

Brussels, 9 April 2008
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TO THE PRESIDENT AND THE MEMBERS OF THE COURT OF JUSTICE OF THE
EUROPEAN COMMUNITIES

**RESPONSE TO THE APPEAL AGAINST THE JUDGEMENT OF THE COURT OF
FIRST INSTANCE IN CASE T-194/04**

In Case: **C-28/08P**

Commission of the European Communities

the other parties to the proceedings being

**The Bavarian Lager Co Ltd.
European Data Protection Supervisor**

Lodged by the European Data Protection Supervisor, Rue Wiertz 60, 1047 Brussels

Represented by [REDACTED] and [REDACTED], administrators at the office of the
European Data Protection Supervisor, acting as Agents;

Having chosen domicile in Luxembourg at the Secretariat General of the European
Parliament, L-2929 Luxembourg, and having consented to the fact that notifications be sent to
them by fax at the following number: +32.2.2831950 or by e-mail at the following e-mail
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1 Introduction

1. The present case concerns the appeal of the Commission of the European Communities against the judgement of the Court of First Instance (CFI) of 8 November 2007 in case T-194/04, *The Bavarian Lager Co. Ltd versus the Commission of the European Communities*. The European Data Protection Supervisor (EDPS) had intervened in the case before the CFI, in support of the applicant.
2. On 29 January 2008, the notice of the appeal was served to the EDPS, in accordance with Article 114 of the Rules of Procedure of the Court of Justice. This response is lodged in accordance with the provisions of Article 115 of the Rules of Procedure. The EDPS understands that he is considered to be a party in the procedure before the Court of Justice, in the sense of the Articles 55 and 56 of the Statute of the Court of Justice.
3. In this response, the EDPS concludes that the appeal of the Commission should be dismissed and requests the Court to uphold the contested judgment of the CFI.
4. The pleas in law and the legal arguments of the EDPS concentrate on the balance between the two Community Regulations concerned, namely:
 - a. 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 data¹;
 - b. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents².

In particular, the EDPS will address the issues mentioned in the appeal under II.1 and II.2 with a focus on the interpretation of Article 4 (1) (b) of Regulation No. 1049/2001. The issue mentioned under II.3 of the appeal (the protection of enquiries and investigations) does not - strictly speaking - fall within the mission of the EDPS. However, the EDPS does not share the point of view of the Commission that the CFI erred in law by misinterpreting this exception.

5. This response will discuss the following issues:
 - a. The balance between the two regulations, giving substance to fundamental rights.
 - b. The interpretation of Article 4 (1) (b) of Regulation No. 1049/2001.
 - c. The interpretation of specific articles of Regulation No. 45/2001, in particular Article 5, Article 8 and Article 18.
6. In point 6 of its appeal, the Commission requests that the Court considers this case as a matter of priority and notes in this respect that two cases are pending before the CFI on the same points of law. The EDPS supports this request and emphasises that a final decision on these points of law by the Court of Justice also has great importance for the administrative practice of the institutions. In recent years, the EDPS has been involved in a number of cases - mainly complaints - on the balance between public access to documents and data protection.

¹ OJ L 8, 12.1.2001, p. 1.

² OJ L 145, 31.5.2001, p. 43.

II. The balance between two regulations

II.1 Main considerations

7. The EDPS fully agrees with point 5 of the appeal where it states that the correct balance between public access to documents and the protection of personal data is a key issue for the two regulations. It was indeed the very point of departure clearly taken into account in the contested judgment of the CFI. It strikes the right balance between the two instruments. It makes sense in this respect to recall the main purpose of the intervention of the EDPS in the case before the CFI. This intervention was not aimed at protecting a person against the disclosure of his personal data, but rather aimed specifically at seeking an optimal balance between the protection of personal data and another fundamental interest of the European citizen -that of public access.³ This approach was well reflected in the reasoning of the CFI.
8. This balance is even more relevant since the two regulations give effect to fundamental rights, included in the Charter of Fundamental Rights of the Union. According to Article 8 (1) of the Charter everyone has the right to the protection of personal data concerning him or her. Article 42 of the Charter provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the Union.
9. The EDPS does not agree with the argument of the Commission where it states that the judgement contains certain erroneous conclusions that disturb the balance established by the Community legislator.
10. According to the EDPS, such balance means on the one hand that the institutions and bodies must give the widest possible access to documents. This means:
 - a. Article 2 of Regulation No. 1049/2001 gives persons a right of access to documents, subject to the principles, conditions and limits defined in the Regulation itself (Article 2 (1) of the Regulation). Thus, access to documents of the institutions constitutes the principle and a decision to refuse access is valid only if it is based on one of the exceptions laid down in Article 4 of Regulation No 1049/2001 (point 93 of the contested judgement).
 - b. According to settled case-law, those exceptions must be construed and applied restrictively so as not to defeat the general principle enshrined in that regulation (point 94 of the contested judgement and the case law mentioned in that point).
 - c. A person requesting access is not obliged to state reasons for the application (Article 6 (1) of the Regulation). He or she does not have to demonstrate any interest in having access to the documents requested (point 92 of the contested judgement and the case law mentioned in that point).
11. The difference of opinion between the Commission and the EDPS focuses on point c of the preceding paragraph. According to the EDPS, any requirement from an applicant to demonstrate an interest in access to certain documents would be contrary to the

³ In this context, see the EDPS Background Paper "Public Access to Documents and Data Protection" from July 2005, available on www.edps.europa.eu.

fundamental nature of Regulation No. 1049/2001. According to the second recital of the Regulation 'openness enables citizens to participate more closely in the decision making process'. An approach in which a citizen has to state **why** he wants to participate would unduly restrict the right to access and would deprive Regulation No. 1049/2001 of its substantive content.

12. This is the main reason why the EDPS argues - contrary to the Commission - that Article 8 (b) of Regulation No. 45/2001 can not be interpreted in a way that an applicant for public access is obliged to establish the reasons for access. For this reason, the first issue mentioned in the Summary of the grounds of appeal can not lead to a conclusion that the CFI erred in law (see further points 48-53 of the response).
13. On the other hand, the right to data protection must be respected. This means:
 - a. The right to data protection is closely related to the right to privacy as protected under Article 8 ECHR, but not identical. The protection can extend to areas not covered by Article 8 ECHR, including other fundamental rights such as the right not to be discriminated.⁴
 - b. The protection of personal data is a concept with a wide scope. Pursuant to Article 2 of Regulation No. 45/2001 personal data means any information relating to an identified or an identifiable natural person. Processing of personal data means any operation or set of operations which is performed upon personal data. The wide scope is well illustrated by points 104 and 105 of the contested decision.
 - c. Within this wide scope, an individual is protected against unfair and unlawful processing. The purposes of the processing must be specified⁵. The laws on data protection, such as Regulation No. 45/2001, contain a number of guarantees and safeguards aiming at ensuring the fairness and lawfulness of processing. The main characteristic of the data protection laws is that these laws protect the data subject through a set of checks and balances.
 - d. The laws on data protection do not aim at prohibiting the processing of personal data, except *in principle* for the special categories of data mentioned in Article 10 (1). Neither do these laws foresee a general right for the data subject to consent to the processing or to object to the processing. Consent and objection are important elements within this system of checks and balances, but other legitimate bases laid down by law can also allow for processing.
14. Because Regulation No. 45/2001 protects the data subject by a system of checks and balances, it would be incorrect to conclude - as the Commission does - that the interpretation of Article 4 (1)(b) of Regulation No. 1049/2001 as given by the CFI deprives the reference in that Article to Regulation No. 45/2001 of its *effet utile* (pt. 3 of the Appeal), disturbs the balance between the two fundamental rights and hence undermines the right of privacy itself (pt. 4 of the Appeal), fails to apply the provisions of Regulation No. 45/2001 (heading of II.1 of the Appeal), fails to interpret Article 4 (1)(b) in the light of the fundamental right of data protection (heading II.2.1 of the Appeal), creates a *lex specialis*, contrary to the wording of Article 4 (1) (b) and Regulation No. 45/2001 (heading of II.2.2 of the Appeal) and harms the right to privacy, due to an uncontrolled processing of personal data (pt. 47 of the Appeal).

⁴ See more extensively Par. 3 of the EDPS Background Paper mentioned in Footnote 3 which builds on the findings of the Court in Judgment of the Court of 20 May 2003, Österreichischer Rundfunk and Others, Joined cases C-465/00, C-138/01 and C-139/01, ECR [2003] p. I-4989.

⁵ See, for instance, Article 8 (2), first sentence, of the Charter of Fundamental Rights of the Union.

15. This is the main reason why the second issue submitted by the Commission in its Appeal - the restrictive interpretation of Article 4 (1) (b) of Regulation No. 1049 deprives the reference in that article to Regulation No. 45/2001 of its *effet utile* - can not invalidate the contested judgement. Regulation No. 45/2001 allows and even calls for a nuanced approach as taken by the CFI. In points 131-132, the CFI concludes that the mere participation of a representative of a collective body in a meeting does not lead to an interference of the private life of the persons who participated and would not undermine the protection of that person's private life or integrity. Such an approach fits within the system of Regulation No. 45/2001 since it leads to fair and lawful processing for a purpose that is specified, independently of the precise interpretation of Article 4 (1) (b) of Regulation No. 1049/2001.

II.2 The point of departure for balancing: Regulation No. 1049/2001

16. The point of departure for balancing is Article 4 (1) (b) of Regulation No. 1049/2001. This point of departure is imperative in the present case, which concerns a request for access on the basis of that Regulation. As said before, under the case law of the Court exceptions to the right of access must be construed and applied restrictively. The text of Article 4 (1) (b) of Regulation No. 1049/2001 contains three conditions for refusal (see also Par. III of this response).

17. In its appeal, the Commission heavily criticizes the balancing of the two Regulations in the contested judgement.⁶ For instance, it states that the judgement removes the processing of personal data in public documents from the scope of Community legislation on data protection and, by doing so, creates a *lex specialis*.⁷

18. In the view of the EDPS, this statement does not do justice to the judgement.

19. Contrary to the position of the Commission, the EDPS underlines that in the circumstances of the present case:

- it is relevant that not all personal data are capable of undermining private life when disclosed. With its reasoning on this point, the CFI did not construe "a third category [of data] in the data protection legislation", but simply applied Article 4 (1) (b) of Regulation No. 1049/2001 (points 31-32 of the appeal).
- it is not relevant that the CFI requires 'a proof of harm' contrary to the judgement of the Court in *Österreichischer Rundfunk*⁸. Both cases may concern the disclosure of personal data in a public document, but that judgement of the Court has nothing to do with Regulation No. 1049/2001, which specifically introduces 'harm' as a condition.

20. As a substantiation of its statement on the *lex specialis*, the Commission discusses the meaning of some recitals of Regulations No. 45/2001 and No. 1049/2001. In particular, it points at the second sentence of the 15th Recital of Regulation No. 45/2001. According to the Commission, the Recital was not meant to establish that matters relating to access to documents fall outside of the scope of Community data protection rules⁹ but aims to extend those rules to all activities of the European Union, including Title V and Title VI of the EU-Treaty.¹⁰

⁶ See also point 14 of this response.

⁷ See for instance pt 22 of the Appeal.

⁸ Paragraph 75 of the Judgement cited in footnote 4.

⁹ This is what the CFI laid down in Pts. 99-100 of the contested judgement.

¹⁰ In support of its position, the Commission attached a letter of the President of the Libe-Committee of the European Parliament of 21 September 2000.

21. The EDPS does not share this interpretation of the Commission. Such an interpretation would be incompatible with the unambiguous wording of the second sentence of the Recital itself: access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255 EC. In Points 99-100 of the contested judgement, the CFI rightly puts emphasis on the literal interpretation of the recital.
22. One could argue about the meaning of the final part of the second sentence of the Recital which deals with the application of Community instruments on access to documents on activities that fall outside the scope of Community law.
23. According to the EDPS this may lead to an interesting academic debate, but it is not a relevant question for the analysis of the Court in the present case which does not deal with activities that fall outside of the scope of Community law.
24. As a final observation, the EDPS emphasises in this context that the object of discussion is a recital and has therefore a limited value; it may clarify the intentions of the legislator but does not have a binding nature. It can not define the relation between the two domains of Community law (public access to documents and data protection) also because this relation is clearly laid down in a satisfactory manner in the law itself, in particular in Article 4 (1) (b) of Regulation No. 1049/2001.

III Interpretation of Article 4 (1) (b)

25. As said before, Article 4 (1) (b) of Regulation No. 1049/2001 contains three conditions. In the opinion of the EDPS, public access may only be refused in cases where:
 - a. The privacy and integrity of an individual is at stake. It is clear from this wording that the protected interest is 'privacy and integrity' and not the protection of personal data.
 - b. The result of public access would be that this protected interest would be undermined. This is the 'harm-test' meant in point 19 above.The assessment whether these two conditions are fulfilled should take place:
 - c. in accordance with the Community legislation regarding the protection of personal data.

26. It would be contrary to the case law of the Court requiring that exceptions to public access must be construed and applied restrictively¹¹ to ignore two of the conditions and to base a refusal solely on the third element of the provision, namely that access would not be in accordance with the Community legislation regarding the protection of personal data. This is basically the position of the Commission in the present case, with which the EDPS disagrees. Indeed, had such a result been envisaged by the Community legislator, then the wording of the exception to public access in Article 4 (1) (b) could and should have been different and only refer to the Community legislation regarding the protection of personal data.

27. The CFI applied Article 4 (1) (b) as follows: "in order to be able to determine whether the exception under Article 4 (1) (b) of Regulation No 1049/2001 applies, it is necessary to

¹¹ See point 10 above.

examine whether public access [to the names of the participants at the meeting of 11 October 1996¹²] is capable of actually and specifically undermining the protection of the privacy and the integrity of the persons concerned"¹³. As part of its assessment, the CFI scrutinised a number of articles of Regulation No. 45/2001. It set out that Regulation No. 45/2001 does not prohibit disclosure of the data in the present case.

28. According to the EDPS, the CFI applied Article 4 (1) (b) in a right and balanced way. The CFI recognises the particularity of Article 4 (1) (b) that contains three conditions, but not all of the same nature. This is an important reason why the EDPS asks the Court to uphold the contested judgement.
29. This being said, it is useful to shortly discuss these three conditions, starting with the concept of 'privacy and integrity' (condition a). In the first place, the term 'integrity' does not have added value in the present context. It is not easy to see how disclosure of personal data in a public document can harm a person's integrity but not his privacy.¹⁴ In the second place, respect for private life or privacy is defined under Article 8 ECHR and elaborated by the European Court of Human Rights. Privacy does not exclude professional activities¹⁵. In the third place, disclosure of a name as such entails the processing of personal data, but does not necessarily have an impact on the privacy of the individual.
30. In *Österreichischer Rundfunk and Others*¹⁶, 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. However, the fact that privacy is not at stake does not mean that data protection law does not apply either. The fact that data protection is a wider concept is illustrated by the case law of the Court, for instance¹⁷:
 - data which relate both to the monies paid by certain bodies and the recipients, constitute personal data within the meaning of Article 2(a) of Directive 95/46, being information relating to an identified or identifiable natural person.¹⁸
 - the same applies to the names and addresses of certain users included in a database of a commercial company whose activities include the provision of internet access services.¹⁹
31. It is fully in line with this case law that the CFI concludes in the contested judgement that the list of meeting participants appearing in minutes contain personal data (Par. 122 of the judgement), but that the disclosure of those names does not lead to the interference of the private life of the persons concerned (Par. 132 132 of the judgement), in a case where persons act in a professional capacity.
32. The second condition in Article 4 (1) (b) - the condition of undermining - does not need to be examined in the present case, where privacy is not at stake. However, should the Court

¹² The facts of this case are put between square brackets by the EDPS. They do not play a role in this appeal on points of law.

¹³ Point 120 of the contested judgement.

¹⁴ The concept of integrity is discussed in p. 19 of the EDPS Background Paper cited in Footnote 3.

¹⁵ See e.g. *Amann vs. Switzerland*, Judgment of the ECHR of 16 February 2000, no. 27798/95, Reports 2000-II, Par. 65.

¹⁶ See footnote 4; pt. 74 of the judgement.

¹⁷ See more in general: Opinion N° 4/2007 on the concept of personal data by the Article 29 Data Protection Working Party, of 20 July 2007, available on the website of the Commission (DG JLS).

¹⁸ Case *Österreichischer Rundfunk and Others*, pt. 64.

¹⁹ Judgement of the Court of 29 January 2008, Case C-275/06, *Promusicae*, p. 45.

take the opposite point of view, namely that the first condition would be fulfilled and 'privacy and integrity' would be at stake, the EDPS argues that in that case the privacy (and integrity) of the persons concerned may be at stake but would not be undermined. 'Undermining' supposes that the persons concerned are actually and specifically affected (point 120 of the contested judgement). Only under such circumstances should public access be denied. A balance between the right to public access and the right to data protection should be found respecting the principle of proportionality. In the context of the present case, the disclosure of names of persons acting in a professional capacity does not normally harm the persons concerned in an actual and specific way.

33. The third condition "in accordance with the Community legislation regarding the protection of personal data" is of a different nature. According to the EDPS it is not an additional requirement for the refusal of public access, but it indicates how the Community institutions should assess whether the privacy of an individual would be undermined, if access to a public document would be given under Article 4 (1) (b) of Regulation No. 1049/2001. The EDPS emphasises that Regulation No. 45/2001 is an appropriate instrument for such assessment, since it does not prohibit the processing of personal data but it frames the processing of personal data within a system of checks and balances.
34. The text of the provision "IN PARTICULAR in accordance with" entails that Community legislation on protection of personal data sets principles that should be considered, among others, in the assessment of the prejudice to the privacy of the data subject. In this regard, the EDPS agrees with the reasoning of the CFI in points 101- 103. The provisions of data protection legislation would only become relevant with a view to refuse access pursuant to Article 4 (1) (b) to the extent they show a concrete harm to the privacy of the concerned person.
35. For example, according to the data protection principles, processing of certain personal data, such as those data referred to by Article 10 of Regulation No. 45/2001 ("sensitive data") are likely by themselves to affect the privacy of the individual. To follow this example, if the Commission were about to disclose sensitive data in the context of a request for access, the principle laid down in Art. 10 would indicate that it is very likely that the privacy of the data subject would be undermined.
36. However, as said before: disclosure of a name as such entails the processing of personal data, but does not necessarily have an impact on the privacy of the individual. To conclude, the EDPS supports the interpretation of Article 4 (1) (b) of Regulation No. 1049/2001, in particular as summarized in point 120 of the contested judgement.
37. It is essential that the CFI assessed the provisions in Regulation No. 45/2001 that possibly could prohibit disclosure.

IV Relevant provisions in Regulation No. 45/2001, in particular Article 5, Article 8 and Article 18.

38. In Point 12 of the appeal the Commission states that the need to establish that the processing of personal data is necessary for a legitimate purpose is one of the core provisions of all Community legislation on data protection. The EDPS underscores this statement. It is basically this notion that frames the processing of personal data within a

system of checks and balances. However, contrary to the position taken by the Commission, the EDPS is convinced that the CFI interpreted the relevant provisions in Regulation No. 45/2001, (in particular Article 5, Article 8 and Article 18) in conformity with the content and purposes of those provisions.

Article 5

39. Article 5 of Regulation No. 45/2001 lays down a series of criteria for making data processing legitimate. It lists the legal grounds on which the processing of personal data should be based in order to be considered lawful.
40. It is in the context of the present case before the Court significant that the Commission proposal that led to Regulation No. 45/2001²⁰, deliberately chose, with regard to (the later) Article 5 of Regulation No. 45/2001, to change the order in the list of the criteria established by Article 7 of Directive 95/46/EC, by putting in the first places the criteria likely to have a bigger practical importance, i.e. the performance of a task carried out by Community institutions and bodies and the necessity to comply with a legal obligation. In this context the Commission explicitly clarified that "the data subject's consent (...) should not in practice be the criteria most often applied in order to make processing legitimate".
41. This is exactly the case when it comes to access to documents. As the CFI correctly stated in Par. 106 of its judgement, pursuant to Article 5(a) or (b) of Regulation No. 45/2001, the processing of personal data is lawful when it is necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation to which the controller is subject. In this case, the right of access to documents of institutions laid down by Regulation No. 1049/2001 constitutes a legal obligation that makes communication of personal data contained in those documents lawful pursuant to Article 5(b) of Regulation No. 45/2001.
42. Therefore, the consent of the data subject is not necessary with a view to granting access to a document containing his or her personal data, provided that the access is necessary to comply with the legal obligation established by Regulation No. 1049/2001. In other words: when it comes to the way EU institutions process data for the public interest of the transparency of decision making and the participation of the citizen, the consent of the citizen does not constitute the appropriate legal basis for processing.

Article 18

43. However, as stated both by the CFI and by the Commission²¹, since the legal obligation laid down by Article 4(1) (b) is not unconditional, the data subject pursuant to Article 18 still enjoys a right to object, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her.
44. The EDPS agrees that the data subject has a right to object, but notes that this right is not absolute. Article 18 should be considered in the context of the relation with Regulation No. 1049/2001 and can not be interpreted as a way to reintroduce the need for consent by any person concerned in any case in which access to document involves disclosure of

²⁰ See COM (1999) 337 final, published in OJ (1999) 376, p.24 E; specifically the comments of the Commission on the articles, p. 39 of the proposal.

²¹ Respectively in Point 120 of the contested judgement and Point 16 of the appeal.

personal data. It should also be noted that the text of Article 18 (a) itself mentions exceptions to the right to object. The case of processing for compliance with a legal obligation to which the controller is subject is such an exception.

45. According to the EDPS²², the Community institution or body involved should ask the opinion of a data subject before deciding on disclosure, when it is likely that the privacy of the data subjects could be substantially affected by the disclosure of a document. It is for the data subject to object by putting forward the "compelling legitimate grounds relating to his or her particular situation" on which the objection is based. However, even in this case, the access to document could not be conditional upon the positive opinion of the concerned person, since this opinion will constitute only one of the elements to be taken into account by the authority that has to decide on the basis of Article 4 (1) (b) of Regulation No. 1049/2001.
46. In this context, it should also be taken into account that the scope for objecting to the processing of personal data is very limited in the framework of a public activity, such as in a case where a person is taking part in a public meeting as representative of an organization. Indeed, in these cases it is highly unlikely that the disclosure would undermine the privacy of the data subject.
47. Against this background, the EDPS supports the judgement of the CFI where it states (in Point 110) that a person's objection cannot prevent a communication of personal data pursuant to Regulation No. 1049/2001, unless this communication would undermine the privacy and the integrity of the individual concerned.

Article 8

48. The EDPS stresses again that on the basis of Regulation No. 1049/2001 it is not for the applicant to justify a specific interest in having full access to a document containing personal data. In this regard, the interpretation of Article 8 of Regulation No. 45/2001 is a key issue. In particular, letter b) of this Article establishes that the transfer of personal data to recipients subject to Directive 95/46/EC should be subject to a two-pronged test: the recipient shall establish the necessity of having the data transferred and there should be no reason to assume that the data subject's legitimate interests might be prejudiced.
49. With regard to the necessity to have data transferred, the EDPS submits that in this case the necessity should be considered as stemming from the right to request access to documents, granted by Article 255 EC and implemented by Regulation No. 1049/2001. Indeed, in this case, the applicant requests documents that are necessary to exercise his right to control and take part in the decision making process of EU institutions.
50. Therefore, as the CFI correctly states, the applicant "does not need to prove the necessity of disclosure for the purposes of Article 8 (b) of Regulation No. 45/2001"²³. On the contrary, if a person requesting access would be asked to justify an additional and specific necessity, beyond the interest of having access to certain documents in compliance with Regulation 1049/2001, both Article 6 (1) and Recital 15 of Regulation No. 1049/2001 would be deprived of their *effet utile*.
51. With regard to the second part of the test, relating to the possible prejudice to data subjects' legitimate interests, the EDPS agrees with the CFI that if the privacy and the

²² See also EDPS Background Paper, p. 31

²³ Point 107 of the contested judgement.

integrity of the individual are not undermined, a disclosure of personal data in the context of access to documents cannot in principle prejudice the legitimate interests of the person concerned.

52. Finally, the EDPS strongly disagrees with the Commission position²⁴ that the CFI interpretation would prevent the applicability of Article 9 of Regulation No. 45/2001, concerning transfers to recipients in third countries, in the framework of requests of access to documents. Also in this case, as mentioned with regard to Article 8, a careful assessment of the harm caused to the privacy of a data subject in a specific case should be carried out. The principles laid down by Article 9 will be part of this assessment. However, with regard to Article 9, the EDPS notes that there is an important difference. For Article 8, harm to privacy cannot easily be assumed, since the transfer occurs to a recipient which is subject to Directive 95/46/EC. The recipient is therefore bound by the provisions of the Directive when he envisages further processing of the personal data. Giving public access to a document containing personal data does not mean that the personal data are disclosed universally, *urbi et orbi*, as the Commission names it. The Community institution or body giving access upon a request has a margin of appreciation. It may choose to actively put the document in the public domain (for instance on its website) but it can also just send a copy to the applicant.
53. On the contrary, when it comes to article 9, the transfer to recipients which are not subject to directive 95/46 is more likely to entail a harm to privacy, if safeguards to ensure adequate protection are not taken, and thus to fall within the exception of Article 4 (1) (b).

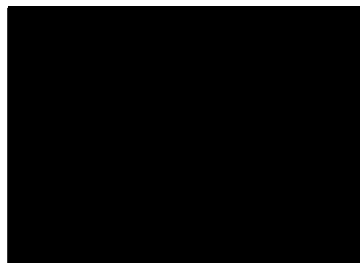
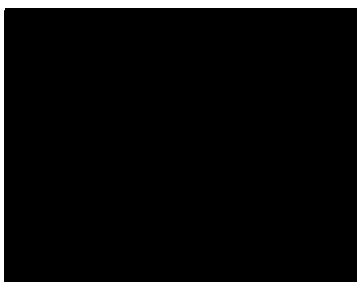
V Conclusion

54. In this response to the appeal, the EDPS put forward a number of arguments that unavoidably lead to the conclusion that the CFI interpreted Article 4 (1) (b) in a way that fully respects the necessary balance between the right to public access and the right to data protection. The EDPS stresses again that the correct interpretation of Article 4 (1) (b) is the test whether the disclosure undermines the privacy of the concerned person, as is clearly laid down in the text of the article itself.
55. In points 57-59 of its appeal, the Commission proposes that personal data in documents should be disclosed when "there is a public interest in disclosure of the personal data". This EDPS objects to this approach, which would substitute the "harm to privacy" test laid down by Article 4 (1) (b) of Regulation No. 1049/2001 with a "public interest in disclosure" test which is not laid down neither in Article 4 (1) (b) nor in Article 8 of Regulation No. 45/2001 and which would result in a strong limitation of the right to access to documents, depriving it of its main content.
56. In addition, the EDPS finds that the Commission reasoning in points 60-63 of its appeal - concerning the possible use of Article 5 (a) Regulation 45/2001 to obtain access to personal data in public documents - is far from being clear and concretely applicable, especially when it should be applied to applicants that are not "data subjects" pursuant to Regulation 45/2001.

²⁴ Par. 14 of the appeal.

57. Therefore, the construction proposed by the Commission in paragraph II.2.5 of its appeal does not provide an acceptable and viable alternative to the interpretation given by the CFI.

58. In the light of the foregoing, the EDPS respectfully recommends the Court to uphold the contested judgement.



Annex: power