Decision of the European Ombudsman on complaint 655/2006/(SAB)ID against the European Parliament

Decision
Case 655/2006/(SAB)ID - **Opened on** 28/04/2006 - **Decision on** 14/07/2008

Strasbourg, 14 July 2008
Dear Mr X,

On 1 March 2006, you lodged with the European Ombudsman a complaint against the European Parliament, concerning the latter's refusal to grant your application for access to the list of all the associates/members of the Additional Pension Fund for Members of the European Parliament ("MEPs").

On 28 March 2006, I opened an inquiry into your complaint and I received Parliament's opinion on it on 6 July 2006. By letter dated 30 August 2006, you made observations on this opinion.

On 18 December 2006, I made a friendly solution proposal in the present case. On 7 May 2007, I received Parliament's reply to my proposal. By e-mail of 25 May 2007, you made comments on this reply.

On 19 July 2007, I decided to consult the European Data Protection Supervisor (EDPS) about the matter. By letter dated 10 September 2007, the EDPS expressed his opinion on the case. I forwarded it to Parliament, which stated that it would refrain from making observations on this opinion. Subsequently, you informed me that you did not wish to comment on this statement made by Parliament.

I am now writing to let you know of the result of my inquiries in your case.

THE COMPLAINT

Background

On 25 November 2005, the complainant requested " *all documents related to the additional pension fund for the members of the European parliament, notably (...) the names of all the associates/members (...)* ".

On 21 December 2005, the Secretary-General of Parliament replied to the complainant's above request and informed him that the Pension Fund was a legal entity established in accordance

with Luxembourg law. He furthermore informed the complainant that Article 10(1) of the Luxembourg law on non-profit-making associations and foundations reads: " *A list setting out in alphabetical order the surnames, first names, addresses and nationalities of the members of the association shall be lodged with the registrar's office at the civil court where the association has its head office, within one month of the publication of the articles of association. It shall be updated each year to show, in alphabetical order, any changes that have occurred in the membership. It may be consulted by anyone free of charge.* " The complainant was referred to obtain access to the list of the associates/members of the Fund in accordance with Luxembourg law.

On 9 January 2006, the complainant appealed against the above-mentioned decision by submitting a confirmatory application in which he again requested, inter alia, a list of the members of the pension fund.

Parliament's Bureau took a decision on the confirmatory application on 1 February 2006. On 2 February 2006, the Vice-President of Parliament responsible for issues concerning access to documents informed the complainant of the Bureau's decision to refuse access to the names of all the associates/members of the Pension Fund, on the following basis: " *The names requested are personal data as referred to in Article 2 of Regulation (EC) No 45/2001. The benefit from the membership to the Additional Pension Fund is not automatic but depends on a voluntary act of the MEPs concerned to become members of the scheme. In this respect it cannot be considered to be part of their mandate and for this reason the participation in the scheme relates to the private life of a Member. Access to such data is in consequence precluded by Article 4(1)(b) of Regulation (EC) No 1049/2001.* "

The complaint to the Ombudsman

On 1 March 2006, the complainant submitted a complaint to the European Ombudsman challenging the above-mentioned decision. He alleged that the Bureau had, in its decision of 1 February 2006, wrongly refused access to the list of names of all the associates/members of the Pension Fund for MEPs. The complainant put forward the following arguments in support of his allegation:

(1) The information asked for was already public under Luxembourg law.

(2) The Pension Fund and the way it operates formed part of the internal organisation of Parliament. The legal basis for the allowances to be paid to the MEPs was within the regulatory autonomy of Parliament which has the right to take whatever measure is required for its internal organisation.

(3) MEPs must be aware that their personal data may be of public interest. The Pension Fund was not a private fund but was set up by Parliament. The Fund was to a large extent financed by public funds. In the past, Parliament has made up for shortfalls in the Pension Scheme. The members of the Fund could use their mandate as MEPs to influence the future and the financing of the Fund. The responsibility for the Fund lies within Parliament and therefore the transparency to which Parliament committed itself should apply.

(4) Parliament was responsible for the Pension Fund. The Bureau was " *the ultimate arbiter of the scheme* ". The complainant also referred to the opinion of the Legal Service of Parliament (SJ-602/04), according to which Parliament was liable for pensions that had been promised. Two-thirds of the contributions were paid directly by Parliament. The member's contributions to the Fund were deducted from the general expenses allowance.

(5) According to the Court of Justice, the exceptions to the fundamental right of access to documents must be construed and applied restrictively. The complainant did not believe that the mere act of disclosing the names of the members affected their privacy. Moreover, Article 5 of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (1) ("Regulation 45/2001") allowed disclosure if this was necessary for the performance of a task in the public interest, such as the interest in accountability and transparency.

(6) The Bureau ignored the advice of the Vice-President responsible for issues concerning access to documents. The latter advised the Bureau to grant access to the list containing the names of all the associates/members of the Pension Fund. The Bureau also ignored the advice of the Legal Service of Parliament.

The complainant claimed that he should be given access to the list of the names of all the associates/members of the Pension Fund.

On 28 April 2006, the Ombudsman opened an inquiry into the above allegation and claim made by the complainant.

THE INQUIRY

Parliament's opinion

In its opinion, Parliament made the following comments on the complainant's allegation and arguments:

(1) A distinction was to be made between the Additional Pension Scheme ("the Pension Scheme") and the a.s.b.l. Pension Fund, which is a non-profit-making association under Luxembourg law and in which the contributions are invested. Members joining the Pension Scheme do not necessarily join the a.s.b.l. Pension Fund as well. As a consequence, the list of members of the Pension Scheme is not the same as the list of members of the Pension Fund. In the complainant's initial application, Parliament understood him to have requested the membership list of the a.s.b.l. Pension Fund, which is a public document under Luxembourg law. In his confirmatory application, he made it clear that he requested the whole list of members of the Pension Scheme, which is a much longer one. This list was not a public document.

(2) The Pension Fund had been set up in anticipation of the Statute of the MEPs and on account of the fact that certain MEPs would not have access to pensions equivalent to those to

which they would have been entitled in their respective national parliaments. Following Parliament's adoption of the Members' Statute on 28 September 2005, a legal basis for the Pension Fund and its future after the first day of the parliamentary term following the 2009 elections had been created. Pending entry into force of the Members' Statute and following the 2009 elections (hence for an interim period), the rules governing the Pension Scheme would indeed find their legal basis in the regulatory autonomy of Parliament derived from Article 199 of the EC Treaty (2) .

(3) Parliament and the a.s.b.l. Pension Fund share certain responsibilities. The a.s.b.l. Pension Fund manages the assets and is administered by a Board of ten members. Parliament's administration applies the rules under the supervision of the Quaestors; receives applications for membership in the Pension Scheme; calculates the contributions to be paid by members and by Parliament; compiles files; establishes entitlements; calculates the pensions; and ensures that follow-up action is taken. Parliament's administration was not involved in the management of the Fund's assets. That was entirely a matter for the a.s.b.l. Pension Fund.

(4) Parliament has no direct control over the activities of the Fund. Article 199 of the EC Treaty confers on Parliament the right to take whatever measures it requires for its internal organisation. Article 22 of Parliament's Rules of Procedure confers that responsibility on the Bureau.

(5) A request for access to documents containing personal data has to be analysed by applying Community legislation on data protection, notably Article 286 of the EC Treaty, Regulation 45/2001, and Article 8 of the Convention on Human Rights. It requires striking a balance between the conflicting interests of the public to have access to documents and the interest of the data subjects to protect their privacy. This approach was recognised by the European Data Protection Supervisor in his Background paper No. 1 ("Public asses to documents and data protection", July 2005).

(6) Under Article 15 of the European Parliament's Rules governing public access to European Parliament Documents (Bureau decision of 28 November 2001, as amended on 26 September 2005), " *[t]he reply to a confirmatory application shall be a matter for the Bureau of the Parliament. The Vice-President responsible for transparency shall take a decision on confirmatory application on behalf of the Bureau and under its authority... Should he or she deem it necessary, and within the time[...] limits laid down, the Vice-President may refer his or her draft decision to the Bureau, in particular if the reply might involve matters of principle relating to the European Parliament's policy of transparency. In his or her reply to the applicant, the Vice-President shall be bound by the decision of the Bureau.* " Pursuant to this article and considering that the confirmatory application by the complainant involved matters of principle, the Vice-President responsible referred the question to the Bureau at its meeting of 1 February 2006. The Bureau held an exchange of views on the subject and heard the Jurisconsult, whose legal advice, however, was not binding. The Bureau, taking into account that the benefit deriving from membership in the Pension Scheme was not automatic but depended, on a voluntary act by the MEPs concerned, considered that the said Scheme was not part of the MEPs' mandate but related to their private life, mainly with respect to the period following the expiry of their

mandate. Moreover, it considered that disclosure of the list of the members of the scheme would harm the legitimate interest of the data subjects and that the harm to the privacy interests of the members outweighed the public interest in disclosure.

The Bureau saw no reasons to change its decision of 1 February 2006. Relatedly, Parliament has not agreed to disclose the list of the members participating in the Pension Scheme as it was of the opinion that access to such data is precluded by Article 4(1)(b) of Regulation 1049/2001.

The complainant's observations

In his observations, the complainant made the following comments:

According to Parliament, the Pension Scheme was set up because certain MEPs would not otherwise have access to pensions equivalent to those to which they would have been entitled in their respective national parliaments. From this it could be concluded that an MEP was entitled to this voluntary pension in a public capacity. An MEP can become a member of the Scheme only by virtue of being a parliamentarian.

It was clear from the documents provided by Parliament that in the past Parliament has made up for shortfalls in the Pension Scheme. The a.s.b.l. Pension Fund manages the assets but the board has no power to change the rules of the Scheme. Parliament's Legal Service therefore held that Parliament was liable for the pensions that had been promised. The members of the Pension Fund can use their public capacity to influence the future and financing of the Fund. Parliament uses public funds to make up for shortfalls in the Pension Scheme.

MEPs work in a public capacity and are entitled to participate in the Pension Scheme by virtue of this public capacity. It could be concluded that the Scheme is a part of the mandate of MEPs and is therefore distinct from a private fund. In this case, public access to documents does not affect the privacy of the persons concerned because, as the European Data Protection Supervisor notes, " *[e]mployees in a public administration must be aware that for several reasons, their personal data may be of public interest to a degree different from the situation where he or she would be working in the private sector. Two such interests are accountability and transparency.* "

The Ombudsman's efforts to achieve a friendly solution

After careful consideration of the opinion and observations, the Ombudsman was not convinced that Parliament had responded adequately to the complainant's allegations and claim.

The proposal for a friendly solution and its rationale

Article 3(5) of the Statute of the Ombudsman directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant.

The Ombudsman therefore made the following proposal for a friendly solution to Parliament:

Parliament could consider (i) re-examining its decision not to accept the complainant's request for access to the list of names of all the members of the Pension Fund and/or Additional Pension Scheme; and (ii) granting this request, unless it invokes valid and adequate grounds for not doing so.

This proposal was based on the following considerations:

According to settled case-law of the Community Courts, the exceptions to public access to documents (3) must be construed and applied strictly so as not to defeat the application of the general principle of access enshrined in Regulation 1049/2001 (4) . In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate that the document to which access is sought does indeed fall within the exceptions listed in Regulation 1049/2001 (5) . In this regard, the statement of grounds required by Article 253 of the EC Treaty must disclose in a clear and adequate way the reasoning of the refusal, so as to enable the persons concerned to evaluate the propriety of the reasons for the decision and, in case of a relevant complaint to the Ombudsman, to enable him to exercise his power of review (6) . The institution which has refused access to a document is thus required to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine (7) . As emphasised by the Court of First Instance, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception, which presupposes that the risk of a protected interest being undermined is reasonably foreseeable (8) .

Article 4(1)(b) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents provides that " *[t]he 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.* " Article 1 of Regulation 45/2001 provides that " *[i]n accordance with this Regulation, the institutions (...) shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data (...).* " Article 2 ("Definitions") of this Regulation defines the meaning, for the purposes of the Regulation, of certain terms, such as " *personal data* " and " *processing of personal data* ". Section 2 of Chapter II of the same Regulation (Articles 5 to 9) lays down the " *Criteria for making data processing legitimate* ".

As stated in Parliament's letter of 2 February 2006 to the complainant, the Bureau rejected the complainant's confirmatory application on the basis of the following: " *The names requested are personal data as referred to in Article 2 of Regulation (EC) No 45/2001. The benefit from the membership to the Additional Pension Fund is not automatic but depends on a voluntary act of the MEPs concerned to become members of the scheme. In this respect it can not be considered to be part of their mandate and for this reason the participation in the scheme relates to the private life of a Member. Access to such data is in consequence precluded by Article 4(1)(b) of Regulation (EC) No 1049/2001.* " Parliament's opinion on the present complaint also states, in support of the rejection of the complainant's confirmatory application, that " *[a] request for access to documents which contain personal data has to be analysed by applying Community legislation on data protection, notably Article 286 EC, regulation 45/2001 and Article 8 of the Convention on Human Rights. It requires striking a balance between the conflicting interests of the data subject in protecting their privacy.* (...) *The Bureau, taking into account that the benefit*

from the membership in the Pension Scheme is not automatic but depends on a voluntary act of the MEPs concerned, considered that it was not part of their mandate but related to the private life of an MEP, mainly the period after the expiry of the mandate. Moreover, it considered that disclosure of the list of the members of the scheme would harm the legitimate interest of the data subjects and that harm to the privacy interests of the members outweighed the public interest in disclosure. "

As regards Parliament's reference to Regulation 45/2001 (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), Parliament merely made a general reference to Article 2 of this Regulation, which only contains "Definitions". More specifically, the said Article defines the meaning, for the purposes of the Regulation, of certain terms, such as " *personal data* " and " *processing of personal data* ". Parliament did not refer to any provisions of Regulation 45/2001 relating to the criteria of lawful processing of personal data (Articles 5 and subsequent of this Regulation) and did not explain if and how it applied these provisions with regard to the complainant's confirmatory application.

Parliament also referred to the necessity of applying Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (9) ("the Convention") in access cases concerning personal data. Relatedly, Parliament noted the need to strike a fair balance between the interest of the public to have access to documents (and information contained therein), on the one hand, and the interest of the data subjects to protect their privacy, on the other hand. However, Parliament has not explained how it applied Article 8 of the Convention in the case at hand and how it performed a proper balancing of the above-mentioned interests.

It seems that, first, Parliament examined the scope of applicability of Article 8 of the Convention (that is, whether disclosure of the requested document(s) and the information contained therein would amount to an interference with protected privacy interests), on the basis of the following considerations: " *The benefit from the membership to the Additional Pension Fund is not automatic but depends on a voluntary act of the MEPs concerned to become members of the scheme. In this respect it cannot be considered to be part of their mandate and for this reason the participation in the scheme relates to the private life of a Member.* " In this context, it must be noted that the European Court of Human Rights ("the Court") has relied on various criteria or considerations when defining the scope of protection of private life and examining whether there has been interference with the right to respect of private life, within the meaning of Article 8(1) of the Convention. Parliament's conclusion that " *the participation in the scheme relates to the private life* " of MEPs is based on certain criteria and considerations such as the fact that " *benefit from the membership (...) [is] not automatic but depend[s] on a voluntary act of the MEPs,* " and that membership is " *not (...) part of their mandate* " and relates " *mainly [to] the period after the expiry of the mandate* " (10) . However, Parliament has failed to explain the relevancy of these considerations, especially in view of the pertinent case-law of the Court. Further, as regards the above-mentioned balancing of interests, which seems to refer to the application of Article 8(2) of the Convention, Parliament simply indicated, for the first time in its opinion, its conclusion that " *harm to privacy interests of the members outweighed the public interest in disclosure* ", without providing any explanations of how it reached this conclusion,

especially in light of the pertinent case-law of the Court.

Relatedly, it must be noted that, when the Court examines whether disclosure of information concerning a person amounts to an illicit interference with his or her right to respect for his or her private life, it takes into account, in particular, (a) whether the person concerned has a "legitimate" or "reasonable expectation" of privacy with respect to this information (11) (in view, in particular, of the fact that the information may be or has been recorded and reported in a public manner (12)); (b) whether the information, although initially confidential under law, has already been "widely disseminated" (13) ; (c) whether the information at issue concerns "public figures" and "public matters" (or matters pertaining to a "debate of general interest") (14) ; and (d) whether it is of a "sensitive" (or "very personal or intimate") nature (15) . In addition, Point 9 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy (16) provides that " *[c]ertain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.* "

Nevertheless, in view of the reasons provided by Parliament in support of its challenged decision, it seems that Parliament failed to properly take into account the above elements when it took this decision and determined its grounds. Taking into account the content of Parliament's opinion, this failure was not remedied in the context of the present inquiry. Relatedly, some of the arguments put forward by the complainant in his complaint, notably arguments under point (1) that the information asked for was already published under Luxembourg law; point (2) that the Pension Fund and the way it operates are part of the internal organisation of Parliament; and point (3) relating to the balance between MEPs right to privacy and public interest, seem to be relevant to the foregoing criteria applied by the Court.

Under the above circumstances, the Ombudsman's provisional conclusion was that the refusal to grant the complainant's request for access to the list of the names of all the associates/members of the Pension Fund and/or Additional Pension Scheme (17) for Members of the European Parliament did not seem to have been adequately grounded and that this could be an instance of maladministration.

Parliament's reply

On 3 May 2007, the EP confirmed its position that it could not give access to the list of names of all the members of the Additional Pension Scheme for MEPs. In support of this position, it referred to Article 4(1)(b) of Regulation 1049/2001 and made the following comments:

- The fact that an MEP benefits from the Additional Voluntary Pension Scheme constitutes personal data and, thus, is a privacy issue protected under Article 8 of the ECHR. Indeed, membership in this Scheme is not automatic but depends on a voluntary act of the MEPs involving a personal financial contribution and relates to the period following the expiry of the mandate. Therefore, the question concerns an issue of private, rather than public, life.
- In Case C-465/00 *Rechnungshof* , the ECJ decided that the term "private life" should not be interpreted narrowly and that there was no principle to justify excluding activities of a professional or business nature from the notion of "private life".
- The fact that the persons concerned (MEPs) are elected representatives does not exclude them from protection of Regulation 45/2001. MEPs may reasonably expect that their financial

affairs would be treated with some degree of discretion (18) .
- The names included in the requested list constitute personal data as referred to in Article 2(a) of Regulation 45/2001. Inclusion of a name on the list, as well as permitting access to such list, constitute processing of personal data within the meaning of Article 2(b) of that regulation. When the list was set up, it was not envisaged that it would be made public. MEPs have never been informed that their membership in the Scheme may be revealed to the public. Releasing this information now would infer use for purposes other than that for which the data had been collected. The consent of the data subjects concerned may constitute the basis for lawful processing under Regulation 45/2001. However, the Board of Directors of the Pension Fund and the EP Bureau have not given their consent to disclose the names of members. Under Article 5(b) of Regulation 45/2001 personal data may be processed if " *processing is necessary for compliance with a legal obligation to which the controller is subject.* " The EP's legal obligation to respect the principle of transparency and public interest in scrutinising the use public funds was not sufficient ground to disclose the document in question. The proper use of public funds was guaranteed by the relevant internal and external checks, such as the Committee on Budgetary Control and the Court of Auditors.

The complainant's observations

The complainant made the following observations:

In its Report on the discharge for the implementation of the EU General Budget 2005, the Committee on Budgetary Control " *insist[ed] that, as the fund is primarily financed by public subsidy (...), the names of members of the Voluntary Pension Fund [* should *] be made public.* " This was rejected by the Parliament's Plenary with the majority of MEPs casting their votes against. The Scheme has 475 members.

In Case T-465/00 *Rechnungshof* , the ECJ also stated that "in a democratic society, taxpayers and public opinion generally have the right to be kept informed of the use of public revenues ...". It further asked whether such an objective " *could not have been attained equally efficiently by transmitting the information as to names to the monitoring bodies alone* ". This was precisely what the complainant had been asking for. He was interested neither in the amounts the MEPs were entitled to nor in how much they contributed.

Although the opinions of the EP Data Protection Officer and Legal Service (19) were confidential, it was clear from the " *note from the Secretary-General to the bureau (...) that both advised that access be granted.* " (20) The opinion of the Legal Service confirmed that the exception of Article 4(1)(b) of Regulation 1049/2001 did not apply to the list of names because those data did not relate to private life.

The consultation of the European Data Protection Supervisor

Taking into account Parliament's reply to his proposal for friendly solution, the Ombudsman decided to consult the EDPS, pursuant to points C and D of the Memorandum of Understanding signed by the EDPS and the Ombudsman on 30 November 2006. He, thus, invited the views of the EDPS on the following question:

Is the European Parliament's refusal to provide access to the list of names of the members of the Additional Pension Scheme on the basis of Article 4(1)(b) of Regulation 1049/2001, in

conjunction with Article 2(a) and (b) and Article 5(b) of Regulation 45/2001, founded on valid and adequate grounds?

The EDPS's reply

In his reply, the EDPS recalled that, in his background paper of July 2005 (21) , 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 institution has to take into account the fundamental nature of both the right to public access and the right to data protection. This results in a balanced approach, which was elaborated in the background paper.

In light of this background, the EDPS took the view that Parliament did not fully take this balanced approach, since it discussed the issue mainly from the perspective of the data subject, but did not balance this perspective with the right of the public to have access to the document(s) is question. The requested list consisted of personal data. Moreover, the privacy of the data subjects was at stake, since membership in the Scheme was the consequence of a voluntary act of the MEP, relating to his personal financial situation. In this regard, the data subject would be substantially affected by the disclosure, since the list revealed information relating to this personal financial situation.

However, these elements have to be balanced, in light of the principle of proportionality, against the principle of the right of the public to know. In this regard, the EDPS made the following remarks.

- Although the MEPs were not informed about the possibility of disclosure at the time the data were collected, there is no indication that they were explicitly informed that these data would not be disclosed.
- The data related to the mandate of the data subjects as MEPs, since the membership of the Pension Scheme was a consequence (albeit not automatic) of being an MEP.
- MEPs have a public, political function. Although this capacity does not exempt them from protection of their privacy, in a transparent and democratic society the basic consideration must be that the public has a right to be informed about their behaviour, even about behaviour that is not part of the exercise of their mandate. MEPs must be aware of this public interest.
- The personal data concerned are not of a sensitive character. It is difficult to describe the actual harm that disclosure would do to the MEP and to state that this data subject would be substantially affected in a way that disclosure would become a disproportionate measure. In other words, disclosure is proportionate.

The EDPS concluded by stating that he, therefore, fully understood the position the Ombudsman had taken in his friendly solution proposal in this case.

The EDPS' opinion was forwarded to Parliament, which refrained from making comments on it.

THE DECISION

1 Allegation that Parliament's Bureau wrongly refused access to the list of names of the members of the Additional Pension Scheme for MEPs

1.1 The case concerns the European Parliament's refusal to grant the complainant's request for

access to the list of the names of the members of the Additional Pension Scheme for MEPs (22) . The request was rejected on the basis of Article 4(1)(b) of Regulation 1049/2001 (in conjunction with provisions of Regulation 45/2001), as relating to the private life of MEPs.

1.2 On the basis of a preliminary finding of maladministration, the Ombudsman proposed as a friendly solution that Parliament re-examine its refusal and grant the request, unless it invoked valid and adequate grounds for not doing so. The proposal contained the Ombudsman's analysis of the legal position, which took into account the rules and principles relating to data protection, privacy and public access to documents. In response, Parliament put forward its reasons for continuing to refuse access.

1.3 Since Parliament's reasons appeared primarily to concern the protection of personal data, the Ombudsman consulted the European Data Protection Supervisor (EDPS). The Ombudsman asked the EDPS whether Parliament's decision to invoke Article 4(1)(b) of Regulation 1049/2001 in conjunction with Article 2(a) and (b) and Article 5(b) of Regulation 45/2001, as grounds for refusing to provide access to the list of names of the MEPs who were members of the Additional Pension Scheme, was founded on valid and adequate grounds.

In his reply, the EDPS took the view that, a lthough the MEPs were not informed about the possibility of disclosure at the time the data were collected and even though the data in question related to the parliamentary mandate of the data subjects, MEPs have a public, political function. Although this capacity does not exempt them from protection of their privacy, in a transparent and democratic society the basic consideration must be that the public has a right to be informed about their behaviour, even about behaviour that is not part of the exercise of their mandate. MEPs must be aware of this public interest. The EDPS further considered that the personal data concerned are not of a sensitive character. He also took the view that it is difficult to describe the actual harm that disclosure would cause to the MEP involved and equally difficult to state that this date subject would be substantially affected in a way that disclosure would become a disproportionate measure. In other words, the EDPS concluded that disclosure would be proportionate and that he fully understood the position the Ombudsman had taken in his friendly solution proposal in this case.

The Ombudsman forwarded the EDPS' reply to Parliament. However, Parliament declined to comment on the views expressed by the EDPS.

1.4 The complainant's observations on Parliament's reply to the proposal for a friendly solution stated, among other things, that the report of the European Parliament's Committee on Budgetary Control on the discharge procedure for the implementation of the EU General Budget for 2005 had insisted that the names of members of the "Voluntary Pension Fund" (i.e., the Additional Pension Scheme) should be made public, but that this was subsequently rejected by a vote in the Plenary.

1.5 This new element, mentioned for the first time in the complainant's observations, led the Ombudsman to examine the documents concerning the Discharge Procedure for 2005 that were available through Parliament's website. The Ombudsman notes that, on 30 March 2007,

Parliament's Committee on Budgetary Control adopted a "Report on the discharge for implementation of the European Union general budget for the financial year 2005, Section I - European Parliament." (23) This Report contained a "Proposal for a European Parliament decision on the discharge for implementation of the European Union general budget for the financial year 2005, Section I - European Parliament" and a "Motion for a European Parliament Resolution with observations forming an integral part of the decision on the discharge for implementation of the European Union general budget for the financial year 2005, Section I - European Parliament." Point 81 of the said motion for a European Parliament Resolution " *[i]nsist[ed] that, as the fund is primarily financed by public subsidy (EUR 11,4 million from the Parliament's budget in 2005), the names of members of the Voluntary Pension Fund [should] be made public* ". This last point was excluded, however, from 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 (24) . The Ombudsman also notes that the discharge procedure constitutes part of Parliament's political activities.

1.6 The Ombudsman recalls that, under Article 195 of the EC Treaty, he aims both to eliminate instances of maladministration on behalf of the general public interest and to resolve the differences between the complainant and the institution concerned.

1.7 In light of the analysis he has made in his proposal for a friendly solution, of Parliament's reply to this proposal, of the complainant's observations on Parliament's reply, of the opinion of the EDPS on the matter, and of the judgment of the Court of First Instance in the *Bavarian Lager* case (25) , the Ombudsman considers that a full assessment of the problem at hand would most likely lead him to confirm his preliminary finding of maladministration and to conclude that Parliament's contested refusal was not legally justified.

When the Institution concerned refuses to accept a proposal for a friendly solution, the Ombudsman may make a draft recommendation and, ultimately, a special report to the European Parliament. A special report puts the matter in the hands of Parliament as a political body.

1.8 The Ombudsman notes that, in the present case, the contested refusal of access reflects a decision already made by Parliament, in the exercise of its political functions, to reject a proposal to disclose the list of names in question. Taking this into account, the Ombudsman sees no reasonable possibility that his further handling of this case would succeed in persuading Parliament to change its position and thereby resolve the differences between the complainant and Parliament.

1.9 As regards the general public interest that maladministration be eliminated the Ombudsman notes that MEPs are directly elected by the peoples of Europe and are therefore politically responsible *vis-à-vis* the electorate as regards political decisions of the Plenary of the kind referred to in points 1.4 and 1.5 above. This implies that, when such decisions are made, the concept of political responsibility, rather than the one of possible maladministration, comes into play. This is an element of central importance in the functioning and in the system of checks

and institutional balances of the European Union.

1.10 In the circumstances described in points 1.8 and 1.9, the Ombudsman considers that it is not useful or appropriate for him to make the full assessment mentioned in point 1.7 above and proceed to a draft recommendation. The Ombudsman, therefore, considers that no further inquiries into the case are justified.

1.11 The Ombudsman points out, however, that in another decision adopted today (in case 3643/2005/(GK)WP) he considered it necessary to criticise the fact that the European Parliament sought to justify its refusal fully to accept the draft recommendation in that 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

Since the European Parliament has already taken a position, as a political body, on the disclosure of the document in question before the stage of a definite finding of maladministration, the Ombudsman considers that no further inquiries into the complaint are justified.

The Ombudsman, therefore, closes the case.

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

Further Remark

In its reply to the Ombudsman's Draft Recommendation in Case 3643/2005/(GK)WP (concerning the related issue of access to data detailing the allowances granted to MEPs), Parliament stated that the situation should be analysed again in the light of the experience of the entry into force, in 2009, of the Statute for Members (Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament, 2005/684/EC, Euratom) and that new implementing rules would come into force in this field. Taking into account this statement, and that, under Article 27 of the Statute for Members, the voluntary pension scheme in question will continue to exist, the Ombudsman encourages Parliament to make a commitment to reconsider the matter, in the above context.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

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

(2) OJ 2002 C 325, p. 184.

(3) Relatedly, it is noted that the applicability *ratione materiae* of Regulation 1049/2001 in the present case is not in dispute and does not come within the scope of the present inquiry.

(4) See Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 45.

(5) Cf. Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* , cited above, paragraph 60.

(6) Cf. Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* , cited above, paragraphs 59 (referring to judicial review).

(7) Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* , cited above, paragraph 61.

(8) See Joined Cases T-391/03 and T-70/04 *Franchet v Commission* , judgment of 6 July 2006, [2006] ECR II-2023, paragraph 115.

(9) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Article 8 of the Convention provides: " *1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.* "

(10) It must be noted that this last consideration appears for the first time in Parliament's opinion.

(11) See *P.G. and J.H. v The United Kingdom* , judgment of 25 September 2001, ECHR 2001-IX, paragraph 53; *Von Hannover v Germany* , judgment of 24 June 2004, ECHR 2004-VI, paragraph 51.

(12) See *P.G. and J.H. v The United Kingdom* , cited above, paragraph 57.

(13) See *Editions Plon v France* , judgment of 18 May 2004, ECHR, paragraph 40; Case *Von Hannover v Germany* , cited above, paragraph 74.

(14) See *Von Hannover v Germany* , cited above, paragraphs 60 and 64.

(15) See Case *Von Hannover v Germany* , cited above, paragraph 59.

(16) Resolution published on the website of the Council of Europe: http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta98/ERES1165.htm [Link].

(17) In this regard, the Ombudsman noted that, in its opinion, Parliament stated, for the first time, that there is a " *Pension Fund* " and an " *Additional Pension Scheme* " and that the former should be distinguished from the latter. Moreover, in its opinion Parliament stated that, in his

confirmatory application, the complainant made it clear that he requested the list of members of the Scheme. However, in the confirmatory application reference is made to both an " *additional pension fund* " and to an " *additional pension scheme* ". In addition, Parliament's letter of 2 February 2006 to the complainant did not make a distinction between a " *Pension Fund* " and an " *Additional Pension Scheme* ", but referred to an " *Additional Pension Fund* ", without explaining whether this expression refers to the " *Pension Fund* ", to the " *Additional Pension Scheme* " or to something else. Furthermore, although the part of Parliament's opinion addressing the complainant's argument (1) clearly suggested that the above reference concerned the " *Additional Pension Scheme* ", the parts of the same opinion concerning the complainant's arguments (2), (3) and (4) referred repeatedly to " *the Fund* " or to the " *pension fund* ". Subsequently, in his observations on Parliament's opinion, the complainant referred to both the " *additional pension scheme* " and to the " *pension fund* ". Taking the above into account, the Ombudsman concluded that it was rather unclear whether the complaint concerned a list of the members of the " *Pension Fund* ", of the " *Additional Pension Scheme* ", or of both. In view of the considerations leading him to the friendly solution proposal, the Ombudsman did not find it necessary to clarify the issue in that context. In accordance with the provision of Article 6(2) of Regulation 1049/2001, he rather invited Parliament to contact the complainant, in the context of the implementation of the Ombudsman's friendly solution proposal, and clarify the exact content of his access request.

(18) Relatedly, Parliament referred to the judgment of 25 September 2001 of the ECtHR in case *P.G. and J.H. v The United Kingdom* , ECHR 2001-IX, para. 57.

(19) In his opening letter, the EO asked the EP to provide the opinion of its Legal Service if it was a public document, but this was not so and the opinion was not provided to the EO.

(20) It is not clear which note is meant here.

(21) Background Paper No 1 of the EDPS on "Public access to documents and data protection."

(22) In his friendly solution proposal in this case, the Ombudsman noted that it was not clear whether the case concerned the " *Pension Fund* " and/or the " *Additional Pension Scheme* " for MEPs and invited the parties to clarify this matter (see, in extenso, above footnote 15). In its reply to the friendly solution proposal, Parliament referred to the Additional Pension Scheme for MEPs. In his observations on this reply, the complainant did not comment on the reply, in relevant part. Under these circumstances, the Ombudsman considers that the case concerns the list of the members of the Additional Pension Scheme for MEPs.

(23) Document A6-0094/2007.

(24) Document P6_TA(2007)0133, C6-0465/2006 - 2006/2071(DEC). In this regard, it may also be noted that, in the "Draft Report on the discharge for implementation of the European Union general budget for the financial year 2006" (Document 2007/2038(DEC)), the rapporteur of Parliament's Committee on Budgetary Control proposed a point (66) which would call for the list

of the members of the voluntary pension fund to be made public. However, this point does not appear in the "Report on the discharge for implementation of the European Union general budget for the financial year 2006" (Document A6-0091/2008) adopted by the Committee on Budgetary Control, in the exercise of its political functions.

(25) See Case T-194/04 *Bavarian Lager v. Commission* , judgment of 8 November 2007 (not yet published in the ECR). In this case, the CFI held, inter alia, the following: (a) access to documents containing personal data falls within the application of Regulation 1049/2001; (b) the exception laid down by Article 4(1)(b) of that regulation concerns only disclosure of personal data which would undermine the protection of the privacy and integrity of the individual; (c) the fact that the concept of 'private life' is a broad one, in accordance with the case-law of the European Court of Human Rights, and that the right to the protection of personal data may constitute one of the aspects of the right to respect for private life, does not mean that all personal data necessarily fall within the concept of 'private life'; (d) a fortiori, not every disclosure of personal data is capable of undermining the private life of the person concerned; (e) the mere fact that a document contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected.

See also Case T-36/04 *API v Commission* judgment of 12 September 2007 [not yet published in the ECR], where the CFI noted, inter alia, that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see paragraph 54 (citing cases)).