Evropský veřejný ochránce práv

Afgørelse i sag 3643/2005/(GK)WP - Přístup veřejnosti k informacím o příspěvcích vyplácených poslancům Evropského parlamentu

Rozhodnutí
Případ 3643/2005/(GK)WP - **Otevřeno dne** 04/01/2006 - **Doporučení týkající se** 24/09/2007 - **Rozhodnutí ze dne** 14/07/2008

Maltský novinář požádal o přístup k údajům, které podrobně uvádějí veškeré částky vyplacené Evropským parlamentem pěti maltským poslancům. Parlament tuto žádost vyřídil v souladu s nařízením 1049/2001 o přístupu veřejnosti k dokumentům, avšak zamítl ji na základě ochrany osobních údajů s vysvětlením, že dotčené dokumenty obsahují osobní údaje ve smyslu nařízení 45/2001 o ochraně fyzických osob v souvislosti se zpracováním osobních údajů orgány a institucemi Společenství. Novinář podal veřejnému ochránci práv stížnost proti tomuto rozhodnutí s tím, že daňoví poplatníci mají právo vědět, jak poslanci Evropského parlamentu nakládají s veřejnými prostředky.

Ve svém stanovisku ke stížnosti Parlament svůj postoj potvrdil. Tvrdil také, že řádné využití evropských finančních prostředků je veřejnosti zaručeno prostřednictvím účinných auditů, které provádí Výbor pro rozpočtovou kontrolu a Účetní dvůr.

Prověrka provedená úřadem veřejného ochránce práv prokázala, že žádost stěžovatele se týkala čtyř druhů příspěvků, které byly zaznamenány v různých databázích. Konkrétně šlo o (i) příspěvek na všeobecné výdaje, (ii) příspěvek na parlamentní asistenci, (iii) příspěvek na cestovní výdaje a (iv) denní příspěvek, který poslanci Evropského parlamentu dostávají za dny práce pro Parlament.

Vzhledem k tomu, že tento případ vyžadoval zachování rovnováhy mezi otevřeností a právem na soukromí, obrátil se veřejný ochránce práv na evropského inspektora ochrany údajů, který zastával názor, že veřejnost má právo být informována o chování poslanců Evropského parlamentu. Podle něho bylo zřejmé, že údaje týkající se samotných poslanců Evropského parlamentu musí být zveřejněny. Pokud však jde o údaje týkající se asistentů poslanců Evropského parlamentu, bylo třeba dodržet výjimky na ochranu jejich oprávněných zájmů.

Veřejný ochránce práv došel k závěru, že odmítnutí Parlamentu poskytnout stěžovateli přístup k dotčeným údajům představovalo nesprávný úřední postup. V návrhu doporučení Parlament vyzval, aby požadované informace zveřejnil.

Parlament ve své odpovědi oznámil, že zveřejní obecné informace o příspěvcích vyplácených poslancům Evropského parlamentu na svých internetových stránkách a zmínil se o možnosti přezkoumat tuto situaci v roce 2009. Přesto však trval na svém odmítnutí s ohledem na specifické údaje požadované stěžovatelem.

Veřejný ochránce práv s radostí přijal skutečnost, že Parlament uznal, že v transparentní a demokratické společnosti má veřejnost právo být informována o využití veřejných prostředků svěřených poslancům Evropského parlamentu. Uvítal také, že Parlament přijal proaktivní politiku zveřejňování informací o různých příspěvcích, na které mají poslanci Evropského parlamentu nárok, na svých internetových stránkách. Veřejný ochránce práv vzal rovněž na vědomí prohlášení Parlamentu, že situace by měla být přezkoumána v roce 2009, s tím, že pokud toto prohlášení představuje závazek Parlamentu k budoucímu přezkumu transparentnosti příspěvků pro poslance Evropského parlamentu, pak ho vítá. Veřejný ochránce práv nicméně litoval, že Parlament zdůvodnil své odmítnutí plně přijmout jeho návrh doporučení odvoláním se na právní výklad nařízení 1049/2001 a 45/2001, který oslabuje zásadu transparentnosti a který Soud prvního stupně zamítl.

Na závěr veřejný ochránce práv trval na svém zjištění nesprávného úředního postupu s ohledem na většinu hledisek případu. Případ uzavřel s kritickou poznámkou.

Strasbourg, 14 July 2008
Dear Mr V.,

On 24 November 2005, you submitted a complaint to the European Ombudsman concerning the European Parliament's rejection of your application for access to data detailing the allowances granted to Parliament's Maltese Members.

On 4 January 2006, I forwarded the complaint to the President of the Parliament. Parliament sent its opinion on 15 March 2006. On 23 March 2006, I forwarded it to you with an invitation to make observations, if you so wished, by 30 April 2006. No observations were received from you by that date.

On 9 August 2006, I informed you that your case had been transferred to another legal officer.

On 28 September 2006, I asked Parliament to allow my services to inspect the documents or information concerned by your complaint. You were informed accordingly on the same day.

On 14 December 2006, my services carried out an inspection of the three databases that contain the data to which you requested access.

On 10 January 2007, I sent to you and to Parliament a copy of the report on this inspection and invited you to make observations, which you sent on 15 January 2007.

By letter of 24 April 2007, I consulted the European Data Protection Supervisor on the questions of data protection raised by your complaint. I informed you and Parliament accordingly on the

same date.

On 4 June 2007, the European Data Protection Supervisor sent his reply. On 13 June 2007, I forwarded it to Parliament with an invitation to make comments. I informed you accordingly on the same day.

On 19 July 2007, Parliament sent its comments. I forwarded them to you on 3 August 2007 with an invitation to make observations, which you sent on 9 August 2007.

On 24 September 2007, I addressed a draft recommendation to Parliament, asking it to reconsider your application for access to the data in question. Parliament was asked to provide its detailed opinion by 31 December 2007. I informed you accordingly on the same day.

On 18 December 2007, Parliament asked me for an extension of the deadline for the submission of its detailed opinion until 29 February 2008, indicating that certain research its Bureau was carrying out in order to provide a full and detailed response to my proposal was not yet complete. On 20 December 2008, I granted the requested extension and informed you accordingly.

On 29 February 2008, Parliament sent its detailed opinion on my draft recommendation. I received Parliament's detailed opinion on 7 March 2008 and forwarded to you on the same day, inviting you to make observations, if you so wished, by 30 April 2008.

By e-mail of 28 April 2008, you asked for an extension of this deadline. I granted you an extension until 31 May 2008. On 31 May 2008, you sent your observations.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

Background

The complainant is a journalist who works for the Maltese weekly newspaper *MaltaToday* . In August 2005, he asked the European Parliament for access to the "published accounts" of its five Maltese Members ("MEPs"). Following an e-mail exchange with Parliament's Register, during which he clarified that his request related to data detailing the payments made by Parliament to the above MEPs, the complainant made a formal request for access under Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (1) ("Regulation 1049/2001"). On 15 September 2005, Parliament rejected this request, arguing that the documents in question contained information considered to constitute personal data pursuant to Article 2 of Regulation (EC) 45/2001 of the European Parliament and of the Council 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 (2) ("Regulation 45/2001"). According to Parliament, disclosure of the documents in question had to be denied because it would infringe the privacy interests of a third party, within the meaning of Article 4(1)(b) of

Regulation 1049/2001.

In a confirmatory application for access, the complainant argued, essentially, that disclosure of the documents would not undermine the protection of the private interests of those concerned and that their publication was in the public interest since MEPs should be open to scrutiny from their constituents.

In its decision on the confirmatory application, dated 13 October 2005, Parliament explained that the request for access concerned documents relating to the financial affairs of different persons, namely, MEPs and parliamentary assistants. Processing of such data was necessary for Parliament's financial management and thus for the performance of a task carried out in the public interest pursuant to Article 5(a) of Regulation 45/2001. However, supplying this information to the public went beyond what was required for the sound functioning of Parliament's administration. Hence the provision of such information was not covered by Article 5(a) of Regulation 45/2001. Parliament added that the exceptions to the general principle of access to documents contained in paragraph 4(1) of Regulation 1049/2001 were drafted in mandatory terms, so that it was obliged to refuse access if it considered that disclosure of documents would undermine the interests mentioned therein. As to the complainant's argument concerning the need for public scrutiny, Parliament argued that the proper use of public funds was guaranteed by the relevant internal and external checks. Pursuant to Rule 74 of Parliament's Rules of Procedure, the allowances received by MEPs were subject to checks as part of the discharge procedure. The Committee on Budgetary Control and the Court of Auditors enforced the applicable rules on behalf of the public.

Parliament also argued that Rule 5(3) of Parliament's Rules of Procedure stipulated that MEPs were not entitled to inspect the personal files and accounts of other MEPs. Since such access was even denied to MEPs, there was all the more reason that it should be denied to persons from outside Parliament.

Furthermore, Parliament pointed out that Regulation 1049/2001 did not, in any way, oblige the institutions to create documents to respond to an application. When the information requested was not available in one or more existing documents but involved the collation of data from a database, the application went beyond the scope of the Regulation. Databases were not in fact collections of documents but constantly changing sets of data. This applied to the information the complainant had requested as this information was contained in an accounting data management system and not in a single document. As a consequence, his request, *stricto sensu* , fell outside the scope of Regulation 1049/2001. However, Parliament added that, in accordance with its policy of transparency, it had examined the application in light of the provisions of the Regulation.

On the basis of these considerations, Parliament rejected the complainant's request.

The complaint to the Ombudsman

In his complaint to the European Ombudsman, the complainant argued that an MEP was a public person who was paid both by national governments and from European funds and thus indirectly by the European taxpayers. The taxpayers should therefore have the right to

scrutinise the use made of their contributions by having access to the MEPs' accounts. He also believed that it was in the national interest of Maltese taxpayers to be informed about these matters by a national newspaper. He referred to Article 6 of the EU Treaty and to the Charter of Fundamental Rights. The complainant emphasised that openness strengthened the principles of democracy and fundamental rights and helped the Union's citizens to participate in EU affairs.

Essentially, the complainant alleged that Parliament had wrongfully refused to grant him access to the data concerning allowances granted to the Maltese MEPs. He claimed that he should be granted such access. The complainant specified that the data should show the amounts the MEPs received from Parliament as well as the way in which these amounts were used for the operation of their offices and for the financing of their pensions under Parliament's pension scheme.

THE INQUIRY

The scope of the inquiry

The Ombudsman asked Parliament for an opinion on the complainant's allegation and claim.

However, he specified that the scope of his inquiry was limited to documents or information existing at the date of Parliament's rejection of the complainant's confirmatory application for access to documents.

Parliament's opinion

In its opinion, Parliament first recalled the information which it had provided the complainant with during his initial contacts with Parliament's Register: The Register had informed the complainant that there were no published accounts. It had described the system which currently existed, in the absence of a Statute for MEPs. It pointed out that this was a hybrid system based on the MEPs' salaries, which were paid by national authorities, and on the " *various secretarial allowances, reimbursement of travel expenses, etc.* ", which were paid by Parliament from its budget. The complainant had then received a copy of the rules governing the secretarial allowances and the reimbursement of travel expenses.

Following an exchange of e-mails, the Register had informed the complainant that the information relating to the payments made to MEPs by Parliament was included in a database. The information was collected purely for accounting purposes and was neither published nor distributed, except to the auditing bodies or institutions provided for in the relevant rules.

In addition to the rules concerning allowances, Parliament provided the complainant with the aggregate figure for the amounts disbursed to MEPs in the form of secretarial and other allowances. According to Parliament, however, what the complainant had actually wanted to obtain was the breakdown for each MEP of the amounts received in respect of each allowance (for example, the salaries actually paid to assistants) and the details of travel undertaken in connection with the MEPs' activities. Parliament submitted that it continued to consider that the detailed breakdown of these figures was covered by Article 4(1)(b) of Regulation 1049/2001 because these accounting documents related not only to MEPs but also to third parties, such as

assistants, whose relationship with MEPs was governed by a contract under private law. Parliament submitted that it was not allowed to interfere in that relationship and limited itself to the role of accountant.

As to the complainant's argument that Maltese MEPs should be subject to control by Maltese taxpayers, Parliament submitted that MEPs were subject to specific checks carried out by the bodies responsible for ascertaining whether their financial management complied with the rules in force. Public scrutiny concerning the proper use of public European funds was guaranteed by effective audits carried out by the Committee on Budgetary Control and by the Court of Auditors. In accordance with Article 74 of Parliament's Rules of Procedure, MEPs' allowances were subject to checks forming part of the discharge procedure.

In addition, Parliament recalled that Article 5(3) of its Rules of Procedure stipulated that MEPs did not have access to personal files and accounts concerning other MEPs. Since such access was denied to other MEPs, Parliament argued that it was *a fortiori* denied to persons from outside Parliament, such as the complainant.

Parliament added that the complainant was furthermore able to have direct access, via the Internet, to the "Declaration of financial interests" of each of the five Maltese MEPs.

The complainant's observations

No observations were received from the complainant.

The Ombudsman's inspection of the file

On the basis of the information he had received up to that point, the Ombudsman proceeded to a preliminary assessment of the complaint. He noted that, although it could have been argued that the complainant's request concerned access to information rather than access to documents, both the complainant and Parliament based their reasoning on Regulation 1049/2001.

However, from Parliament's submissions, it was not yet entirely clear to the Ombudsman what exactly were the documents or information to which the complaint related.

Therefore, the Ombudsman decided, pursuant to Article 3(2) of the Ombudsman’s Statute, to ask Parliament to give his services access to these documents or information.

On 14 December 2006, Mr C., Head of the Unit "Members' Allowances" of Parliament's Directorate-General for Finance, received the Ombudsman's representatives. He explained that there are four different types of allowances for MEPs that are handled by his unit, namely, (i) the allowance for general expenditure, (ii) the allowance for the reimbursement of parliamentary assistance expenses, (iii) travel allowances and (iv) the so-called subsistence allowance. He stated that data concerning these allowances are recorded in three databases, namely, (a) a database called **INDE** for general expenditure, (b) a database called **CID** concerning the allowance for the reimbursement of parliamentary assistance expenses and (c) a database called **MIME** for the travel and subsistence allowances.

By way of example and on a confidential basis, Mr C. showed the Ombudsman's

representatives printouts of extracts of these three databases for individual MEPs.

(a) The printouts of database **INDE** showed the name of the MEP concerned, the amount s/he received as a general expenditure allowance, the amount of contributions to the MEPs' pension scheme to be deducted from the allowance and the MEP's bank account details. Mr C. explained that the allowance was paid as a lump sum that was the same for all MEPs, but that the amount of pension contributions to be deducted varied according to individual factors (such as age and the chosen scheme) and obviously equalled zero for MEPs who did not participate in the MEPs' pension scheme. He stated that Parliament's *Social Rights* Unit was responsible for determining these amounts.

In reply to a question from the Ombudsman's representatives as to whether the amount of the lump sum was made public, Mr C. stated that it was not public as such, but that certain media had published the amount that had been fixed for the year 2005.

(b) The printouts of database **CID** showed the amount that the MEP concerned had requested to be paid to his or her assistants each month. Apart from the name of the MEP, the printouts showed the assistants' names and the amounts each of them received according to their contracts with the MEP. In other cases, the name of a company was indicated instead of the names of assistants. Mr C. explained that the contracts MEPs concluded with their assistants were not necessarily work contracts, but could also be service contracts. He explained that the amounts paid to assistants on behalf of MEPs under this allowance varied and was subject to a fixed ceiling. The printouts showed, for each month, this maximum figure and the portion thereof that had been used during that period, as well as the amount that had not been used. Mr C. explained that each month's unused budget could be used at any time up to the end of the year, when it would expire. He also explained that the proof required for making payments to the assistants was the latters' contract with the MEP and proof of their social security coverage. He went on to state that his unit did not receive the assistants' salary slips.

In reply to a question as to whether it would be possible to produce extracts of the database that did not reveal the assistants' names, Mr C. stated that this was not a standard operation but that it could be done using filters or a query tool such as *Business Objects* .

(c) Mr C. also explained that the printouts from database **MIME** showed, first, the allowance paid for the MEPs' travels between their place of origin and their working places, that is, Brussels and Strasbourg. He stated that this allowance was paid in a lump sum, which was calculated on the basis of the relevant distance travelled and the chosen means of transport. The lump sum would also be reimbursed if the actual costs of travel were lower. However, MEPs were required to produce their boarding passes in order to be reimbursed for air travel. Secondly, the database showed the MEP's subsistence allowance, which is granted for days spent working for Parliament. Mr C. explained that this allowance was granted on the basis of lists the MEPs signed when, for example, attending the committees of which they were a member. The amount of the allowance was the same for every MEP. Thirdly, the database showed reimbursements for other travel expenses, which, according to Mr C., were made on the basis of proof of the costs actually incurred. The headings that appeared in the example

presented to the Ombudsman's representatives included the following: air travel, " *frais divers* " (miscellaneous expenses), hotel costs and taxi charges. A more detailed printout showed the dates and places of travel, as well as the connection used. Concerning the subsistence allowance, the more detailed printout showed the name of the committee attended.

Mr C. explained that the database also contained more details for headings such as *frais divers* . He confirmed that there were no data concerning third parties in this database. Travel expenses of assistants, for example, could not be reimbursed under this allowance.

In reply to a question from the Ombudsman's representatives as to whether, apart from these allowances and apart from pensions, Parliament made any other payments to MEPs, Mr C. stated that this was not the case at his level but that the *Social Rights* Unit also paid for medical expenses as well as for language and computer courses. In addition, the imprest account officers of other Directorates-General could on some occasions be entitled to make advance payments for MEPs during their missions abroad. However, those would subsequently have to be verified and approved by Mr C.'s unit.

A report on the inspection was sent to the complainant and to Parliament.

The complainant's observations

Commenting on the inspection report, the complainant confirmed that his request for access to documents related to the four types of allowances registered in the three databases that the Ombudsman's representatives had inspected. He reiterated his view that the information contained in the databases should be made public because the European taxpayers were entitled to control the use made of their contributions. Furthermore, Maltese MEPs were accountable to the Maltese voters for the way in which they spent the money they received from the European budget in connection with their duties.

The complainant also emphasised that, as Mr C. had pointed out, it was possible to release detailed information on the MEPs' payments to their assistants without revealing the latters' names. Such a course of action would allow the release of the requested information without breaching Article 4(1)(b) of Regulation 1049/2001. He argued that, given that detailed information contained in the three databases could be made public without releasing the names of third parties, the request for access did not go beyond the scope of Regulation 1049/2001.

The complainant asked the Ombudsman to consider whether the release of the requested information could undermine the protection of the privacy or integrity of the individuals concerned and to ascertain whether it would pose a real risk of serious harm to their protected interests.

The complainant added that, should parts of a document not be accessible, the rest of the document should be disclosed.

The Ombudsman's consultation of the European Data Protection Supervisor *The Ombudsman's considerations*

Following careful analysis of the information that had been provided to him by the complainant and by Parliament, the Ombudsman considered that the present case left room for divergent

views as to the correct interpretation and application of data protection rules. More specifically, it required that a balance be struck between openness and the right to privacy, a situation the European Data Protection Supervisor ("EDPS") had discussed in his Background Paper on public access to documents and data protection (3) .

Therefore, the Ombudsman decided to consult the EDPS on this case, pursuant to Parts C and D of the Memorandum of Understanding between the EDPS and the Ombudsman (4) . Accordingly, the Ombudsman asked the EDPS for his view on the question as to whether and, if so, to what extent, the data requested by the complainant could be released.

In particular, the Ombudsman noted that Parliament had argued that certain documents could not be released because they contained personal data concerning third persons, especially the names of the MEPs' assistants. However, Parliament did not appear to have considered the possibility of granting partial access to such data, for example by deleting the assistants' names. In the context of payments to assistants, it also appeared that such payments, which are made every month on behalf of the respective MEP, vary up to a certain fixed ceiling. The Ombudsman's representatives had been informed that each month's unused budget under this allowance could be used at any point up to the end of the year, when it would expire. Therefore, it could be asked whether it would not be possible to give access at least to certain aggregate figures, such as the information whether and to what extent MEPs exhausted their budget under this allowance for a given year. Furthermore, and as far as the MEPs themselves are concerned, Parliament did not appear to have considered whether, in the event that the documents in question contained sensitive data concerning its MEPs, to ask them for their opinion on the effects of potential disclosure of the data.

The EDPS's reply

In his reply, the EDPS recalled that, in his background paper, he had extensively discussed situations in which an institution takes a decision on a request for public access to documents containing personal data. In such situations, the EDPS argued, the institution had to take into account the fundamental nature of both the right to public access and the right to data protection. This resulted in a balanced approach. However, it was quite often not evident whether, under specific circumstances, public access must be granted to personal data.

Against this background, the EDPS made a number of observations concerning the case at hand.

First, he stated that it had to be taken into consideration that the case primarily dealt with the personal data of MEPs. Although the position of MEP did not mean that persons holding such a position should be denied protection of their privacy, the basic consideration in a transparent and democratic society had to be that the public has a right to be informed about their behaviour. The MEPs had to be aware of this public interest. In the present case, this was even more evident because it dealt with the expenditure of public funds, entrusted to the MEPs. The EDPS pointed out that, in Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* (5) , the Court of Justice explicitly recognised the objective of monitoring the proper use of public funds as a justification for interference with privacy.

The EDPS furthermore stated that, as far as the personal data of the MEPs' assistants were concerned, the outcome had to be more nuanced. In this connection, he argued that while, in this respect as well, the public's right to information was predominant, exceptions designed to protect the assistants' legitimate interests were nevertheless needed. According to the EDPS, an example of this could be that disclosure of the name of an assistant, in relation to the MEP for whom he or she worked, could reveal the assistant's political views. This was sensitive data within the meaning of Article 10 of Regulation 45/2001. The EDPS stated that, at first sight, the solution the Ombudsman had suggested in his considerations, namely, to blank out the assistants' names, would adequately protect the assistants' rights. The EDPS also took the view that, if, for specific reasons, this solution did not satisfy the justified interests of the data subjects, access to aggregate figures, as mentioned by the Ombudsman, could be considered.

As to the possibility of asking the MEPs for their opinion on the effects of potential disclosure of data, the EDPS stated that, in general, he fully endorsed the use of this option. However, he added that, in the present case, he was not convinced of its usefulness, in so far as it concerned data relating to the MEPs themselves. In conclusion, the EDPS stated that it seemed obvious that these data had to be disclosed. He considered, however, that it could be useful to ask about the effects of potential disclosure of the data relating to assistants.

The Ombudsman forwarded copies of the EDPS's reply to Parliament and to the complainant.

Parliament's comments

Parliament answered that it had examined the EDPS's opinion in great detail. However, it again drew the Ombudsman's attention to the arguments it had advanced in its opinion on the present case. Parliament emphasised that it was important to recall that, as the Bureau had pointed out in its decision on the complainant's request for access, audits concerning the use of public funds were carried out internally as well as outside the institution. Parliament went to point out that such audits had to be carried out by independent organisations, such as the European Court of Auditors, and in accordance with the institutional procedures guaranteeing respect for both regulations governing the use of public funds and freedom of action for the MEPs.

The complainant's observations

In his observations on the EDPS's reply and on Parliament's comments on this reply, the complainant emphasised again that the principles at stake in his complaint were transparency and accountability. He agreed that internal and external audits had to be carried out in accordance with institutional procedures. However, it had to be ensured that MEPs could be held accountable for their actions by the people who had elected them. The complainant added that, since MEPs belonged to Europe's most senior representatives, it was their right to be paid good professional rates. However, he considered that the public was entitled to know just what these rates were.

The complainant stated that he was pleased to note that the EDPS had concluded that the data concerning the MEPs themselves had to be disclosed. He fully agreed with the EDPS's opinion that the MEPs had to be aware of the public interest in being informed about their behaviour and that this was even more evident in his case because it concerned the expenditure of public funds. The complainant thanked the Ombudsman for his efforts in this case.

THE OMBUDSMAN'S DRAFT RECOMMENDATION

The Ombudsman's considerations

1. The Ombudsman noted that both the complainant and Parliament based their reasoning in the present case on the provisions contained in Regulation 1049/2001, relating to access to *documents* , although it could have been argued that the complainant's request concerned access to *information* . Therefore, the Ombudsman also based his considerations exclusively on legislation relating to access to documents.

2. The Ombudsman also noted that the position the EDPS took when the Ombudsman consulted him in relation to this case was broadly similar to that consistently taken by him in relation to public access to documents. In the present case, the standards of transparency had to be particularly high, given that it concerned (i) the use of public funds to which citizens contribute by way of their taxes and (ii) the behaviour of these citizens' elected representatives.

3. In relation to Parliament's arguments against disclosure of the data, the Ombudsman considered that he had to distinguish between the MEPs themselves and third parties.

4. As the EDPS had clearly stated, MEPs had to be aware of the public interest in their behaviour, particularly if this behaviour is, as in the present case, connected with the use of public funds. Therefore, the Ombudsman took the view that, in this aspect of the case, openness should prevail over the right to privacy as laid down in Article 4(1)(b) of Regulation 1049/2001.

5. As to Parliament's argument that specific checks by the Committee on Budgetary Control and the Court of Auditors ensured that public funds were used correctly, the Ombudsman recalled that Regulation 1049/2001 does not require applicants to give reasons for their application for access to documents. Therefore, the Ombudsman regarded as invalid the argument put forward by an institution examining an application that the same end which the applicant wishes to attain by requesting access to certain documents may be achieved by other means. The Ombudsman therefore considered that Parliament's reference to financial checks by the responsible bodies was not relevant in the context of this case.

6. The Ombudsman also noted that Parliament additionally referred to Rule 5(3) of its Rules of Procedure, which provides that MEPs may not have access to the personal files and accounts of other MEPs. Parliament took the view that, since such access was denied to other MEPs, it was *a fortiori* denied to persons from outside Parliament. The Ombudsman recalled that Parliament's Rules of Procedure were adopted by Parliament itself in order to organise its internal functioning. He considered that they could not be applied directly to Parliament's relations with citizens. Thus, they did not appear to constitute an appropriate legal basis for rejecting the complainant's application for access.

7. The Ombudsman thus considered that the arguments put forward by Parliament were not convincing and that, therefore, Parliament's refusal to grant the complainant access to the data he requested, in so far as they related exclusively to MEPs, was not justified. This constituted

maladministration.

8. In so far as personal data relating to MEPs' assistants were concerned, the Ombudsman recalled that, in his letter to the EDPS, he had noted that Parliament did not appear to have considered the possibility of granting partial access to documents containing such personal data, for example, by deleting the assistants' names. The EDPS confirmed that the blanking out of the assistants' names would adequately protect their rights, unless there were specific reasons as to why this solution would not satisfy their legitimate interests. Therefore, the Ombudsman considered that Parliament would not have had to disclose the assistants' names. However, its failure to consider the possibility of granting partial access to documents containing personal data of assistants, for example, by blanking out the assistants' names, also constituted maladministration.

9. These considerations led the Ombudsman to draw the following conclusions in relation to the data contained in the individual databases:

The **INDE** database for general expenditure did not appear to contain any data relating to persons other than the MEPs themselves. The Ombudsman considered it to be obvious that the amount of the lump sum paid to all MEPs for their general expenditure should be disclosed, if it was not already public. The MEPs' bank account details, which also appeared on the excerpts of this database, should of course not be disclosed.

As regards deductions from the lump sum provided for the MEPs' pension scheme, the Ombudsman noted that the EDPS had not commented on this issue in particular. However, it had to be noted that the Ombudsman was dealing with another complaint concerning public access to the list of names of all MEPs who participate in the MEPs' pension scheme (6) . The Ombudsman's inquiry into that case was still pending. Therefore, he considered that he should await the outcome of that case before making recommendations in relation to the question whether Parliament should also give access to data that are connected with the participation of individual MEPs in the MEPs' pension scheme.

As regards the **CID** database recording the allowances for the reimbursement of parliamentary assistance expenses, the Ombudsman took the view that the assistants' names should not be disclosed. However, as far as the Ombudsman could see, there did not appear to be any specific reasons, such as those mentioned by the EDPS, which would require further anonymisation beyond the blanking out of the assistants' names. Therefore, the Ombudsman considered that, in the absence of any specific reasons against such disclosure, access should be granted to the relevant excerpts from this database, with the exception of references to the assistants' names, which should be deleted.

As regards the **MIME** database recording travel and subsistence allowances for MEPs, the Ombudsman noted that, as Parliament's representative had confirmed, the database did not contain any data concerning third persons. He therefore considered that full access to the data contained in this database should be granted.

10. On the basis of the above considerations, the Ombudsman concluded that Parliament wrongly rejected, in its entirety, the complainant's application for access to the data contained in its databases **INDE** , **CID** and **MIME** . This constituted maladministration.

The draft recommendation

Based on the preceding considerations, the Ombudsman made the following draft recommendation to the European Parliament, in accordance with Article 3(6) of the Statute of the European Ombudsman:

" *Parliament should (i) reconsider the complainant's application for access to data detailing the allowances granted to the Maltese MEPs and (ii) grant the complainant access to these data according to the considerations set out above.* "

Parliament's detailed opinion

In its detailed opinion, Parliament emphasised that MEPs had to be able to carry out their mandate in complete independence, which had to be safeguarded from any undue pressure. It pointed out that their re-election was the ultimate check by the citizen on their actions and activities. Given the differences in living standards at the European level, which had become even more striking following the latest enlargement, Parliament had decided to pay certain allowances to Members in addition to the salary paid by national authorities. The objective of such allowances was to harmonise the Members' working conditions and to guarantee their political and financial independence.

Parliament stated that it appreciated the argument that, in a transparent and democratic society, the public had a right to be informed about the use of public revenues, in this case the public funds entrusted to MEPs. Accordingly, it informed the Ombudsman that, with a view to improving Parliament's policy of transparency as regards the allowances' system for MEPs and in line with best practices identified in different Member States, its Bureau had decided to publish on its website (a) information concerning the Rules Governing the Payment of Expenses and Allowances to Members ("PEAM") and (b) the amounts to which the Members are entitled under the different headings. This publication, which would include information on all changes in the amounts or rules as soon as they occurred, would be accompanied by an easily accessible and citizen-friendly explanation of the purpose and use of each allowance.

As regards the general expenditure allowance, Parliament stated that all Members received the same flat-rate monthly allowance for general expenditure, which was revised annually by the Bureau and currently amounted to EUR 4 052. On request, citizens could obtain information on the amount fixed every year. The intended proposal to publish information on the allowances on Parliament's website would make this figure directly accessible to the public. Parliament took the view that it would thus comply with the Ombudsman's request as regards this type of allowance.

As regards the allowance for the reimbursement of parliamentary assistance expenses, Parliament stated that each Member was entitled to a monthly allowance of this type up to a maximum amount of currently EUR 16 914 to cover expenses arising out of the employment or use of the services of one or more assistants. It pointed out that, according to Annex XV (point 1.3, last indent) of the Rules of Procedure of the European Parliament, the list of Members'

assistants had to be made directly accessible to the public. The assistants' names were in fact already accessible on Parliament's website and could be searched either directly or in relation with the names of Members. Thus, granting access to the documents concerning the reimbursement of parliamentary assistance expenses, even with the assistants' names blanked out, would interfere with the assistants' right of privacy because the cross-referencing of both sources of information would reveal the details of the personal income of individual assistants. Consequently, the mere blanking out of their names would not be sufficient to protect them.

Parliament added that, according to the judgment of the Court of Justice in the *Rechnungshof* case (7) , in order to be lawful, the treatment of personal data consisting in the transmission to third parties of data concerning payments in favour of natural persons must be necessary for and appropriate to the public interest objective being pursued. In the present case, control over public expenditure constituted the public interest to be protected. The publication of the names of assistants, or details which allowed identification by deduction, was not necessary in the sense of Article 5(a) of Regulation 45/2001 for the realisation of this public interest.

As regards the travel and subsistence allowances, Parliament recalled that, when a Member participated in an official meeting of one of Parliament's bodies within the EU, the amount of the travel allowance was calculated on the basis of the mode of transport and the distance per return journey between the place of residence and the place of work. Information on the methods of calculation and the amounts involved would be made available on Parliament's website following the Bureau's decision.

Parliament submitted that an appropriate balance had to be struck between the two different public interests in guaranteeing a free exercise of the Members' mandate on the one hand and an efficient control over public expenditure on the other. Parliament took the view that disclosure of nominal breakdowns of the amounts received under the travel allowance heading could have serious consequences for the Members. Indeed, should these documents become accessible, conclusions could be drawn concerning the political activity of a Member as well as his or her sources of information. Such probing into the exercise of their mandate could infringe the principle laid down in Rule 2 of Parliament's Rules of Procedure requiring that Members exercise their mandate independently.

As regards the subsistence allowance, Parliament pointed out that Members were entitled to a flat-rate allowance, which currently amounted to EUR 287 per day, for participation in official meetings of Parliament's bodies. This allowance was intended to cover accommodation expenses and meals, as well as any other expenses incurred during the stay. It added that this information would be made available on Parliament's website following the Bureau's decision.

As regards the need to balance data protection and control over public expenditure, in general, Parliament reiterated that the present complaint primarily concerned MEPs' personal data, which had to be processed in accordance with Regulation 45/2001. According to the case-law of the Community courts, granting public access to a document containing personal data constituted a treatment of personal data within the meaning of Article 2 of Regulation 45/2001, and the obligation incumbent on the institutions under Regulation 1049/2001 to grant access to

documents constituted a legal obligation to process personal data within the meaning of Article 5(b) of Regulation 45/2001. Under this Article 5(b), personal data could be processed if " *processing is necessary for compliance with a legal obligation to which the controller is subject* ". The Court of Justice had recognised the objective of monitoring the proper use of public funds as a justification for so-called invasion of privacy, but had maintained that processing should be consistent with the principle of proportionality when it was for a public purpose (8) . The interest, therefore, in ensuring the best use of public funds had to be balanced against the seriousness of the interference in the rights of the persons concerned to respect for privacy.

Parliament stated that its Bureau had taken the view that the personal data, that is, the names and sums paid for individual items, of MEPs contained in statements on payments of expenses and allowances related to the privacy of individuals and that disclosure would have considerable implications for the persons concerned. Moreover, it should be noted that the proper use of public funds in this particular case was already guaranteed by the relevant internal and external checks. The public interest in the verification of the expenditure was satisfied through the audit mechanisms involving Parliament's Committee on Budgetary Control and the Court of Auditors. Furthermore, it should be acknowledged that these audits respected the right of privacy of the Members and their assistants to the extent that the officials involved in the internal and external verification procedures had an obligation of professional secrecy.

Parliament added that its Members had never been informed that the details of their expenses may be revealed to the public. Releasing this information would mean to use it for purposes other than that for which the data had been collected (Article 6 of Regulation 45/2001). Parliament also reiterated that, according to its Rules of Procedure, Members did not have access to personal files and accounts of other Members, which meant that access was *a fortiori* denied to persons outside Parliament.

Parliament emphasised that, contrary to what the Ombudsman had found, it had not refused access on the grounds that the end which the applicant wished to attain by requesting access to documents could be achieved by other means. It had merely stated that the overriding public interest - which could justify disclosure - invoked in a request had to be distinct from the general public interest in access to documents and had to be specific to the situation in question (9) , that is, appropriate to the public interest objective being pursued.

In conclusion, Parliament upheld its opinion that disclosure of documents revealing details of amounts paid to individual Members in the form of various allowances provided for under the PEAM rules would be disproportionate to the objective being pursued in Regulation 1049/2001, namely, the administration's accountability to the citizen in a democratic system (Recital 2). The release of the data was not necessary and was therefore incompatible with Article 5(a) of Regulation 45/2001. In particular, the presence of a democratically legitimate organ, the Committee on Budgetary Control, and of an external audit mechanism, the Court of Auditors, justified the conclusion that effective means of control over the MEPs' expenditure were in place.

Parliament also reported that inquiries with national parliaments in the Member States had

shown that, in general, individual details or breakdowns of the allowances actually paid out to Members of Parliament were not made public. Parliament enclosed with its letter to the Ombudsman a table setting out the practices it had found to be in place in the different EU Member States and in certain states outside the EU.

According to Parliament, the majority of national parliaments published on their websites brief descriptions of the allowances to which Members of Parliament are entitled in the exercise of their mandates, as well as the purpose of these allowances and the rules governing them. However, the fact that hardly any national parliaments provided information on allowances paid to individual Members indicated that such disclosure was generally felt to be an undesirable breach of privacy. Moreover, the mere fact that there were different practices among national parliaments called for restraint on the part of the European Parliament, in order to avoid obliging Members to adopt a practice which went beyond what was required in their own Member States.

Parliament added that individual Members could, of course, decide whether they wanted to disclose more information on the allowances paid to them than was required by Parliament's rules.

Parliament moreover pointed out that it should be borne in mind that the Statute for Members would enter into force on the first day of the European Parliament parliamentary term beginning in 2009. In this context, new implementing rules would come into force. In particular, the rules concerning reimbursement of travel expenses and the pension scheme would change. Therefore, Parliament submitted that the situation should be analysed again in the light of the experiences arising from the Statute’s entry into force.

The complainant's observations

In his observations, the complainant maintained his complaint. He noted that Parliament had so far not even asked the five MEPs to whom this case related for their opinion on the matter, although doing so could have added more views to the debate. Moreover, it had not established whether the MEPs had given their consent to disclosure of the data, pursuant to Article 5(d) of Regulation 45/2001.

The complainant emphasised again that his request was in the public interest and stated that he could not trust Parliament's internal audits. In this context, the complainant underlined that one such audit on the parliamentary assistance allowance, which had lasted 14 months, had recently been completed. However, Parliament had then decided not to publish the results of this audit. The complainant submitted that a summary of the findings of the audit had been published by an MEP, on his own initiative, and that this summary referred to various irregularities. Therefore, the complainant asked what guarantees Parliament was offering citizens in terms of transparency and proper auditing relating to MEPs' accounts.

The complainant asked the Ombudsman to take all possible action to bring his complaint to the wider attention of MEPs, the public and the European media, in particular against the background of the proposed reform of Regulation 1049/2001, which, according to him, would further restrict access to documents. Furthermore, he asked the Ombudsman to ensure that

Parliament fulfilled its announcement to publish information on MEPs' allowances on its website and thus complied with the Ombudsman's request in this respect.

The complainant took the view that it was clear from the summary of the internal auditor's report published by one MEP that the present rules on the parliamentary assistance allowance offered an opportunity for abuse, making it possible for MEPs, for example, to pay the full amount available under this allowance to service providers although they only had one or even no accredited assistant or to pay the allowance to a bogus company.

Moreover, the same summary showed that, in 26% of the cases sampled for the audit report, no certificates of affiliation to a social security scheme had been submitted to Parliament's administration, which the auditor had considered not to be in line with the PEAM rules. Additionally, there were cases of assistants being paid excessively for travel and subsistence costs. The complainant took the view that this summary had to be taken into account when assessing whether the disclosure he had requested was "necessary in a democratic society".

The complainant also noted that Parliament interpreted the notion of privacy in a very broad way which led it to block all access to the MEPs' accounts. However, in his view, his request in no way constituted an intrusion into the "inner circle" of the private lives of MEPs and their assistants, but pursued the legitimate aim of holding MEPs publicly accountable.

The complainant emphasised again that voters had to be able to scrutinise whether the MEPs' achievements during their tenures justified the amount of money they were paid by Parliament. Otherwise, voters could not fully make use of the benefits of democracy.

THE DECISION

1 Public access to data concerning allowances granted to MEPs *The relevant facts*

1.1 The complainant, a journalist who works for the Maltese weekly newspaper *MaltaToday* , asked the European Parliament for access to data detailing the payments made by Parliament to its five Maltese MEPs. Parliament rejected the complainant's application and confirmatory application, arguing that the documents in question contained personal data pursuant to Article 2 of Regulation (EC) 45/2001 of the European Parliament and of the Council 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 (10) ("Regulation 45/2001"). According to Parliament, disclosure of the documents would infringe the privacy interests of a third party, within the meaning of Article 4(1)(b) of Regulation (EC) 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (11) ("Regulation 1049/2001"). Moreover, the proper use of public funds was guaranteed by the relevant internal and external checks carried out by the Committee on Budgetary Control and the Court of Auditors. Parliament also argued that Rule 5(3) of its Rules of Procedure stipulated that MEPs were not entitled to inspect the personal files and accounts of other MEPs. Therefore, *a fortiori* , such access had to be denied to persons outside Parliament.

1.2 In his complaint to the Ombudsman, the complainant argued that an MEP was a public person who was paid both by national governments and from European funds and thus indirectly by the European taxpayers. The taxpayers should therefore have the right to scrutinise the use of their contributions by having access to the MEPs' accounts. He emphasised that openness strengthened the principles of democracy and fundamental rights and that it helped the Union's citizens in their participation in EU affairs.

The Ombudsman's inquiry

1.3 In its opinion, Parliament maintained its position. It stated, in particular, that it could not give access to the documents at issue because they related not only to MEPs but also to third parties, such as assistants, whose relationship with MEPs was governed by a contract under private law. Parliament submitted that it was not allowed to interfere in that relationship and thus limited itself to the role of an accountant. It also maintained that public scrutiny concerning the proper use of European funds was guaranteed by effective audits carried out by the Committee on Budgetary Control and by the Court of Auditors.

1.4 An inspection by the Ombudsman's services showed that the complainant's request concerned four types of allowances for MEPs, recorded in three databases by Parliament's Directorate-General for Finance. In particular, database **INDE** records allowances for general expenditure, database **CID** records allowances for the reimbursement of parliamentary assistance expenses, and database **MIME** records travel and subsistence allowances of MEPs. By way of example and on a confidential basis, the Ombudsman's representatives were shown printouts of extracts of these three databases concerning individual MEPs.

- The printouts of database **INDE** showed the name of the MEP concerned, the amount he or she received as a general expenditure allowance, which was paid as a lump sum that was the same for all MEPs, the amount of contributions to the MEPs' pension scheme to be deducted from the allowance, which varied according to individual factors, and the MEP's bank account details.
- The printouts of database **CID** showed the amount that the MEP concerned had requested to be paid to his or her assistant(s) each month. Apart from the name of the MEP, the printouts showed the assistants' names and the amounts each of them received, in accordance with their contracts with the MEP. In other cases, the name of a company was indicated instead of the names of assistants, given that the contracts MEPs concluded with their assistants could also be service contracts. The amounts paid to assistants on behalf of MEPs under this allowance varied and were subject to a certain fixed ceiling. The printouts showed, for each month, this maximum budget and the portion thereof that had been used, as well as the amount that had not been used. Parliament's representative stated that each month's unused budget could be used at any time up to the end of the year, when it would expire.
- The printouts of database **MIME** showed, first, the allowance paid for the MEPs' travels between their place of origin and their working places, that is, Brussels and Strasbourg. This allowance was paid in a lump sum, which was calculated on the basis of the relevant distance and the chosen means of transport. The lump sum would also be reimbursed if the actual costs of travel were lower. However, MEPs were required to produce their boarding passes in order to be reimbursed for air travel. Secondly, the database showed the MEP's subsistence allowance, which is granted for days spent working for Parliament and is calculated on the basis of lists the MEPs signed when, for example, attending the committees of which they were a member. The

amount of the allowance was the same for every MEP. Thirdly, the database showed reimbursements for other travel expenses, which were made on the basis of proof of costs actually incurred. The headings that appeared in the example presented to the Ombudsman's representatives included the following: air travel, " *frais divers* " (miscellaneous expenses), hotel costs and taxi charges. A more detailed printout showed the dates and places of travel as well as the connection used. Concerning the subsistence allowance, the more detailed printout showed the name of the committee attended. Parliament's representative stated that there were no data concerning third parties in this database. Travel expenses of assistants, for example, could not be reimbursed under this allowance.

The view of the EDPS

1.5 Given that the present case required that a balance be struck between openness and the right to privacy, the Ombudsman consulted the European Data Protection Supervisor ("EDPS") on whether and, if so, to what extent, the data requested by the complainant could be released. In his reply, the EDPS pointed out that, although the position of MEP did not mean that the persons holding that position should be denied protection of their privacy, the basic consideration had to be that the public had a right to be informed about their behaviour. The MEPs had to be aware of this public interest. In the present case, this was even more evident because it dealt with the expenditure of public funds entrusted to the MEPs. As to the possibility of asking the MEPs about their opinion on the effects of potential disclosure of data, the EDPS stated that he was not convinced of the usefulness of this possibility in the present case because it seemed obvious that the data relating to the MEPs themselves had to be disclosed.

As regards data concerning the MEPs' assistants, the EDPS stated that the outcome had to be more nuanced. While arguing that the public's right to information was predominant in their case as well, the EDPS nevertheless held that exceptions to protect the assistants' legitimate interests were needed. He went on to point out, as an example, that disclosure of the assistants' names in connection with the MEPs for whom they worked could reveal the assistants' political views, which constituted sensitive data within the meaning of Article 10 of Regulation 45/2001. According to the EDPS, the blanking out of the assistants' names would constitute adequate protection of their rights. The EDPS also took the view that, if, for specific reasons, this solution did not satisfy the justified interests of the data subjects, access to aggregate figures could be considered.

The Ombudsman's draft recommendation

1.6 Following a thorough assessment of the different aspects of the case, the Ombudsman concluded that Parliament wrongly rejected, in its entirety, the complainant's application for access to the data contained in its databases **INDE** , **CID** and **MIME** . This constituted maladministration. He therefore addressed a draft recommendation to Parliament, asking it to " *(i) reconsider the complainant's application for access to data detailing the allowances granted to the Maltese MEPs and (ii) grant the complainant access to these data* " in accordance with the considerations he had put before it.

Parliament's detailed opinion and the complainant's observations

1.7 In its detailed opinion, Parliament informed the Ombudsman that, in line with best practices identified in different Member States, its Bureau had decided to publish on its website information concerning the Rules Governing the Payment of Expenses and Allowances to Members ("PEAM") and the amounts to which the Members are entitled under the different

headings. It took the view that it would thereby comply with the Ombudsman's request in as far as the general expenditure allowance was concerned. As regards the allowance for the reimbursement of parliamentary assistance expenses, Parliament maintained that granting access to these data would, even if the assistants' names were blanked out, interfere with their right of privacy because the cross-referencing of this information with the list of Members' assistants, which was already directly accessible on Parliament's website, would reveal the details of the personal income of individual assistants. As regards the travel allowance, Parliament argued that disclosure of the breakdown of the amounts received under this heading could have serious consequences for the Members, in particular, because conclusions could be drawn concerning the political activity of the Member as well as his or her sources of information. As regards the subsistence allowance, the amount of the flat-rate allowance which was paid per day would be made public on Parliament's website.

Parliament maintained that disclosure of personal data, that is, names and sums paid for individual items, would be disproportionate to the objective pursued by Regulation 1049/2001. It held the view that disclosure was not necessary and therefore incompatible with Article 5(a) of Regulation 45/2001. Moreover, the MEPs had never been informed that the details of their expenses might be revealed to the public. Also, the fact that hardly any national parliaments provided information on allowances paid to individual members indicated that such disclosure was generally felt to be an undesirable breach of privacy. The mere fact that there were different practices among national parliaments called for restraint on the part of the European Parliament, in order to avoid obliging Members to adopt a practice which went beyond what was required in their own Member States.

Parliament also pointed out that individual Members could, of course, decide to disclose more information than was required by Parliament's rules. It added that, once the Statute for Members would enter into force in 2009, new implementing rules would also come into force concerning the reimbursement of travel expenses and the pension scheme. Therefore, Parliament submitted that the situation should be analysed again in the light of the experiences likely to arise from the entry of the Statute into force.

1.8 In his observations, the complainant maintained his complaint. He drew the Ombudsman's attention to a summary of an internal audit report produced by Parliament’s Internal Auditor, which had been made available by an individual MEP and which, according to the complainant, proved that the current rules offered MEPs an opportunity for abuse. He argued that the summary should be taken into account when assessing whether the disclosure he had requested was "necessary in a democratic society". The complainant took the view that Parliament interpreted the notion of privacy too broadly. This stance by Parliament confirmed that public scrutiny was indeed necessary in order to enable the voters to judge the MEPs' performance. The complainant also pointed out that Parliament had never asked the five Maltese MEPs concerned for their opinion and had not established whether they had given their consent to disclosure of the data. He asked the Ombudsman to take all possible action in order to bring this case to the wider attention of MEPs, the public and the media. He also asked the Ombudsman to verify whether Parliament had fulfilled its announcement that it would make certain information available on its website.

The Ombudsman's assessment

1.9 The Ombudsman considers that the issues raised by the complainant in the present case could, in theory, be interpreted from three main perspectives, that is to say, in relation to the principles of transparency, financial accountability and political responsibility. The principle of transparency forms part of the principles of good administration, respect for which the Ombudsman has to try and ensure. As regards the second of these principles, the manner in which MEPs use public funds raises the issue whether the relevant expenditure has been properly accounted for. The Ombudsman considers that this examination constitutes the primary responsibility of Parliament's internal budgetary control authorities and of the Court of Auditors. As regards the principle of political responsibility, the Ombudsman takes the view that this matter falls within the exclusive competence of Parliament and its MEPs. Parliament and MEPs play a role of central importance in the functioning and in the system of checks and institutional balances of the European Union, and they act, ultimately, under the control exercised by the voters themselves.

1.10 It is therefore important to stress at the outset that the present inquiry exclusively concerns the issue whether, in the present case, Parliament has respected the principle of transparency with regard to public access to the data in question. The Ombudsman recalls once again that both Parliament and the complainant based their reasoning on Regulation 1049/2001 concerning access to *documents* . Given that Parliament accepted to examine the complainant's request as a request for access to documents under this regulation (and not, for example, as a request for information), the procedures and criteria laid down in this regulation have to be applied. This also implies that only the exceptions provided for in the regulation could constitute valid grounds on which the complainant's application could lawfully be rejected.

1.11 In its detailed opinion, Parliament referred to a study of Member State practices concerning access to allowances granted to members of national parliaments. The Ombudsman notes that it appears from the study submitted by Parliament that a large number of national parliaments indeed do not provide information on individual payments to their members, but that it also appears from the same source that seven national parliaments do give access to this information and that no results are indicated for another eight parliaments, three of which appear to have replied to an earlier study in 2002, indicating that they did give access to the information in question. Parliament argued that the mere fact that there were different practices among national parliaments called for restraint on its part, in order to avoid obliging Members to adopt a practice which went beyond what was required in their own Member States. However, the question as to whether or not access should be granted in the present case is a question which has to be resolved exclusively at the EU level and in application of EU law only. The information that Parliament has provided concerning the practices adopted at the Member State level, though valuable as a source of comparative data, cannot therefore justify rejecting the complainant’s application on grounds that are not within the exemptions contained in Regulation 1049/2001.

1.12 The Ombudsman also takes note of Parliament's statement that the situation should be re-assessed following the entry into force in 2009 of the new Statute for Members. In so far as this statement represents a commitment by Parliament to a future review of the transparency of

MEPs' allowances, the Ombudsman welcomes it. However, what is at issue in the present case is an application for access to documents which was submitted in 2005 and the way in which it was handled by Parliament. It is therefore obvious that the Ombudsman has to assess this case on the basis of the law in force at the time when Parliament dealt with the application.

The relationship between Regulation 1049/2001 and Regulation 45/2001

1.13 According to its fourth recital, the purpose of Regulation 1049/2001 is " *to give the fullest possible effect to the right of public access to documents* ". Article 4(1)(b) of the Regulation, which Parliament evoked in order to support its position, provides as follows:

" *The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.* "

According to the established case-law of the Community Courts, (i) exceptions to the general right of access to documents laid down in Regulation 1049/2001 are to be applied and interpreted restrictively (12) ; (ii) the institution concerned, where it refuses access, must assess in each individual case whether the relevant document falls within the exceptions foreseen (13) ; and (iii) the possibility of granting partial access to information not covered by the relevant exceptions has to be considered (14) .

Article 5 of Regulation 45/2001 provides as follows:

" *Personal data may be processed only if:*

(a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed, or

(b) processing is necessary for compliance with a legal obligation to which the controller is subject, or

(c) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, or

(d) the data subject has unambiguously given his or her consent, or

(e) processing is necessary in order to protect the vital interests of the data subject. "

1.14 The Ombudsman notes that Parliament cited the judgment of the Court of Justice in the *Österreichischer Rundfunk* case (15) , in which the Court held that Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (16) did not preclude national legislation requiring disclosure of the names of the recipients of amounts of annual income above a certain threshold, provided that the national court determines that such disclosure is necessary for and appropriate to the public

interest objective pursued by the legislation. Parliament argued that, in the present case, control over public expenditure constituted the public interest to be protected and that publication of individual payments to MEPs and assistants was not necessary in the sense of Article 5(a) of Regulation 45/2001 for the realisation of this public interest.

1.15 This legal position appears to be based on the assumption that Regulation 1049/2001 creates a *renvoi* to Regulation 45/2001 where documents containing personal data are concerned. The Ombudsman considers that such an approach would have serious implications for citizens' right of access to documents under Regulation 1049/2001.

In particular, it should be noted that Article 6(1) of Regulation 1049/2001 provides that applicants do not need to state reasons when they ask for access to a certain document. However, Article 8(b) of Regulation 45/2001 requires that personal data shall only be transferred "if the recipient establishes the necessity of having the data transferred". Both Article 8(b) and Article 5(a) of Regulation 45/2001, on which Parliament based its view in the present case, require necessity in order for data transfer to be lawful. The application of these provisions would thus render Article 6(1) of Regulation 1049/2001 meaningless in all cases where citizens ask for access to a document that contains personal data. In the Ombudsman's view, this cannot have been the intention of the Community legislator. It is therefore necessary to find an interpretation that pays proper regard to the interests protected by both Regulation 45/2001 and Regulation 1049/2001.

1.16 As regards the relationship between Regulation 1049/2001 and Regulation 45/2001, the Ombudsman has always taken the view that both public access to documents and data protection are legitimate rights, but that they are not competing rights (17) . The prevailing principle in public administration has to be to serve the citizens through open decision-making procedures, in order to allow them to monitor the exercise of its power. On the basis of these considerations, the Ombudsman has consistently emphasised in the context of a number of complaints concerning access to documents that such access may not be restricted by an unduly wide interpretation of data protection legislation (18) .

1.17 The EDPS has broadly taken the same view in his Background Paper on public access to documents and data protection (19) . He confirmed this view in his reply to the Ombudsman's consultation in the present case, in which he pointed out that, although MEPs clearly must not be denied protection of their privacy, the basic consideration in a democratic society has to be that the public has a right to be informed about their behaviour.

1.18 In this respect, it is worth noting that the relationship between Regulations 1049/2001 and 45/2001 has also been considered by the Court of First Instance ("CFI") in its recent judgment on the *Bavarian Lager* case (20) , which concerned, among other things, access to the names of lobbyists who attended a meeting with the Commission and national government representatives. In its judgment, the Court held that Article 8(b) of Regulation 45/2001 may not be applied where personal data should be transferred in order to give effect to Regulation 1049/2001.

1.19 The Ombudsman notes that the legal interpretation expressed by Parliament in its detailed opinion had already been formulated by the President of the European Parliament in a letter addressed to the Ombudsman on 28 October 2002 (21) . The then President of Parliament - Mr Pat Cox - clearly expressed Parliament's position that the Ombudsman's interpretation of the legal relation between Regulation 1045/2001 and Directive 45/2001, which was the same as that adopted in the current decision, " *....would represent a change in the substantive law,* as the effect of Article 4(1)(b) of Regulation 1049/2001 is to subordinate the public access right contained in Article 2 of that Regulation to Community data protection legislation " [emphasis added].

1.20 This *renvoi* theory was also consistently defended by the Commission until the CFI rejected such an interpretation in the *Bavarian Lager* case. However, the Commission has appealed to the Court of Justice against the CFI's judgement (22) on the ground, among others, that the CFI held that Article 8(b) of Regulation 45/2001 may not be applied in the case of personal data in documents held by an institution falling under Regulation 1049/2001 and that no provision of either Regulation 45/2001 or Regulation 1049/2001 requires or permits this provision to be disabled in order to permit a norm under Regulation 1049/2001 to have effect. This ground for the Commission's appeal is, in substance, the same as the legal interpretation put forward by the European Parliament in its detailed opinion to the Ombudsman.

1.21 As has been generally explained above and will be developed in more detail hereunder, the Ombudsman remains convinced that this is not the correct interpretation of the general legal question of the relationship between Regulation 1049/2001 and Regulation 45/2001. This view of the Ombudsman is shared by the EDPS and has also been confirmed by the Court of First Instance in the *Bavarian Lager case* which, until the Court of Justice issues its judgement on the appeal, remains the authoritative interpretation in this matter and has to be respected both by Parliament and the Ombudsman.

1.22 Therefore, as regards the present case, the Ombudsman takes the view that the complainant did not need to establish that the processing and transfer of the data in question was necessary.

The interpretation of Regulation 1049/2001

1.23 When it assessed the complainant's application on the basis of Regulation 1049/2001, Parliament came to the conclusion that the exception laid down in Article 4(1)b was applicable because disclosure would undermine the protection of " *privacy and the integrity of the individual* ". It is clear that the documents to which the complainant wishes to be given access contain personal data. However, in its judgment in the *Bavarian Lager* case, the Court of First Instance held that not all personal data were (in the event of their disclosure) by their nature capable of undermining the private life of the person concerned. Instead, the CFI held, it had to be assessed whether public access was " *capable of actually and specifically undermining the protection of the privacy and the integrity of the persons concerned* " (23) .

1.24 Before applying this test to the present case, the Ombudsman considers it useful briefly to deal with two arguments raised by the parties in the context of the interpretation of Regulation 1049/2001.

1.25 First, it should be recalled that the exception laid down in Article 4(1)b of Regulation 1049/2001 is phrased in unconditional terms. In other words, access cannot be granted if the disclosure of a document would undermine the protection of the privacy and the integrity of a person. This exception cannot be overruled, as can the exceptions laid down in Article 4(2), by an overriding public interest in disclosure. Therefore, the Ombudsman is surprised to note that, in its detailed opinion, Parliament appeared to argue that a request for access had to refer to an overriding public interest which had to be distinct from the general public interest in access to documents.

1.26 Second, in his observations, the complainant argued that Parliament should have established whether the MEPs had given their consent to the processing according to Article 5(d) of Regulation 45/2001. Parliament has not referred to this argument in its submissions. However, Parliament argued that the MEPs had not been informed about the possibility that the details of their expenses could be revealed to the public.

In its judgment on the *Bavarian Lager* case, the Court of First Instance held that the processing of data required under Regulation 1049/2001 constitutes a legal obligation for the purposes of Article 5(b) of Regulation 45/2001. Therefore, the data subject did not, in principle, have a right to object. However, it was necessary to take into account, on the basis of Article 4(1)b of Regulation 1049/2001, the impact which disclosure of data concerning the data subject might produce (24) . In his reply to the Ombudsman's consultation, the EDPS took the view that MEPs had to be aware of the public interest in their activity, in particular where it concerned the expenditure of public funds. Therefore, it was not necessary to ask the MEPs about their opinion as regards the effects of disclosure of the data in question.

In view of the above, the Ombudsman considers that the question whether the MEPs concerned were consulted or whether they had been informed about the possibility that the details of their expenses could be revealed to the public is not relevant for his assessment of Parliament's rejection of the complainant's application under Regulation 1049/2001.

The Ombudsman's conclusions as regards the individual sets of data concerned

1.27 Bearing all of the above considerations in mind, the Ombudsman will now turn to the individual sets of data concerned by the complainant's request for access to documents. These are data relating to (1) the general expenditure allowance recorded in the **INDE** database, (2) the allowance for the reimbursement of parliamentary assistance expenditure recorded in the **CID** database and (3) the travel and subsistence allowance recorded in the **MIME** database.

(1) The general expenditure allowance

1.28 As regards the general expenditure allowance recorded in the **INDE** database, the Ombudsman recommended that the amount of the lump sum paid to all MEPs should be disclosed, if it were not already public. The Ombudsman considered in effect that it was not possible to see how disclosure of this information was capable of actually and specifically undermining the protection of the privacy and the integrity of the MEPs concerned.

1.29 The Ombudsman notes that, in its detailed opinion, Parliament informed him that the lump sum in question currently amounted to EUR 4 052 and was revised annually. He takes note of

Parliament's statement that citizens may obtain, on request, information on this amount and welcomes Parliament's announcement that it would now make the information publicly available on its website. Even though Parliament did not explicitly say so, the Ombudsman trusts that the information to be provided on Parliament's website will include the lump sum amounts from the year 2004 onwards, given that the complainant's request specifically related to the years 2004 and 2005.

1.30 Therefore, the Ombudsman considers that Parliament has effectively accepted this aspect of his draft recommendation. As a matter of fact, it is now clear that all the five MEPs from Malta (like all other MEPs) receive the said allowance. In these circumstances, to insist that Parliament should disclose the relevant data from the **INDE** database for each of these MEPs would serve no useful purpose, since the relevant document would only confirm what the complainant now knows anyway.

1.31 In his observations on Parliament's detailed opinion, the complainant asked the Ombudsman to ensure that Parliament comply with its announcement that it would publish the relevant information online. The Ombudsman recalls that he has no power to force an institution or body to take a certain measure in order to eliminate the maladministration that he has identified. As regards the present case, the Ombudsman has in any event no reason to doubt that Parliament will proceed to the publication of the data as announced in its detailed opinion. However, should Parliament, contrary to all expectation, not comply with its announcement within a reasonable time, the complainant could consider submitting a new complaint to the Ombudsman.

1.32 As regards data connected with participation in the MEPs' pension scheme, which are also recorded in the **INDE** database, the Ombudsman announced, in his draft recommendation, that he would await the outcome of case 655/2006/(SAB)ID concerning access to the list of MEPs who are members of the pension scheme. His decision in that case was also adopted today. The Ombudsman arrived at the conclusion that, after having reached a provisional finding of maladministration and made a friendly solution proposal which was refused by Parliament, a full assessment of the problem at hand would most likely lead him to conclude that Parliament's contested refusal to disclose this information was not well-founded and that this constitutes an instance of maladministration.

However, the Ombudsman noted that the relevant issue had already been considered by Parliament and that the latter, acting as a political body and sitting in plenary session (25) , appeared to have taken the decision that this data should not be disclosed. This decision taken by Parliament implies that the concept of political responsibility, rather than the one of possible maladministration of the institution comes into play. This distinction is an element of central importance in the functioning and in the system of checks and institutional balances of the European Union. In these circumstances, the Ombudsman considered that no further inquiries were justified into this issue and closed the case. Given that the same considerations apply also in relation to the corresponding aspect of the present complaint, he takes the view that also no further inquiries into this issue on his part are justified.

(2) The allowance for the reimbursement of parliamentary assistance expenditure

1.33 As regards the allowance for the reimbursement of parliamentary assistance expenditure, recorded in the **CID** database, the EDPS took the view that the public's right to information was predominant, but that exceptions to protect the assistants' legitimate interests were needed. The EDPS pointed out, in this context, that disclosure of the assistants' names in connection with the MEPs for whom they worked could reveal the assistants' political views.

The Ombudsman agreed with the EDPS and recommended that, in the absence of any specific reasons arguing against disclosure, access should be granted, except for references to the assistants' names, which should be deleted.

Parliament did not implement the Ombudsman's draft recommendation in this respect. In its detailed opinion, it informed the Ombudsman that each Member was entitled to a monthly allowance of this type up to a maximum amount of currently EUR 16 914. However, Parliament argued that disclosure of a detailed breakdown of the amount of this allowance claimed by each MEP would, in practice, violate the privacy of assistants because it would make it possible to cross-reference this information with the list of parliamentary assistants, which is publicly accessible on Parliament's website, in order to obtain the details concerning the personal income of individual assistants.

1.34 The Ombudsman notes that the point raised by the EDPS concerning the protection of the political views of assistants does not appear to be relevant any longer for his own assessment because the information in question is already in the public sphere. However, Parliament's argument that the cross-referencing of the register with information on the parliamentary assistance allowance could allow conclusions as to how much individual assistants are paid merits closer examination. The Ombudsman considers that it cannot be excluded, in principle, that the disclosure of information which would allow such conclusions is capable of actually and specifically undermining the protection of the privacy and the integrity of the assistants concerned. He is not convinced, however, that disclosure of aggregate data concerning this allowance would have these negative consequences in each and every case. In any event, the Ombudsman is not convinced that conclusions concerning the payments made to individual assistants would be possible in the case of MEPs who have more than one assistant or in the case of MEPs who make use of the possibility to pay a company to provide assistance services. The Ombudsman notes that, according to the list of assistants available on Parliament's website, two of the five Maltese MEPs concerned by the present complaint currently have more than one assistant. However, it should also be acknowledged that, were those assistants to work in different countries and to be paid in different currencies, this could again lead to the possible identification of payments made to them.

1.35 Parliament would therefore have had to provide further and better explanations in order to establish its argument that the information to be disclosed would, in the present case, allow conclusions concerning the personal income of individual assistants, However, the Ombudsman notes that Parliament has not made any effort to show that disclosure of the relevant data in the concrete cases of the five Maltese MEPs would allow conclusions to be reached as to the salary of their individual assistants and that disclosure of these data is capable of actually and specifically undermining the protection of the privacy and the integrity of the assistants

concerned.

1.36 Moreover, the Ombudsman recalls that, in his consultation with the EDPS, he raised the possibility of releasing information as to whether and to what extent MEPs exhausted their budget under the parliamentary assistance allowance for a given year. The EDPS agreed with this possibility in case there should be specific reasons for maintaining that the deletion of the assistants' names would not be sufficient. However, the Ombudsman notes that Parliament has unfortunately not commented on this possibility, either.

1.37 The Ombudsman is aware of the fact that compiling such aggregate data may require operations in the database concerned which go beyond simple printing of excerpts. In its reply to the complainant's application for access, Parliament correctly observed that Regulation 1049/2001 concerned access to existing documents and did not oblige institutions to create documents. Parliament added that when the information requested was not available in one or more existing documents but involved the collation of data from a database, a request for access to this information, *stricto sensu* , fell outside the scope of Regulation 1049/2001. However, the Ombudsman also notes that Parliament nevertheless considered that the complainant's application should be examined in the light of the provisions of Regulation 1049/2001. Given that granting access to the information concerned would in any event make it necessary for Parliament to print it from the database in which it is contained, the Ombudsman considers that preparing a printout with aggregate figures would not appear to cause a disproportionate amount of extra work. Moreover, it appears from the Ombudsman's inspection of the databases concerned that the operations required to produce aggregate data would be relatively simple.

1.38 In view of the above, the Ombudsman considers that Parliament has failed to provide a satisfactory explanation as to why it could not grant access to the breakdown of the amount of the allowance for the reimbursement of parliamentary assistance expenditure claimed by the individual MEPs concerned and, in any event, has failed to consider granting access to aggregate data. This is an instance of maladministration.

(3) The travel and subsistence allowance

1.39 As regards the **MIME** database, the Ombudsman recommended that full access to the data contained in this database should be granted.

It appeared from his inspection of this database that three different categories of information are contained in it: (a) lump sum payments for travels between the MEP's place of origin to Brussels or Strasbourg, (b) the subsistence allowance paid on the basis of the lists of presence signed by MEPs and (c) special travel expenditure, that is, to places other than Brussels or Strasbourg, which was reimbursed on the basis of proof of the costs incurred. Parliament argued that a balance needed to be struck between the public interest in guaranteeing a free exercise of the MEPs' mandate and the public interest in an efficient control of the public expenditure. As regards the travel allowance, Parliament announced that it would make information on the methods of calculation and the amounts involved available on its website. However, disclosure of the breakdown of amounts received under this heading could have serious consequences for the Members, allowing conclusions to be drawn about their political activity and their sources of

information and thus infringing their independence. As regards the subsistence allowance, which currently amounted to EUR 287 per day, Parliament announced that it would make information on this amount and on the function of the payments under this heading available on its website.

1.40 The Ombudsman welcomes Parliament's announcement that it will provide additional information as regards the travel allowance. However, he also notes that Parliament has not implemented his draft recommendation to release the data detailing the amounts received by individual MEPs under this heading. The same is true for the subsistence allowance. Although the Ombudsman welcomes the additional information provided by Parliament, he considers that this information does not answer the request of the complainant, who wished to receive information on the individual amounts received by the MEPs under this latter heading.

1.41 As to Parliament's argument that the release of the data could allow conclusions to be drawn concerning the MEPs' political activity and their sources of information and thus infringe their independence, it is not clear to the Ombudsman which of the exceptions laid down in Article 4 of Regulation 1049/2001 Parliament seeks to invoke in this regard. He doubts whether Parliament's argument is at all relevant in the application of Regulation 1049/2001.

1.42 However, even if the argument were considered to be relevant, the Ombudsman fails to understand how release of the data referred to under points (a) and (b) in paragraph 1.39 above could have such consequences. It is obvious that MEPs have to travel to Brussels and Strasbourg for their mandate and that it is part of their work to attend meetings at these places, for which they receive the subsistence allowance. Moreover, most - if not all - of these meetings are public, which means that everybody would be able to ascertain whether a certain MEP has travelled to Brussels or Strasbourg.

1.43 The Ombudsman therefore maintains his view that Parliament has not established that its refusal to grant access to the data concerning the individual payments for travels to the working places and to the amounts paid in subsistence allowance was legally justified. This is also an instance of maladministration.

1.44 As regards point (c) in paragraph 1.39 above, the Ombudsman notes that it appeared from his inspection of the **MIME** database that this database does not seem to contain any information as to the purpose of MEPs' travels to places other than Brussels and Strasbourg such as, for example, the names of persons met by the MEPs involved. Nevertheless, he acknowledges that it cannot be excluded that certain information contained in the database should not be disclosed in as far as this would be needed for the protection of the MEPs' activities and their sources of information. However, Parliament has not provided any concrete information as to the nature and proportion of such data.

In any event, Parliament does not appear to have considered granting partial access to such travel data. He recalls, in this respect, that it appeared from his inspection of the **MIME** database that printouts of different levels of information could be produced. The first level of information shown to the Ombudsman's representatives contained aggregate data under

headings such as air travel, *frais divers* , hotel costs and taxi charges. A more detailed printout then showed the dates and places of travel as well as the connection used.

In the Ombudsman's view, it is difficult to see how the aggregate data available on the first level of information could allow conclusions as to the MEPs' political activity or their sources of information and could thus infringe their independence.

1.45 In view of the above, the Ombudsman concludes that Parliament has failed to provide convincing reasons as to why it could not grant the complainant access at least to aggregate data concerning MEPs' travels to places other than Brussels and Strasbourg. This is also an instance of maladministration.

1.46 The Ombudsman therefore concludes that Parliament's detailed opinion does not contain a satisfactory explanation of its continued refusal to provide the complainant with access to (1) data concerning payments made to the MEPs under the allowance for reimbursement of parliamentary assistance expenditure, (2) data concerning individual payments to the MEPs for their travel to Parliament's working places, (3) data concerning individual amounts paid to the MEPs as subsistence allowances, and (4) aggregate data concerning reimbursement of the costs incurred by each of the MEPs for travel to places other than Parliament's working places. As regards these aspects of the case, therefore, the Ombudsman maintains the findings of maladministration contained in the draft recommendation.

1.47 If the Ombudsman does not consider that the detailed opinion received from an institution or body to which he has addressed a draft recommendation is satisfactory, he may draw up a special report to the European Parliament, in accordance with Article 3(7) of the Statute of the Ombudsman. The submission of a special report gives the European Parliament, as a political body which derives its legitimacy from its direct election by citizens and which exercises an important role in the Union's constitutional order, the opportunity to take a position on the Ombudsman's views and conclusions in cases of general importance.

1.48 The Ombudsman considers that the present case is indeed of sufficient general importance to warrant a special report. However, it is clear from Parliament's detailed opinion that the contents of that opinion are the result of intense political discussion in Parliament and that, when giving its approval to the detailed opinion, the Bureau of Parliament (whose members are elected by MEPs), therefore acted as a political organ of Parliament. Moreover, the effect of Rule 195(2) of Parliament's Rules of Procedure is that no action can be taken on a special report from the Ombudsman without the authorisation of the Conference of Presidents, which is also a political organ of the Parliament. In these circumstances, the Ombudsman considers that no useful purpose would be served by submitting a special report to Parliament concerning the maladministration which gave rise to the draft recommendation in the present case.

1.49 When the Ombudsman decides that failure to comply with a draft recommendation does not justify the presentation of a special report to Parliament, his normal practice is to close the case with a critical remark. A critical remark issued in such circumstances confirms to the

complainant that the complaint was justified and informs the institution or body concerned of what it has done wrong, so that it can avoid similar maladministration in the future.

1.50 In the present case, the analysis in points 1.27 to 1.46 above explains to the complainant in detail the extent to which the Ombudsman considers his complaint to be justified and his reasons for that view. Furthermore, the Ombudsman has done all that is possible within his powers to persuade Parliament to respect the complainant's legal right of access. The Ombudsman recalls in this regard that, unlike the Court, he has no power to annul the decision of Parliament to refuse the complainant's application for access. As regards possible future requests for access, the Ombudsman has already done all that is possible within his powers to persuade Parliament to apply Regulation 1049/2001 as interpreted by the Court of First Instance in the *Bavarian Lager* case, so as to give effect to the principle of transparency.

1.51 The Ombudsman therefore considers that a critical remark in the present case would serve neither of the purposes for which such a remark is usually made when the detailed opinion on a draft recommendation is unsatisfactory but no special report is made to the European Parliament.

1.52 The Ombudsman recalls, however, that a study (26) he completed this year also underlined that an additional function of critical remarks is to strengthen public trust in the Ombudsman's impartiality, by showing that the Ombudsman is willing publicly to censure the Union Institutions when necessary. Moreover, the Ombudsman recalls that, as noted in point 1.9 above, the principle of transparency forms part of the principles of good administration, respect for which the Ombudsman has to try and ensure. For this reason, the Ombudsman considers that is appropriate to put on the public record, in a critical remark, his regret that Parliament has sought to justify its refusal fully to accept the draft recommendation to remedy the maladministration in this case by relying on a legal interpretation that weakens the principle of transparency and which has been rejected by the Court of First Instance in the *Bavarian Lager* case.

2 Conclusion

2.1 The Ombudsman applauds the fact that Parliament's detailed opinion on the draft recommendation acknowledges that, in a transparent and democratic society, the public has a right to be informed about the use of public funds entrusted to MEPs. The Ombudsman welcomes Parliament's adoption of a proactive policy of publishing on its website information about the different allowances to which MEPs are entitled. The Ombudsman also notes Parliament's statement that the situation should be re-assessed following the entry into force in 2009 of the new Statute for Members and, in so far as this statement represents a commitment by Parliament to a future review of the transparency of MEPs' allowances, he also welcomes it.

2.2 As regards Parliament's position on the complainant's legal rights under Regulation 1049/2001, the Ombudsman is glad to note that, as regards access to the general expenditure allowance, Parliament has implemented the relevant aspect of his draft recommendation.

2.3 As regards the other aspects of the draft recommendation, the Ombudsman maintains the findings of maladministration contained in the draft recommendation and considers it necessary

to make the following critical remark:

The Ombudsman regrets that the European Parliament has sought to justify its refusal fully to accept the draft recommendation to remedy the maladministration in this case by relying on a legal interpretation that weakens the principle of transparency and which has been rejected by the Court of First Instance in the *Bavarian Lager* case.

The Ombudsman therefore closes the case.

The President of the European Parliament will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2001 L 145, p. 43.

(2) OJ 2001 L 8, p. 1.

(3) "Public Access to Documents and Data Protection", Background Paper Series n° 1, July 2005. The paper is available on the EDPS's website (http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/21 [Odkaz]).

(4) OJ 2007 C 27, p. 21.

(5) Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989.

(6) Complaint 655/2006/(SAB)ID (confidential).

(7) Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 92.

(8) Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and others* [2003] ECR I-4989, paragraph 92.

(9) Parliament referred to the judgment of the Court of First Instance in Case T-84/03 *Turco v Council* [2004] ECR II-4061, paragraph 82.

(10) OJ 2001 L 8, p. 1.

(11) OJ 2001 L 145, p. 43.

(12) See, for example, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63.

(13) See, for example, Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van Der Wal v Commission* [2000] ECR I-1, paragraph 24.

(14) See Case C-353/01 P *Mattila v Commission* [2004] ECR I-1073, paragraph 30.

(15) Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and others* [2003] ECR I-4989, paragraph 92.

(16) This directive contains provisions similar to those set out in Regulation 45/2001.

(17) See the Ombudsman's note on "Openness and data protection" of 14 November 2001 (http://www.ombudsman.europa.eu/letters/en/20011114-1.htm [Odkaz]).

(18) See, for example, the Ombudsman's decisions in cases 1919/2005/GG (http://www.ombudsman.europa.eu/decision/en/051919.htm [Odkaz]) and 3269/2005/TN (http://www.ombudsman.europa.eu/decision/en/053269.htm [Odkaz]).

(19) "Public Access to Documents and Data Protection", Background Paper Series n° 1, July 2005. The paper is available on the EDPS's website (http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/21 [Odkaz]).

(20) Case T-194/04 *Bavarian Lager Co. Ltd v Commission* , judgment of 8 November 2007, not yet reported.

(21) This letter answered a letter of the European Ombudsman to the President of the European Parliament and of the Commission of 30 September 2002, expressing the Ombudsman's concerns about the way both Directive 95/46/EC and Regulation 45/2001 on the processing of personal data were being misinterpreted, with the risks of subverting the principle of openness and the public access to documents.

(22) C-28/08 P, *Commission v. Bavarian Lager* . See OJ C 79 of 29 March 2008, p.21 [Odkaz].

(23) Paragraph 120 of the judgment.

(24) Paragraph 109 of the judgment.

(25) Parliament's decision "on the discharge for implementation of the European Union general budget for the financial year 2005, Section I - European Parliament" taken in Plenary session on 24 April 2007.

(26) See page 6 of the Study of follow-up given by Institutions to critical remarks and further remarks made by the Ombudsman in 2006 available on the Ombudsman’s website: http://www.ombudsman.europa.eu/followup/en/default.htm [Odkaz].