

Public hearing in Case T-161/04 (21 January 2011)

Pleadings of the EDPS

Introduction

Mr. President, honourable Members of the Court,

1. The simultaneous application of the two relevant EU regulations, to which I will refer as "the public access regulation" and "the data protection regulation", is no new subject for your Court. The leading judgment is the well-known *Bavarian Lager* judgment of the Court of Justice of 29 June last year (C-28/08 P, ECR 2010 p. I-***). In that judgment, the Court rejected an approach previously taken by your Court on the matter.
2. The approach the EDPS expressed as intervening party in the *Bavarian Lager* case and which he previously explained in an extensive background paper published back in 2005, was fully in line with the previous approach of your Court. As a consequence of the *Bavarian Lager* judgment, the EDPS has been forced to reconsider his position on the matter.
3. Today is the first hearing after the decision of the Court in *Bavarian Lager* in which the matter is discussed. I would like to take the opportunity to explain to you the adjusted EDPS approach as far as it is relevant to the circumstances of the present case.
4. Even under the new approach, the EDPS still supports the form of order sought by the Applicant, namely to annul the decision refusing the Applicant access to the reserve list as well as to the individual appointing decisions.
5. According to the EDPS, the Commission erred in law, by failing to assess the matter under Article 8(b) of the data protection regulation and by requiring the Applicant to lodge a new access request on the basis of that provision.

6. The EDPS takes the view that this constitutes sufficient ground to annul the contested decision.
7. In case your Court wishes to provide guidance in its judgment on the outcome of the obligatory assessment under Article 8(b) of the data protection regulation, the EDPS would also like to explain that the outcome of such an assessment would in principle have favoured disclosure of the documents to the Applicant.

As to the failure to assess the matter under Article 8(b) and requiring a separate request

8. The Applicant based his request on the public access regulation, which contains a provision linking it with the data protection regulation, namely Article 4(1)(b) (see also BL, par. 57). The Court considered in *Bavarian Lager*, that where a request based on the public access regulation seeks to obtain access to documents including personal data, the provisions of the data protection regulation become applicable in their entirety, including Articles 8 and 18 thereof (BL 63).
9. In the contested decision, the Commission requested the Applicant to formulate a new request in accordance with the data protection regulation, thereby referring more in particular to Article 8(b) of that regulation. The request had to be addressed to a different DG within the Commission.
10. This is a remarkable position which is clearly inconsistent with the approach the Commission itself took in the *Bavarian Lager* case. In par. 74 of that judgment, the Court refers to the point of view of the Commission that it was obliged to treat the request of Bavarian Lager under the specific regime of both regulations, particularly under Article 8(b) of the data protection regulation.
11. The Court of Justice clearly endorsed the approach of the Commission in *Bavarian Lager* (see BL 75). The Court explicitly concludes that since

Bavarian Lager had not provided any express legitimate justification, the Commission was not able to perform the assessment under Article 8(b) of the data protection regulation (see BL 78).

12. It therefore follows clearly from the *Bavarian Lager* judgment that, in a situation as the present one, a request for public access should have led to a further assessment of the request under Article 8(b) of the data protection regulation.
13. In the current case, the Applicant - contrary to the applicant in the *Bavarian Lager* case - did in fact provide the Commission with an express legitimate justification for the disclosure. The Applicant sought access in order to prepare an action he intended to submit to the Court against his classification as grade A7 upon entry into service (see pt. 31 of the Report of the Hearing).
14. According to the EDPS, the contested decision can be annulled on this ground.
15. However, as indicated, the EDPS will in addition explain that the outcome of the assessment under Article 8(b) of the data protection regulation would in principle have led to the disclosure of the documents to the Applicant.

The assessment under Article 8(b) of the data protection regulation would in principle have led to disclosure

16. Article 8(b), in addition to the other basic provisions of the data protection regulation, determines the conditions under which access to personal data may be granted to a person like the Applicant.
17. These conditions are:
 - (1) the person requesting access has to establish the necessity of having the data transferred,
 - (2) the institution must see whether there is no reason to assume that the data subject's legitimate interests might be prejudiced.

18. The first condition has been explained by the Court in the *Bavarian Lager* judgment. As already mentioned, the applicant has to provide, and I quote the crucial par. 78 of the judgment, 'express and legitimate justification or [...] convincing argument in order to demonstrate the necessity for those personal data to be transferred' (end quote). According to the Court in the same consideration, such information enables the institution to weigh up the various interests of the parties concerned. Institutions should furthermore verify whether the second condition is met.

19. Let me now consider these two conditions to the present case.

20. I make a distinction between on the one hand the reserve list and on the other the individual appointment decisions.

The reserve list

21. At present, reserve lists are published in the *Official Journal*, and thereby made available to the public at large. Persons on these lists are informed about this publication in advance.

22. However, the reserve list requested by the Applicant has never been publicly available, and the persons involved have not been notified about possible public disclosure at that time.

23. As to the first condition - the necessity of the transfer - the EDPS takes the position that there is in fact no need to consider the specific interest advanced by the Applicant. The current practice of publishing reserve list in the *Official Journal* shows that the outcome of the balance between general transparency interests and the interests of the persons concerned favours disclosure. The legitimate justification for disclosure is therefore manifest for the Commission.

24. If the Court does not accept that the legitimate justification is manifest for general reasons of transparency, the EDPS considers that the specific interest

put forward by the Applicant can constitute such a justification. The Applicant, who was individually involved in the competition, can have justified reasons to challenge the legality of subsequent decisions concerning him, or the lack of such decisions for which he needs the information.

25. Especially since comparable information is currently publicly available, the EDPS considers that a general balance of the various interests concerned would in principle favour disclosure of the reserve list to the applicant.

26. However, there might be legitimate grounds relating to the particular situation of data subjects involved which require non-disclosure. These specific interests can be accommodated under the second condition of Article 8(b).

27. With a view to current practice, there is in principle no reason to assume that the legitimate interests of the persons concerned are prejudiced by the disclosure to the Applicant. However, since the information is apparently no longer available, the Commission should consult the persons concerned. Not in order to ask their consent - Article 8(b) does not require this - but to enable the Commission to take a well-informed decision. It should in any event inform the data subjects before the information was actually disclosed to the Applicant. This to allow them to prevent disclosure on the basis of Article 18 of the data protection regulation on compelling legitimate grounds relating to their particular situation.]

The individual appointment decisions

28. The availability of individual appointment decisions is different from the availability of the reserve lists. Whereas, nowadays, reserve lists are available to the public at large, the individual appointment decisions are published only within the institution concerned and therefore primarily only available to colleagues.

29. The reason for which the Applicant sought access to the appointment decisions is in line with the purposes for which these decisions are internally

published. Such publication informs colleagues about such decision and will be referred to by direct colleagues in case they wish to question internal decisions concerning their own appointment or lack of promotion.

30. In this respect, it should be underlined that the Applicant was a Commission official at the time of his request.

31. The Applicant provided the Commission with an express and legitimate justification in order to demonstrate the necessity under the first condition of Article 8(b). Current practice shows that the subsequent balance of the various interests concerned in principle favours disclosure to the Applicant.

32. To this it must be added, that necessity requires that access is only granted to the personal information which is actually needed for the purpose invoked. It should be assessed which of the unavailable decisions would actually serve this purpose.

33. The second condition of Article 8(b) should again be met as well in order to safeguard the specific interests of the data subjects involved. In that respect I refer to what I just stated in relation to the reserve lists.

To conclude

34. The contested decision should be annulled, since the Commission erred in law, by failing to assess the matter under Article 8(b) of the data protection regulation and by requiring the Applicant to lodge a new access request on the basis of that provision.

35. Moreover, the assessment under Article 8(b) of the data protection regulation would in principle have led to the disclosure of the data to the Applicant. In any case in the absence of justified objections on the basis of Article 18 of the data protection regulation.

Thank you for your attention