

Seminar "Transparency and Clear Legal Language in the EU"

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"The relation between transparency and the rights of privacy and the protection of personal data"

Peter Hustinx

European Data Protection Supervisor

Ladies and Gentlemen,

Let me first of all thank the Swedish presidency for inviting me to this seminar on transparency and clear legal language in the EU. There seems to be no better place to discuss issues of transparency than here in Sweden, a country with a long tradition in transparency and an inspiration for many others in this area. In my contribution, I will focus on the *interface* between transparency on the one hand, and privacy and data protection on the other. Sweden has also played a pioneering role in this second field.

By way of background, I would like to spend some time on what is at stake in this interface.

1. Transparency and data protection: two fundamental values

There can be little doubt about the importance of transparency in the public sector. Transparency is one of the fundamental values of modern democratic societies which are covered by the rule of law. The principle is ensured and elaborated in many legal instruments. Let me just mention a few of them.

In Europe, the principle of transparency can be found in many national constitutions, and almost all EU member States have adopted freedom of information acts which elaborate the more specific right of access to information.

The European Court of Human Rights has recently taken some steps towards recognising such a right under the right to freedom of expression as contained in Article 10 of the European Convention on Human Rights. And less than three months ago, a Convention on Access to Official Documents was opened for signature at the Council of Europe and already signed by 12 Member States, among which Sweden.

At the level of the EU, transparency is a key principle which is reflected in Article 1 of the EU Treaty stating that 'decisions are taken as openly as possible'. The right of public access to EU documents was furthermore recognised as a fundamental right in 2000 when the EU Charter of Fundamental Right was solemnly proclaimed. The right can also be found in Article 255 of the EC Treaty which constitutes the legal basis of Regulation 1049/2001 on access to documents of the institutions. In the near future, depending obviously on the outcome of the Irish referendum early next month, the transparency principle and the public access to documents will become even more visible and prominent with the entry into force of the Lisbon Treaty. And the EU Charter of Fundamental Right will furthermore become legally binding.

The importance of transparency and the fundamental status of the right of public access to information is thus well-established. This does of course not mean that all information should be out in the open. There are certain interests which justify keeping some information undisclosed. Some of those interests are protected as fundamental rights as well and they are at the heart of my daily work as EDPS: the rights to privacy and the protection of personal data (or data protection).

The rights to privacy and data protection have the same fundamental value as the right of public access to information. Most of the instruments just mentioned recognise the right to data protection as well, either alone or as part of the right to privacy. The right can be found in national constitutions and secondary legislation. It is developed by the Court of Human Rights under Article 8 of the European Convention on Human Rights and already in 1981 a Convention on data protection was adopted in the context of the Council of Europe. The right to data protection is furthermore contained in the EU Charter of Fundamental Rights next to the right to privacy. However, the right to data protection as such cannot be found in current EU or EC Treaties. This will change once the Lisbon Treaty enters into force.

Although both well established fundamental rights normally go along without any problems, situations do occur in which both rights represent contradicting interests. One can easily think of examples: a citizen requesting disclosure of the medical file of a civil servant, or a newspaper wanting to have insight in the expenses of a member of a national or the European Parliament. In fact, with regard to all documents held by the government which contain personal information, even if it is only the name of an individual, both fundamental rights can be in conflict with each other.

A choice between these underlying interests then needs to be made. This choice must reflect the outcome of a proper balancing test. In general, finding the right balance between two conflicting fundamental rights can best be done in a concrete situation, thereby taking into account all the relevant circumstances. What at first sight seems to be an obvious result of a balancing test can - under certain circumstances - turn out differently. The legislator can of course not predict and address all these specificities.

However, in the case of public disclosure and data protection, I believe that some direction can already be given at a general level, which means: by the legislator. To put it more firmly, the legislation which contains further rules on public access to information and data protection must in my view present a clear framework within which a proper balance is or can be achieved.

Such a framework offers the citizens the necessary legal clarity and certainty and should prevent two risks. The first is that individuals are disproportionately affected by the public disclosure of their personal data. The public disclosure of a medical file of a civil servant, for instance, should normally not be allowed. The second risk is that data protection rules are used to unjustifiably prevent openness. I noticed that this risk is more or less addressed in Article 8 of the Swedish Data Protection Act, stating that “The provisions of this Act are not applied to the extent that they would limit an authority’s obligation under Chapter 2 of the Freedom of the Press Act to provide personal data”. Members of a parliament should normally not be allowed to keep their expenses secret based on data protection considerations.

Especially at EU level, practice has proven that unclear legislation on this matter leads to uncertainty, ongoing discussions and perhaps abuse of rules. From the moment that I took office in 2004, I have invested considerably in this subject and have tried to contribute to the establishment of a satisfactory framework by publishing practical guidelines, presenting observations in the leading Court case on the issue (the Bavarian Lager Case), and by participating in the ongoing debate on the recast of the EU regulation on public access to documents.

I now want to elaborate further on the framework which the law should provide. In that context, an important role should be reserved for the notion of 'privacy'.

2. Achieving the right balance: using the privacy notion

As said, when the public disclosure is requested of a document held by the government containing personal information, different interests are at stake. On the one hand, the interest of transparency, which is to enable the citizens to scrutinise what the government is doing, which in its turn enhances trust in the government and the legitimacy of its acts. On the other hand, the interest of a specific individual to determine what information about him or her becomes public or is kept secret. In this respect, however, one must bear in mind that data protection legislation does *not* grant individuals full and absolute control over their personal data.

At this point, I would like to underline the distinction between privacy ('protection of private life') and data protection ('protection of personal data'). Although both rights are closely related and even partly overlapping, they are not the same. Proof of this can be found in the EU Charter of Fundamental Rights, in which the two rights stand next to each other (Articles 7 and 8). The right to privacy is in the first place a 'negative' right: one should abstain from interfering with the right to privacy, unless the interference is foreseen by law and necessary for a justified purpose. The right to data protection rather is a 'positive' right. The rules on data protection must be understood as reflecting a system of checks and balances. It sets conditions to the use of personal data, whereas it contains specific rights and obligations, procedures and oversight mechanisms.

The distinction between the protection of privacy and the protection of personal data has practical consequences. Although there is a big overlap, not all situations which are covered by data protection law, are necessarily covered by the protection of privacy as well. This can be derived from the case law of the European Court of Human Rights. In general, the Court has given a broad interpretation to 'private life'. It may for instance also cover parts of someone's 'professional life'. However, the interpretation given to 'private life' is not unlimited. The Court has, for instance, repeatedly stated that the public disclosure of information about politicians or other public figures by newspapers not always interferes with the privacy protection of these persons. Of course, in the famous case of the princess of Monaco, Caroline von Hannover, the Court of Human Rights established that public figures are not deprived of a right to privacy. Even when you are famous you have a legitimate privacy expectation. However, in general, public figures can expect the public disclosure of information which relates to the performance of their official function or their public tasks or role.

The applicability of the data protection rules on the other hand is not dependent on what people can expect about what happens with their information. This expectation can play a role in determining whether the processing of this information is allowed according to the rules, but it does not deprive the person involved from his or her rights and remedies granted to him or her by the data protection rules. The data protection rules apply to all the (automatic) processing of any information relating to an identified or identifiable natural person.

Still, the privacy notion can be helpful when addressing situations in which data protection rules come into conflict with competing obligations stemming from another fundamental right, such as the right of public access to information.

In my view, a balanced approach should focus on public access and *privacy* rather than on public access and *data protection*, without, of course, ignoring the latter. I take this position, because it is precisely in situations where the privacy is not at stake that it is felt unreasonable, or even abusive, to come up with a strict application of the data protection rules. Or, to put it in terms of underlying interests, in these situations the interests of transparency clearly prevails over the interest of the person involved.

A focus on the right to privacy furthermore offers a clear opportunity to strike a balance between the different interests when the privacy is at stake, whereby the more elaborated rules on data protection are taken into account. Also in cases which fall within the scope of privacy protection the interests of transparency can prevail. As said, the 'negative' right to privacy allows for interference if this is necessary for a legitimate purpose. The outcome of this test, however, fully depends on the specific circumstances of a concrete situation. For such cases, the legislator should leave room to the administrative authorities to make this concrete assessment which will be done if the law contains a reference to the right to privacy.

Although the focus on privacy rather than data protection already frames the way in which the collision with transparency rules is dealt with, a general reference to privacy only will, in my view, not provide for sufficient legal certainty and clarity.

Let me now turn to the discussion at EU level to better clarify these reflections.

3. The current discussion at EU level

In the earlier mentioned Regulation 1049/2001 on public access to documents, reference is made to both privacy and data protection. The wording used is rather ambiguous. The meaning of the privacy notion is therefore subject to debate which created confusion and led to the *Bavarian Lager* case. For the time being, the Court of First Instance created some clarity.

For those of you that are not familiar with the facts of this case, it concerned a request for access to minutes of a Commission meeting, which was attended by Commission officials, representatives of the UK government, and representatives of a business association. Since the latter people refused the disclosure of their names in the minutes, the Commission only released the minutes after blanking out these names thereby basing itself on data protection legislation.

In November 2007, the Court of First Instance delivered its judgment. It rejected the position of the Commission and put the emphasis on the privacy of the persons

involved. It stated that “the mere fact that a document contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected, even though professional activities are not, in principle, excluded from the concept of ‘private life’” and it decided that the disclosure of the names “did not affect the private life of the persons in question”.

The Commission disagreed with the Court of First Instance and appealed to the Court of Justice. This means that a final decision on how the current legislation must be applied is still to be expected. Next month, on 15 October, the Advocate-general will publish her opinion and a judgment will hopefully follow soon afterwards.

Although, at least for the time being, the current rules are interpreted by the Court of First Instance in a rather satisfactory way, the current discussion on the recast of the public access regulation should in my view be used as an opportunity to set things straight and to provide the citizens with more clarity on the matter. This means, first of all, that the legislator should indeed put the focus on privacy without using the current ambiguous language. However, such a general reference is not enough.

To enhance legal certainty and clarity, I would be in favour of a more detailed provision, as I extensively explained in my opinion of 30 June 2008 on the Commission's recast proposal. This opinion can be found on the EDPS website. To summarise very briefly: the provision that I developed puts the emphasis on privacy [and integrity], but furthermore specifies situations in which disclosure of the information will normally not harm the privacy [or integrity] of the person involved. Information must be disclosed, for instance, if it solely relates to the professional activities of the person concerned or if it has already been published with the consent of the person involved. Defining these specific situations in my view enhances legal certainty and prevents the possibility of abuse.

I was of course very pleased to see that the European Parliament, on 11 March 2009, adopted amendments which changed the Commission proposal in accordance with the lines set out in my opinion of June 2008.

At this stage, I can only hope that in the political turmoil surrounding the discussion on the recast of the transparency Regulation, the intention to properly regulate and address the interface with the data protection rules is upheld, preferably in line with the amendments adopted by the Parliament.

4. Conclusion

Let me sum up. Finding the proper balance between the different interests underlying the fundamental values of transparency and data protection is a complicated and delicate subject. As explained, in finding the right balance between public disclosure of information and the protection of personal data, the distinct notion of 'privacy' can play a guiding role.

It is in any case not a problem which solves itself. The legislation which contains further rules on public access to information and data protection must in my view provide for a clear framework within which a proper balance is or can be achieved. If this is properly done, it will prevent the risk of abuse of rules but will also create legal clarity and certainty to which the citizens of Europe are entitled.

In other words, what is required from the Swedish Presidency is political leadership and clear legal language to ensure a good balance.