



8 March 2023

Case 5/2022

FINAL DECISION

[.],

Appellant,

v

the Single Resolution Board

Christopher Pleister, Chair
Luis Silva Morais, Vice-Chair and Co-Rapporteur
David Ramos Muñoz, Co-Rapporteur
Marco Lamandini
Helen Louri-Dendrinou

TABLE OF CONTENTS

Background of facts 3
Appellant 11
Board 12
Findings of the Appeal Panel 14
Tenor 32

FINAL DECISION

In Case 5/2022,

APPEAL under Article 85(3) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010¹ (the “SRMR”),

[.], represented by [.], [.], with address for service at [.] (hereinafter the “Appellant”)

v

the Single Resolution Board (hereinafter the “Board” or “SRB”),

(together referred to as the “parties”),

THE APPEAL PANEL,

composed of Christopher Pleister (Chair), Luis Silva Morais (Vice-Chair and Co-Rapporteur), David Ramos Muñoz (Co-Rapporteur), Marco Lamandini and Helen Louri-Dendrinou,

makes the following final decision:

Background of facts

1. This appeal relates to the SRB decision of 16 August 2022, (hereinafter the “**Confirmatory Decision**”) rejecting the Appellant’s confirmatory application, by which the SRB was requested by the Appellant to reconsider its position in relation to its initial request and the SRB’s response thereto, concerning the access to documents in accordance with Article 90(1) SRMR and of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereinafter “**Regulation 1049/2001**”), and the SRB Decision of 9 February 2017 on public access to the Single Resolution Board documents³ (hereinafter “**Public Access Decision**”).
2. On 17 May 2022, the Appellant requested access to:
 - a. the report drawn up by the administration in the context of the preliminary assessment of [.] request for assistance, concerning the possible conflict of interest of the parties involved;
 - b. the word document drawn up by the SRB human resources department and sent to the compliance department (hereinafter “**Compliance Team**”) on 26 November 2021;

¹ OJ L 225, 30.7.2014, p.1.

² OJ L 145, 31.5.2001, p. 43

³ SRB/ES/2017/01.

- c. the list of (*full and non-summarised*) exchanges between the Compliance Team and the Appellant's line managers, including the SRB's Legal Service ([.]), the dates and frequency of the exchanges and any other relevant information
 - d. a copy of the statements gathered as part of the preliminary assessment;
 - e. the chain of instructions, the persons involved in the preliminary assessment, what information was analysed and by whom.
3. Before such request for access to documents under Regulation 1049/2001, the Appellant had initiated on 9 May 2022 a procedure under Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (hereafter the "**Staff Regulation**"). In this procedure [.] also made a request to access those same documents (Annex 1 of the Notice of Appeal).
 4. Annex 2 of the Notice of Appeal includes the subsequent exchange of communications between the Appellant and [.] legal counsel and the Board. On 12 May 2022, the Board acknowledged receipt of this communication, and on 13 May 2022, the Board asked the Appellant how [.] wished to treat the request for access to documents. On 17 May 2022, the Appellant indicated that the request was made in a broad way as a request of access to documents of the institutions under Regulation 1049/2001, especially its articles 2 (1) and 6, and, if necessary, on a subsidiary basis, as a request by the person concerned of access to [.] individual file and to the data that concern [.], under Article 26 of the Staff Regulations and Article 17 of Regulation 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (hereafter the "**EUDPR**").
 5. Thus, the Board treated this communication of 17 May 2022, as three separate requests. First, a request of access to data under EUDPR, which it rejected on 18 August 2022. Second, as a request of access to the file under Article 26 of the Staff Regulations, which it rejected on the 19 August 2022 (Notice of Appeal, Annexes 6 and 7). Third, as a request of access to documents under Regulation 1049/2001, which is exclusively analysed in the present proceedings.
 6. The request was rejected by the Board with initial decision adopted on 13 June 2022. In that decision the Board stated that it had identified the following documents as falling within the scope of the Appellant's request: a. Internal Note on Point 3.1. of Annex II to the SRB Code of Ethics (for the request under letter a. above) and b. Document dated 26 November 2021 with the relevant SRB Services' answer and comments on the questions of the Compliance team in respect of a request for assistance under Article 24 of the Staff Regulations (for the request under letter b above). However, according to the Board, it could not grant access to

those documents due to the application of exceptions under Articles 4(1)(b) (protection of privacy and integrity of the individual), 4(2) (protection of the purpose of inspections, investigations and audits) and 4(3) (protection of decision-making process) of Regulation 1049/2001, and there was no overriding public interest in disclosing them. As to the requests under letters c. and d. the Board replied that it did not hold any documents that would correspond to that description, and as to the request under letter e. the Board considered it as a request for information, and did not deal with it at all in its initial response.

7. The Appellant submitted a confirmatory application on 27 June 2022, which was rejected by the Board with the Confirmatory Decision of 16 August 2022.
8. The Notice of Appeal was submitted to the Appeal Panel on 26 September 2022 and notified to the Board by the Secretariat of the Appeal Panel on 3 October 2022.
9. In [.] appeal, the Appellant made i.a., a request to access exchanges between the Compliance Team and the Appellant's line managers and some members of the Compliance Team are also members of the Secretariat.
10. In light of this, and to fully safeguard the integrity and the appearance of integrity of the present proceedings, the Appeal Panel ensured that all members of the Secretariat who are also members of the Compliance Team did not have any involvement whatsoever in the handling of this appeal nor did participate in any meetings, communications or acts pertaining to the present proceedings from its inception. For this purpose, a different functional email address was created on 27 September 2022, for all communications pertaining to the present appeal, to which access was granted to only one member of the Appeal Panel Secretariat, without any function whatsoever in the Compliance Team, thus ensuring the complete segregation of the present proceedings *vis-à-vis* any members of the Appeal Panel Secretariat that form part of the Compliance Team.
11. With said measures in place, the appeal was served to the Board, with a deadline to response of two weeks until 17 October 2022. In that same communication the parties were duly informed that the Appeal Panel Secretariat staff that had functions in the Compliance department would not take part in the proceedings of the appeal, and the management of the appeal would be conducted from a different functional email address, specifically created for the appeal and where access would be restricted to the mentioned Appeal Panel Secretariat staff. The Appellant acknowledged receipt of such communication on 5 October 2022 and informed that it was satisfied by the action taken to that effect.
12. On 6 October 2022, the Board submitted a reasoned request for an extension of five weeks for the filing of its response to the appeal, until 21 November 2022. On 10 October 2022, the Appeal Panel granted an extension of four weeks, in light of the complexities of the case.
13. On 18 October 2022, the Board filed a request for instructions referring to the language of the appeal proceedings.

14. On 21 October 2022, the Appeal Panel clarified that the language of the appeal was English.
15. On 9 November 2022, the Appeal Panel issued a Procedural Order stating the following:

The Appeal Panel has determined that, for the just determination of the appeal in case 5/2022 it is necessary for the Appeal Panel to examine, under strict confidentiality *vis-à-vis* the Appellant:

- (1) the “internal note” on Point 3.1. of Annex II to the SRB’s Code of Ethics;
- (2) the document dated 26 November 2021 with the SRB Services’ answers and comments on the questions of the compliance team in respect of a request for assistance under Article 24 of the Staff Regulation.

For this purpose, as a measure of inquiry weighing confidentiality against the right to an effective legal remedy at this stage of the proceedings, having regard also to Article 104 of the General Court’s Rules of Procedure, the Appeal Panel orders the Board to deposit with the Secretariat of the Appeal Panel, in a sealed enveloped clearly marked ‘confidential documents case 5/2022’ by **the close of business of Monday, 21 November 2022** at the SRB’s premises, one or more numbered hardcopies of the above documents and subject to the adoption of appropriate technical means and all necessary security measures, to allow remote access to the Appeal Panel Members via electronic devices to an electronic copy of the same for reading only. Having regard also to Article 104 of the General Court’s Rules of Procedure, the above documents deposited by one party shall neither be communicated to the other party nor shall be part of the file of these proceedings open to the access of the Appellant or of any third party, corresponding exclusively to a mere element intended for comprehensive information and due diligence on the case on the part of the Appeal Panel.

16. On 11 November 2022, the Board filed its response.
17. On 14 November 2022, the Board’s response was forwarded to the Appellant with the deadline to file [.] rejoinder by 28 November 2022.
18. On 21 November 2022, the Board filed objections to the procedural order of 9 November 2022, alleging that it could not comply with the Appeal Panel order to deposit the requested documents. In the Board’s view, (a) providing the documents would have had serious detrimental consequences on the request for assistance, but also on future requests for assistance, because confidentiality of the procedure under Staff Regulations was essential, and disclosure of the documents outside the very restricted need-to-know circle of the formal procedure, such as to the Appeal Panel, would necessarily adversely affect the trust that alleged victims of harassment place in the SRB, to the point of discouraging them from filing requests for assistance, and (b) a full review of the requested documents seemed unnecessary to determine the appeal, because they related to a formal procedure initiated by the Appellant, which was ongoing. According to the Board, on 6 September 2022, the SRB rejected a complaint filed by the Appellant under Article 90(2) Staff Regulation against the decision to reject his request for assistance, and the Appellant had, pursuant to Article 91(2) of those same Regulations, three months (plus ten days) to bring an action for annulment before the General Court, the three-month period not having elapsed at the moment when the confidential access was requested.
19. On 23 November 2022, the Board’s objections were forwarded to the Appellant. The Appeal Panel invited the Appellant to file [.] comments to the Board’s objections together with [.] rejoinder to the Board’s response. Given the relatively short timeframe to do so, as the

rejoinder was due on 28 November 2022, the Appeal Panel of its own motion granted the Appellant a longer deadline, namely 2 December 2022, to file [.] rejoinder and [.] comments to the Board's objections.

20. On 28 November 2022, the Appellant filed [.] rejoinder together with [.] comments to the Board's objections to the procedural order. The Appellant reiterated [.] arguments concerning [.] request, under both the Access to Documents Regulation 1049/2001, Article 26 of the Staff Regulations and the right of access to data under the EUDPR.
21. On the specific matter of the procedural order, and the Board's reaction to it, the Appellant replied to the Board's two objections. On the Board's emphasis on the confidentiality of the proceedings, first, the Appellant expressed [.] surprise to see that [.] protection and right to confidentiality was being used against [.], given that, in the Appellant's view, these very same rights had been breached by the Board, by sharing [.] personal information beyond the "need-to-know basis" circle; second, that the aim of the appeal was to ask an external body (the Appeal Panel) to exercise control over the way the "need-to-know basis" is defined; third, that the Appellant, as the Applicant under Article 26 Staff Regulations was the party best placed to determine whether [.] protection required sharing or not the documents with the Appeal Panel; and fourth, that the assessment of the request for access to documents must be conducted on a case-by-case basis, and not on the basis of hypothetical considerations, such as the risks for future potential applicants.
22. On 28 November 2022, the Appellant's rejoinder was forwarded to the Board with a deadline of two weeks to file its reply, by 12 December 2022.
23. On 5 December 2022, after having considered the arguments of the parties the Appeal Panel issued a second procedural order, with the following content:

The Appeal Panel issued a Procedural Order dated 9 November 2022 in this appeal, requesting the Board to deposit with the Secretariat of the Appeal Panel, one or more hardcopies of "the "internal note" on Point 3.1. of Annex II to the SRB's Code of Ethics" and "the document dated 26 November 2021 with the SRB Services' answers and comments on the questions of the compliance team in respect of a request for assistance under Article 24 of the Staff Regulation".

On 21 November 2022, the Board reacted to the Procedural Order with a note, where it submitted that it considered itself to be unable to provide the Appeal Panel with those documents. The reasons alleged by the Board were twofold.

First, in the Board's view, "*Providing the documents would have serious detrimental consequences on the present request for assistance, but also on future requests for assistance*". The rationale for this was that those Documents related to a request for assistance under Article 24 of the Staff Regulations (SR) lodged by the Appellant, which triggered a formal procedure, which was characterized by confidentiality, without disclosure beyond the need-to-know circle of the formal procedure. Disclosing the documents to the Appeal Panel would, according to the Board, adversely affect the trust in the Board of alleged victims of harassment. According to the Board this would happen even if the Appeal Panel were to reject the appeal, given that the nature of the documents disclosed would be described in the final decision. The fact that the Appellant is also the author of the request for assistance is irrelevant, given that Regulation 1049/2001 refers to "public" access to documents.

Second, in the Board's view, "a full review of the Documents seems unnecessary to determine the Appeal", because, regardless of their contents, the Board submits that as documents relating to a formal procedure, those documents are exempted from disclosure pursuant to Article 4(1) b) and (2) of Regulation 1049/2001.

The Appeal Panel sent the Board's note to the Appellant, asking the Appellant for any reaction. Such reaction was expressed in a note of 28 November 2022, whereby the Appellant opposed the Board's refusal to grant the Appeal Panel access to the documents.

On the first reason of the Board (serious detrimental consequences on requests for assistance), the Appellant alleged that (i) the protection of [.] right for confidentiality should not be used against [.], (ii) that denying access to documents to the Appeal Panel called to control over the way the "need-to-know" basis is defined and implemented undermined the effectiveness of the external controls, that (iii) the Applicant was the party better placed to determine whether [.] protection required not sharing the documents with the Appeal Panel; and that (iv) the assessment of the request for access must be made on a case-by-case basis, and not on the basis of hypothetical considerations, such as the risks for future potential applicants. The Appellant also included additional considerations about the need-to-know circle of parties, as well as the rights of defense of the Appellant, and the need for the Board to respect its own procedures. On the second reason of the Board, the Appellant argued that the internal procedure was closed, and thus was not still ongoing.

CONSIDERATIONS

As the Appeal Panel has already clarified in previous decisions, the competence of the Appeal Panel is restricted by Articles 85(3) and 90(3) of Regulation 806/2014. Article 90(3) of the Regulation clearly refers to the right of access to documents under Regulation 1049/2001 regarding *public* access to documents. This right of access contrasts with the right of access to the file, contemplated under Article 90(4) of Regulation 806/2014, over which the Appeal Panel does not have competence.

The Appeal Panel must decide under Regulation 1049/2001, and Article 2(1) of that Regulation states that "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State". Article 42 of the Charter of Fundamental Rights of the European Union uses similar language.

Therefore, in this case, the Appeal Panel must not decide whether access to documents must be granted or not to this individual Appellant, who is also a party in the Board's internal proceedings. The Appeal Panel must exclusively decide whether "any citizen or the Union" or any resident of the Union should have access to those documents.

Thus, in its decision whether to grant, or not, access to the documents, the Appeal Panel must accordingly consider the protection of the privacy and integrity of the individual/s involved in the proceedings not only assuming that access will only be granted to said individual/s, but assuming that access is granted to any other citizen of, or resident in the Union.

However, the final decision on access to the documents (by any Union citizen or resident) is different from the decision and strictly procedural pondering by which the Appeal Panel seeks to have itself access to the documents to determine whether the reasons alleged by the Board for refusing access apply in the aforementioned described context. In this regard, some understandable objections to the disclosure of the documents require the weighing or balancing of competing considerations. However, in this specific case the Appeal Panel considers that such weighing and balancing cannot be made fully in the abstract.

In particular, the protection of the purpose of inspections, investigations and audits, under Article 4 (2) third indent, or the protection of decision-making process, under Article 4 (3) of Regulation 1049/2001 must be weighed against the existence of an overriding public interest in disclosure. Such weighing and balancing cannot, in this case, be made in the absence of an examination of the documents by the Appeal Panel.

Also, with regard to the “privacy and the integrity of the individual,” under Article 4 (1) (b) of Regulation 1049/2001, the Appeal Panel would still need to determine the extent to which the documents could compromise the privacy or integrity of the individual, and/or whether a redacted version of the documents could be disclosed.

The Board’s reference to the “need-to-know” circle must be interpreted also in light of the fact that the Appeal Panel is entrusted by the SRM Regulation, with deciding on access to documents, which often have a private and sensitive nature, and involve individuals. This role can only be performed if the Panel is able to examine the relevant documents.

24. On 12 December 2022, the Appeal Panel Secretariat informed the Board that a restricted Virtual Data Room had been created where the mentioned documents could be safely uploaded by the Board.
25. On the same day, 12 December 2022, the Board filed its reply to the Appellant’s rejoinder, maintaining its position that the confidential documents in their entirety could not be shared with the Appeal Panel for the reasons stated above.
26. On 13 December 2022, the Board’s reply was forwarded to the Appellant.
27. On 23 December 2022, the Board did not file the documents requested by the Appeal Panel.
28. On 3 January 2023, the Appeal Panel issued another Procedural Order stating the following:

The Appeal Panel issued a Procedural Order dated 9 November 2022 in this appeal, requesting the Board to deposit with the Secretariat of the Appeal Panel, one or more hardcopies of “the “internal note” on Point 3.1. of Annex II to the SRB’s Code of Ethics” and “the document dated 26 November 2021 with the SRB Services’ answers and comments on the questions of the compliance team in respect of a request for assistance under Article 24 of the Staff Regulation”.

On 21 November 2022, the Board reacted to the Procedural Order with a note, where it submitted that it considered itself to be unable to provide the Appeal Panel with those documents.

The reasons alleged by the Board were twofold. First, regarding the “*serious detrimental consequences on the present request for assistance, but also on future requests for assistance*” due to the potential exposure of a procedure subject to staff regulations to the “public” access to documents under Regulation 1049/2001. Second, according to the Board, the full review of the documents seemed unnecessary to determine the appeal, because they were exempted from disclosure, as pertaining to a formal procedure, under Article 4 (1) (b) and (2) of Regulation 1049/2001.

The Appeal Panel shared this reaction with the Appellant, who objected to it, in a note of 28 November 2022, where the Appellant alleged that the protection of [.] interest, as the alleged victim was being used against [.], that the Appellant was in a better position to determine whether such interests were being harmed, and that the assessment should be made on a case-by-case basis, not in light of the risks for future potential applicants in internal procedures. The Appellant also alleged that the internal procedure was closed, and that refusing to grant confidential access undermined the external controls by the Appeal Panel.

On 5 December 2022, the Appeal Panel issued a Procedural Order. In that Order the Appeal Panel clarified that the request by the Appeal Panel to have confidential access to the documents had been done strictly in the context of a procedure under Regulation 1049/2001, which regulates “public” access to documents. Therefore, in the Appeal Panel’s view, the standard applicable should not be

the one applicable to a request by one person to access documents concerning her individually, as in the right of access to the file, which is a subject-matter outside the scope of the Appeal Panel remit under Articles 85 and 90 SRMR. Instead, the standard should be the one applicable to a request made by “any” citizen or resident of the Union” and the decision to grant access may in the end have erga omnes effects.

This may be relevant when balancing the general right of access, against exceptions to disclosure, such as the need to protect the “decision-making process” or “the purpose of inspections, investigations and audits” and the exceptions against the existence of an “overriding public interest” under Article 4(2) or Article 4(3) of Regulation 1049/2001.

Article 4(6) of Regulation 1049/2001 also requires that “if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”. This implies, in turn, that it is necessary to determine whether the solution should consist in granting access, not granting access, or granting access to a redacted version.

The Appeal Panel also further clarified that the documents made confidentially available to the Appeal Panel by the Board would not form part of the file. At the same time, the Appeal Panel considered that, in the given circumstances, the balancing and determination described above should not be done in the abstract.

For these reasons, the Appeal Panel reiterated its request, and granted the Board an additional time, until the 23rd of December 2022, to deposit the requested documents. The Appeal Panel Secretariat has habilitated a Virtual Data Room (VDR) for the Board to deposit the documents.

On 12 December 2022, the Board reacted to the Appeal Panel Procedural Order from 5 December 2022 with a note, indicating that it was, in its view, unable to comply with the Appeal Panel request. The Board indicated that it was unable to do so for all the reasons set out in its response to the Procedural Order of 9 November 2022. The Board reiterated that, “*in order to decide whether the SRB correctly applied Article 4(2) third indent of Regulation 1049/2001, the Appeal Panel will only have to assess whether the exception set out therein applied at the date of the confirmatory response*” and that such an assessment does not depend on the content of the documents, but on the interpretation of Article 4 (2), and the status of the formal procedure.

After the expiry of the deadline, the Board has not deposited any of the requested documents in the VDR.

In light of this, the Appeal Panel notes, for all relevant purposes and considering all legal implications at stake, that the Board has not complied with the terms of the request made by the Appeal Panel, and that, in light of its note of 12 December 2022, it is not going to do so.

The purpose of the evidentiary process is to independently determine whether the exceptions to disclosure apply. The Appeal Panel draws the attention of the Board that it may not be persuaded, *in abstracto*, that the requested documents are covered in full by the exceptions invoked by the Board, and that no part of said documents may be subject to disclosure, pursuant to Article 4(6) of Regulation 1049/2001. In this context, and regardless of the aforementioned considerations on other implications of the Board’s stance in this case, the Appeal Panel invites therefore the Board to provide alternative means of evidence, including witnesses if deemed necessary for the just determination of the appeal, alternative to the documents requested by the Appeal Panel’s Procedural Order not complied by the Board and that may substantiate the finding that not even parts of the documents can be disclosed. To this purpose, the Board is requested to provide such alternative means of evidence, including the call of witnesses, if any, by the close of business of 13 January 2023.

29. On 13 January 2023, the Board filed a response to the procedural order of 3 January 2023 where it recalled that the parties agreed that the requested documents in their entirety related

to “inspections, investigations and audits”, and that had difficulties to perceive or identify alternative evidence necessary to determine whether the exception applied in substance to the requested documents in their entirety. Nonetheless, going slightly further from its previous position of refusing to share the confidential documents in their entirety, it offered to share (i) the version of the ‘internal note’ on Point 3.1. of Annex II to the SRB’s Code of Ethics *because* this had already been shared by the Appellant with the Appeal Panel, as Annex 7 of [.] Appeal, and (ii) a redacted version of “the document dated 26 November 2021 with the SRB Services’ answers and comments on the questions of the compliance team in respect of a request for assistance under Article 24 of the Staff Regulation” for the Appeal Panel members’ reading only.

30. On 16 January 2023, the Appeal Panel forwarded the Board’s response to the Appellant, and proceeded to check the copy of the documents, which turned out to be (i) the same copy of the document that the Appeal Panel already had in its power, as Annex 7 of the Notice of Appeal, with the same redactions, and (ii) a version of the document dated 26 November 2021, so heavily redacted that it could only be read that it related to the request for assistance, and nothing else.
31. On 25 January 2023, the Appeal Panel asked the parties whether they considered it necessary to have a hearing. The Appellant replied on 27 January 2023, and the Board replied on 25 January 2023. Both parties waived their right to make oral statements in front of the Appeal Panel, both stating that they considered that the Appeal Panel could reach its decision based on the parties’ written submissions.
32. On 14 February 2023, the Appeal Panel notified the parties that the Chair considered that the evidence was complete and thus that the appeal had been lodged for the purposes of Article 85(4) of Regulation 806/2014 and Article 20 of the Appeal Panel’s Rules of Procedure.

Main arguments of the parties

33. The main arguments of the parties are briefly summarised below. It is specified that the Appeal Panel considered all arguments raised by the parties, irrespective of the fact that a specific mention to each of them is not expressly reflected in this decision.

Appellant

34. The Appellant divides [.] pleas with reference to the documents requested, and the reasons alleged by the Board to refuse access. With regard to the a. Internal Note on Point 3.1. of Annex II to the SRB Code of Ethics and b. Document dated 26 November 2021 with the relevant SRB Services ‘answer and comments on the questions of the Compliance team in respect of a request for assistance under Article 24 of the Staff Regulations, the Appellant submits that refusing access violates [.] rights of defence. According to the Appellant, the principle of good administration is guaranteed by Article 41 of the Charter of Fundamental Rights, which includes the right of every person to have access to their file, with due regard for the legitimate interests of that person (their own and those of other persons), and that the

documents, insofar as they are of direct concern to the Appellant, must form part of [.] personal file and must therefore be accessible to [.]. The Appellant also alleges that [.] rights under the EUDPR have been violated not granting [.] access to the information requested, because the documents requested contain [.] personal data, and he needs these data to defend [.] interests, specifically in legal proceedings.

35. In addition, also with regard to the documents under letters a. and b. mentioned above the Appellant also submits that, by refusing access to these documents the Board infringes not only [.] rights as a defendant but also the principle of transparency which governs activities within the Board. In this regard, the Appellant alleges that the reasons given for refusing access must explain how such access could specifically and actually undermine the interest protected by the exception, and that the Board's allegation that future parties may be deterred from requesting access to the procedure under Staff Regulations is merely hypothetical. The Appellant also alleges that the contested decision not to open an administrative inquiry following the Appellant's complaint is now final, given that it was confirmed by the express rejection of [.] complaint, and thus there is no reason to refuse access based on the fact that it would undermine ongoing proceedings.
36. With regard to the documents under letters c. and d., where the Board replied that it lacked any documents under that description, the Appellant asked the Appeal Panel to exercise oversight.
37. With regard to the documents under letter e., where the Board replied that this was a request for information, the Appellant alleged that, in [.] letter of 19 August 2022, regarding the request of access to personal data under EUDPR, Human Resources subsequently referred to the fact that the document specified under this letter did not contain any personal data relating to the Appellant, implicitly admitting that documents corresponding to the description made by the Appellant do indeed exist, asking the Appeal Panel to exercise oversight.
38. Finally, the Appellant criticised the fact that the Board dealt with the Appellant's request of access as three separate procedures, of access to the file under the Staff Regulations, of access to data, under EUDPR, and under Regulation 1049/2001, since European courts examine the applicants' requests from the point of view of both Regulations at the same time.
39. The Appellant asks therefore the Appeal Panel to remit the case to the Board.

Board

40. The Board preliminarily notes that the principle of Regulation 1049/2001 is that any disclosure is made *erga omnes*, i.e., that everyone may have access to the documents, which may even be published in a public register, and thus the only relevant basis for the assessment are the documents themselves, i.e., their content and the context in which they were created. Therefore, according to the Board, for purposes of the public access regime, the specific personal circumstances of an applicant, including any relation the applicant may have with

the documents, cannot be taken into consideration, and thus, the Board concludes, by taking into account the content and the context of the documents it has refused access.

41. The Board also notes that requests by the Appellant concerning the access to [.] file or access to [.] personal data are inadmissible, as they manifestly fall outside the competence of the Appeal Panel.
42. On the merits, first the Board submits that the Appellant's claim that the refusal to provide access to the documents based on Article 3 letters (a) and (b) of Regulation 1049/2001 is contrary to [.] rights of defence is irrelevant, since, in light of its preliminary consideration, the individual situation of the Appellant is not a relevant consideration for purposes of Regulation 1049/2001. In second place, the Board also alleges that it adequately stated reasons for refusing access to the relevant documents. In third place, the Board points that it adequately applied the provisions of Regulation 1049/2001, including (i) the protection of privacy and the integrity of the individual, because parts of the documents contain personal data, and even if these were redacted, there is a risk of identification of other data subjects; the protection of the purpose of inspections, investigations and audits, because, in the Board's view, the proceedings cannot be considered closed until the Board's decision to reject the Appellant's complaint in the proceeding under Staff Regulations becomes irrevocable, i.e., when the deadline for appealing it has elapsed or the Court of Justice issues its decision on appeal, and (iii) the protection of the Board's decision-making process applies because the documents were drafted by the Board for internal use, and the protection of internal decision-making is also forward-looking, considering the risk of self-censorship that disclosure may have on the Board's staff in the future.
43. With regard to the documents requested under letters c., d. and e. the Board submits that the Board does not have any documents that correspond to the description under letters c. (the list of *full* (and non-summarised) exchanges between the Compliance Team (and in particular [.] if [.] intervened in this matter) and the Appellant's line managers, including the SRB's Legal Service ([.]) and the dates and frequency of the exchanges and any other information relevant to the complaint; and **d.** (a copy of the statements gathered as part of the preliminary assessment) and thus the Board is not in a position to grant the Appellant's request, while the request under letter **e.** (the chain of instructions, the persons involved in the preliminary assessment, what information was analysed and by whom) is not a request of access to documents, but a request of information, and, as such, it is inadmissible.
44. Finally, the Board notes that the request of public access to such documents would not be in the interest of the Appellant, and that there are procedures more suitable to grant access to documents to persons with a specific relation to administrative procedures, such as those of access to the personal file, and access to personal data, where the corresponding units adopted their respective decisions.
45. In light of all these considerations, the Board requests the Appeal Panel to dismiss the appeal.

Findings of the Appeal Panel

46. The request of access to documents by the Appellant giving rise to this decision became a separate piece where the previous proceeding was one under Staff Regulations, with allegations based on its Articles 24 and 90. It is, otherwise, subject to the same principles of access to documents decisions.
47. In this regard, the Appeal Panel preliminary notes that in previous decisions concerning access to documents under Regulation 1049/2001, the Appeal Panel has stated the overriding principles that must guide in the determination of appeals concerning the Board's refusal to grant access to documents under Regulation 1049/2001 in the context of a bank resolution as follows:
- (a) The right of access is a transparency tool of democratic control of the European institutions, bodies and agencies and is available to all EU citizens irrespective of their interests in subsequent legal actions (see for instance judgment 13 July 2017, *Saint-Gobain Glass Deutschland*, C-60/15, EU:C:2017:540, paragraphs 60 and 61 and in particular judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 20: “as the addressee of those decisions [denying access to documents], the applicant is therefore entitled to bring an action against them. (...)”).
 - (b) As indicated by Article 85(3) SRMR, the Appeal Panel has no competence to hear appeals against a decision of the Board referred to in Article 90(4) SRMR. The Appellant can therefore not rely, at least in an appeal before the Appeal Panel, on the right to access the SRB's file on the basis of Article 90(4) SRMR. The Appeal Panel must therefore determine if the Appellant is entitled to access the requested documents, in whole or in part, having regard solely to Regulation 1049/2001 and to the Public Access Decision. As to the Public Access Decision, the Appeal Panel notes that it implements Regulation 1049/2001 by adopting “practical measures” to this aim and must therefore be interpreted and applied so as to ensure its full consistency with Regulation 1049/2001. The Appeal Panel further noted that, although the regime of Article 90(4) SRMR is not relevant to the effect of the present appeal, Regulation 1049/2001 and the Public Access Decision must be interpreted taking into account also the special limitations set out in Article 90(4) SRMR in such a manner that they do not make each other devoid of purpose (this means that Regulation 1049/2001 and the Public Access Decision cannot grant access to documents for which access is expressly excluded by Article 90(4) SRMR).
 - (c) According to Regulation 1049/2001 “the purpose of [the] Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access” (recital 4) and “in principle, all

documents of the institutions should be accessible to the public” (recital 11). Regulation 1049/2001 implements Article 15 TFEU which establishes that citizens have the right to access documents held by all Union institutions, bodies and agencies (such right is also recognized as a fundamental right by Article 42 of the Charter of Fundamental Rights). However, certain public and private interests are also protected by way of exceptions and the Union institutions, bodies and agencies should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (recital 11). Article 4 of Regulation 1049/2001 sets out these exceptions as follows:

Article 4

Exceptions

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

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

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

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

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

- (d) In principle, exceptions must be applied and interpreted narrowly (see e.g., judgment 17 October 2013, *Council v. Access Info Europe*, C-280/11, EU:C:2013:671, paragraph 30). However, case-law on public access to documents in the administrative context (as opposed to case-law on public access in the legislative context) suggests that a less open stance can be taken in the administrative context because “the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution” (see to this effect judgment 4 May 2017, *MyTravel v. Commission*, T-403/15, EU:T:2017:300, at paragraph 49; judgment 21 July 2011, *Sweden v. Commission* C-506/08 P, EU:C:2011:496, at paragraphs 87-88; judgment 29 June 2010, *Commission v. Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 60-61).
- (e) Settled case-law permits Union institutions, bodies and agencies to rely in relation to certain categories of administrative documents (in state aid, mergers, cartels, infringement and court proceedings) on a general presumption that their disclosure would undermine the purpose of the protection of an interest protected by Regulation 1049/2001 (see to this effect judgment 28 June 2012, *Commission v. Edition Odile Jacob*, C-404/10, EU:C:2012:393; judgment 21 September 2010, *Sweden and Others v. API and Commission*, C-514/07 P, EU:C:2010:541; judgment 27 February 2014, *Commission v. EnBW*, C-365/12 P, UE:C:2014:112; judgment 14 November 2013, *LPN and Finland v. Commission*, C-514/11 P and C-605/11 P EU:C:2013:738; judgment 11 May 2017, *Sweden v. Commission*, C-562/14 P EU:C:2017:356). Where the general presumption applies, the burden of proof is shifted from the institution to the applicant, who must be able to demonstrate that there will be no harm to the interest protected by the Regulation 1049/2001. This also means that the Union institutions, bodies or agencies are not required, when the general presumption applies, to examine individually each document requested in the case because, as the CJEU noted in *LPN and Finland v. Commission*, Joined Cases C-514/11P and C-605/11P (cited above, paragraph 68), “such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally global”. At the same time, though, settled case-law clarifies that, since the possibility of relying on general presumptions applying to certain categories of documents, instead of examining each document individually and specifically before refusing access to it, would restrict the general principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001, “the use of such presumptions must be founded on reasonable and convincing grounds” (judgment 25 September 2014, *Spirlea v. Commission*, T-306/12, EU:T:2014:816, paragraph 52).
- (f) When determining whether disclosure is prevented by the application of one of the relevant exceptions under Regulation 1049/2001, EU institutions, bodies and agencies enjoy in principle a margin of appreciation. Review is then limited,

according to settled case-law, to verifying whether procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, among others, judgment 4 June 2015, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. European Central Bank*, T-376/13, EU:T:2015:361, paragraph 53; judgment 29 November 2012, *Thesing and Bloomberg Finance v ECB*, T-590/10, EU:T:2012:635, paragraph 43), and provided that the actual viability of judicial review in respect of decisions is ensured (see to this effect in light of judgment 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, at paragraphs 79-81).

48. Having in mind these principles and precedents, the Appeal Panel has carefully examined the pleas raised by the Appellant and the arguments of the Board in response and has come to the following conclusions.

(a) Admissibility of the appeal.

49. First of all, the Appeal Panel needs to consider the Board's objections on admissibility. In this regard, the Board raises no objections on the admissibility of the appeal itself, which is one of access to documents under Regulation 1049/2001. The Board, however, objects to the admissibility of some of the Appellant's submissions, namely:

- (1) the submissions concerning access to documents under letters a. and b. based on the right of access to the file, or the right of access to personal data, or the submission that access should be granted because the opposite would violate the Appellant's rights of defence, as falling outside the Appeal Panel's remit;
- (2) the submission on access to documents under letters c. and d., because these are documents that do not exist;
- (3) the submission on access to documents under letter e., because this constitutes a request of access to information, not documents.

50. The Appeal Panel proceeds to analyse these objections in order.

(1) The submissions on access to the file, access to personal data, and access based on the Appellant's rights of defence.

51. The Board is correct in pointing out that, in a request of access to documents under Regulation 1049/2001 the Appeal Panel should not take into consideration the individual situation of the Appellant. The fact that the documents requested by the Appellant concern the Appellant [.] cannot be a relevant consideration in the Appeal Panel's assessment.

52. Article 90 of the SRMR clearly differentiates between the right of access to documents under Regulation 1049/2001 (under Article 90(1) SRMR), and the right of the persons subject to the decision to access the file (under Article 90(4) SRMR). Within this dichotomy, only the

former is subject to a decision by the Appeal Panel (Article 90(3) SRMR). Thus, the Appeal Panel cannot evaluate in any manner whatsoever the right of the party subject to the proceedings, as such party, but only the right of access to documents by the general public.

53. As such, the Appellant's submissions regarding the right of access to [.] file are inadmissible, as they manifestly fall outside the remit of the Appeal Panel.
54. The same conclusion must be reached with regard to the request of access to data under Regulation 2018/1725, the EUDPR. It is a right of access that is clearly different from the right envisaged under Articles 85(3), and 90(1) and (3) SRMR, which refer only to the one contemplated under Regulation 1049/2001.
55. For that same reason, the merit in the Appellant's allegation that the compartmentalization of proceedings (access to documents, access to file, access to data) leads to a result that is not satisfactory, is not something that the Appeal Panel may decide upon. This is beyond its remit.
56. Finally, the submissions regarding the Appellant's right of defence are a matter that also manifestly falls outside the remit of the Appeal Panel. The Appeal Panel must assess this appeal without considering the fact of whether the Appellant is the staff member who initiated the procedure under Staff Regulations, or a journalist wishing to dig deeper into the Board's staff practices, without due regard to the interests of said staff members, or any other party.
57. This, however, does not mean that considerations of judicial protection and right of defence are completely irrelevant when deciding exclusively over the right of access to documents pursuant to Regulation 1049/2001 and Articles 85 and 90 SRMR, as it happens in the present proceedings. In fact, in prior decisions, such as those in cases 38 to 44/17, and 21/18 the Appeal Panel held that judicial protection, enshrined in Article 47 of the Charter, was a relevant criterion when assessing the right of access to documents under Regulation 1049/2001 (see *inter alia* paragraph 51 of the Appeal Panel's decision in case 21/18; paragraph 32 of the Appeal Panel's decision in case 42/17; or paragraph 35 of the Appeal Panel's decision in case 41/17). This is possible without transforming the general right of access into the affected party's (private) right of access because access to justice not only has the 'private' dimension associated to a specific party's right, but also the public dimension, which enables control of the actions of institutions, bodies and agencies, i.e., judicial accountability, which sits alongside democratic accountability. In this dimension, in the Appeal Panel's view, democratic and judicial accountability reinforce each other, and are both relevant to shape the right of access to documents and the overall SRB's legitimacy.
58. This is in line with the case-law of the General Court, which, although distinguishing between the right of public access, and other rights of access (e.g. based on the applicant's individual right of defence) does not effect a complete or strict compartmentalization, when this could go against the scrutiny of the acts of the specific body, and the integrity of its proceedings. For example, in cases of recruitment processes based on competitions subject to multiple choice exams under the Staff Regulations, the General Court has held that the institution or

agency can refuse disclosure of the multiple choice questions, among other reasons, because some questions could be re-used, and thus “to avoid upsetting the equality between the participants, [...] so as to avoid the possibility of some candidates having knowledge of questions that might be asked and preparing them when not all of the candidates might have that opportunity” (judgment of the General Court 23 September 2020, *ZL v European Union Intellectual Property Office (EUIPO)*, T-596/18, EU:T:2020:442, at paragraph 60; see also judgment 12 November 2015, *Alexandrou v Commission*, T-515/14 P and T-516/14 P, EU:T:2015:844, paragraph 82). Furthermore, this general rule could have an exception, and the questions may be communicated, if two conditions are fulfilled: first, the applicant must, in [.] or her complaint, have specifically disputed the relevance of certain questions or the validity of the answer adopted as correct; and secondly, the difference between [.] or her results and the pass threshold must be such that, assuming that [.] or her complaint is well founded, the applicant could be among the candidates who passed the tests in question” (*ZL v EUIPO*, at paragraph 55) and this in order to make it possible to exercise judicial control (*Alexandrou v Commission*, at paragraph 98). Thus, even under the public right of access, both the exception to disclosure, and the exception to the exception, can, in some cases, take into consideration the position of the applicant, as instrumental to serve the broader interest of the integrity of the proceedings.

59. As a consequence, the Appellant’s submissions based on [.] right of access to [.] individual file and right of access to data are inadmissible, as falling outside the remit of the Appeal Panel. The same can be said about the submissions concerning [.] right of defence, in what regards the Appellant’s condition as a staff member involved in the procedures where the documents requested were generated. In contrast, the submissions concerning the right of defence, as a mechanism of accountability, are not inadmissible.

(2) The request of access to documents under letters c., d. and e.

60. The Appeal Panel notes in this respect that, although the definition of ‘document’ to the effect of Regulation 1049/2001 must not be interpreted restrictively, as it is clearly shown by the wide encompassing wording of Article 3, letter a) of Regulation 1049/2001 once a European institution, body or agency asserts that a document does not exist, according to settled case-law, it is not obliged to create a document which does not exist (CJEU, judgment 11 January 2017, *Typke v. Commission*, C-491/15 P, EU:C:2017:5 at para 31) and the institution, body and agency can rely on a rebuttable presumption that, indeed, the document does not exist (GCEU, judgment 23 April 2018, *Verein Deutsche Sprache v. Commission*, T-468/16, EU:T:2018:207). The Appellant did not attempt to reverse such rebuttable presumption in the instant case.
61. Moreover, according to settled case-law, once the institution, body and agency asserts that a document is not in its possession, it is not obliged to provide explanations as to why it does not hold such document (judgment 11 June 2015, *McCullough v Cedefop*, EU:T:2015:374, paragraph 50).

62. Finally, the request to access “the chain of instructions, the persons involved in the preliminary assessment, what information was analysed and by whom;” can be interpreted as a request to access information, i.e., how the procedure was organized. As such, it is a request for information, and not in itself a request to access concrete documents, and accordingly it is not covered by Regulation 1049/2001. Thus, the Appeal Panel is not competent to decide on it, and such request is inadmissible.

(b) The merits of the appeal.

63. Having dismissed the Appellant’s submissions concerning documents under c., d. and e., it corresponds now to the Appeal Panel to analyse the remaining submissions, pertaining to letters a. and b., which are described below with the related clarifications. These are:

- a. the report drawn up by the administration in the context of the preliminary assessment of [.] request for assistance, concerning the possible conflict of interest of the parties involved. According to the Board in its Confirmatory Decision (the Contested Decision) the document corresponding to this description is the “internal note on point 3.1 of Annex II to the Code of Ethics”. The Appellant facilitated a redacted version of this document as part of Annex 7 of the Appeal. According to the Board, the redactions show that it relates to the procedure for a request for assistance under Article 24 of the Staff Regulations (Formal Procedure). The Board redacted specific parts of the Appellant’s allegations (left hand column), and the practical totality of the Board’s assessment (right hand column).
- b. the Word document drawn up by Human Resources and sent to the Compliance team on 26 November 2021. According to the Board in its Confirmatory Decision (the Contested Decision) the document corresponding to this description is a document dated 26 November 2021 with the relevant SRB Services’ answers and comments on the questions of the Compliance team in respect of a request for assistance under Article 24 of the Staff Regulations. The Board offered, in its reaction of 13 January 2023, to the Appeal Panel procedural order No 3, dated 3 January 2023 to meet the Members of the Appeal Panel and show a redacted version of this document to the Members of the Appeal Panel for their reading only. The version was so heavily redacted that it only showed one reference to a procedure under Staff Regulations.

(1) Preliminary considerations.

64. The Board has refused access on the basis of three different objections, namely (i) the protection of privacy and the integrity of the individual, in particular the protection of personal data under Regulation 2018/1725 – EUDPR; (ii) the protection of the purpose of inspections, investigations and audits; and (iii) the protection of the decision-making process.
65. In assessing the application of each of these exceptions the Appeal Panel, following its precedent practice in this field, will proceed as follows: first, the general rule under Regulation 1049/2001 is that the documents must be accessible; second, the Board has the burden of showing that one of the exceptions apply, and that these also apply to a partial access; third,

if one of the exceptions applies, the Appellant has the burden of showing that there is an overriding interest in disclosure, if this is stipulated as a limit to the exception; four, the individual position of the Appellant shall not be taken into consideration for purposes of the assessment, as aforementioned clarified and considering the implications of an exclusive application in this case of the specific framework of Regulation 1049/2001.

66. In the assessment to be made, the Appeal Panel must necessarily consider, and weigh, that the Board has refused to grant access to the Appeal Panel to the documents requested, as indicated above. The Appeal Panel has clarified, and reiterated, in its successive procedural orders, that its procedural decision to have confidential access to the documents was different from any final decision to grant access to any documents to the public and was an instrument to properly weigh considerations of confidentiality and accountability, that access should take place under conditions of confidentiality, and that any documents accessed would not form part of the Appellant's file, to which he could claim access under Article 41 of the Charter of Fundamental Rights of the European Union. The Appeal Panel, following the refusal of the Board to deposit the requested documents, with its procedural order of 3 January 2023 went even further in order to ensure the maximum procedural latitude and opportunities compatible with fully safeguarding all other legal interests and principles at stake, expressly allowing the Board the opportunity to suggest alternative means of evidence that could demonstrate, specifically, that public access to documents was not warranted, as follows:

[...] the Appeal Panel invites therefore the Board to provide alternative means of evidence, including witnesses if deemed necessary for the just determination of the appeal, alternative to the documents requested by the Appeal Panel's Procedural Order not complied by the Board and that may substantiate the finding that not even parts of the documents can be disclosed. To this purpose, the Board is requested to provide such alternative means of evidence, including the call of witnesses, if any, by the close of business of 13 January 2023.

67. However, the Board has insisted that the personal information concerning a request for assistance under Article 24 of the Staff Regulations can only be communicated on a "need to know" basis, and alleged that Appeal Panel does not form part of such "need to know" circle.
68. The Appeal Panel wishes to note that it does not share the view of the Board in its interpretation of the meaning of "need to know". The Appeal Panel subscribes the utmost concern about the need for confidentiality in the procedure of request for assistance under Article 24 of the Staff Regulations. This concern is expressed, *inter alia*, in para. 4.3. of the SRB Ethics and Compliance Framework of 27 October 2020 (SRB/CH/2020/17), which relies on the roles of the Ethics and Compliance Officer and the Chair.
69. However, this Framework, as any other framework or guidance emanated from the Board are not constitutional or legislative norms. They are internal documents that seek to clarify, to the extent possible, the application of general principles, such as the protection of privacy and personal data, or rights to good administration (articles 7, 8 and 41 of the Charter of Fundamental Rights of the European Union), which also include the right of access to documents (Article 42 of the Charter). Thus, the full normative implications of these

principles have to be determined on the basis of the contours of each specific case duly pondered *vis-à-vis* such general principles. In light of this, the correct way to approach this issue is not to see whether the Board's internal documents expressly include the Appeal Panel among those who can have access to the specific information of a request for assistance procedure.

70. To the extent that the “need to know” principle is based on fundamental rights, such as privacy or data protection, it is subject to exceptions, such as the consent of the right holder, and the existence of legitimate reasons for sharing the information. With regard to consent, even though the Board might understandably be cautious about safeguarding the privacy of the person concerned in the request for assistance proceedings under Article 24 of the Staff Regulations, that person is the Appellant, and [.] has clearly and unequivocally consented to the Appeal Panel's accessing information about [.] identity and the documents concerning [.] by filing [.] request of access, by including as annexes to the Notice of Appeal the documents of such description in [.] possession, and by expressly accepting such access in [.] communication of 28 November 2022, in reaction to the procedural order of 9 November 2022. If other persons were involved in the request for assistance procedure whose consent could have been requested (see, judgment 29 June 2010 (Grand Chamber), *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378) the Appeal Panel has no indication that such consent was refused, or even sought by the Board.
71. Even in the absence of consent, a second exception to privacy and data protection is the existence of legitimate reasons for sharing the information, such as the need to ensure other fundamental rights or principles, namely accountability. The Board's Ethics and Compliance Framework only mentions the Board's Ethics and Compliance Officer (ECO):

“ The information, interview/witness testimonies, and/or documents obtained in the exercise of the ECO's powers of investigation shall, as a general rule, be treated as strictly confidential in accordance with the professional secrecy rules and applicable relevant secrecy protocol. Any disclosure shall be strictly on a need-to-know basis, and carried out according to Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data². This provision shall be without prejudice to any obligations to notify an SRB staff member of evidence in the context of disciplinary proceedings under Title VI and Annex IX of the Staff Regulations.

The provisions of this Section 4 are without prejudice to the rights to privacy and data protection, in particular, the SRB's obligations concerning the protection of personal data under Regulation 2018/1725. They are also without prejudice to the rights of defence and the principle of equality of arms, in the context of disciplinary proceedings under Annex IX of the Staff Regulations. “

and does not make any mention to, e.g., the Court of Justice of the European Union, and yet there is little doubt that, should the Board's decision dismissing the Appellant's complaint, or refusing to grant access to the documents be appealed before the General Court, the Board would be obliged, as a matter of principle, to transfer the information corresponding to the procedure, including personal data.

72. By way of example, the internal protocols of other agencies to deal with requests for assistance under Article 24 Staff Regulations are more explicit about the possibility to share information with the institutions and bodies that are statutorily empowered to ensure accountability. The European Banking Authority's Data Protection Notice concerning the data processed in requests for assistance under Article 24 of the Staff Regulations, for example, states that:

“Personal data processed in the context of a request for assistance may be disclosed to the Executive Director and the staff member responsible for handling this request in the Legal and Compliance Unit. Data may also be disclosed to a limited number of staff in the Human Resources Unit on a ‘need to know’ basis. If the staff member concerned contests a decision rejecting a request for assistance, the file may be referred to the Court of Justice of the European Union. Data may also be sent to the Ombudsman if the staff member concerned addresses a complaint”.⁴

73. Yet, even if that note is a more explicit example about the ‘need to know’ circle, the description cannot be taken as exhaustive, nor complete. In a situation where the staff member accessed the Court of Justice not to “challenge” the rejection of the request for assistance, but to request access to [.] file, there is little doubt that such access would be granted. Conversely, it is conceivable that personal data might not be sent to the Ombudsman if the complaint addressed by the staff member is unrelated to the request for assistance. Whether such access is granted as a result of the definition of the “need to know”, or as a way to ensure the proper exercise of scrutiny is not relevant. The point is that such access must be granted to the courts and to the bodies statutorily empowered to exercise independent scrutiny, either in the context of an action that challenges the conclusions of the request for assistance procedure under Article 24, or the complaint, under Article 90 of the Staff Regulations, or an action that seeks access to documents. This is a matter of necessity derived from the principles safeguarded by the courts or bodies exercising independent scrutiny.

74. In other words, the correct approach should be to determine whether confidential access to documents by the Appeal Panel is necessary *in concreto* to ensure the proper balance between, on the one hand, the interests protected by the Staff Regulations' procedures and, on the other hand, the accountability principles under Regulation 1049/2001. This assessment has to be done by the Appeal Panel, and not the Board, unless the procedure is to be subverted, by allowing a party in it to unilaterally dictate the terms of access and accountability.

75. The Board's view, as expressed in its positions stated in the course of the present proceeding, that the Appeal Panel does not need to be granted confidential access, because its narrow remit is limited to oversee “public access” requests, unlike, e.g., European courts, which have a broader remit, reflects a view that does not correspond to the actual practice of the courts nor is shared by the Appeal Panel. In the judgment of the General Court 14 July 2021, *AI v European Centre for Disease Prevention and Control (ECDC)*, case T-65/19, EU:T:2021:454 the applicant had filed a request for assistance, under Article 24 of the Staff Regulations, alleging harassment, and requested to the ECDC Director to access several documents

⁴ EBA Data Protection Notice – Request for Assistance Under Art. 24 SR. https://www.eba.europa.eu/sites/default/documents/files/document_library/1001191/Privacy%20notice_Art.%2024%20SR%20%28002%29.pdf

pertaining to the investigation on grounds of [.] right of access to the file and rights of defence, [.] right to access personal data *and* [.] right of access to documents under Regulation 1049/2001. The Director refused said access. The applicant subsequently made a request to access the investigation report on the basis of [.] right of defence and access to the file (Article 41 of the Charter; “right of defence request”), and, on the same day, it made a confirmatory application to access the investigation report on the basis of Article 7(2) of Regulation No 1049/2001, and on the basis of the right of access to data (“public access request”). The Director refused the “right of defence request”, but replied to the “public access request” by granting the applicant the possibility to, first, consult on the spot a non-confidential version of the investigation report and, secondly, receive a document containing [.] personal data. The applicant signed an attendance sheet stating, in handwriting, that he contested the conditions of access to that report.

76. The applicant subsequently contested the refusal of the “right of defence” request and the Court “ordered ECDC to produce the documents to which access had been refused by the second contested decision. Those documents were transmitted to the Court on 27 August 2020 and were not notified to the applicant, in accordance with Article 104 of the Rules of Procedure” (*AI v ECDC*, at paragraph 50). The Court did so in order to determine whether the partial access, granted in the context of the “public access request”, had been sufficient.
77. In refusing confidential access as a procedural measure of inquiry the Board is, in fact, preventing the Appeal Panel, which is a body statutorily empowered to ensure accountability, from performing an independent and credible check on whether the reasons stated by the Board to refuse, in whole or in part, the disclosure of the requested documents correspond to the actual content of those documents and to represent genuine concerns protected by the exceptions from disclosure by Article 4 of Regulation 1049/2001.

(2) The protection of privacy and the integrity of the individual, in particular the protection of personal data under Regulation 2018/1725.

78. The Board has submitted that the Appellant’s arguments, based on [.] individual interest and intention, are irrelevant for the establishment of a public interest in disclosure. Yet, according to Regulation 1049/2001 the burden falls onto the Board to show that the exception applies, before the Appellant has the burden of showing an overriding public interest.
79. The Board stated, in the Contested Decision, that parts of the requested documents contain personal data, in particular names of staff members. The Appeal Panel naturally acknowledges that names of staff members need to be redacted. However, the definition of “personal data” is not broad, and does not, in any way, encompass *all* the information contained in the documents as such “personal data”. Article 3 (1) of Regulation 2016/1725 – the EUDPR states that:

“‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an

online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;” (emphasis added)

80. The exception of personal data was analysed by the Court of Justice in its judgment 16 July 2015, *ClientEarth ad PAN Europe v EFSA and Commission*, case C-615/13 P, EU:C:2015:489. In that case, a number of external experts had made comments to a draft guidance document, and the European Food and Safety Authority (EFSA) granted access to the comments, but redacted the names of the experts. The appellants sought disclosure of these, in order to know, with respect to each of the comments made by the external experts, which of those experts was the author, and the General Court, and the Court of Justice, considered that the exception based on personal data applied “in so far as that information would make it possible to connect to one particular expert or another a particular comment, it concerns identified natural persons” (*ClientEarth* at 29).
81. In the Contested Decision the Board stated that the documents contained “career related information as well as information related to professional and personal related developments”, a consideration subsequently reiterated in its reply, and its reply to the rejoinder. Yet, this is not relevant for the purpose of characterizing the information as “personal data”, since it refers to the context and content of the information, not its identifiability (see *Client Earth* at paragraph 30, and authorities cited therein). The sensitive nature of the information may be relevant to assess whether disclosure may “undermine the privacy and integrity of the individual”, but this is a second step to be taken once the information is characterized as personal data, not if the information cannot be characterized as such.
82. The Board also argued in the Contested Decision that, although the redaction of personal data would be in principle possible, there is a risk of identification of such other data subjects, due to the particular context that these documents were produced and the relatively small size of the organization. However, in the Appeal Panel’s view this argument strictly in itself and unaccompanied by other relevant qualifications and data, is too sweeping because, as such, it could encompass any content of any document produced by the Board. If the implication is that it may be possible to identify the author of a comment for someone who, like the Appellant, is sufficiently familiar with the organization of the Board, this too, is unconvincing. As argued by the Board, the individual position of the Appellant should not be taken into consideration for purposes of the Public Access, in one way or the other.
83. More importantly, the Appeal Panel’s assessment of whether the redaction of additional parts other than the names and similar identifiers could be justified under the protection of privacy and data protection has been prevented by the Board’s refusal to grant the Appeal Panel access to an unredacted version of the documents. Article 4 (6) of Regulation 1049/2001 expressly states that “if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”. Having access to an unredacted version of the documents under conditions of strict confidentiality would have helped the Appeal Panel assess whether, beyond the data that “identified” specific natural persons (e.g., name, or identification number) there could be some substantive content that could render some

natural persons identifiable, and should thus be redacted as well. Without having been provided access, the Appeal Panel cannot simply presume that such is the case.

84. As a result, the Appeal Panel considers that the protection of privacy and personal data justified the redaction of names and similar identifiers in the relevant documents, but cannot justify any redactions beyond that; nor, naturally, non-disclosure of the whole documents.

(3) The protection of the purpose of inspections, investigations and audits.

85. The Board stated, in the Contested Decision, that the relevant documents contain information obtained by the Board in the context of a preliminary assessment for the purposes of a request for assistance under Article 24 of the Staff Regulations (and thereby and “investigation” within the meaning of Article 4(2) third indent of Regulation 1049/2001). The Board also stated that it considered that the procedure under Article 24 continued with the assessment of the complaint, under Article 90(2) of the Staff Regulations, against the decision of the Appointing Authority over the Article 24. Thus, to the extent that the procedure under Article 90(2) was not finished, the Board considered the procedure under Article 24 “ongoing”, i.e., until all processes connected to it were finalised.
86. Subsequently, in its response to the appeal, the Board alleged that the procedure under Article 24 could still be considered open to the extent that the Rejecting Decision, adopted under Article 90(2), following the complaint against the decision under Article 24, was subject to an appeal before the Court of Justice. Only when the decision did become final would the Board consider that such procedure was finished.
87. The Appeal Panel notes that, in the Contested Decision and in its response, and its reply to the rejoinder, the Board has repeatedly stated that the relevant documents form part of procedures that may qualify as “inspections, investigations and audits”. However, Article 4 (2) third indent of Regulation 1049/2001 states that access to documents may be refused “where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits”. Although the Board has stated the reasons why, in its view, the documents form part of a procedure, it has not stated the reasons whereby disclosure would undermine the purpose of such a procedure.
88. The statement of reasons is one of the key elements in the assessment of cases on access to documents. According to the General Court, the statement of reasons “must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality” (judgment 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 147 and the case-law cited).
89. In particular, according to the case-law, it is “for the institution which has refused access to a document 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, secondly, whether the need for protection relating to that exception is genuine (emphasis added) (judgment of the General Court 26 March 2020, *Bonnafous v Commission*, T-646/18, EU:T:2020:120, paragraph 24, with reference to judgment 4 May 2012, In ‘t Veld v Council, T-529/09, EU:T:2012:215, paragraph 118 and the case-law cited).

90. This is in line with other case-law, whereby the European courts have clearly held that the EU institution, body, office or agency refusing to grant access on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of that undermining must be reasonably foreseeable and not purely hypothetical (judgments 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 51, and judgments of the General Court 22 March 2018, *De Capitani v Parliament*, T-540/15, EU:T:2018:167, paragraphs 63 to 65, and of 25 January 2023, *De Capitani v Council*, T-163/21, EU:T:2023:15, paragraph 69).
91. In the case of “inspections, investigations and audits”, court precedents have considered valid statements of reasons that pointed, e.g., to the ongoing nature of the investigation (judgment of the General Court 12 May 2015, *Technion and Technion Research & Development Foundation v Commission*, T-480/11, EU:T:2015:272 paragraph 66).
92. It must be stressed that the European courts do not make an exception in cases involving matters of personnel or human resources. *Bonnafou v Commission*, cited above, was one such case involving matters of human resources. In that case, the applicant requested access to the document ‘Final audit report – IAS Audit on HR Management in the Education, Audiovisual and Cultural Executive Agency (Ares(2018)361356)’, and the statement of reasons by the Commission was considered valid because the Commission argued that this would hinder the effective implementation of the recommendations contained in the document and because the related follow-up actions recommended in the audit report had not been fully completed (*Bonnafou v Commission*, at paragraph 3). In particular, the Court considered valid the explanation that disclosure “would jeopardise the serenity and independence of the audit, in particular with regard to its follow-up and the validation thereof by the internal auditor” and also that “there was a foreseeable risk of the climate of mutual trust between the EACEA and the internal auditor being undermined by disclosure of the requested document, which could have an adverse effect on the implementation of the appropriate recommendations” (*Bonnafou v Commission*, at paragraph 29). Thus, even if it relied on a presumption of confidentiality, the Commission explained that (i) the document was identified as the result of an audit, (ii) which still needed to be validated by the auditor, and (iii) in such case, it would involve a follow-up in the form of implementation.
93. That explanation contrasts with the one tentatively provided by the Board in this case. First, the Board identifies the documents in a non-descript manner, i.e., as “internal note on point 3.1 of Annex II to the Code of Ethics” and a “a document dated 26 November 2021 with the

relevant SRB Services' answers and comments on the questions of the Compliance team in respect of a request for assistance under Article 24 of the Staff Regulations". That is still too undefined and too vague as evidenced with the illustration aforementioned considered concerning the explanation provided by the Commission in the *Bonnafou v Commission* precedent.

94. Second, the Board has not explained why the disclosure of the specific documents would undermine the protection of the purpose of the specific inspection, investigation or audit. In *Technion v Commission* the Court considered valid the justification that 'at the date on which the [decision in question] was adopted, the final report on the audit procedure had not yet been adopted and that additional investigations concerning this audit remained possible and could have been contemplated' (*Technion and Technion Research and Development Foundation v Commission* at paragraph 66). In *Bonnafou v Commission* the Commission justified its non-disclosure on the fact that, although the audit itself was finished, it still had to be validated, and subsequently implemented.
95. Yet, in the present case the Board already adopted the decision for the procedure under Article 24 of the Staff Regulations, and it subsequently adopted the decision for the complaint under Article 90(2) of the Staff Regulations that followed. The Board did not suggest in the Contested Decision that there is still anything left to check, validate, or implement nor provided any elements in that sense in the context of the present proceedings. The Board has merely alleged that the procedure is not finished, because the decision under Article 90(2) is still subject to appeal before the General Court. However, this in and of itself does not explain how disclosure could undermine the purpose of a procedure that, at least within the Board, has reached the end of the road, and where no follow-up is expected. Thus, the Board's explanation does not "disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it" (see *supra Elf Aquitaine v Commission* at paragraph 147).
96. Even if the Appeal Panel could infer the nature of those documents by matching the Board's reference to the documents with the description of them in the Appellant's request, and even if it could then hypothetically try to guess their content, and even if it could then, again hypothetically, try to surmise why the availability of an appeal before the Courts meant that the purpose of the internal procedure could be undermined, this is not how the statement of reasons, or the scrutiny of the Board's acts in general, should work.
97. The Appeal Panel is aware that "whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question" (see judgment 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 150 and the case-law cited).
98. However, the statement of reasons cannot be *all* context. The Board cannot simply and *in abstracto* state that the internal process is subject to appeal before the Courts, and expect the

Appellant, or the Appeal Panel, to infer what is the implication of this, leaving the Board the possibility of subsequently stating that the inference was wrong.

99. In the present case, the Appeal Panel could have gained a better understanding of the nature of one of the documents because the Appellant submitted a redacted version of it as one of the Annexes of the Appeal, and it is likely that the Appellant, given [.] particular position as the party involved in the internal procedure, could infer the nature of the documents. Yet, this particular position should not be the standpoint from where to assess the validity of the reasons. The statement of reasons may require a reasonable effort to put the statement in context, but it should not require privileged access or speculation.
100. Even more importantly, the Board's statement of reasons does not justify why partial access to the document could not be granted. However, since this problem also affects the reasons based on the protection of internal decision-making process they will be analysed below.

(4) The protection of decision-making processes

101. Lastly, in the Contested Decision, the Board stated that disclosure of (parts of) these documents would undermine the Board's decision-making process within the meaning of Article 4(3) first paragraph (protection of decision-making process) of Regulation 1049/2001. This was because, in the Board's view, the Board's staff involved in the preparation of similar documents could factor in the risk of possible disclosure in the future. To the Board, this could lead to a practice of self-censorship and, accordingly, result in a situation where the Board's decision-making bodies no longer benefit from the free and complete exchange of views and preparatory work of Board staff (in this context, *inter alia*, the collection and assessment of the facts as part of the preliminary assessment) that is required to reach an informed decision, also citing the judgment 9 September 2008 in case T-403/05, *My Travel v Commission*, EU:T:2008:316, paragraphs. 50 to 52.
102. As in the case of other exceptions, to determine that this exception applies, two steps are needed. One, to determine that the document is part of an internal decision-making process. Two, to determine that the process will be seriously undermined. According to the case-law, the decision-making process is 'seriously' undermined, within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001 where, *inter alia*, the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, *inter alia*, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (judgments of the General Court 18 December 2008, *Muñiz v Commission*, T-144/05, not published, EU:T:2008:596, paragraph 75; of 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, paragraph 71; of 9 September 2014, *MasterCard and Others v Commission*, T-516/11, not published, EU:T:2014:759, paragraph 62; and more recently of 25 January 2023, *De Capitani v Council*, T-163/21, EU:T:2023:15).

103. Some court precedents have allowed non-disclosure based on the protection of the internal decision-making processes, where the institution, body or agency relied on presumptions over categories of documents, and applied the rules applicable in the specific context, including on matters pertaining to Staff Regulations (judgment 15 November 2015, *Alexandrou v Commission*, cases T-515/14 P and T-516/14 P EU:T:2015:844 paragraphs 89-90 and authorities cited therein). On matters of personnel, for example, the Court has used the principle of secrecy of the deliberations of the jury, under Article 6 of Annex III of the Staff Regulations to refuse access to the content of multiple-choice questions (*Alexandrou* at paragraphs 94-96; see also judgment 8 December 2021, *JP v Commission*, Case T-247/20 EU:T:2021:871 paragraphs 46, 48).
104. Yet, in all those relevant precedents, the nature of the document was sufficiently self-explanatory about the content of such document (e.g., multiple choice questions), or “the Commission distinguished between two groups of documents [...]” and “it clearly set out, drawing distinctions depending on the nature of the information contained in the requested documents, the reasons why the information concerned came within the sphere covered by that exception” (*JP v Commission* at paragraphs 46, 48). Also, and fundamentally in those cases, the European courts had access to the content of the documents to exercise an independent check on the assessment by the institution or body.
105. Based on the above, the Appeal Panel wishes to recall the Board’s preliminary remark in its response on the merits, where it stated that the *erga omnes* nature of the access under Regulation 1049/2001 means that “the only relevant basis for the assessment of the disclosure are the requested documents themselves. It must be assessed based on their content, and the context in which they were created, whether they can be disclosed or whether an exception provided under Regulation 1049/2001 applies and thus justifies their non-disclosure” (Board’s response, at paragraph 13).
106. The Appeal Panel fully corroborates the position thereby stated by the Board. This is precisely the problem. The Board accepts, even argues that the assessment of disclosure and the exceptions must be based on the documents’ *contents* and their context, but then refuses access under conditions of strict confidentiality to the *contents* of the very same documents to the Appeal Panel, which is the body statutorily entrusted with the independent review of the Board’s refusal of access. This choice has clear implications on the Board’s ability to discharge the burden of proof as to the actual occurrence of the conditions for a valid recourse to one or more of the exceptions to public disclosure pursuant to Regulation 1049/2001.
107. Since the Appeal Panel cannot conduct its assessment based solely on the context, and the Board’s statements remain too vague to understand what is exactly the nature and content of the documents, the Board has failed to show that disclosure of (parts of) these documents would undermine the Board’s decision-making process.
108. The Board highlights the risk that employees may exercise self-censorship as a result of their assessments being disclosed. However, in stating so, the Board is only taking into account *one*

of the risks involved, i.e., the risk of self-censorship for perceived lack of confidentiality. In doing so the Board leaves out the opposite risk, which in the Appeal Panel's view is of crucial importance, i.e., the risk that employees fail to report cases of misconduct because they perceive that they are not handled with adequate independence and procedural safeguards. Such a concern could be dispelled if a partial disclosure of documents could show that, in effect, adequate safeguards were adopted. This presents a *prima facie* reason why partial disclosure, to the extent possible, should be desirable. This links with the next, and final consideration.

(5) *The refusal of partial disclosure*

109. The Board's justification of its refusal to grant access to the documents refers to the totality of the documents, without clearly specifying the reasons why partial access could not be granted. In this context, it is necessary to refer to Article 4 (6) of Regulation 1049/2001, which states: "If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released". This provision also applies to determine the explanatory burden of proof that the party refusing disclosure must meet to justify such refusal (see, e.g., judgment 29 October 2020, Intercept Pharma Ltd and Intercept Pharmaceuticals, Inc. v European Medicines Agency, case C-576/19 P, EU:C:2020:873, paragraphs 53-56; judgment 22 January 2020, MSD Animal Health Innovation GmbH and Intervet International BV v European Medicines Agency, C-178/18 P, EU:C:2020:24, paragraphs 77-82).
110. In this regard, the Courts have found that the institutions must assess precisely the contents of the documents, and offer specific reasons to determine which documents may be disclosed or not, and also, and decisively, *mutatis mutandis*, for the purposes of the present proceedings, whether *parts* of the documents may be disclosed or not. The General Court stated in a case that "it is not apparent from the reasons given for the contested decision that each of the documents comprising the Lombard Club file, taken individually, is covered in its entirety by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001. It is not clear that disclosure of any information contained in them would undermine the purposes of the Commission's inspections and investigations" (judgment 13 April 2005, Verein für Konsumenteninformation v Commission of the European Communities, case T-2/03, EU:T:2005:125, paragraph 87). Conversely, the institution was considered to have acted lawfully in cases where it granted access to some parts of the documents, and justified the refusal of access to other parts (judgment 19 December 2019, European Central Bank (ECB) v Espirito Santo Financial, C-442/18 P, EU:C:2019:1117, paragraphs 12, 47, 55, 56), or in cases where it specifically justified non-access also to parts of the document (judgment 10 September 2008, Rhiannon Williams v Commission of the European Communities, case T-42/05, EU:T:2008:325, paragraph 125).
111. At this point, and relying on these precedents, the Appeal Panel finds that the Board's justification is insufficient. Even if one were to accept the Board's view that the documents requested contain personal data, pertain to an inspection, investigation or audit, and form part

of the Board's internal decision-making process, the assessment of whether, and to what extent, partial disclosure may undermine the privacy, investigations or internal decision-making would need a more precise explanation from the side of the Board, which does not even identify, in a clear and unequivocal manner, the nature and presumed contents of the documents.

112. In this context, that is not enough. The internal procedure where the documents were generated comprised multiple allegations of misconduct *vis-à-vis* an employee, breaches of confidentiality or conflicts of interest. The documents could comprise the Board's staff confidential assessment over such allegations, or more general considerations about the Board's policies, or specific ones about the specific procedure, but without referring specifically to the individual staff member. Absent a more specific indication, the Board's justification is, in the Appeal Panel's view, clearly insufficient.
113. Had the Appeal Panel been granted access to the documents it might have been able to ascertain such content, and, in light of this, to duly put the Board's allegations in context, and also, fundamentally, to understand why partial access, even to a heavily redacted version of the documents, was not possible without endangering internal procedures, or the result of the internal investigation. In light of the above, the Board has failed to duly justify why partial access to the documents could not be granted.

Conclusions

114. The Board has the burden of showing that the documents requested fall within one or more of the exceptions under Regulation 1049/2001. The Appeal Panel finds that the full content of the documents requested does not fall within the exception of "personal data". Furthermore, the Appeal Panel finds that the objection based on the protection of "inspections, investigations and audits", and the protection of the "internal decision-making process" were supported by an insufficient statement of reasons. The Board's justification of its refusal to grant access, in particular its refusal to grant partial access, was insufficiently grounded and lacked specificity. Furthermore, in the absence of an access to the documents by the Appeal Panel under conditions of strict confidentiality, the Appeal Panel cannot attest whether those reasons are correct under the law. In light of this, it is up to the Board to adopt a decision that remedies these procedural defects.

On those grounds, the Appeal Panel hereby:

Remits the case to the Board.

Helen Louri-Dendrinou

(SIGNED)

David Ramos Muñoz
Co-Rapporteur

(SIGNED)

Luis Silva Morais
Vice-Chair and Co-Rapporteur

(SIGNED)

Marco Lamandini

(SIGNED)

Christopher Pleister
Chair

(SIGNED)

For the Secretariat of the Appeal Panel

[.]

(SIGNED)