

European Parliament, LIBE Committee

Presentation of Background Paper "Public Access to Documents and Data Protection"

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Mr. President, Members of LIBE,

It is with great pleasure that I am here to present my paper on public access and data protection, to be published today. This paper is the first in a series of background papers in which I intend to address fundamental subjects related to data protection.

These papers will clarify how I will interpret and apply some important Community provisions in this area. By writing such papers, I hope to contribute to good governance of the Union and to the effective protection of the fundamental rights of the European citizen.

And of course, by presenting papers like this I intend to fulfil my assignments as European Data Protection Supervisor in an optimal way, in addition to checking data processing systems and advising on new legislation. So, if everything goes according to plan, you will see me more often on occasions like this.

This paper on public access and data protection is about two fundamental rights. Citizens have a right of access to documents of EU-institutions. Equally, citizens enjoy protection of their personal data.

But what happens when those data are part of a document, which happens quite often since all references to individuals are regarded as personal data? Would this mere reference prevent the disclosure to other persons who exercise their democratic right

of access? Would this mean that these references always have to be erased from a document?

The answer to this question is of course no: we do not need and do not want the automatic refusal of access if a document contains personal information. And this is one of the reasons why our paper is useful.

As I said: two fundamental rights. The intersection between these two rights has always been perceived as a difficult area: on the level of the institutions, but also within the member states. We want the political process to be public and transparent, but we also want to protect the privacy and the integrity of the individual.

The Community legislature has acknowledged the problem and has provided for exceptions to the right to public access as well as to the right to data protection, in case both fundamental rights might collide. However, these exceptions do not determine how to act in specific cases.

This subject has been much discussed, but not yet condensed into one comprehensive document. This is what I do now.

My aim is to provide a pragmatic, informative and practical approach, which contributes to good governance and the best protection of both fundamental rights. Of course, the paper gives my interpretation of the area, which I cannot impose on anyone. However, I intend to follow this approach in individual cases before me, and I recommend it to others.

This brings me to the substance: Regulation (EC) 1049/2001 provides for the 'widest possible public access' to documents of the European Union. The number of exceptions to the citizens' right of access is limited.

The Court of Justice formulates it as a 'right to information', a right that is conferred to every citizen of the European Union and to anyone else residing within the Union, independent of who he or she is, or for what reason he or she wants the information.

Exceptions to that right, guaranteed by the Treaty, must be interpreted and applied strictly.

This right is, of course, not unlimited. The relevant exception discussed in the paper has been laid down in Article 4(1)(b) of the Regulation: access must be refused 'if disclosure would undermine the protection of the privacy and integrity of the individual, in particular in accordance with Community legislation on protection of personal data'.

I will come back to these criteria, which build the core of my analysis. At this point, let me make some basic remarks on data protection, privacy and integrity.

- I say nothing new by stating that data protection can have a wider implication than only the protection of privacy. Within the context of the subject of today: a public document can include personal data, but not affect the privacy of the persons mentioned. The name of a Member of the Commission is regarded as personal data, but mentioning the name in a document has nothing to do with privacy. When we talk about the 'Bolkestein-directive', no one's privacy is at stake.

- Privacy in itself is difficult to define, since it depends on time, place and expectations of people. We know this, and at this point I want to say in the first place, it has a broad scope which also extends to the workplace, and secondly: principles of data protection have been developed in order to cope with such uncertainties and to provide a consistent framework.

This brings me to the analysis itself, in case personal data are part of a public document.

We propose a case-by-case approach that takes all elements into account, and defines a concrete and individual examination based on the following three questions:

- 1) Is the privacy of a person whose data are mentioned in a document at stake?
- 2) Would he or she be substantially affected by disclosure?
- 3) Is public access allowed by data protection legislation, in particular by Regulation (EC) 45/2001?

Question 1: As we have seen, personal data is not identical to privacy, which I see as a qualified interest of the data subject: if sensitive data are involved (like his medical

file), his honour and reputation are at stake, or confidential personal information might be disclosed, then privacy is at stake. In case of officials of a public body - this certainly applies to higher officials of the institutions - there is a high degree of public interest in what they do in their job. As a consequence, they can not easily invoke their right to privacy, and in any case, they have no general right to be anonymous.

Question 2: A substantial harm to privacy is needed. It is interesting to know if the data at stake have already been made public. In that case, normally there is no substantial harm to privacy.

By the way, we recommend decision-makers to contact data subjects for their opinion before deciding whether to disclose or not.

Question 3 was on the requirements of the data protection legislation.

Firstly, disclosure must be compatible with the purposes of collection of the data: how could the data subject reasonably understand the purpose, when he for instance filled a form as part of his application to a post at an institution? Could he expect that the data on the form were to be kept confidential, even if someone else - like a competitor for the post asks for them? The answer is not always evident.

Secondly, disclosure must be proportional. This means:

- What kind of harm would disclosure lead to?
- Will information be published, or 'only' handed over to the applicant?
- If it is disproportionate to disclose the full document: is partial access - with deletion of the names of the persons mentioned in a document - an acceptable solution?

We conclude our recommendations in the paper with two effective approaches:

The first one is what we call 'the proactive approach': Make clear in advance to the data subject what data are subject to disclosure. Of course, this is only acceptable if this approach is legitimate and reasonable to data subjects: if someone is obliged to provide information, it is not always as simple as announcing that the data will be made public.

A proactive approach can take several forms: an organisation can establish clear procedures, reliable ICT-systems or effective internal rules.

The second effective approach is 'partial access' which I have just mentioned. I want to emphasise that this is an exception to the general rule of public access, forced by the right to information. Another point I want to emphasise is that deleting the reference to persons is only useful if the personal data in question is not the primary source of interest of a document. This is of course not a good approach, if a member of the public asks for a list of names.

Let me conclude my introduction. I hope that I did not discuss this difficult subject in a too academic or theoretical way. This is in any case not what we meant by elaborating this subject. And exactly for these reasons, the paper we now launch is not purely theoretic or academic, but also presents practical examples (to be used as best practices) and ends with a checklist, to be used by decision makers.

I thank you for the time and attention you reserved for this subject, which may not be as spectacular and urgent as many of the other subjects you have to deal with, but continues to be highly relevant. Moreover, I hope to have demonstrated that this is a subject with practical importance, for people within the institutions who have to decide on the disclosure of documents to the public, and also for the democratic life of the Union, good governance and the respect of fundamental rights, which certainly affect all European citizens.