

Ms Luisa Izuzquiza
Email : ask+request-5150-edef4e6@asktheeu.org
Our ref: CGO/LPU/3598c/2018
(Initial application : CGO/LPU/3598a/2018)

Warsaw, 28 May 2018

Your application for access to Frontex documents - confirmatory application

Dear Ms Izuzquiza,

With reference to your confirmatory application of 18 April 2018, registered on 20 April 2018 and extended on 16 May 2018, in which you confirmed your initial application of 14 February 2018 - for which the deadline was extended on 5 March 2018 and to which Frontex replied on 27 March 2018 - where you applied for access to

*"- all contracts, agreements and/or contractual statements signed with Spain, Sweden, Denmark, Finland and Norway in regards to Joint Operation Triton 2016; and
- all contracts, agreements and/or contractual statements signed with Spain, Sweden, Denmark, Finland and Norway in regards to Joint Operation Triton 2017.*

I am particularly interested, for each of the above-mentioned Member States, in the following documents:

- Specific Financing Decision*
- Request for Pre-Financing*
- Acknowledgement of Receipt*
- Request for Interim/Final Payment*
- Forms for the calculation of the contribution,"*

I note your arguments in your confirmatory application

I. In its response, Frontex has failed to explain how disclosure of the requested documents would have a negative impact on the ongoing evaluation process for JO Triton 2017.

According to Frontex, disclosure of the requested documents would imply disclosing "the exact type, capabilities and weaknesses of human resources and equipment made available".

While I understand how this information would be part of the evaluation process, what Frontex fails to explain is how making this information available would actually affect the course of the evaluation, given that the main actors involved in such a process are Frontex and EU Member States, and both Frontex and EU Member States are already aware of such details regarding the operation.

Therefore, given that the requested documents concern exclusively Frontex and five specific Member States, I hardly see how disclosure would negatively affect a process where all the actors are already familiar with such information; and if this were to be indeed the case and damage to the process were to be possible, Frontex has failed to explain if and how.

II. In its response, Frontex has failed to explain how disclosure of the requested documents would "specifically and actually" undermine public security.

Given that, as mentioned in my initial request, both Joint Operation Triton 2017 and 2016 have effectively come to an end and a new Joint Operation, Themis, is now underway, Frontex is failing to explain - as required by the European Court of Justice (Case T-167/10) - how disclosure would "specifically and actually" undermine public security.

Even if particular aspects of Joint Operation Triton (both in its 2016 and 2017 versions) have inspired to some extent Joint Operation Themis, given that the operational plans and further operational details for JO Themis are not currently publicly available, the public, in possession of the requested documents regarding of JO Triton, would only and merely be able to speculate and suppose how that information is applicable to Frontex's current activities in the Central Mediterranean.

Those speculations and suppositions from the public would be purely hypothetical, and could in no way be interpreted as a specific and actual harm to public security.

III. As a matter of fact, Frontex's assessment that disclosure of the requested documents would harm public security is incorrect, as demonstrated by the fact that these documents are already in the public domain, having been disclosed by one of the Member States concerned by my initial request to Frontex.

Indeed, documents falling under the scope of this request (i.e.: the requested contracts signed between Frontex and Sweden) have already been released by Sweden itself:
https://fragastaten.se/request/contractsagreements_with_frontex_3

To this extent, disclosure has evidently and manifestly not caused harm to the Union's public security, proving Frontex's initial assessment incorrect.

In this regard, I'd like to recall that Article 15 of the Treaty on the Functioning of the European Union states that "(...) the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible." Furthermore, the European Border and Coast Guard Regulation also states in its preamble that "The Agency should be as transparent as possible about its activities".

Disclosure of the requested documents by Sweden proves that it is indeed possible to achieve this level of openness around Frontex's JO Triton, without prejudice to public security, thus creating a standard of transparency assumable by both Frontex and the Member States participating in its Joint Operations.

Finally, I'd like to add one last point and argument which goes beyond the scope of this particular confirmatory application, as it applies more broadly to Frontex's access to documents practices, but that is also applicable to the requested documents and is therefore relevant in this context:

IV. Frontex's persistent lack of transparency regarding its past operations are contravening the EU's transparency principles and rules, as well as the own Agency's commitment to transparency, enshrined in its own regulation.

The present case is not the first time Frontex has argued that documents related to the Agency's operations in 2016 are not releasable because they "informed the conceptualisation" of the Agency's operations in 2017. Likewise, Frontex has considered before that documents related to the Agency's operations in 2017 are not releasable either, as they, too, inspired in some way the new operation, JO Themis, which is currently ongoing.

To this extent one can surely assume that documents regarding the 2018 operation will not be releasable in 2019 either, as they will also be reflected in some way in the Agency's 2019 operations, and so on, and so on.

The fact that Frontex is consistent in its actions and in its operations, and the fact that it learns from its lessons, cannot come at the cost of EU citizens' and residents' right of access to documents, which is recognised as a fundamental right in the European Union.

I would also like to recall that Frontex holds a great responsibility when it comes to ensuring respect for human rights at the EU's borders, as well as for the safeguard of the lives of people in vulnerable conditions and/or in peril.

While I do not doubt Frontex takes the above-mentioned responsibilities seriously, I'd like to urge Frontex to take just as seriously the right of all EU citizens to hold the Agency accountable for its actions, and by doing so, to raise the bar on its level of transparency when it comes to its past operations at the very least.

I hereby request that Frontex:

- Rectifies its preliminary assessment where it states that the disclosure of the requested documents would undermine public security; and
- Discloses the requested documents,

In regard to your arguments I and II, please be informed that the evaluation of Joint Operation Triton 2017 is still ongoing. At this stage, not all European Union Member States and Schengen Associated Countries (SAC) are involved in the evaluation but only those, which have participated in the Joint Operation. Furthermore, within those European Union Member States/SAC having access, access to the financial documents is limited to border authorities only and thus only the border authorities in select Member States are at this point in time "already aware of such details regarding the operation".

After the conclusion of the evaluation, the reports are shared with all Member States - thus going beyond Spain, Sweden, Denmark, Finland and Norway - having participated in these operations. Findings of these evaluations have flown in other currently ongoing operations and will flow into the adjustment of other future joint operations. Consequently, granting access to documents related to Joint Operation Triton 2017 at this stage would not only hamper its evaluation but due to their impact on ongoing - and future - operations would eventually jeopardize the effective control and surveillance of external sea borders of the European Union and the fight against cross-border crime; and thereby undermining the

protection of the public interest as regards public security as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001¹.

I appreciate your request for further explanations to fully understand how the disclosure of the financial documents would - as the General Court has held in its Judgment of 6 December 2012² - "specifically and actually" undermine public security. Through their particular nature, the documents pertaining to both years, 2016 and 2017, they "informed the conceptualization" of currently ongoing and will flow into future operations as these documents contain information in regard to human resources deployed in certain areas of the operations and form important parts allowing for drawing conclusions on strengths and weaknesses of forces in these areas. However, I have to inform you that due to their sensitive nature, further information regarding the reasons which forced us not to release these documents cannot be provided, as this would entail revealing exactly these pieces of information the protection of which is covered by the protection of the public interest as regards public security as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001, which is *inter alia* based on the notion of Articles 9(4) and 11(2) of Regulation (EC) No 1049/2001, as the General Court has recognized in its Judgment of 7 February 2018³.

Finally, I would like to mention that the principle of transparency and the rights of individuals to access documents of European Union 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 European Union as implemented by Regulation (EC) No 1049/2001 as reemphasized in Article 74 of the European Border and Coast Guard Regulation⁴, are not unlimited: Recital 11 of Regulation (EC) No 1049/2001 highlights the need to balance transparency with the aim to protect certain public and private interests, as specified in Article 4 of Regulation (EC) No 1049/2001. I therefore recall that the Agency, for it to exercise its mandate - ensuring security at the external borders of the European Union and contributing to combatting trafficking of human beings, smuggling of weapons, drugs, and thus to the fight against terrorism - and thus the protection of the public interest as regards public security has a wider discretion for determining whether the disclosure of a document to the public would undermine its endeavour to carry out its tasks and thus to jeopardize this interest as laid down in Article 4(1)(a) first indent of Regulation (EC) No 1049/2001. Having re-balanced the two needs, due to the complex and delicate nature of conceptualizing and effectively implementing a joint operation, I come to the same conclusion as expressed in the reply you received on 27 March 2018.

In regard to your argument III, I would like to inform you that the Swedish authorities' decision to release the documents, which was based on the national freedom of information framework and concerning only to documents held by and pertaining solely to Sweden, cannot be construed as imposing an obligation on Frontex to release documents in relation to the other Member States mentioned in your application. The Agency is bound by its own governance framework, which includes Regulation (EC) No 1049/2001, and its decision not to disclose the documents is based on its obligations towards all Member States and the public interest of the European Union and its Member States. For the abovementioned reasons, I cannot enter into a discussion to which extent the release of these documents has already undermined the protection of the public interest as regards public security; yet the fact that one Member State has made documents relating to this Member State accessible does not relieve Frontex from its legal obligations. Also in reply to this argument, I uphold the decision as expressed in our reply of 27 March 2018 not to disclose those documents relating to the remaining Member States.

Concerning your **argument IV**, I again recall that Frontex undertakes a case-by-case evaluation of all applications. As part of this individual analysis, which takes into account

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 Case T-167/10, *Case Evropaiki Dynamiki v. Commission*, ECLI:EU:T:2012:651.

³ Case T-852/16, *Access Info Europe v. Commission*, ECLI:EU:T:2018:71.

⁴ Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16.9.2016, p. 1).

all circumstances prevailing at the point such initial and confirmatory application is received, documents⁵, including operational plans⁶ that had not been releasable at an earlier point in time had eventually been released when the exception had ceased to be applicable.

Therefore, I regret having to inform you that your application to

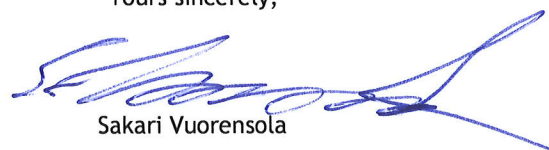
- *rectify the preliminary assessment, and to*

- *disclose the documents applied for,*

cannot be granted.

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 Ombudsman, under the relevant provisions of the TFEU.

Yours sincerely,



Sakari Vuorensola

Director of Corporate Governance

⁵ https://www.asktheeu.org/en/request/jo_triton_operational_plan_for_2?unfold=1.

⁶ See only: https://www.asktheeu.org/en/request/triton_operational_plan#incoming-8676.