EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – GESTDEM 2018/4453

Dear ,

I refer to your email of 4 October 2018, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 10 August 2018, you had requested access to any ‘documents relating to [the] Messok Dja new park that is being established in the Republic of Cameroon’. You had added that you were ‘particularly interested in:

1) [a]ny consultation documents about the park with the local community and indigenous communities affected by the proposed park

2) [a]ny documents that show the proposed zoning of the park

3) [a]ny emails or communications about the proposed park between the EU and the [World Wildlife Fund].’

In its initial reply dated 4 October 2018, the Directorate-General for International Cooperation and Development drew your attention to the fact that the protected area in question will be created in the Republic of Congo, and not in the Republic of Cameroon. It identified two documents that fall within the scope of your request\(^3\) and refused access to these documents, based on the exception of Article 4(2), first indent of Regulation 1049/2001 (protection of commercial interests of a natural or legal person).

In your confirmatory application, you question whether all documents falling under the scope of your request were identified and request a review of the position of the Directorate-General for International Cooperation and Development. You put forward a number of arguments to support your request. These have been taken into account in the assessment, the results of which are described below.

2. **Assessment and Conclusions under Regulation 1049/2001**

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the relevant Directorate-General at the initial stage.

Following your confirmatory application, the European Commission carried out a renewed, thorough search for documents that would fall under the scope of your request. Based on this renewed search, I confirm that the Commission has not identified any document held by it, other than those identified at the initial stage, that would fall under the scope of your request. This means concretely that the European Commission does not hold any other document regarding the creation of the protected area in question, in general, and holds no document that would fall under points 1 and 3 of your initial request, in particular.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that Regulation applies only to existing documents in the possession of the institution. Given that no other document falling under the scope of your request has been identified, the Commission is not in a position to handle your confirmatory application with regard to this specific request.

With regard to the two documents falling under the scope of your request, having examined your confirmatory application, I would like to inform you that, after consultation of the third party author in accordance with Article 4(4) of Regulation 1049/2001, wide partial access is granted to both documents, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual), for the reasons set out below.

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\(^3\) See page 2 of the initial reply.
Article 4(1)(b) of Regulation 1049/2001 provides that ‘the institutions shall refuse access to a document where disclosure would undermine the protection of (...) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

The requested documents contain personal data such as the names of persons or other data from which their identity can be deduced. Moreover, one document contains personal data such as bank account details and salary information, as well as biometric data such as handwritten signatures and initials.

In its judgment in the Bavarian Lager case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001 (hereafter ‘Data Protection Regulation’) becomes fully applicable.

Article 2(a) of the Data Protection Regulation provides that personal data ‘shall mean any information relating to an identified or identifiable person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity’. According to the Court of Justice, ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of “private life”’. The names of the persons concerned as well as other data mentioned above undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

It follows that the public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject’s legitimate interests might be prejudiced. Those two conditions are cumulative. Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

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6 Judgment of 20 May 2003, Rechnungshof v Österreichischer Rundfunk and Others, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
8 Idem, paragraphs 77-78.
In its judgment in the *ClientEarth* case, the Court of Justice ruled that ‘whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access’9. I refer also to the *Strack* case, where the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data10.

In your confirmatory request, you do not establish the necessity of having the data in question transferred to you.

As to the biometric data such as handwritten signatures and initials, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 is an absolute exception that does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to disclose publicly the personal data in question and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. **PARTIAL ACCESS**

As indicated above, wide partial access is granted to both documents identified, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and integrity of the individual). Please find attached the redacted versions of these documents.

4. **NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that Article 4(1)(b) of Regulation 1049/2001 is an absolute exception that does not require the institution to balance the exception defined therein against a possible public interest in disclosure.

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5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: 2