



The Director-General

Brussels
devco.r(2019)7193937

Subject: Your application for access to documents – Ref GestDem No 2019/5864

Dear Sir,

We refer to your email dated 15 October 2019 in which you make a request for access to documents, registered on 17 October 2019 under the above-mentioned reference number. We also refer to the letter dated 08 November 2019 via which the time limit for handling your request was extended by 15 working days, pursuant to Article 7(3) of Regulation (EC) No 1049/2001.

You request access to « *The report of the investigation/mission carried out by Observatoire Congolais des Droits de l'Homme* » (OCDH) in Messok Dja and any other documents which refer to Messok Dja proposed protected area and FPIC that OCDH gave to the Commission ».

Your application concerns the following document: « Note d'information Mission de monitoring dans la zone de Messok-Dja » produced by the OCDH in July 2019, received by the Commission on 30 August 2019 under reference number Ares(2019)5487670.

Since the document concerned originates from a third party, the originator of the document has been consulted.

Following an examination of the document requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents and taking into account the opinion of the third party, we regret to inform you that your application cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

Mr Stephen Corry
SURVIVAL INTERNATIONAL
18, Rue Ernest et Henri Rousselle
75013 Paris
France

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In accordance with Article 4(6) of Regulation (EC) No 1049/2001, we have considered the possibility of granting partial access to this document. However, no meaningful partial access is possible without undermining the interests described below.

Pursuant to Article 4(2), third indent, of Regulation (EC) No 1049/2001 '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure'.

The Court of First Instance has ruled that the exception in Article 4(2), third indent, of Regulation (EC) No 1049/2001 applies if disclosure of the documents in question may endanger the completion of inspections, investigations or audits¹. It also follows from the case law of the Court that it is possible for this exception to apply as long as other investigations or inspections continue².

The document that you seek to obtain is a report produced following an independent field investigation in the zone of Messok Dja, aiming to examine presumed violations of human rights denounced by certain sources. The purpose and content of the requested report relates to an ongoing investigation by the Ministry of Justice, Human Rights and the Promotion of Indigenous Peoples of the Republic of Congo on alleged abuses of authority within the area of Messok Dja forest; disclosure of the requested document may jeopardise in a reasonably foreseeable way the latter investigation which is still in progress.

Against this background, there is a real and non-hypothetical risk that the release of the document requested would undermine the purpose of investigations, protected by Article 4(2), third indent, of Regulation (EC) No 1049/2001.

Furthermore, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its 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.

The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725')³.

The document to which you request access contains personal data, in particular names, functions, pictures, opinions and testimonies of and with respect to natural persons.

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data⁴.

¹ Judgment of 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04, ECLI:EU:T:2006:190, paragraphs 109.

² *Idem*, paragraphs 110 – 113.

³ Official Journal L 205 of 21.11.2018, p. 39.

⁴ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:C:2017:994.

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁵, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable⁶.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy, jeopardise their safety and subject them to unsolicited external contacts.

Consequently, we conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Lastly, the authors of the document have objected to disclosure of the document that they sent to the Commission and have motivated their position by underlying that release of the report without the opinion of the concerned individuals would contravene the [Congolese] Decree 2019-201 on Free, Prior and Informed Consent (FPIC) of the indigenous

⁵ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

⁶ Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

populations, in accordance with the [Congolese] Law N ° 05-2011 on the promotion and protection of the rights of the Indigenous Peoples, thereby undermining the protection of investigation proceedings and legal opinions, as protected under Article 4(2) of Regulation (EC) No 1049/2001. In addition, the authors of the document had highlighted the confidential and strictly internal nature of the report upon its transmission to the European Commission, which is necessary to safeguard the independence of their investigations and the objectivity of their proceedings, by protecting them from undue external interference and pressure.

Please note that the exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the document requested. Nor have we been able to identify any public interest capable of overriding the interests protected by Article 4(2) of Regulation (EC) No 1049/2001. We conclude, therefore, that their protection prevails.

Please note also that Article 4(1)(b) of Regulation (EC) No 1049/2001 has an absolute character and does not include the possibility to demonstrate the existence of an overriding public interest.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management & Access to Documents'
BERL 7/076
B-1049 Brussels

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Koen DOENS