

Public hearing in Case T-194/04 (13 September 2006)

Pleading of the EDPS

1. The first time the EDPS intervenes

Mr. President of the Third Chamber, Judges,

It is the first time the EDPS has applied for admission to intervene before the Court of First Instance. And I am happy to stand here, after the president of the third chamber ordered positively on our request. My pleading will concentrate on the second plea of the applicant. In these pleading I would like to elaborate on the EDPS background paper of July 2005 on public access to documents and data protection, published on the website of the EDPS.

It is not only the first time, but it is also in a particular role the EDPS is represented here. The intervention of the EDPS is not aimed at protecting a person against the disclosure of his personal data, but it aims to seek for an optimal balance between the protection of personal data and another fundamental interest of the European citizen, namely the right to have access to EU documents. We consider this balancing of different interests at stake as a necessary part of the mission of the EDPS.

Although the EDPS is represented here in support of the conclusions of the applicant, we do not share all his arguments. In particular, we insist that the UK-Court of appeal decision in Durant, referred to by the applicant, gives a far too narrow interpretation of the scope of data protection under Community law. I will come back to that.

However, this difference in opinion does not lead to a different result: the Commission should produce the full set of names of persons who attended the meeting of 11 October 1996.

As to the position of the Commission, we fully agree with the argument of the Commission in point 67 of the Report for the Hearing that the rights to data protection and to access to documents are of the same nature, importance and degree. Our point is that the result of the reasoning of the Commission is that these two rights are not respected in an equivalent way. The result is not balanced and does not do justice to the principle of proportionality.

I start with two points in order to illustrate why the result of the reasoning of the Commission is not balanced.

2. Right to anonymity

First and most important: The present case is about persons participating in a meeting. If one follows the reasoning of the Commission, the Community legislation on data protection would give people a right to participate anonymously in meetings with public authorities. They have this right because - according to the Commission - their names can only be mentioned in the public version of the minutes of the meeting after they have been given the possibility to consent to or refuse publication. If one looks at the present case: the names of persons who did not give consent were deleted from the public minutes.

In our view, this is the wrong approach: data protection rules do not imply the existence of a general right to participate anonymously in public activities. On this point, we support the letter of the Ombudsman of 30 September 2002, which has been quoted in point 31 of the Report for the Hearing and that disapproves to a right to anonymity. An approach as taken by the Commission would not only, as the Ombudsman rightly states, subvert the principle of openness and disregard the equivalence of both regimes, but it would not serve the interest of data protection either. If people participate in public activities, they may normally not expect that their participation stays confidential. Because they can not have such a legitimate expectation, data protection principles will not be violated. This is precisely why we do not support the Commission in this case.

3. Article 8 of Regulation 45/2001

There is a second reason why the reasoning of the Commission does not do justice to the right balance between the two public interests at stake and that is the importance given by the Commission to Article 8, sub b, of Regulation 45/2001 that requires that a recipient of personal data establishes why he needs the data.

The EDPS takes a firm stance on this: As the request for accessing documents is based on democratic principles, any person can ask for a document without having to mention why he needs it. We consider this as one of the cornerstones of transparency law, as has been confirmed by Article 6 (1) of Regulation 1049. Therefore, Article 8 of Regulation 45 does not have any importance in this case.

4. Our point of departure: Regulation 1049/2001

Mr. President,

This brings me to the balancing of the two fundamental rights itself. Our point of departure is Regulation 1049/2001. The reasons for choosing this point of departure are simple:

- In the first place: we are examining a request for public access and not a request from a data subject based on Regulation 45.
- In the second place and more important: Article 4 (1) (b) of Regulation 1049 is the only article under Community law that explicitly deals with the relation between the two rights. Regulation 45 does not deal with this matter, which is confirmed by recital 15 of Regulation 45, saying: *"Access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255 of the EC Treaty."*
- In the third place, when one looks at the substance of Article 4 (1) (b): It is about balancing. The wording 'undermining' is chosen deliberately. If even a marginal effect on data protection would lead to the non disclosure of an EU document, the right to public access would be substantially harmed.

5. Textual interpretation of 4 (1) (b)

One could give different interpretations to Article 4 (1) (b). In fact, this is the core of the present case. We choose to follow the wording of Article 4 (1) (b). In our view, Article 4 (1) (b) contains three cumulative conditions: privacy, undermining and the reference to the data protection rules.

In any event, Article 4(1) (b) does not contain a direct referral to data protection legislation in the sense of the so-called 'renvoi'-theory as defended by the Commission. Would that have been envisaged, then the wording of the exception could and should have been far more explicit.

6. The first condition: privacy (and integrity).

On the first condition: It is clear from the wording of this provision that the interest protected is 'the privacy and integrity of the individual' and not the protection of personal data as such. Because of this wording, the EDPS argues that when it comes to public access to personal data, data protection law must be applied only in situations where the privacy of the data subject is at stake.

In the present case, the privacy is not at stake. I even have the strong impression that the Commission agrees to this: the Commission expressly states (*point 71 of the Report for the Hearing*) that the persons present at the meeting were acting on the instructions of the bodies they were representing, in their capacity as employees of those bodies and not in a personal capacity.

Respect for private life or privacy is defined under Article 8 ECHR and elaborated by the Court in Strasbourg. According to the case law of that Court, processing of personal data can, for instance in case of secret surveillance or sensitive data, affect the privacy. On top of that, privacy does not exclude professional activities. On the other hand, disclosure of a name as such normally does not involve privacy. In *Österreichischer Rundfunk*, the Court of Justice makes an important distinction: the mere recording of a name connected with income by an employer does not raise issues related to "private life" whereas the communication of these data to third parties does interfere with private life.

In this context, it is important to realize that "data protection" is much wider than "respect for private life" or "privacy". So, the fact that privacy is not at stake does not mean that data protection law does not apply either. This is even more relevant since, as I have mentioned before, we oppose the arguments of the applicant related to the *Durant*-case in the UK. This case wrongly limits the scope of data protection to data containing "biographical" elements. Such an approach is not founded on any element of the wording of the definitions within Community law.

The concept of data protection involves a set of rules and principles which apply whenever "personal data" are processed, regardless of whether these are within the scope of privacy or not. This is illustrated by the Court in the two leading cases on data protection. In *Österreichischer Rundfunk* (par. 64), the Court considered that information on money that had been paid connected with the name of the recipient constitute personal data and in *Lindqvist* (par 24) the Court included the name in connection with telephone coordinates. Both cases clearly illustrate the wide scope of data protection (i.e. then Directive 95/46/EC).

Regulation 45 defines personal data as: 'Any information relating to an identified or an identifiable person'. For a better understanding of this wide concept, I refer to document 105 of 2005 issued by the Article 29 Working Party for data protection, which discusses the scope of data protection in relation to RFID technology (p.8).

According to this document, information relates to an individual if it refers to the identity, characteristics or behaviour of an individual or if it is used to determine or influence the way in which that person is treated or evaluated. This explanation is fully in line with the case law of the Court in *Rundfunk* and *Lindqvist*.

In the light of the definition of personal data, one can only conclude that even a name of a person as such falls within the definition of personal data. We recognise that the Court did not express itself clearly on this matter. In any event, it is crystal clear that a name of a participant mentioned in the minutes of a meeting falls within the scope of personal data. It reveals the identity of a person as well as the participation of this person in a particular meeting.

I come back to the starting point: data protection is wider than privacy. This is a building block of data protection. Already the Council of Europe Convention 108 from 1981 - the basis of data protection in Europe - mentions in its Preamble, in Article 1, and in point 25 of the explanatory memorandum, that data protection is not only needed for reasons of privacy but also for the enjoyment of other fundamental rights, like non-discrimination or fair trial.

Finally, the Charter of fundamental rights of the EU illustrates that data protection and privacy are not the same. Both are mentioned as two different fundamental rights. This leads to an early conclusion. In the present case, as has been very well described by the Commission, there is no privacy at stake, so Article 4 (1) (b) can therefore not be invoked to keep the names secret. Persons participating in public activities and acting as employees are, under the circumstances as presented to the Court, not protected by the right of privacy. Their names can be produced by the Commission, since their privacy is not at stake. It is therefore, contrary to what the Commission defends, not relevant whether or not those persons gave their consent to the disclosure. As I have said before, they have no right to anonymity.

In short, since privacy is not at stake the EDPS supports the second plea of the applicant and proposes to your Court to annul the contested decision.

Just for reasons of clarification, I will discuss the other conditions of Article 4 (1) (b) as well.

7. The second condition: Undermining

On the second condition, 'undermining', this word implies a substantial effect, not a mere theoretical one. Disclosure of a document can only be refused on the basis of

Article 4 (1) (b) if this would have a substantial effect on privacy. I have said this before.

In our view Article 4 (1) (b) is worded in this way so as to ensure the equivalence of the right of privacy and the right to public access. Refusal of disclosure - which in itself undermines the right to public access - is only allowed if this is necessary to protect a person's privacy, or in other words to ensure that privacy will not be undermined. It reflects the need for proportionality of a decision by the EC-administration.

8. The third condition: Is disclosure in accordance with data protection legislation.

This brings me to the third part of 4 (1) (b) of Regulation 1049, starting with the words 'in particular'. In our view this is a third condition that has to be fulfilled. How to examine whether a document must be disclosed, if in a specific case *someone's privacy is affected*? In such a case the responsible Community authority will have to examine the Community legislation on personal data. More specifically, Regulation 45/2001.

It is in this context good to emphasise that Regulation 45 does not fully take into account the specific situation of access by the public to EU documents containing personal data. The wording of the Regulation does not provide the needed solutions. For the present case, the relevant provisions of this regulation are Articles 4 and 5, both copied in the report for the hearing, and NOT Article 8. I mentioned this before. Article 4 of Regulation 45 lays down the principle of purpose limitation, an essential principle in data protection. Data must be collected for a specific purpose and may not be processed in a way incompatible with these purposes.

In the present case, it is clear that the attendance list of the meeting was not made for public access. However, this does not exclude public access since the data subject could or should reasonably expect disclosure to the public, taking into account the fact that he or she is handing over information to a public body bound by obligations to be transparent to the public. Under those circumstances, the disclosure is not incompatible with the purpose of collection.

Article 5 defines the lawfulness of the processing. It allows processing if this is necessary for the fulfilment of a task carried out in the public interest or for the

compliance with a legal obligation. Both conditions are fulfilled, since Regulation 1049/2001 requires disclosure.

To summarize the examination of Regulation 45: In the circumstances of the present case, neither Article 4 nor Article 5 would prohibit disclosure.

As I have indicated before, the Commission stresses importance to the consent of the data subject. I already mentioned Article 8, sub b of Regulation 45. According to the EDPS, the applicants do not have to provide any argument why the disclosure of the names of the participants to the meeting would shed an additional light on the Commission's decision. By asking for those arguments, the Commission disregards the importance of public access as an instrument for participation in the public debate. The arguments of the Commission relating to the right to object of the data subject under Article 18 of Regulation 45 lead to a similar unwanted result. The Commission seems to see the right to object as an absolute right. It is not. In the first place it does not apply when disclosure takes place on the basis of Article 5 (b) of the Regulation, when processing is necessary in order to fulfil a legal obligation. In the second place, when it applies, the objection must be justified and based on his or her personal situation. This means that the person objecting - and not, I repeat, the person asking for information - must give the justification. More precisely, he must - in order to object successfully- give a plausible reason why he would suffer prejudice if his name were disclosed to the public.

9. Balancing and proportionality

The outcome of this short analysis of Regulation 45 is different from what the Commission advocates. According to the EDPS, Regulation 45 does normally not explicitly forbid disclosure of a public document, containing personal data. This could be different if "sensitive data" as mentioned in Article 10 of the regulation are at stake, but that is presently not the case.

At this stage we come back to the need for a balanced approach. In our view such a balanced approach can be conducted in the best way, by interpreting Article 4 (1) (b) as follows:

No disclosure should take place if privacy is substantially affected. Whether this is the case, should be examined in accordance with the rules and principles of data protection. There is no general right of the data subject to object to disclosure.

10. The outcome in practice

The outcome of this balancing act is not always easy. In Chapter 5 of our background paper we give some examples of the possible difficulties.

In the present case however, there is a clear outcome and that is why we propose to your Court to annul the contested decision, as far as it is based on Article 4 (1) (b) of Regulation 1049.

Mr. President, Judges, I thank you for your attention.

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