

Public Right of Access to Lobbyist Information Trumps EU Privacy Rights

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The authors analyze a recent decision by the European Court of First Instance that suggests that data protection or privacy is not an absolute right in the European Union — and that it has to be balanced against other societal interests.

On November 8, 2007, the European Court of First Instance (“CFI”) issued an important judgment balancing the right of public access to documents held by the EU institutions against the protection of privacy and personal information.¹ The judgment provides support for the proposition that data protection or “privacy” is not an absolute right in the EU, but rather, must be balanced against the societal interest in a transparent decision-making process.

The judgment clarifies that the privacy interests of lobbyists, participating in the decision-making process of an EU institution as representatives of a professional body, are subordinated to the public’s right to information. This means that public access to a document reflecting such

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participation cannot be refused merely because the document contains personal information. For example, lobbyist names may, from now on, be released without allowing lobbyists the right to object.

This judgment comes amid a debate within the EU regarding the role of lobbyists in the democratic process. The EU is seeing an increase in the number of lobbyists as well as in their perceived power. Influenced by the U.S., steps are being taken to regulate lobbying activities. For example, in 2008, the Commission will launch a register for lobbyists, requiring the disclosure of budget figures and a breakdown of major clients and funding sources.

BACKGROUND

On the basis of EU rules on public access to documents (Regulation 1049/2001/EC of 30 May 2001), a UK importer of beer from Germany, Bavarian Lager, had requested that the Commission disclose to it the minutes of a meeting between the Commission, the UK Department of Trade and Industry and a French brewers' association. The meeting minutes contained a list of the participants classified by reference to the bodies they represented and described by reference to their title, the initial of their forename, their surname and the service, department or association to which they belonged within those bodies. The Commission granted access to the minutes but blanked out the names of those participants who had not approved of disclosure on the ground that disclosure would be contrary to EU rules on the protection of personal data (Regulation 45/2001/EC of 18 December 2000).

PUBLIC ACCESS RIGHTS VERSUS DATA PROTECTION

The CFI determined that the matter before it concerned access to documents, even though they contained personal data, and thus fell primarily under EU rules on public access to documents. The general principle under the access rules is that all documents of EU institutions should be accessible to the public except, *inter alia*, when disclosure would undermine the protection of privacy and the integrity of the individual. On this basis, EU rules on the protection of personal data come into play, inter-

preted in the light of fundamental freedoms, such as the right to private life pursuant to Article 8 of the ECHR.

The CFI found that the Commission had wrongly rejected Bavarian Lager's request for access to the full meeting minutes on the grounds of EU data protection rules. First, it is not enough that the meeting minutes merely contain personal data (*e.g.*, the names of the participants allowing identification) for privacy protection considerations to override the right of public access. For privacy rules to prevail, disclosure of personal data must undermine the protection of privacy and integrity of the individuals concerned and affect their private life.

Second, the individuals concerned had participated in the meeting as representatives of their respective organizations and the minutes did not contain any personal opinions attributable to those individuals. In those circumstances, disclosure of the names of the representatives was not capable of "actually and specifically" affecting the protection of privacy and integrity of the individuals concerned and it did not affect the private life of those individuals.

PRACTICAL ASPECTS OF THE JUDGMENT

Some guidance may be distilled from the judgment:

- Where a representative of a business or other organization is "acting in a professional capacity," documents containing the names of the representatives, opinions expressed on behalf of the body represented and decisions taken, the consequences of which concern the body represented, will in general be publicly accessible.
- A third party seeking access to such documents, *e.g.*, minutes of a meeting between a representative of a business or other organization and an EU institution, will not be required either to demonstrate an express and legitimate purpose or to explain why they need the documents and the person whose name appears in the documents will not have a right to object to disclosure.
- Where a personal opinion expressed by a representative of a business or other organization can be identified in a document, access can be

refused on the grounds of data protection. It is therefore important to clearly distinguish between personal and professional opinions in, e.g., meeting minutes drawn up by an EU institution.

- Public access to documents may be denied on the grounds of data protection in relation to “certain aspects” of the professional life of an individual. This will be determined on a case-by-case basis with guidance from the case law of the European Court of Human Rights.

LOOKING FORWARD

The Commission has proposed that non-registered lobbyists (*i.e.*, those not signing up to the voluntary lobby register to be launched by the Commission in 2008) will not be “able to speak on behalf of their stakeholders” and, for example, their contributions to a Commission consultation would be treated as “individual” contributions. Interestingly, one conclusion could be that non-registered lobbyists are not “acting in a professional capacity” and that their contacts with the Commission may thus be protected under EU data protection rules.

The Commission is currently reviewing EU rules on public access to documents and has said that it will take into account the CFI judgment in its proposals for new legislation. Legislation amending or replacing the current rules must be approved by the European Parliament. The European Parliament’s position was set out in a report published in relation to Bavarian Lager’s request: the European Parliament does not believe data protection should be at issue in situations where persons are “acting in a public capacity, [...] taking part in public decision making on their own initiative, or [...] they try to influence such decision making.”

There is a current focus in the EU on a strengthened policy on openness. The revision of the current rules on public access and the lobby register are both products of a “European Transparency Initiative,” unveiled by the Commission in response to a perceived low degree of public trust in EU institutions. The CFI judgment will likely mean that future Commission efforts and any new legislation on public access will place the emphasis on a strong public right to information.

NOTE

¹ Judgment of the CFI in Case T-194/04 *The Bavarian Lager Co. Ltd v. Commission*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0194:EN:HTML>.