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**Subject: Your request for consultation on the EO's rules on the redaction of documents (case 2018-0051)**

Dear [...],

We thank you for consulting the EDPS on the European Ombudsman's ('the EO') rules and guidelines ('the Guidelines') on the handling of personal data of EU staff and other individuals contained in documents subject to an access to document request, which has been adopted by the EO's management.

In your request for consultation, you specify that the EO would like to consult the EDPS on the above Guidelines' compliance with the current data protection legislation and to get the EDPS' views of the compatibility with the forthcoming Regulation.

The EO's Guidelines give a short introduction about the replacement of the old guidelines, state that the new rules are being adopted to increase the protection of personal data, note that a person seeking public access to the documents may establish necessity to obtain access to the data in question and mention that the EO shall actively inform its staff of these rules. The main part of the Guidelines covers the following topics: EO staff; signatures, recordings and images (EO, EU administration and other); e-mail addresses and other contact details; staff and members of another EU institution or body and; persons who are not EO staff and not staff of the EU administration.

## **1. Background**

After the ruling in case C-28/08 P, *Commission v Bavarian Lager*<sup>1</sup> ('Bavarian Lager'), the EDPS took the view that in order to achieve a fair balance between the right to data protection

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<sup>1</sup> Judgment of 29 June 2010, ECLI:EU:C:2010:378.

and the public interests of transparency, institutions should take a proactive approach on the matter and not assess the possible public nature of personal data they collect only at the moment they receive a request for public access to a documents containing personal data.

In its policy paper of 24 March 2011 ‘Public access to documents containing personal data after the Bavarian Lager ruling’<sup>2</sup>, the EDPS advises the EU institutions and bodies to develop a proactive approach as regards disclosure of names of their staff. Institutions should assess and make clear to their staff - before or at least at the moment they collect their data - the extent to which the processing of such data includes or might include its public disclosure. This approach ensures that in case of public disclosure of personal data by the EU institutions, data subjects are well-informed and are enabled to invoke their rights under the data protection regulation.

To achieve this, the EDPS recommends developing internal policies, creating a presumption of openness for certain personal data, such as those that relate to public figures acting in their public capacity or relate solely to the professional activities of the person concerned.

In light of the above, the EDPS welcomes the EO’s proactive approach and provides its comments on their updated rules on the redaction of documents including personal data as follows.

## **2. Analysis**

### **2.1 All provisions of Regulation 45/2001 apply**

The *Bavarian Lager* ruling clarified that when a request based on Regulation 1049/2001 seeks to obtain access to documents containing personal data, the provisions of Regulation 45/2001 become applicable in their entirety. Therefore, it is important to underline that the proactive approach to develop internal policies should not only serve the purpose of informing the data subjects in advance but also cover other relevant provisions of Regulation 45/2001. This means in particular the requirements of data quality and the lawfulness of processing under Articles 4 and 5, data transfers under Article 8 and 9, and the right to object under Article 18.

Regarding information and the right to object, informing the data subjects about the envisaged disclosure enables data subjects to invoke their rights under Regulation 45/2001. One of those rights is the right to object to the processing (see Article 18). The data subject can do so on compelling legitimate grounds relating to their particular situation. If there is a justified objection, the data may not be disclosed.

The Guidelines specify that the EO shall actively inform its staff of these rules. The EDPS welcomes this proactive approach but observes that the Guidelines do not include any information about the fact that Regulation 45/2001 applies in its entirety and do not inform the data subjects about the right to object. Furthermore, the EDPS emphasises the importance of informing other data subjects, not only staff of the EO, about a possible disclosure of their personal data so that they can invoke their data protection rights.

It should be mentioned that Articles 14(1) and (2) of the upcoming Regulation<sup>3</sup> state that the controller should take appropriate measures to provide any information referred to in Articles

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<sup>2</sup> Available on the following link: [https://edps.europa.eu/sites/edp/files/publication/11-03-24\\_bavarian\\_lager\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/11-03-24_bavarian_lager_en.pdf)

<sup>3</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices

15 and 16 relating to the processing to the data subject in a concise, transparent intelligible and easily accessible form, using clear and plain language. The controller should furthermore facilitate the exercise of the data subjects' rights under Articles 17 to 24 of the upcoming Regulation.

## 2.2 Notion of personal data

The EO's Guidelines refer to different categories of personal data such as names, signatures, recordings and personal data in general. The EDPS considers that, when receiving a request, the EO should initially identify what kind of personal data the request covers.

Personal information is defined as any information that relates to an identified or identifiable natural person. Personal information does not only include information about an individual's name, e-mail address, image etc. but also information regarding an individual's activities, such as their working relations and economic or social behaviour. In most cases, personal information includes identification data (e.g. contact details) but also information that relates to the behaviour of an individual.

This is not covered by the Guidelines concerning EO staff and only briefly referred to as 'names and personal data' under the paragraph on persons who are not EO staff/staff of the EU administration. The EDPS therefore suggests that the EO adds an additional paragraph, which clarifies the notion of personal data with the purpose to help staff identifying personal data in a specific request.

## 2.3 Establishment of necessity

The Guidelines do not make a difference between the initial and the confirmatory stage and whether this has an implication for the assessment of the disclosure of the personal data included in the documents. Unless arguments in this regard are already provided in the initial stage, the EDPS considers that applicants should be invited, if they still request the withheld personal data, to provide the EO with a legitimate justification or compelling arguments to demonstrate the necessity for the personal data to be disclosed, due to Article 8(b) of Regulation 45/2001 in line with the *Bavarian Lager* ruling (see the EDPS Policy paper 'Public access to documents containing personal data after the Bavarian Lager ruling', page 11 and forward).

It is mentioned in the second paragraph of the Guidelines that 'With regard to the rules and guidelines as they relate to personal data, the general principle applies that the person seeking public access to the documents may establish a necessity to obtain access to the data in question.' The EDPS suggests that the EO develop this section so it is clear that even though access to some categories of personal data, such as names of EO staff below HoU level, would generally be refused in line with the Guidelines, there is a possibility that this information would be disclosed if the applicant establishes necessity. Depending on the practices of the EO, it might be useful to add information to the staff on how to assess this or who within the EO to contact in this regard.

## 2.4 Redaction of functional e-mail addresses

The Guidelines explain that e-mail addresses of any individual or functional e-mail account should normally be redacted in order to reduce the risk of misuse (for instance through automated internet-crawlers). The EDPS would like to point out that Article 4(1)(b) of

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and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, Brussels, 10.1.2017 COM(2017) 8 final.

Regulation 1049/2001 relates to the protection of personal data and that only individual email accounts are considered as personal data.

### 2.5 Consent as a basis for lawfulness of the disclosure

In its Guidelines, the EO describes under ‘Staff and members of another EU institution or body’ that names of staff and members of other EU bodies shall be redacted unless: ‘...the staff or member is part of the political administration or organisation, [...]; or the EO is informed that the rules of the other EU body allow for names of its staff, by category or otherwise, to remain un-redacted, or express and appropriate consent for disclosure has been given to the EO following consultation. [...]’.

With regard to the possibility to disclose personal data based on consent (Article 5(d) of Regulation 45/2001), the EDPS underlines that, although data can be publicly disclosed based on the consent of a person involved, this is not the preferred option<sup>4</sup> and subject to very strict conditions. Any consent should be freely given, specific and informed and should also be unambiguous. This goes beyond merely informing the data subjects and requires an active expression of their will.

On the other hand, consent is not required where other available options provide an adequate ground for legitimate processing. The EDPS considers that Article 5(a) of Regulation 45/2001 is the appropriate legal basis for the disclosure of personal data in the context of Regulation 1049/2001.<sup>5</sup> This article states that personal data may be processed (in this context disclosed to the public) only if such processing is *necessary* for the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in the institution or body. The possibility for data subjects to exercise their rights in this regard is ensured by informing them about the possible disclosure. This will enable them to invoke their right to object and put forward arguments relating to their particular situation (see 2.1 above).

### **3. Conclusion**

In this Opinion, the EDPS has made some recommendations to ensure compliance with Regulation 45/2001, as well as suggestions for improvement. In particular, the EO should:

- Add to the Guidelines that all the provisions of Regulation 45/2001 becomes applicable if a request under Regulation 1049/2001 includes personal data;
- Include information about the data subjects’ right to object to the disclosure;
- Ensure that data subjects that are not EO staff are informed before an envisaged disclosure of their personal data so that they can invoke their rights under Regulation 45/2001;
- Add a paragraph about the notion of personal data with the purpose to help staff identifying personal data in a particular request;
- Clarify that, even though access to some categories of personal data are refused by default, this information could potentially be disclosed if the applicant were to establish necessity;

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<sup>4</sup> Article 5 mentions ‘consent’ only after (a) ‘necessity for a task carried out in the public interest’, (b) ‘necessity for compliance with a legal obligation’ and (c) ‘necessity for the performance of a contract to which the data subject is party’.

<sup>5</sup> It has also been argued that the legal basis is Article 5(b) of Regulation 45/2001, i.e. the ‘processing is necessary for the compliance with a legal obligation to which the controller is subject’. However, a legal obligation under Regulation 1049/2001 only exists (and provides an adequate legal basis) in cases where the exception under Article 4(1)(b) of Regulation 1049/2001 does not apply.

- Ensure that disclosure of personal data based on consent is only used when the person genuinely has a free choice, and not when other available options provide an adequate ground for legitimate processing.

The EDPS invites the EO to inform the EDPS about the implementation of the recommendations made above within six months from the date of receipt of this Opinion together with any practical experience on its applicability. The Guidelines should also be revised in line with the upcoming Regulation once the final text becomes available.

Yours sincerely,

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