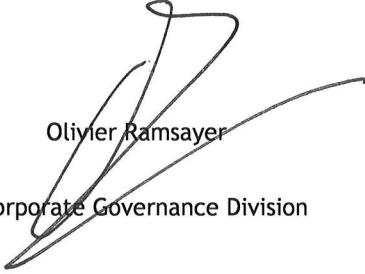
In regard to the remainder of point 2, I uphold the decision of 15 November 2019

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,

Olivier Ramsayer

Director of Corporate Governance Division





PUBLIC ACCESS TO DOCUMENTS

Presentation for the Consultative Forum on 30 October 2019

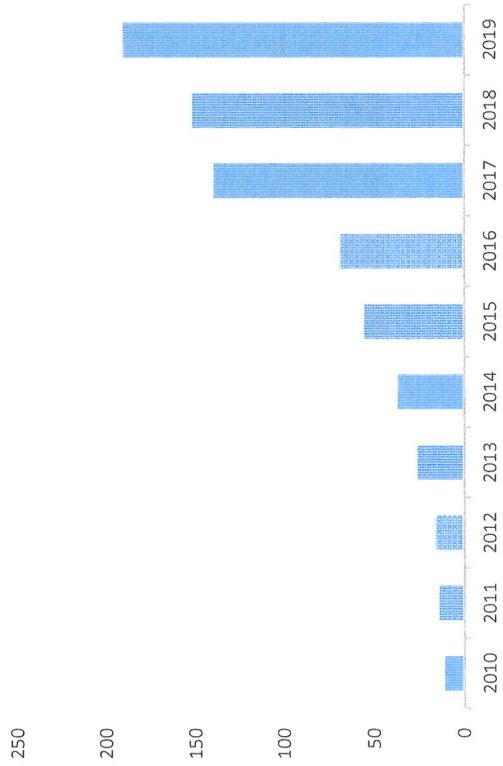
By:

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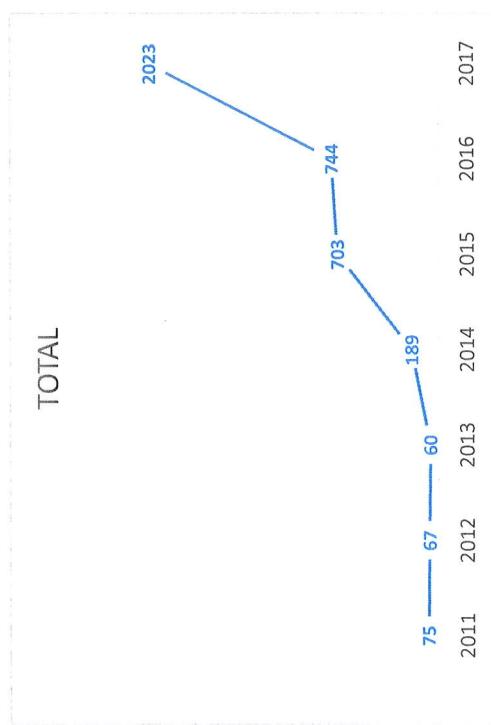
Transparency
Office
October 2019

STATISTICS

2010-2019 Applications *per annum*



2011-2018 Number of Documents
Processed *per annum*



What is PAD about?

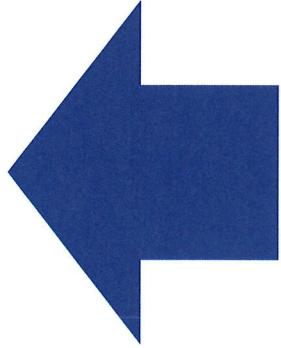
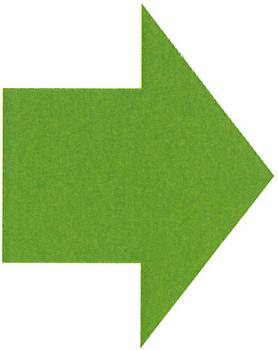
1. PAD is a component of any EU body

2. PAD forms part of the Agency's core business!

3. Important to strike a right balance

Protection of operational information

Transparency



LEGAL BASIS

Primary law:

- EU Charter of Fundamental Rights - Article 42.
- Treaty on the Functioning of the European Union- Article 15

Secondary law:

- **Regulation (EC) No 1049/2001** of 30 May 2001 regarding public access to European Parliament, Council and Commission documents
[applicable through Article 74 European Border and Coast Guard Regulation]

Frontex rules:

- **MB Decision No. 25/2016** of 21 September 2016 adopting practical arrangements regarding public access to documents held by Frontex
- **ED Decision 2016/119** on the Transparency Office and on instructions for handling applications for public access to documents

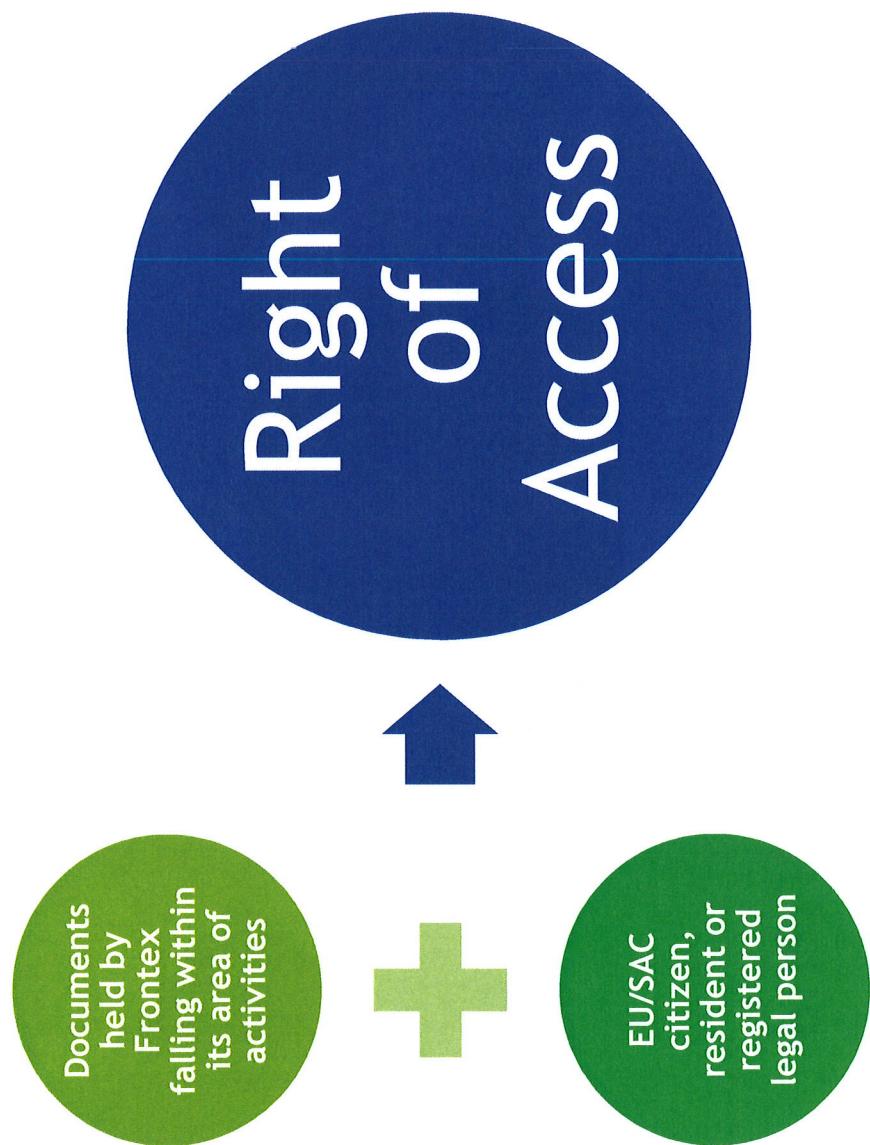
WHAT IS PAD?

PUBLIC ACCESS TO DOCUMENTS

Open to EU citizens/
residents/registered legal
persons and SAC citizens

Renders the document
public

SCOPE AND BENEFICIARIES

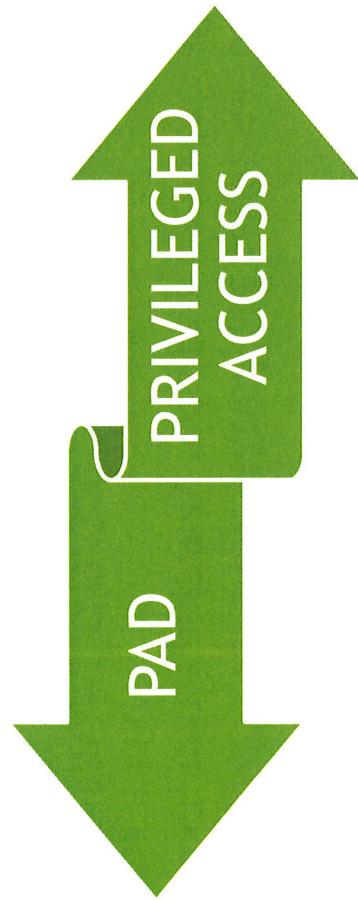


WHAT PAD IS NOT



- **Requests for information** are requests for news, knowledge or data (found in no/many documents and may require a compilation).
- Regulation 1049/2001 is **not applicable**
- **Press Office** responsible in Frontex

WHAT PAD IS NOT



- **Privileged access** e.g. under the Financial Regulation is access to information for interested parties (candidates, tenderers) in procurement procedures: **113FR and 161 RAP**.

DOCUMENTS

1) WHAT IS A DOCUMENT?



2) INFORMATION STORED IN DATABASES

“ ... as regards databases, anything that can be extracted from them by means of a normal or routine search may be the subject of an application for access made pursuant to Regulation No 1049/2001.”

(Case T-214/13: Rainer Typke v European Commission).

Note: the right of access to documents under Regulation No 1049/2001 applies only to **existing documents** held by Frontex. An application that would require the creation of a new document is **not** an application for access and does **not** come within the parameters of Regulation No 1049/2001

3) THIRD-PARTY DOCUMENTS

THIRD-PARTY DOCUMENTS

- “any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community bodies (institutions, agencies) and third countries”

- SIRs (Serious Incident Reports)
- Raw data in Iconet
- Letters / other correspondence from Member States
- Documents partially belonging to third party - SLA, WA, MoU, etc.
- Other

THIRD-PARTY DOCUMENTS

The **holder of the document** “**shall consult the third party** with a view to assessing whether an exception [...] is applicable, unless it is clear that the document **shall or shall not be disclosed**.”



5-day deadline is granted to the third party

The third party is properly informed of the procedure

In case of silence, **Frontex carries out its own assessment** of the exceptions



When the document has **already been disclosed**

When the third party has given **prior authorization** (e.g. the CF)

Other:

e.g. exceptions obvious – personal data / very sensitive operational info

ROLES AND RESPONSIBILITIES

TRANSPARENCY OFFICE

Established
by MB
Decision No
25/2016

Housed
within LPU

Works
closely with
the Case-
Handlers

Processes
PAD
applications

CASE-HANDLERS

Appointed through ED Decision 2016/119

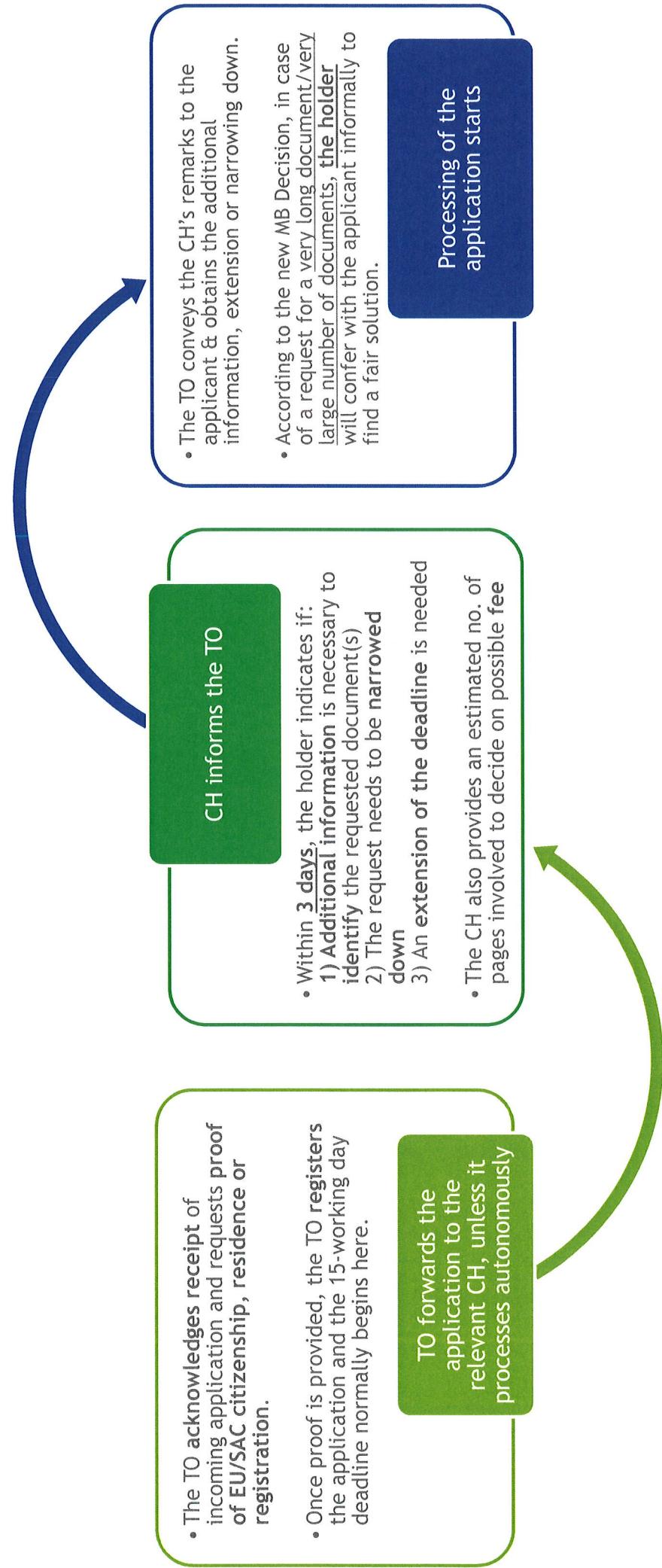
Handle PAD applications in thematic area

Work closely with the TO, under instructions of HoU & HoTO

HoU in charge of quality control and compliance

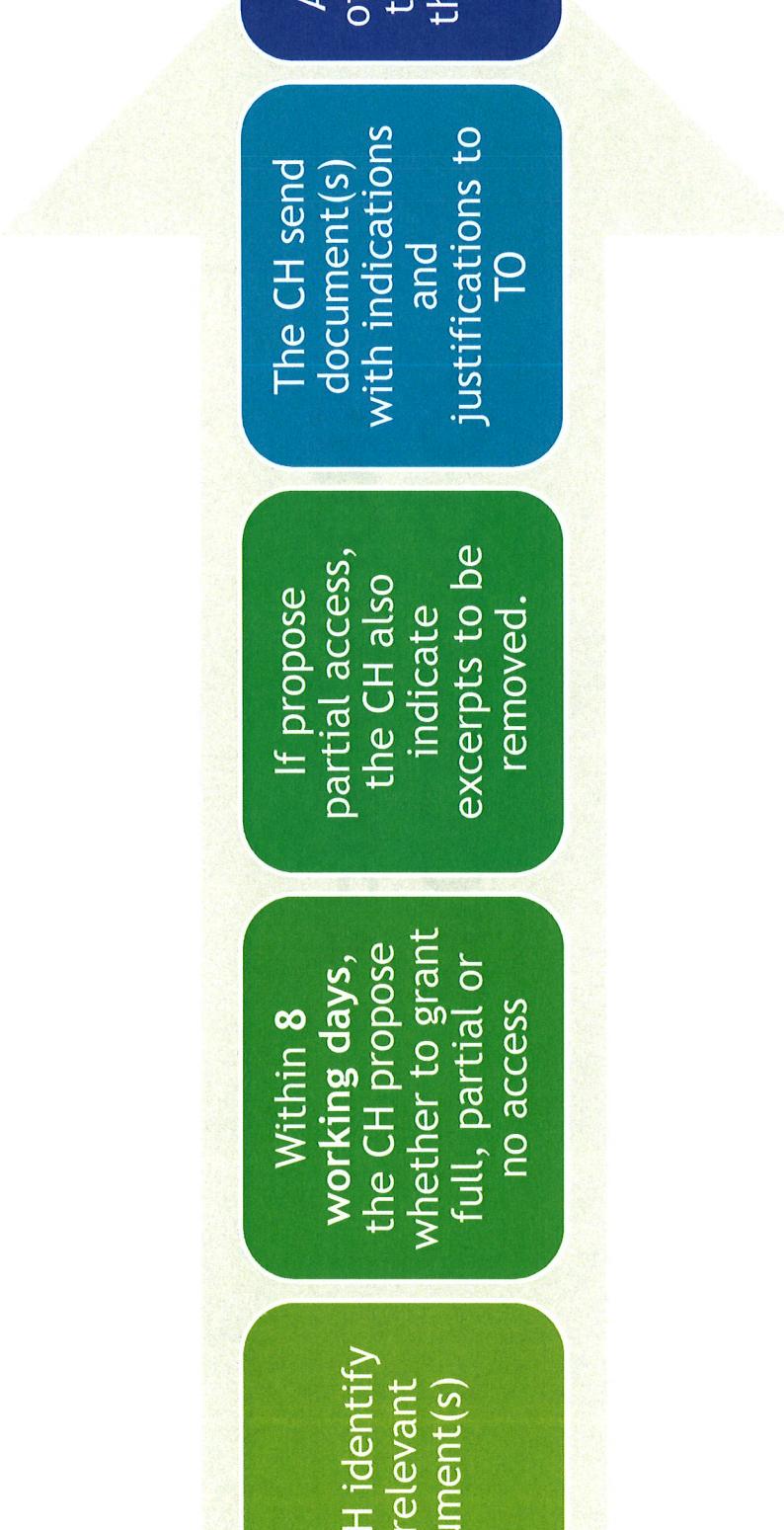
PRE-PROCESSING OF APPLICATIONS

STEP BY STEP



PROCESSING OF APPLICATIONS

STEP BY STEP WITHIN 15 WORKING DAYS

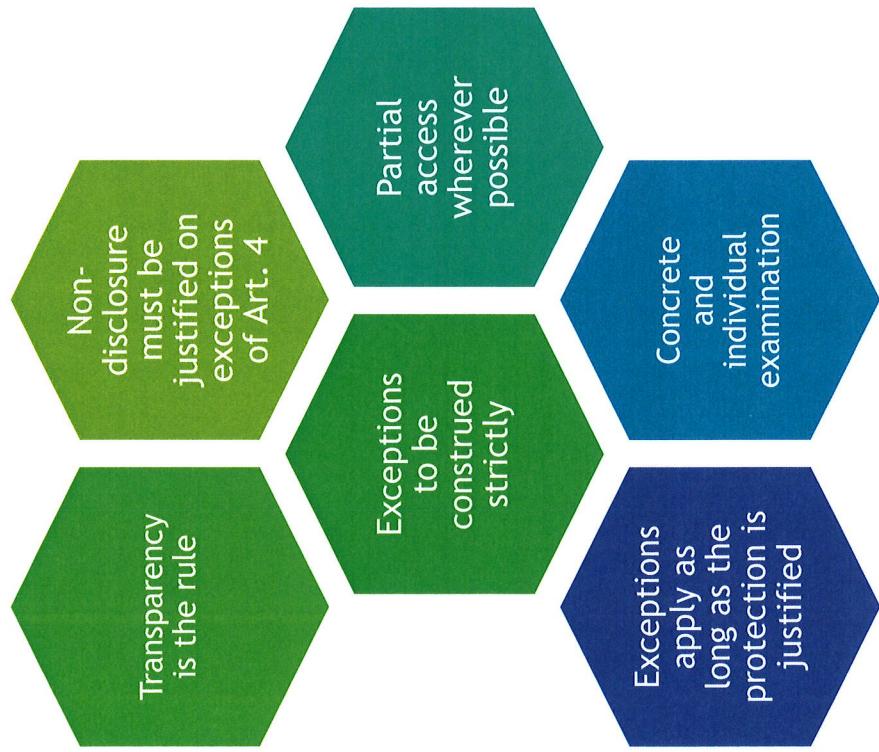
- 
- The CH identify the relevant document(s)
 - Within 8 working days, the CH propose whether to grant full, partial or no access
 - If propose partial access, the CH also indicate excerpts to be removed.
 - The CH send document(s) with indications and justifications to TO
 - After TO check of justifications, the CH prepare the document(s) for release

IDENTIFYING PARTS TO BLANK OUT AND PROVIDING A JUSTIFICATION

FRONTEX	
Subject	SIR Ongoing SAR 4 missing persons
Joint Operation	Poseidon Sea 2014
Reporting unit/person	FSO Lesvos
1. General information on the incident	
Incident date/time	22 November 2014 03:30
Original informant	Hellenic Coast Guard
Finding date/time/source	22 November 2014 03:30
Location of the Incident	Sea area near Plomari (South of Lesvos Island) 
Latitude / Longitude	38° 52,065N 026° 25,114E 
Reference to operational area	<input checked="" type="checkbox"/> Inside <input type="checkbox"/> Outside
SAR activated date/time	22 November 2014 03:30
Involved Frontex resources, co-financed assets; HR / TE	TBC
Distance Incident place to Frontex assets	
Detection date/time/who	22 November 2014 03:30 HCG CPB 602

 **Author:** All the blanked out parts in this document contain information and coordinates regarding the operational area. Their disclosure would expose law enforcement officials patrolling the area and harm the course of future and ongoing operations, thus facilitating irregular migration. This would undermine the protection of the public interest as regards public security, in light of this, these parts are not disclosed pursuant to the exception laid down in the first indent of Article 4(1)(a) of Regulation No 1049/2001.

LPU CHECK - COMPLIANCE WITH REGULATION 1049/2001



Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- (a) the public interest as regards:
 - public security,
 - defence and military matters,
 - international relations,
 - the financial, monetary or economic policy of the Community or a Member State;
 - (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
 - commercial interests of a natural or legal person, including intellectual property,
 - court proceedings and legal advice,
 - the purpose of inspections, investigations and audits,unless there is an overriding public interest in disclosure.
3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

EXCEPTIONS UNDER REGULATION 1049/2001

Absolute exceptions

- Article 4(1)(a) - protection of the public interest as regards public security
- Article 4(1)(b) - protection of personal data [combined with Data Protection Regulation].

Relative exceptions

- Article 4(2) 1st, 2nd and 3rd indent - protection of commercial interests, legal advice, the purpose of investigations
- Article 4(3) - protection of the Agency's decision-making process
 - **DOUBLE TEST:** harm and overriding public interest in disclosure

SENSITIVE DOCUMENTS

Classified as ‘SECRET’ or ‘CONFIDENTIEL’ and non-classified marked as ‘LIMITED’

Despite being sensitive, such documents are also subject to public access

Applications for sensitive documents shall be handled only by persons assigned and who fulfill conditions under Frontex security rules

When redacting a sensitive document before disclosing, remove the security marking

INITIAL APPLICATIONS

- The CH propose full, partial or no access. HoU checks LPU checks justifications
- Head of TO decides on access
- ED/DED is informed of sensitive cases
- Partial access, refusal or silence entitles the applicant to submit a confirmatory application

CONFIRMATORY APPLICATIONS

- The TO/LPU reconsiders the application and proposes full, partial or no access
- The holder is informed if proposal is to grant (more) access.
- DCGO decides on access
- ED/DED is informed of sensitive cases
- Partial access, refusal or silence entitles the applicant to institute court proceedings against Frontex or complain to the European Ombudsman.