



Universiteit  
Leiden  
The Netherlands

**Toegang tot documenten en bescherming van persoonsgegevens in de Europese Unie : over de openbaarheid van persoonsgegevens**  
Kranenborg, H.R.

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## Summary

### ACCESS TO DOCUMENTS AND DATA PROTECTION IN THE EUROPEAN UNION – ON THE PUBLIC NATURE OF PERSONAL DATA

#### INTRODUCTION

In September 2002, the European Ombudsman sent a letter to Romano Prodi, the former president of the Commission, in which he stated the following:

‘The European Ombudsman is concerned that data protection rules [...] are being diverted from their proper purpose of helping to ensure respect for the individual right to privacy as laid down by Article 8 (1) of the European Convention on Human Rights: *Everyone has the right to respect for his private and family life, his home and his correspondence*. Instead, they are being used to undermine the principle of openness in public activities’.<sup>1</sup>

According to the Ombudsman, it seemed that the European Institutions believed that a general right to anonymously participate in public activities existed, and he provided the Commission President with a few examples. One of them was the refusal of the Commission to disclose the names of participants of a meeting organised by the Commission in connection with a possible infringement procedure against the United Kingdom. Andrew Ronnan, director of Bavarian Lager Company, had asked for the disclosure of these names, because he suspected that some of the persons present during the meeting were connected to corruption in the UK. He received the minutes of the meeting, but the names of the participants were blanked out. Andrew Ronnan based his request for access on Regulation 1049/2001 in which the rules on access to documents are laid down.<sup>2</sup> The Commission’s refusal was based on Article 4(1)(b) of this regulation, which reads as follows:

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1 Letter of the European Ombudsman, Jacob Söderman, of 30 September 2002 (to be found at <http://www.ombudsman.europa.eu/letters/en/default.htm>, italics in the original document).

2 Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 on public access to European Parliament, Council and Commission documents (OJ 2001, L 145/43).

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

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

The Community legislation referred to in this Article mainly consists of Regulation 45/2001 on the protection of personal data processed by the European institutions.<sup>3</sup> According to the Commission this regulation prohibited the disclosure of the names. Ronnan brought the case before the Court of First Instance (CFI), pleading that the Commission misinterpreted Article 4(1)(b) of regulation 1049/2001. During the proceedings he was supported by the European Data Protection Supervisor (EDPS). This supervisor was created in 2004 and had published a background paper on the reconciliation of the rules on access to documents and data protection.<sup>4</sup> The EDPS intervened in Ronnan's case and criticised the restrictive data protection approach of the Commission. At the time this study was concluded, the *Bavarian Lager*-case was still pending.

The case of Andrew Ronnan is a clear example of how two rights can collide. Andrew Ronnan invoked his right to access to documents, whereas the Commission based itself on the right of the participants of the meeting to protection of their personal data. These two rights have the opposite point of departure. Access to documents implies publicity, whereas data protection implies secrecy. For this reason, it is obvious that the two rights can conflict. When the legislator elaborates these rights in secondary legislation, the potential collision must be taken into account. Although at first sight the above cited Article 4(1)(b) of Regulation 1049/2001 seems to deal with the issue, the legal framework it sets out read in conjunction with the data protection regulation is far from clear. That is why the Commission on the one hand, and Ronnan, the Ombudsman and the EDPS on the other hand can defend opposite approaches with solid arguments derived from the current legal framework.

The subject of this research is the tension between access to documents and data protection in the European legal order. It concentrates on answering the following question: *How should access to documents and data protection be reconciled in the EU legal order?*

The study starts with providing the reader with an overview of the history, substance and application of both regimes in the European legal order. This descriptive and critical analysis mainly focuses on the EU, but also pays attention to developments within the Council of Europe which are of clear signi-

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3 Regulation 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 data (OJ 2001, L 8/1).

4 EDPS, *Public access to documents and data protection*, Background Paper Series, July 2005, (to be found at <http://www.edps.europa.eu>).

ficance for the EU legal order. This overview constitutes the legal basis for the remainder of the research in which I develop a proposal on how both rights could be reconciled in law, either at the EU level or at the level of the Member States.

It is argued that within the EU legal order both rights are established at the highest legal level; the level of primary law. From this it follows that there is no hierarchical order between the two. In order to reconcile these equally important rights, the underlying interests have to be defined and balanced. This exercise permits me to establish *in abstracto* when the result is clearly disproportionate. It is also possible to define limits to the way in which the two regimes can be reconciled by the legislator. This allows me to present my views on how the balance between the underlying interests should be struck. I drew inspiration from case law of the European Court of Human Rights and the European Court of Justice, from opinions of the different actors involved in the *Bavarian Lager*-dispute, from the national legislation and relevant case law of the EU Member States and from the doctrine. Since in the EU the current legal framework is unclear and therefore far from ideal, I translate my views into a concrete amendment of regulation 1049/2001. This is timely since the discussion on the revision of the regulation was opened in April 2007 and the issue on the reconciliation of access rules and data protection rules is one of the main points of discussion.<sup>5</sup>

#### THE RULES ON ACCESS TO DOCUMENTS AND DATA PROTECTION IN THE EU AND THE COUNCIL OF EUROPE

The most important instrument regarding access to documents in the Council of Europe is a non-binding Recommendation adopted in 2002 by the Committee of Ministers.<sup>6</sup> At the moment this research was concluded, there was discussion with regard to the possible transformation of the Recommendation into a legally binding convention. In the EU, Regulation 1049/2001 is the main instrument on access to documents. The right to access to documents, as part of transparency of governance, promotes two main interests: the democratic legitimacy of acts of government and the control of government. These interests can be inferred from the wording of the Recommendation and Regulation 1049/2001, the preparatory documents thereof and several policy documents on the subject. Whether the right to access to documents constitutes a funda-

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5 Green Paper *Public Access to Documents held by institutions of the European Community – A review* of 18 April 2007 (COM(2007)185, to be found at [http://ec.europa.eu/transparency/revision/docs/gp\\_en.pdf](http://ec.europa.eu/transparency/revision/docs/gp_en.pdf)). Up-to-date information on the development of the revision-process can be found at [http://ec.europa.eu/transparency/revision/index\\_en.htm](http://ec.europa.eu/transparency/revision/index_en.htm).

6 Recommendation REC(2002)2 of the Committee of Ministers of 21 February 2002 (to be found via [http://www.coe.int/T/CM/adoptedTexts\\_en.asp#P38\\_1190](http://www.coe.int/T/CM/adoptedTexts_en.asp#P38_1190)).

mental right and is protected as such under the European Convention on Human Rights (ECHR) is presently the subject of debate. It follows from the case law of the European Court of Human Rights (ECtHR) that a general and absolute right to access to documents can not be derived from the provisions of the ECHR. One admissibility decision of the ECtHR, however, seems to suggest that once a right to access to documents is granted by national legislation, the refusal of access can be dealt with by the ECtHR under Article 10 ECHR.

The substance of the rules on access to documents is basically granting persons a right to access without the requirement to state reasons for the request, whilst formulating an exhaustive list of discretionary or mandatory exceptions to this right and providing procedural rules.

Contrary to the access rules, a binding instrument on data protection does exist within the Council of Europe. In 1981 a Convention on this matter was concluded which is currently ratified by 38 states, amongst whom all 27 EU Member States.<sup>7</sup> The Convention served as starting point of EC legislation in this field. In 1995 the EC adopted a directive, which was transposed in 2001 into a regulation concerning the processing of personal data by the EC institutions: Regulation 45/2001. The ECHR plays a far more dominant role with regard to data protection in comparison to access to documents. In its case law under Article 8 ECHR, which contains the right to privacy, the ECtHR has formulated conditions for legitimate data processing and referred to the Convention on data protection quite extensively.

It is not easy to define the underlying interest of data protection. The right aims to safeguard that data processing is legitimate. Article 8 of the EU Charter of Fundamental Rights provides a brief explanation of what legitimate data processing entails; data must be processed fairly, for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.<sup>8</sup> This, however, does not define the individual interest for data protection. Since this research focuses on the disclosure of personal data to the general public, the relevant individual interest will be defined as the interest of the data subject to be able to determine whether personal information is public or not.

Basically, the rules on data protection prohibit the processing of personal data and formulate the conditions under which processing is legitimate. An important principle is the purpose binding principle: data may only be processed when it is collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.<sup>9</sup> Next to the conditions, a couple of specific rights are granted to the data subject. These

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7 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (*European Treaty Series*, No. 108).

8 Charter of Fundamental Rights of the European Union (OJ 2000, C 364/1).

9 See Article 4 (1)(b) Regulation 45/2001 and Article 5 of the Data Protection Convention.

are *inter alia* the right to be properly informed or the right to have access to own personal data. Stricter rules are set for certain sensitive data, such as data revealing the racial or ethnic origin of the data subject or data concerning health or sex life.

#### PRIVACY AND DATA PROTECTION IN THE EU LEGAL ORDER

Although the ECtHR brings privacy and data protection together, it seems to make a distinction in the scope of the two rights. This statement touches upon a more general and fundamental discussion on the relationship of privacy and data protection. Some scholars consider both to be interchangeable, others see important differences between the two.<sup>10</sup> I have tried to contribute to this debate – at least within the European legal context – by looking more closely at how the ECtHR limits the scope of privacy protection in cases which are brought to the Court under the right to freedom of expression. It turned out that the Court attaches considerable weight to the fact that public figures, such as politicians or members of Royal families, can reasonably expect that certain general data or data related to their official capacity are published. According to the Court, the publication of this kind of information falls outside the scope of the privacy protection of these persons. If this case law is read in conjunction with the Court's case law on data protection under Article 8 ECHR, one can determine that the Court excludes from the privacy scope the processing (which also includes the disclosure) of data:

- which are not private in itself, and
- which are not systematically stored images or sound recordings, or other data,
- which are not systematically stored with the focus on the data subject, and
- when the data subject could reasonably expect the processing (disclosure).

The *Bavarian Lager*-case is an example of a case which seems to fulfil these conditions. The case concerned the disclosure of the names of certain people in their official public capacity (no private data was requested), the names were contained in the minutes of the meeting (no images or sound recordings and no systematic and data subject focussed storage occurred) and the participants could reasonably expect disclosure since they were acting in their public capacity and participating in a meeting of the European Commission. Although such disclosure falls outside the scope of privacy protection, it does fall within the scope of the rules on data protection.

The difference in scope of privacy and data protection makes it possible to identify three situations:

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<sup>10</sup> See respectively A.F. Westin, *Privacy and Freedom*, New York 1970, Atheneum and D.M. O'Brien, *Privacy, Law, and Public Policy*, New York 1979, Praeger Publishers.

*Situation 1:* Disclosure of personal data is outside the scope of privacy protection and within the scope of data protection;

*Situation 2:* Disclosure of personal data is within the scope of privacy protection and within the scope of data protection;

*Situation 3:* Disclosure of personal data is within the scope of privacy protection and (within the data protection rules) within the special regime for the protection of sensitive data.

The interest of the data subject increases gradually. This difference in weight of the underlying interest is reflected in the data protection rules with regard to situation 2 and 3, since a special regime is indeed created for sensitive data. In the data protection rules, however, the distinction between situation 1 and 2 is not addressed. In other words, the data protection rules are unabridgedly applicable to situations which are apparently not severe enough to fall within the scope of privacy protection. In my opinion, this distinction should nevertheless be made in the data protection rules since for these situations it seems justified to set less strict rules on data protection.

#### DEFINING THE OVERLAP BETWEEN THE RULES ON ACCESS TO DOCUMENTS AND DATA PROTECTION

By looking more closely at the provisions of Regulation 1049/2001 and Regulation 45/2001 it is possible to describe the overlap between both rights. Although it seems obvious that both regimes apply to the situation in which someone requests access to a document that contains personal data, the reality appears to be a bit more complicated. Indeed, the concepts of 'document' and 'personal data' are both broadly defined. It turns out that both regulations can be applicable to all identifiable information which is in some way materialised. Regulation 1049/2001 is limited to documents held by the European Parliament, the Commission and the Council. In practice, however, almost all institutions, agencies and organs have accepted to comply with the rules of the transparency regulation.

In one respect both regulations differ importantly in scope. Whereas the transparency regulation is applicable in all three pillars of the EU, regulation 45/2001 applies only to the first pillar. It is argued, however, that if someone invokes the transparency regulation concerning a second or third pillar matter, the institution must take the data protection regulation into account.

#### DEFINING THE LIMITS FOR THE LEGISLATOR WHEN RECONCILING BOTH RIGHTS

The status of the right to access to documents in the EU legal order has already been the subject of debate for many years. The discussion concentrates on

whether the right can be considered as a general principle of EC law. A part of this discussion deals with the question whether the right is protected by the ECHR, as mentioned above.

An important contribution to this debate can be found in the opinion of Advocate-general Léger in a case instigated by former MEP Hedi Hautala.<sup>11</sup> In his 2001 opinion the AG explains the development of the right in the European legal order. He refers to Article 255 of the EC Treaty, points out the fact that the right is enshrined in the EU Charter of Fundamental Rights, and refers to the ECHR and the evolving position of the right of access to documents in the Member States. In spite of the profound plea of its AG, the Court did not acknowledge that the right to access to documents was a general principle of EC law. However, since the decision of the Court the right has developed further. This became clear in the discussions preceding the drafting of the Treaty establishing a Constitution for Europe. Not only would the Charter have become legally binding, the right as such was given a more prominent place and was formulated in a more general way. As is well-known, the Constitutional Treaty was rejected by the majority of the French and Dutch people. Subsequently, after a year of reflection, the Constitutional Treaty was again discussed. This discussion was still going on when this research was concluded. Be that as it may, the Constitutional Treaty gives a strong indication of the weight attached to the right. Moreover, the subject of strengthening the right to access to documents was no stumbling block during the negotiations. At the level of the Member States the right to access is also increasingly gaining attention. This is reflected in the recent adoption of legislation on this issue in several Member States. It can therefore be argued that at the moment of writing, the right to access to documents has developed into a right which is indeed part of primary EC law.

The right to privacy is without doubt part of primary EC legislation because of its adoption in Article 8 of the ECHR. It is not as simple to establish whether the right to data protection as such (with its broader scope) has the same status. The right to data protection is, however, codified and elaborated in the earlier mentioned Council of Europe Convention, to which all EU Member States are party. Furthermore, the right is enshrined in the EU Charter of Fundamental Rights, and, as was also the case with the right to access to documents, its position and substance in the Constitutional Treaty improved considerably. It is therefore argued that the right to data protection can also be considered as having a primary law status.

In order to find out what should be done when the right to access to documents and the equally important right to data protection collide, a parallel is drawn with the way in which the ECJ deals with the collision of fundamental rights and free movement rules. The Court dealt with this question in the

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11 Opinion of Advocate-general Léger of 10 July 2001, *Council vs. Hautala*, C-353/99 P, Rec. 2001, p. I-9565.

*Schmidberger*-case, in which there was a conflict between the free movement of goods and the freedom of expression. The Court considered that the underlying interests of both freedoms should be balanced in order to reach a proportional outcome.<sup>12</sup> According to the ECJ, the outcome is not proportional if it is impairing the very substance of the rights guaranteed.<sup>13</sup> It is important to point out that this balance can either be struck by an institution in a concrete case or by the legislator in more general terms. Of course the legislator can leave the balancing of interests entirely up to the institutions, but it could also improve legal certainty by stating in advance that for some situations one of the two rights is superior to the other.

Certain limitations to the way the legislator can decide to strike the balance do exist. Following the *Schmidberger* judgment, the test to be applied is whether the very substance of the right to access to documents or the right to data protection is undermined. Obviously, the essence of one of these rights is impaired if the legislator decides that in all cases one of the two rights prevails. There are, however, more subtle ways in which the very substance of one of the conflicting rights can be undermined. If, for instance, the legislator decides that access to documents containing personal data of someone else is only possible if the applicant shows a specific interest in disclosure, this undermines the essence of the right to access to documents since the right protects general interests (democratic legitimacy and public control) and one is therefore not required to state reasons. Another example is when the legislator grants the subject of the data in the document absolute control over its data. Although this serves the interest of the individual (who then has the ability to determine whether personal information is public or not), it simultaneously undermines the interest underlying the right to access. Such an interpretation would make the possibility of identifying and holding the people working for the government accountable completely dependent upon the willingness of the persons involved.

IN THE CURRENT EU LEGAL FRAMEWORK THE POSSIBLE COLLISION IS NOT SUFFICIENTLY ADDRESSED

As has been mentioned above the current framework does not provide a clear answer. Although article 4(1)(b) of regulation 1049/2001 refers to the rules on data protection it has, when read in conjunction with regulation 45/2001, not led to a clear legal framework in which a fair balance of the underlying interests involved can be struck. This is on the one hand due to the ambiguous wording of Article 4(1)(b) and on the other hand to the fact that the data protection rules do not take the disclosure of personal data for transparency

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12 ECJ, 12 June 2003, *Eugen Schmidberger*, C-112/00, Rec. 2003, p. I-5659.

13 ECJ, *Schmidberger*, § 80.

reasons into account at all. Both elements are discussed in the *Bavarian Lager*-case between Andrew Ronnan, the EDPS and the Commission.

The text of the Article 4(1)(b) refers both to the protection of privacy and the protection of personal data. Ronnan, together with the European Ombudsman and the EDPS, argues that the exception can only be invoked if it is established that the privacy of the person of whom the document contains personal data is at stake. Only in that case, the institution should look at the data protection legislation. The Commission, on the contrary, argues that the rules on data protection should always be applied and have priority.

Once the hurdle (if any) of Article 4(1)(b) is taken, the question arises how the data protection rules should be applied to the situation in which a person asks for access to a document containing someone else's personal data. The Commission defends a strict interpretation of the data protection rules, whereas Ronnan, the Ombudsman and the EDPS argue in favour of a more liberal interpretation. The Commission argues that the disclosure of data to the public should be regarded as a transfer of personal data to recipients other than the Community institutions. As a consequence, the person requesting access must establish the necessity of having the data transferred, which means that a simple reference to its right to access to documents will not suffice. According to the Commission, the only other possibility to get access to the data is when the data subject consents to the disclosure. The way in which the Commission interprets the data protection rules does not, in my view, reflect a balanced approach of the conflict between both rights. It could even be defended that by using the Commission's interpretation, the data protection rules undermine the very substance of the right to access to documents, since this interpretation results in an elimination of the essence of access to documents in the way as described in the previous paragraph: applicants have to state reasons or disclosure is completely dependent upon the approval of the data subject. Another approach is defended in detail by the EDPS in its background paper. The EDPS regards the right to access to documents as a legal obligation for the institutions. According to the data protection rules, processing of data is allowed if it is necessary for compliance with a legal obligation. From this, read in conjunction with article 4(1)(b) of regulation 1049/2001, the EDPS derives a proportionality test which leads to a balance of interests to be made by the institution concerned. Although the efforts of the EDPS lead to a far more balanced approach, it cannot achieve this without a very extensive or creative interpretation of some of the data protection provisions. For the reconciliation with the right to access to document this interpretation can certainly be useful, however the risk exists that this broad interpretation, since it would also apply to other forms of data processing, may not be appropriate in all circumstances.

Be that as it may, because of the lack of clarity and the forced way in which only a fair balance can be struck, the current situation is far from ideal and should be reconsidered. For the time being, it is up to Court of First Instance,

where the case is presently pending, to provide some clarification, preferably in line with the more balanced approach taken by the EDPS.

#### THE RECONCILIATION OF ACCESS TO DOCUMENTS AND DATA PROTECTION IN THE EU MEMBER STATES

Obviously, Member States are also confronted with the tension between access to documents and data protection. That is to say, if they acknowledge both rights. All Member States have data protection legislation in force, since they were all obliged to implement directive 95/46. The situation is bit different with regard to legislation on access to documents since the EU has no harmonising power in this field. Most of the states, however, do have legislation on access to governmental information, or at least some provisions on the issue in more general legislation. Three Member States, Cyprus, Luxembourg and Malta, have no legal provisions on the issue at all.<sup>14</sup>

In order to get an impression on how the rules on access to documents and data protection can be reconciled in legislation, the relevant laws of the 24 Member States were described and briefly analysed. The survey shows that in some countries both regimes are not interrelated at all: the law on access to documents contains no reference to data protection or even to privacy and, vice versa, the data protection rules make no reference to access to documents.<sup>15</sup> The other extreme occurs in countries that provide very clear and detailed rules dealing with conflicts between both laws.<sup>16</sup> These conflict rules show solutions gradually moving from a plain privacy exception in the access rules, to a more detailed privacy exception, to an explicit reconciliation with the data protection rules. It is apparent that almost all states chose to regulate the possible conflict in the legislation on access to documents. In a couple of states the data protection rules briefly refer to these rules on access to documents.

If the reconciliation of both rights is more substantively addressed in national legislation, different possibilities appear. In a number of states the legislator leaves the balance of interests explicitly to a governmental body. Sometimes the legislator gives some direction to this assessment, for instance by stating that the breach of the right to privacy should be significant. In a significant number of Member States, the legislator formulates a category or categories of data which fall outside the privacy or data protection exception

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14 See for a more substantive analysis H.R. Kranenborg & W.J.M. Voermans, *Access to Information in the European Union. A Comparative Analysis of EC and Member State Legislation*, Groningen 2005, Europa Law Publishing.

15 See Austria and Spain.

16 See, for instance, Germany and the United Kingdom.

to the right to access to documents. Most often these data relate to a person acting in an official capacity.

Specific attention was given to a decision of the English Court of Appeal in the case of *Durant vs. Financial Services Authority*.<sup>17</sup> In its judgment, the English Court gave a more limited interpretation to the notion of 'personal data' than is commonly used in Europe. According to the Court the mere mention of someone's name in a document does not necessarily amount to his personal data. The judgment was explained by the British Information Commissioner which mentioned as an example a situation which is comparable to the *Bavarian Lager*-case. In fact, the English Court seems to exclude situation 1, which was described above, from the scope of data protection. The judgment attracted the attention of the Commission and it is rumoured that the Commission considered to start an infringement procedure against the UK for the incorrect implementation of directive 95/46. Although I welcome the effort to lessen the impact of data protection rules, I argue in this study that this should not be done by limiting the notion of 'personal data' and thereby restricting the scope of data protection legislation in general. In order to prevent uncertainty and a fragmented application of the data protection legislation, the solution should be found or created inside this legislation.

#### TOWARDS A PROPOSAL ON THE RECONCILIATION OF ACCESS TO DOCUMENTS AND DATA PROTECTION

With the above findings in mind, I have developed a general proposal on how to reconcile the right to access to documents with the right to data protection.

First of all, the question must be answered which of the two regimes should constitute the legal basis for the reconciliation of both rights. In my opinion it makes no difference if either the transparency rules or the data protection rules are chosen, as long as the 'other' legislation explicitly refers to the legislation containing the rules for solving conflicts.

Before turning to the actual balance of interest, a preliminary point must be raised. Disclosure of personal data based on a request for access to documents is always a secondary processing of data. It is argued that if the original processing of the personal data was illegitimate, in other words, if the institution was not entitled to possess these personal data, these data may not be disclosed.

The legal framework for dealing with the possible conflict should be based on a balance of the underlying interests of both rights, discussed above. For the right to access to documents these interests are the improvement of the

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17 Court of Appeal (civil division) 8 December 2003, *Michael John Durant t. Financial Services Authority*, [2003] EWCA Civ 1746 (to be found at <http://www.hmccourts-service.gov.uk/judgmentsfiles/j2136/durant-v-fsa.htm>).

democratic legitimacy of acts of government and creating the possibility of control of government. For the right to data protection the underlying interest of the data subject is to be able to determine whether personal information is public or not. As was shown above three different situations should be distinguished.

Situation 1 (the disclosure of the data falls outside the scope of privacy protection and within the scope of data protection) concerns the disclosure of general and function-related data of persons acting in their official capacity. In my opinion the only reasonable outcome of the balance of interests here is that these data should be disclosed without restrictions. In order to control the government, and hold persons which are actively involved in the decision making process accountable, the citizens simply need to know who is doing what. As the European Ombudsman puts it: there is no right to participate in public activities anonymously. Anonymity should only be allowed in special circumstances, for instance, if someone is threatened or anonymity is essential for the proper functioning of an official. Since, in my view, this outcome is clear and should be made clear and for the sake of legal certainty, the legislator should put this rule in explicit terms in the access to documents legislation.

In situation 2 (disclosure of personal data is within the scope of privacy protection and within the scope of data protection) it is difficult to strike the balance of interest without the facts of a specific case. Therefore, the legislator should leave the actual assessment up to the institution concerned. The legislator could, however, make clear that the institution concerned should first investigate whether the disclosure of the personal data actually serves the transparency interests. In situation 2, blanking out of the personal data and providing access to the remainder of the document could constitute a satisfactory solution. For instance, for a general insight of the EU expenditure on salaries it is not necessary to provide the citizens with a list of every civil servant and their exact remuneration. The interests of transparency are just as well ensured when the list is disclosed without the names. Of course blanking out the names is not always a solution, or the 'need to know' may extend to the personal data. In that case, a balance must be struck which takes all the circumstances of the specific case into account. Elements which can play a role are whether the data subject is actively involved in the EU decision making process, the actual position of the data subject within the EU hierarchy, the substance of data, the nature of the document, the consequences of disclosure for the data subject and the conduct of the data subject and the institution before the disclosure of the data.

In situation 3 (disclosure of personal data falls within the scope of privacy protection as well as the special regime for the protection of sensitive data) the interest of the data subject should be afforded the highest protection. In my opinion, the disclosure of these data should only be allowed if it is in accordance with the specific provisions in the data protection legislation. In

this situation the legislator could also, for the sake of clarity and legal certainty, lay down explicit rules.

The current regulation on access to documents provides for an exception to the discretionary exceptions for reasons of an overriding public interest. If there is a greater interest of the public than the one provided for in the regulation, documents can be disclosed after all. In my view such an overriding public interest test could be applied in situation 2 and even in situation 3. This would allow disclosing information in special circumstances where, for instance, the requested data could contribute substantively to a current and strong public debate.

These rules create, in my view, a general basis for solving conflicts between the two rights. Of course there are different ways in which these principles can be put into concrete provisions. To give an example, a concrete proposal for the amendment of regulation 1049/2001 could be formulated as follows:

- 1 *Access to a document containing personal data shall, except for exceptional circumstances and other exceptions in this regulation, be granted if it concerns solely the name, title, function, contact details or information concerning activities carried out in the course of the function of a person who is actively involved in government activities.*
- 2 *Access to personal data shall further be granted if access actually serves the control of the government or the legitimacy of the legislative process or an overriding public interest and if disclosure does not constitute an unjustified interference with the right to privacy of the data subject.*
- 3 *Access to personal data which falls within the scope of article 10 regulation 45/2001 shall be granted in accordance with that provision, unless there is an overriding public interest in disclosure.*

As stated above, this proposed amendment of regulation 1049/2001 should be accompanied by an amendment of the data protection regulation, in the sense that a reference to the regulation on access to documents is introduced.

