



## **Public access to documents containing personal data after the *Bavarian Lager* ruling**

### **I. Introduction**

#### *I.1. The reason for an additional EDPS paper*

On 29 June 2010, the European Court of Justice delivered judgment in Case C-28/08 P, *Commission v Bavarian Lager*.<sup>1</sup> The case concentrated on the question whether the Commission had to publicly disclose names included in a document on the basis of the EU rules on public access, or whether EU rules on data protection prevented the Commission from doing so.

The long awaited judgment brought to a close part of a lengthy debate on how to interpret the EU rules on public access to documents and data protection in the event that the underlying interests lead to opposing claims.

The EDPS has been participating in this debate since 2005, when he published a Background paper on the subject which served as guidance in a time of uncertainty about the interpretation of the applicable rules. It was used and applied by different institutions. It also served as a reference document for the European Ombudsman in decisions on the matter. Furthermore, the EDPS intervened in the *Bavarian Lager* case before the Court.

After the Court's judgment in *Bavarian Lager*, a part of the analysis presented in the Background paper is no longer valid. In particular chapter 4, which deals with the simultaneous application of both rules, chapter 5, which contains examples to illustrate the practical application of the EDPS approach and chapter 6, which contains a check-list, have to a large extent become outdated. On the other hand, chapter 2, which describes the history, legal context and the content of the EU rules on access to documents, and chapter 3, which explains the meaning of and the relationship between the notions 'privacy' and 'data protection' and presents the main element of data protection, are still relevant. For a detailed background explanation of the two sets of rules involved, the reader is therefore referred to those two chapters of the Background paper.<sup>2</sup>

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<sup>1</sup> ECJ 29 June 2010.

<sup>2</sup> The EDPS Background paper is available at the EDPS website (<http://www.edps.europa.eu>).

After the judgment of the Court, there appeared to be a need for further guidance on the matter. The EDPS therefore decided to publish this additional background paper. The paper explains the revised EDPS position on the matter following the ruling and sets forth general directions for the EU institutions and bodies on how they can ensure that in daily practice data protection and transparency obligations are equally respected.

The EDPS intends to regularly update this paper in the light of developments in the Court's case law, and in the light of the lessons learned from good practices in the different EU institutions.

## *1.2. Structure and main message of the paper*

This additional paper is organised as follows. After this general introduction (chapter I), the *Bavarian Lager* judgment of the Court will be analysed (chapter II). The ruling clarifies the meaning of the relevant provisions of the relevant law. However it leaves open certain operational consequences which are addressed in this additional paper.

In this respect the EDPS urges the institutions to develop a proactive approach on the matter.

In brief, a proactive approach means that institutions assess and subsequently make clear to data subjects - before or at least at the moment they collect their data - the extent to which the processing of such data includes or might include its public disclosure.

A proactive approach is beneficial to the institutions as it will undoubtedly reduce future administrative burdens for those responsible for the data processing and those that deal with public access requests, subject to some time and effort being invested at the outset. It will reduce the number of complicated situations in which the institutions have to be *reactive*, in other words where they have to decide upon public disclosure upon a request for public access, such as in *Bavarian Lager*. Furthermore, it contributes to reducing time-consuming litigation on this issue.

The proactive approach allows institutions to respect the data protection rules while at the same time implementing the principle of openness. The proactive approach applied in the way described in this paper will ensure that, in case of public disclosure of personal data by the EU institutions, such processing will be fair and lawful and that the data subjects involved are well-informed and fully enabled to invoke their rights under the data protection regulation.

The proactive approach will be further developed in chapter III.

Chapter IV addresses the situations in which the institution concerned is confronted with a request for public access to personal data which was initially not foreseen or thought of. At the moment of writing several cases concerning such 'reactive' situations were pending before the Court which eventually might lead to a refinement

of the judgment in *Bavarian Lager*.<sup>3</sup> Since the EDPS is involved as intervening party in several of these cases, this additional paper will not consider the reactive approach in detail. Only a few general guidelines are presented on how such situations may be resolved.

The paper ends with a short concluding chapter (chapter V). The EDPS will underline that, for the longer term, there is need for a general legal framework which gives more substantive guidance on the subject than the current one. The EDPS would recall in this respect his press statement after the judgment.<sup>4</sup>

## **II. Analysis of the Bavarian Lager judgment**

### *II.1. Facts and legal background of the dispute*

The *Bavarian Lager* case arose when a UK importer of German beer complained to the Commission about UK legislation which limited his ability to sell his beer to public houses. The Commission opened an infringement procedure and organised an investigation of his complaint, including a meeting in October 1996 with UK government representatives and representatives of the European beer industry. The infringement procedure against the UK was closed some time after the meeting took place. The director of Bavarian Lager requested the Commission for public access to the minutes of the meeting. The Commission provided access to the minutes except for the names of five persons. Two of these persons had expressly refused to consent to the disclosure of their identity after the Commission had asked them so. The Commission had been unable to contact the other three persons.

The request of Bavarian Lager was based on Regulation (EC) No 1049/2001 which contains rules on public access to documents held by EU institutions (further referred to as the 'public access regulation').<sup>5</sup> The refusal of the Commission was based in part on Article 4(1)(b) of the public access regulation which reads as follows:

The institutions shall refuse access to a document where disclosure would undermine the protection of: [...]

(b) privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

The relevant rules on data protection referred to in this provision are laid down in Regulation (EC) No 45/2001 (further referred to as the 'data protection regulation').<sup>6</sup>

The meaning of Article 4 (1) (b) was not fully clear. In the discussion, basically two views were taken:

- The view in which the second half of the provision constituted a 'renvoi' to the Community legislation on data protection, and in particular the data protection regulation, meaning that once a public access request was made for a

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<sup>3</sup> See for instance *Valero Jordana* (T-161/04), *Dennekamp* (T-82/08) and *Egan and Hackett* (T-190/10).

<sup>4</sup> See press release of 30 June 2010, available on the EDPS website (<http://www.edps.europa.eu>).

<sup>5</sup> See OJ 2001, L145/43.

<sup>6</sup> See OJ 2001, L8/1.

- The view that it should first be established that the privacy of the persons involved was affected, before the data protection rules would come into play. In other words, the data protection rules were applicable once a threshold (privacy affected) was met (threshold theory).

In the earlier mentioned Background paper the EDPS advocated the threshold theory and, for the *Bavarian Lager* situation, argued that the privacy of the individuals who attended the meeting (acting in their professional capacity) would not be affected by the full public disclosure of the minutes. According to the EDPS, the exception to public access as laid down in Article 4(1)(b) of the public access regulation could therefore not be relied upon by the Commission.

The Commission advocated the renvoi theory and applied the data protection rules to the matter, thereby concentrating on Article 8(b) of the data protection regulation, which relates to the transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC.<sup>7</sup>

Article 8(b) reads as follows:

Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, [...]

(b) 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.

According to the Commission, Bavarian Lager had not established the necessity of the transfer and concluded that the names could therefore not be disclosed.

Bavarian Lager, supported by the EDPS, contested this approach. It was argued that the requirement to prove the necessity, in cases where the privacy of the persons involved was not affected by disclosure, would be contrary to one of the core principles of the access to documents regulation, namely that applicants are not obliged to state reasons for requesting access to a document. This principle is enshrined in Article 6(1) of the public access regulation.

## *II.2. The judgment of the Court*

At first instance the Court of First Instance, now the General Court, confirmed the threshold theory.<sup>8</sup> However, it was rejected by the Court of Justice on appeal. The Court confirmed the renvoi theory of the Commission. The main elements of the reasoning of the Court were the following.

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<sup>7</sup> See OJ 1995, L281/31. Directive 95/46 harmonises the Member State legislation on data protection. This category of recipients must be distinguished from those that are not subject to Directive 95/46, namely recipients in countries outside the EU (third countries). The applicable provision is Article 9 of the data protection regulation which will be discussed later in this document.

<sup>8</sup> GC 8 November 2007, *Bavarian Lager/Commission*, case T-194/04.

- Surnames and forenames may be regarded as 'personal data'. The communication of such data falls within the definition of 'processing', for the purpose of the data protection regulation.<sup>9</sup>

- Article 4(1)(b) of the public access regulation requires that any undermining of the privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with the data protection regulation.<sup>10</sup>

- Where a request based on the public access regulation seeks to obtain access to documents containing personal data, the provisions of the data protection regulation become applicable in their entirety.<sup>11</sup> The usual analysis under the data protection regulation must therefore be applied in every case, in particular the requirements of data quality and the lawfulness of processing under Articles 4 and 5, data transfers under Article 8 and 9, and the right to object under Article 18.<sup>12</sup>

- The Commission was right to verify whether the persons mentioned in the minutes had given their consent to the disclosure of personal data concerning them. By requiring that, in respect to the five persons who had not given their express consent, Bavarian Lager establish the necessity for those personal data to be transferred, the Commission complied with Article 8(b) of the data protection regulation.<sup>13</sup>

- Article 8(b) requires that the person requesting access provides an express and legitimate justification or convincing arguments in order to demonstrate the necessity for those personal data to be transferred. Since Bavarian Lager had not done so, the institution was not able to weigh up the various interests of the parties concerned, nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced.<sup>14</sup>

- In addition, the Court considered that the provisions of the public access regulation were not infringed, since access to the remainder of the documents had been granted.<sup>15</sup>

### *II.3. General remarks on the judgment*

The judgment clarifies the meaning of Article 4(1)(b) of the public access regulation. It must be interpreted as a direct referral to the data protection regulation, without any threshold. Moreover, the Court is clear about the fact that surnames and forenames

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<sup>9</sup> Paras 68 and 69.

<sup>10</sup> Para 59.

<sup>11</sup> Para 63.

<sup>12</sup> These provisions will be further discussed in the chapters III and IV.

<sup>13</sup> Paras 75 and 77.

<sup>14</sup> Para 78.

<sup>15</sup> Para 76.

may be regarded as 'personal data' and that the communication of such data falls within the definition of 'processing' in the sense of the data protection regulation.

In case of a public access request for a document containing personal data, such as in the *Bavarian Lager* case, the rules on data protection are entirely applicable, with Article 8(b) having crucial importance. It follows from the judgment that the Commission, under Article 8(b) of the data protection regulation, should in principle have weighed up the various interests of the parties concerned.<sup>16</sup> However, since Bavarian Lager had not provided any express and legitimate justification, this balance of interests could not be made by the Commission. The Court was therefore not in a position to evaluate the outcome of such a balancing test. As a consequence, the judgment itself provides no guidance as to the way in which to strike a fair balance between the different interests at stake.<sup>17</sup>

The Court furthermore considered that the Commission rightly verified whether the data subjects *had* given their consent to the disclosure of their personal data and in the absence of express consent rightly required Bavarian Lager to establish the necessity of the transfer.<sup>18</sup> The EDPS takes the view that, with regard to the analysis under Article 8(b), these considerations should not be read as obliging the institutions to request the consent of the data subject in every case in which public disclosure of personal data is asked for. The data protection rules provide that the legitimate interests of the data subject may be sufficiently safeguarded if he or she is afforded the right *to object* to the disclosure as provided for in Article 18 of the data protection regulation. The difference between requesting consent and affording data subjects the right to object will be further analysed in both following chapters.

The proactive approach will be further discussed in the next chapter. The question how institutions should react to access requests in the absence of any proactive approach (such as in the *Bavarian Lager* case) will be further analysed in chapter IV.

### **III. The proactive approach**

Openness of EU activities is not achieved only through (positively) answering to requests for public access. Institutions and bodies must also aim as far as possible for transparency of their activities of their own motion, i.e. by actively providing the public with information and documents, for example in a register as referred to in Article 12 of the public access regulation. This goes beyond the scope of the *Bavarian Lager* case, in the sense that Article 8(b) of the data protection regulation is not relevant for situations where documents are actively provided, and then either or not downloaded from a public register.

The EDPS takes the view that in order to achieve a fair balance between the right to data protection and the public interests of transparency, institutions should take a proactive approach on the matter and not assess the possible public nature of personal data they collect only at the moment they receive a request for public access to a document containing personal data.

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<sup>16</sup> Para 78.

<sup>17</sup> Relevant guidance may be derived from other case law of the Court of Justice, see footnotes 19 and 20.

<sup>18</sup> See paras 75 and 77.

### *III.1. Balancing the various interests at stake*

Complicated situations can be prevented if a proactive approach is chosen.

The EDPS takes the view that institutions should assess in advance the extent to which the processing includes or might include the public disclosure of the data. If such disclosure is envisaged, they should make this clear to data subjects before or at least at the moment that the data are collected.

The proactive approach assures that in case of public disclosure of personal data by the EU institutions, data subjects involved are well-informed and are enabled to invoke their rights under the data protection regulation.

Being proactive implies that the balance between the public interests which underlie openness and the interests protected by the data protection rules is already established before or at least at the moment that the data are collected and thus before a public access request is being made.

It goes without saying that there are many cases in which the balance between the different interests at stake favours the non-disclosure of personal data. For example, there is no doubt that medical files of EU civil servants should not be made public.

On the other hand, there are also situations in which the balance favours openness.

Generally speaking, such could be the case with personal data contained in documents relating to a public figure acting in his or her public capacity or relating solely to the professional activities of the person concerned.

In this respect, the EDPS would refer to the discussion on the recast of the public access regulation which was proposed by the Commission in April 2008.<sup>19</sup> An element in that discussion is how the relationship between the public access regulation and the data protection regulation could be clarified. The EDPS issued an opinion on the Commission proposal in June 2008 and underlined and further explained the main points of the opinion in his Comments of February 2009.<sup>20</sup> In this legislative procedure, two reports were adopted by the European Parliament.<sup>21</sup> No public documents concerning the position of the Council are available. Furthermore, the EDPS would like to refer to his analysis developed in the Background paper of 2005.<sup>22</sup> The guidelines presented therein on the balance of interests *after* a request for access has been made, remain equally valid for the assessment *before* data are collected.

The outcome of this balancing test can already be decided by the legislator in certain situations. If the outcome favours transparency, legislation may oblige the institutions

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<sup>19</sup> See COM(2008)229 final of 30 April 2008.

<sup>20</sup> Opinion of 30 June 2008, OJ 2008, C 2/7. The Comments of 16 February 2009 can be found on the EDPS website (<http://www.edps.europa.eu>, under Consultations >> Comments).

<sup>21</sup> Report P6\_TA(2009)0114 of 11 March 2009 (plenary meeting) and, after the entry into force of the Lisbon Treaty, Report PE 439.989v01-00 of 12 May 2010 (LIBE Committee).

<sup>22</sup> See in particular p. 36-40 of the Background paper.

to publicly disclose the personal information. The legal basis for the public disclosure of the personal data can be found in Article 5(b) of the data protection regulation, which states that personal data may be processed if the processing is necessary for the compliance with a legal obligation to which the controller is subject. The current online Commission Directory containing general professional information about its officials serves as a good example.<sup>23</sup>

Such legislation should, of course, be compatible with Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.<sup>24</sup> This implies, as the European Court of Justice held in the *Schecke* ruling, that it should be ascertained that the obligation is proportionate to the legitimate aim pursued.<sup>25</sup>

In the absence of a specific legal obligation the institutions themselves have to assess the balance between the different interests at stake. The EDPS takes the position that institutions should do so as a matter of good practice before or at least at the moment they collect such data.

On the one hand, this follows from the principle of openness, as well as the principles of good administration and good governance, as enshrined in the Treaties and in the EU Charter. In Article 1 TEU it is stated that decisions should be taken as openly as possible and Article 15 TFEU obliges EU institutions, bodies, offices and agencies to conduct their work as openly as possible. The public is furthermore entitled to good governance as referred to in Article 15(1) of the TFEU as well as to good administration and access to documents under, respectively, Articles 41 and 42 of the Charter of fundamental rights.<sup>26</sup> On the other hand, this is part of fair data processing as ensured by the right to data protection enshrined in Article 16 TFEU and Article 8 of the EU Charter.

Such disclosure would find its legal basis in Article 5(a) of the data protection regulation, following which personal data may be disclosed in public if such processing is necessary for the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in the institution or body.

Internal policies could be developed, creating a presumption of openness for certain personal data referred to above, namely those that relate to a public figure acting in his or her public capacity or relate solely to the professional activities of the person concerned.

It is important to underline that such policies should comply with the other relevant provisions of the data protection regulation as well.

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<sup>23</sup> See [http://ec.europa.eu/staffdir/plsql/gsys\\_tel.display\\_search?pLang=EN](http://ec.europa.eu/staffdir/plsql/gsys_tel.display_search?pLang=EN).

<sup>24</sup> See ECJ 20 May 2003, *Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01 and ECJ 9 November 2010, *Volker und Markus Schecke*, Joined Cases C-92/09 and C-93/09.

<sup>25</sup> *Ibid*, para 72. A step by step analysis on the proportionality of the legal obligation which was discussed in the *Schecke* case, namely to disclose personal data about the beneficiaries of agricultural funds, can be found in paras 65-89 of the judgment.

<sup>26</sup> See in this respect the draft-recommendation of the European Ombudsman of 29 April 2010 in complaint 2493/2008/(BB)TS, paras 39-48 and 100.



It should be ensured, for instance, that personal data is not disclosed if, given specific circumstances, there is a reason to assume that the legitimate interests of a given data subject might be prejudiced by disclosure.<sup>27</sup> Persons involved should therefore be properly informed about the envisaged disclosure and be afforded the right to object. This issue will be explained in chapter III.2 in more detail.

Furthermore, compliance with the data protection regulation means that the public disclosure should either be (part of) the purpose of the data processing or not be incompatible with the purpose for which the data are collected (see Article 4(1)(b) of the data protection regulation). The collected data should furthermore be necessary and proportionate in relation to the aim pursued. In Article 4(1)(c) of the data protection regulation it is stated that the processing must be adequate, relevant and not excessive in relation to the purpose for which the personal data are collected or further processed.

### *III.2. Informing the persons involved and ensuring their right to object*

The institution involved, as controller of the data, is under an obligation to inform the data subject at the moment of collection of the data about, inter alia, the purpose of the processing operation for which the data are intended and the recipients or categories of recipients of the data (see Articles 11 and 12 of the data protection regulation). This obligation must be seen as part of the transparency of the data processing, which follows from the obligation to process data fairly, as laid down in Article 4(1)(a) of the data protection regulation.

In the context of the proactive approach, when informing the data subject about the purpose of the processing at the moment of collection, the institution should provide the data subject with as much information as possible about whether the public disclosure of the data is (part of) the purpose of the collection, or whether it will be considered as a form of processing of the data which is not incompatible with the purpose of collection.

There might be circumstances in which the public disclosure can reasonably be expected by the data subject. However, this can only be assumed in very clear cases.

In situations in which the public disclosure is not unconditionally announced at the moment of the data collection, the EDPS considers it an element of fair processing (Article 4(1)(a) of the data protection regulation) that the data subject is informed subsequently before the information is in fact disclosed to the public.

Informing the data subject about the envisaged disclosure enables data subjects to invoke their rights under the data protection regulation. One of those rights is the right to object to the processing of his or her data (see Article 18 of the data protection regulation). The data subject can do so 'on compelling legitimate grounds relating to

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<sup>27</sup> See also p. 12/13 of the EP Report of 11 March 2009 and p. 33/34 of the EP Report of 12 May 2010. Guidance on situations in which a presumption of openness is not justified can be derived from the Court's case law. See for instance ECJ 7 November 1985, *Adams/Commission*, case 145/83, GC 12 September 2007, *Nikolaou/Commission*, case T-259/03 and GC 24 September 2008, *M./European Ombudsman*, case T-412/05.

his or her particular situation'. If there is a justified objection, the data may not be disclosed.

There is an important distinction with regard to the right to object between processing of the data on the basis of Article 5(b) (legal obligation) and on the basis of Article 5(a) (task carried out in the public interest). If the data is processed on the basis of a legal obligation, this is excluded from the scope of the right in Article 18(a) of the data protection regulation, and the data subject has no right to object. However, if the legal obligation is not unconditional and, for instance, includes the exception mentioned in the previous paragraph, namely that the data will not publicly be disclosed in case there is a reason to assume that disclosure would prejudice the legitimate interests of that person and if the person involved is properly informed in advance, the data subject will have the possibility to put forward reasons why he or she takes the view that that exception applies to him or her.

Although data can also be publicly disclosed on the basis of the consent of the person involved (see Article 5(d) of the data protection regulation), this is not a first option<sup>28</sup> and subject to very strict conditions: any consent should be freely given, specific and informed and should also be unambiguous.<sup>29</sup> This obviously goes beyond the mere informing of the data subject and normally requires his or her active participation. On the other hand, consent is not required where other available options provide an adequate ground for legitimate processing. With the exception of unconditional legal obligations, participation of the data subject is ensured in the way just described, by being well-informed and enabled to invoke the right to object or to put forward arguments why the conditional nature of the legal obligation applies to the specific situation of the data subject.

### *III.3. The way forward*

As has been noted, public disclosure of personal data can be provided for in future legislation, in which case the ground for lawful processing will be Article 5(b) of the data protection regulation.

However, under the present legislation, the most practical way forward seems to be that the EU institutions develop policies as to the proactive approach to be taken on this subject. As explained, the legal basis for the disclosure of data could then be found in Article 5(a) of the data protection regulation.

These policies should reflect the outcome of a careful balance of the different interests at stake. They should fully comply with the relevant provisions of the data protection regulation, as discussed above.

Whilst developing such policies, the EDPS encourages the EU institutions, agencies and bodies to engage in constructive cooperation and learn from each other through exchanging examples of good practice.

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<sup>28</sup> Article 5 mentions "consent" only after (a) "necessity for a task carried out in the public interest", (b) "necessity for compliance with a legal obligation", and (c) "necessity for the performance of a contract to which the data subject is party".

<sup>29</sup> See Article 2(h) and Article 5(d).

#### Summary of the proactive approach:

- Institutions should assess and subsequently make clear to the data subjects, before or at least at the moment that their personal data are collected, the extent to which the processing includes or might include the public disclosure of the data.
- It implies that the balance between the public interests which underlie openness and the interests protected by the data protection rules is made in advance, before or at least at the moment that the data are collected and thus before a public access request is being made.
- The proactive approach assures that in case of public disclosure of personal data by the EU institutions, data subjects involved are well-informed and are able to invoke their rights under the data protection regulation.
- Internal policies could be developed, creating a presumption of openness for certain personal data, namely those that relate to a public figure acting in his or her public capacity or relate solely to the professional activities of the person concerned.
- Personal data should not be disclosed if, given particular circumstances, there is a reason to assume that disclosure would prejudice the legitimate interests of a given data subject.
- These policies should be fully in line with rules on data protection. Data subjects should, for instance, be properly informed about the public disclosure of the data collected and should be enabled to object to the disclosure.

## **IV. How to react to public access requests?**

### *IV.1. Access under Article 8(b) of the data protection regulation*

The proactive approach discussed in the previous paragraph can lead to the public disclosure of a document containing personal data by an institution on its own motion for instance through the public register and/or directly on the internet. As stated before, Article 8(b) is not relevant when access is acquired to data which at the moment of the request is already legitimately publicly available.

In the absence of a proactive approach, a disclosure upon request must be dealt with by the institution involved under Article 8(b) of the data protection regulation. This follows from the *Bavarian Lager* judgment.

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. This means, as already mentioned, that (1) the recipient has to establish the necessity of having the data transferred and (2) the institution must see whether there is no reason

to assume that the data subject's legitimate interests might be prejudiced. According to the Court Article 8(b) entails a balance of interests to be made by the institution concerned.<sup>30</sup>

The outcome of the assessment under Article 8(b) naturally depends on the circumstances of a specific case.

Both conditions will now be discussed separately. It should be kept in mind that actual disclosure is only allowed if *both* conditions are met. So, even if the necessity of the transfer is established (the first limb) the second limb of Article 8(b), which ensures respect for the legitimate interests of the data subjects, should be considered as well.

#### *The first limb of Article 8(b)*

As to the first limb of Article 8(b), it follows from the *Bavarian Lager* judgment that it does not suffice for the recipient to simply invoke the general interests of transparency when requesting access to a document which contains personal data. This was what Bavarian Lager, at least implicitly, had done by basing its request on the public access regulation.

The most common situation will be the situation in which the applicant tries to demonstrate the necessity of having the data transferred for a specific individual interest (e.g. for use as proof in a court case). If the necessity is established and the legitimate interests of the data subject are not prejudiced (the second limb of Article 8(b), see below), the institutions will decide to provide the applicant with the document on an individual basis. The recipient is subsequently allowed to use data for the specific purpose it was collected for and is bound thereafter by the national rules on data protection. In these cases, the disclosure is based on the data protection regulation and not on the public access regulation: one no longer speaks about public access in the sense that the document is accessible to the public at large, but about *privileged individual access*.<sup>31</sup>

However, there are situations in which this first condition of Article 8(b) might be met for general reasons of transparency, without the applicant having to provide any further express and legitimate justification in order to demonstrate the necessity of the publication. These are the cases in which a proactive approach was taken and the information was in principle legitimately intended to be made public<sup>32</sup>, but in which the disclosure has not yet taken place or in which the disclosure upon request would not be in line with the modalities of public access as announced in the proactive phase.

In such cases the general transparency interest for disclosing the information might be assumed manifest under the first condition of Article 8(b).

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<sup>30</sup> See para 78 of the judgment.

<sup>31</sup> If the requested data constitutes personal data relating to the requester, an access request is dealt with under Article 13 of the data protection regulation.

<sup>32</sup> See the analysis in chapter III.

It is furthermore conceivable that there are circumstances in which the applicant might be able to demonstrate the necessity of having the data transferred for reasons which are closely related to the general interests of transparency. This might for instance be the case if a journalist asks for access to certain information in order to instigate or fuel a debate of public interest.

#### *The second limb of Article 8(b)*

As indicated, actual disclosure is only possible if the second limb of Article 8(b) is considered as well. The question is how the institution involved must establish whether the legitimate interests of the data subject might be prejudiced by the transfer of the data. Following the wording of Article 8(b), if there is no reason to assume that such is the case, the transfer can take place as long as the recipient has established the necessity of having the data transferred (the first condition). However, in case of doubt it seems reasonable that the data subject is invited to present his or her views on the possible transfer. The invitation to present his or her views must not be seen as a request for consent to the transfer. Such an interpretation would make the required balance of interests, which the Court reads into Article 8(b), devoid of substance. It should rather be seen as allowing the institution involved to take a well-informed decision. The data subject should in any event be informed about an envisaged transfer, which enables the data subject to invoke his or her right to object as laid down in Article 18 of the data protection regulation.

#### *IV.2. Access under Article 9 of the data protection regulation*

The explanation above raises the question what should be done if the person requesting access to a document containing personal data falls *outside* the scope of application of Directive 95/46, *i.e.* is situated outside the EU. Such a transfer is not governed by Article 8 of the data protection regulation, but is subject to stricter requirements which are contained in Article 9 of the data protection regulation.

In this respect, the EDPS would underline that, as in the case of Article 8(b) of the data protection regulation, Article 9 thereof does not stand in the way of the active public disclosure by an institution of a document containing personal data, for instance on the internet.<sup>33</sup>

Article 9 comes into play if the document has not yet been released to the public and a specific request for access is received. The general rule contained in Article 9(1) is that personal data may only be transferred to recipients outside the EU, if (1) an adequate level of protection is ensured in the country of the recipient, and (2) the data are transferred solely to allow tasks covered by the competence of the controller to be carried out.

It follows from this provision that in principle it will not be possible to allow a request for public access to a document containing personal data. The applicant, requesting public access on the basis of the public access regulation will not easily fulfil the

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<sup>33</sup> See ECJ 6 November 2003, *Lindqvist*, C-101/01, para 56 and further.

second requirement. Besides, the presence of an adequate level of protection has been formally established only with regard to a relatively small number of countries.<sup>34</sup>

However, there are exceptions to the general rule which are laid down in Article 9(6) of the data protection regulation. In particular, the exception contained in Article 9(6)(f) is relevant for the present issue. According to this provision personal data may be transferred if the transfer is made from a register which, according to EU law, is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest.

In the spirit of Article 9(6)(f), the EDPS takes the view that the disclosure of a document containing personal data to a person who is not covered by the application of Directive 95/46, is allowed if the public disclosure of the document was already foreseen at the moment of the collection of such data.

Article 9(6)(f) also allows a transfer of personal data if the requester shows a legitimate interest. However, the prior condition is that the transfer must be made from a register which is intended to provide information to the public.

If the document cannot be handed over on the basis of Article 9(6)(f), a transfer of the data should comply with the general rule of Article 9(1) or fulfil the conditions of one of the other exceptions in Article 9(6). This will, however, not lead to public access to the document.

A practical consequence of this is that, in the absence of a proactive approach or the applicability of a possible exception, the institutions should verify, in case of a request for a document containing personal data, where the applicant is situated in order to see whether Article 8 or Article 9 of the data protection regulation applies.

To sum up:

- Article 8(b) of the data protection regulation is not relevant when access is acquired to data which at the moment of the request is already legitimately publicly available.
- Under Article 8(b), the following steps should be taken:
  - the recipient should establish the necessity of having the data transferred, unless the reason for disclosing the data is manifest ;
  - the institution must balance the different interests at stake;
  - the institution must consider whether there is any reason to assume that the data subject's legitimate interests might be prejudiced (consent of the data subject is not required, the data subject can be asked to present his or her views).
- The analysis under Article 8(b) might lead to privileged individual access, to public access or to a refusal to grant access.

<sup>34</sup> See for an overview [http://ec.europa.eu/justice/policies/privacy/thridcountries/index\\_en.htm](http://ec.europa.eu/justice/policies/privacy/thridcountries/index_en.htm).

- Article 9 of the data protection regulation is applicable to requests for access to documents containing personal data, if the applicant is situated outside the EU.

## V. Conclusion

The right to protection of personal data and the right to public access to documents are two fundamental democratic principles which together enforce the position of the individual against the administration and which normally go along together very well. In those cases in which the underlying interests of these principles collide, a reasonable assessment should be made departing from the fact that both are of equal importance.

The Court in *Bavarian Lager* took an approach to the subject matter which differed from the EDPS' approach set forth in the Background paper of 2005. This additional paper has set forth the EDPS position on the matter following the ruling and provided further guidance as to how to ensure that the data protection rules are complied with while at the same time achieving openness and transparency.

The EDPS is convinced that the interpretation given by the Court will enable the institutions to reach a fair balance between both fundamental principles. However, the EDPS underlines that an effective solution requires a proactive approach to be followed. As has been explained in this additional paper, the EDPS believes that institutions should, as a matter of good practice, take a proactive approach. The EDPS therefore urges the institutions to develop policies on this subject and engage in a constructive cooperation on the matter.

In the longer term, the EDPS maintains that there is a need for a general legal framework which gives more substantive legislative guidance on how to ensure the achievement of a fair balance between the two fundamental principles of data protection and openness. The EDPS therefore urges the EU legislator to continue with the amendment of the public access regulation and develop a legal framework along the lines on which common agreement appears to be within reach.<sup>35</sup>

Brussels, 24 March 2011

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<sup>35</sup> See press release of 30 June 2010, available on the EDPS website (<http://www.edps.europa.eu>).