



Opinion on a notification for prior checking received from the Data Protection Officer of the European Investment bank on the Dignity at Work Policy

Brussels, 20 April 2005 (Case 2004-67)

1. Proceedings

1.1. On 18 June 2004, Mr MINNAERT Data Protection Officer of the European Investment Bank requested by letter the opinion of the European Data Protection Supervisor on the need for prior checking of the Dignity at work policy. The documents annexed to this request included a note to staff concerning the policy; a call for volunteers for the role of confidential counsellors; a description of the informal procedure for addressing alleged bullying and harassment; a description of the investigation procedure and a description of the roles and responsibilities of the different parties.

1.2. After analysis of the relevant documents the EDPS made a request for further information on 6 July 2004. The information requested concerned the collection of personal information by confidential counsellors and the record keeping by the Human Resources department.

1.3. After reception by electronic mail on 10 August 2004 of answers to the questions raised, the EDPS sent a letter on 14 October 2004 requesting formal notification as a prior checking case.

1.4. A formal notification for prior checking was received by the EDPS on 7 February 2005.

1.5. Further requests for information were made on 23 February 2005 and 21 March 2005. Information was sent by the DPO by fax on 22 March and further information was given during a telephone conversation on 4th April.

2. Examination of the matter

2.1. Facts

The EIB has established a Dignity at Work policy to prevent harassment and bullying at the work place and to provide a structure and procedure for dealing with alleged cases. The procedure applies to all the members of staff of the EIB. It also applies by extension and insofar as their corresponding contract so provides to third parties whose services are provided within the premises of the EIB. The policy provides for two types of procedures: an informal procedure and a formal procedure.

The informal procedure consists in trying to solve the problem with the offending party. If help is needed the person is advised to consult one of the "confidential counsellors" for help as soon as possible. The role of the confidential counsellor is to help and support people; listen, analyse and help clarify the situation for the person and to advise on procedures for handling complaints. The counsellor is of course subject to strict confidentiality throughout the procedure and afterwards. The confidential counsellors are not allowed to keep documents concerning the informal procedure in a structured form.

The informal procedure comes to an end if:

- the situation is resolved to the satisfaction of the person, or
- a decision is taken by the individual not to pursue things further, or
- a decision is taken by the individual to make a formal complaint to the Director of Human Resources.

At the request of the staff member, an investigation procedure may be opened. No formal action can be taken unless the investigation procedure is initiated in a correct way. If the complaint is very serious, or if the person prefers, the investigation procedure may be initiated at any time.

An investigation panel composed of three independent persons is established: one EIB staff member and two external persons each with knowledge and experience of bullying and harassment issues. The procedure provides for a series of hearings where both parties and any witnesses are heard separately by the panel, plus any other individuals the panel members wish to hear. The result of the panel hearing is a recommendation to the President who takes the decision on what action is to be taken.

The President's decision should indicate any decision to be taken and the timing. For example, he may request the opening of a disciplinary procedure or further investigations into a department or work unit. No later than 5 working days following the Panel's recommendation to the President, both parties are informed in writing of the President's decision, to which is annexed the Panel's recommendation.

To protect all parties concerned, the proceedings are kept strictly confidential and information will be shared only where strictly necessary. Any personal data compiled by the Investigation Panel which needs to be retained is submitted to the Human Resources Department for filing. All documents pertaining to an investigation procedure up to and including the President's decision will be kept in a file with strictly limited access in the Human Resources Department for 5 years. Any sanction resulting from the President's decision will be kept (according to the time specified in the decision) in the staff member's personal file. Human Resources Directorate will keep confidentially and under the control of the DPO, the records of names, dates, complaints and outcomes in order to review the policy and to ensure consistency and equity.

2.2. Legal Aspects

2.2.1. Prior checking

The present processing operation falls within the scope of Regulation (EC) 45/2001 since it involves the processing of personal data which form part of a filing system or are intended to form part of a filing system (Article 3(2) of the Regulation). This point will be further developed below (2.2.2.).

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as "processing operations intended to evaluate certain aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)b). We are in the presence of processing of personal data intending to evaluate personal aspects relating to the data subject (notably his conduct). The case therefore falls within the scope of the prior checking procedure.

Although the frontier is not always easy to establish, the present prior check does not intend to address any processing of personal data in the frame of a disciplinary action initiated at the term of the Dignity at Work procedure.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the Dignity at Work policy has already been established. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 7 February 2005. According to Article 27(4) the present opinion must be delivered within a period of two months that is before the 7 April 2005. Requests for information suspend the delay for 1 + 14 days. The opinion must therefore be rendered no later than 22 April 2005.

2.2.2. Processing of personal data by counsellors during the informal procedure

The Regulation applies to the processing of data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or which are intended to form part of a filing system (Article 3.2 of Regulation 45/2001). A personal data filing system is defined in the Regulation as "any structured set of personal data which are accessible according to specific criteria". Written notes are therefore to be considered as processing of personal data if they are filed in a structured form.

The policy provides for two phases: an informal procedure and an investigation procedure. The investigation phase clearly includes the processing of personal data since the Human Resources Directorate collects and stores the data. Any personal data compiled by the Investigation Panel which needs to be retained is submitted to the Human resources Department for filing. This filing will be structured according to the

name of the complainant or the alleged harasser and therefore qualifies as a personal data filing system falling within the scope of Regulation 45/2001.

In relation to the informal part of the procedure, initially the information provided by the DPO specified that the Counsellors listen to staff and note down (in a file for Counsellor use only, with no retention limit specified) the details of the case. The collection of personal information included e-mail communications or other documents in support of a complaint (see e-mail of DPO dated 10 August 2004). However, in later documents it is specified that the Counsellors are not allowed to keep structured filing of personal data (see notification form for prior checking by EDPS). The Counsellors must sign a note to this effect (see draft note to the Confidential Counsellors).

The EDPS presumes that this measure was adopted so as to avoid the application of the data protection Regulation to individual Counsellors. However the EDPS would like to make certain comments at this point. The Regulation 45/2001 does not intend to prohibit the processing of personal data in a case such as that envisaged during the informal phase of the Dignity at Work policy. On the contrary it permits the processing of the data providing the respect of certain measures in order to guarantee the protection of the personal data.

It may be necessary in certain situations for Counsellors to process the data. The EDPS believes that should this be the case, the Regulation should apply. Therefore rather than to exclude the application of the Regulation by preventing the Counsellors from keeping the documents received or analysed in a structured form, the rule should be that Counsellors may process the data provided that the relevant data protection principles are respected. These principles may imply for example that personal data may only be collected if the Counsellor ensures that this was necessary in the specific case (a particularly complicated or lengthy case for example). Once the Counsellor has carried out his role in the informal procedure, he should not retain any personal data unless the necessity of keeping this data can be demonstrated, which means that normally it should be destroyed unless it is relevant for the formal phase of the procedure. In any case, the Counsellor should be entitled to keep a trace of the names of the persons who consulted him and the dates of the visits so as to report on his own work for example.

2.2.3. Legal basis and lawfulness of processing

A number of legal acts can serve as legal basis for the policy.

On 29 May 1990 the Council (Social Affairs) passed a Resolution on the protection of the dignity of men and women at work, addressed to the Member States and to the institutions of the European Communities. This resolution calls on institutions to "develop positive action measures aimed at achieving a work environment" "to counter unwanted conduct of a sexual nature or other conduct based on sex affecting the dignity of women and men at work".

The Dignity at Work procedure is based on the Staff Code of conduct of the EIB. Indeed, the code of conduct explicitly prohibits any form of harassment (Article 3.6)

and provides that a victim of any harassment is entitled to talk freely to his superiors or to the Director of Human Resources, without this being held against him. Furthermore the code of conduct provides that any member of staff who violates the code shall be liable to disciplinary measures (Article 1(5)).

The lawfulness of the processing according to Regulation (EC) 45/2001 is therefore based on the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of an official authority vested in the Community institution (Article 5(a)).

2.2.4. Data Quality

Article 4 of Regulation (EC) 45/2001 provides for certain requirements as concerns the quality of personal data.

Personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed" (Article 4(1)c). This is determinant for the data which is to be collected and kept in the course of the procedure. Measures should be taken so as to ensure that this is respected throughout the procedure and as concerns any data kept in the personal file. Staff handling these files must be made aware of these rules and must act accordingly.

Personal data must also be accurate and where necessary kept up to date. The Regulation further provides that "every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified" (Article 4 (1)(d)).

There are no systematic rules as concerns the type of data put in a file. The data will very much depend on the case. Having said this, rules must be established as concern the criteria to place evidence or data in a file, such as only relevant data may be kept.

Rules must also establish that any subsequent modifications or rectifications must be inserted in the file so as to ensure up-dated information.

2.2.5. Conservation of data

Personal data may be kept in a form which permits the identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed (Article 4(1) (e)).

According to the notification made to the EDPS, the individual Confidential Counsellors are not allowed to keep structured filing of personal data. Any personal data compiled by the Investigation Panel which needs to be retained is submitted to the Human Resources Department for filing.

The notification to the EDPS further specifies that all documents pertaining to an investigation procedure up to and including the President's decision will be kept in a file with strictly limited access in the Human Resources Department for 5 years. The EDPS considers that this time limit on the retention period of documents concerning the investigation period is adequate in the light of the purpose for which the data are being processed.

Any sanction resulting from the President's decision at the term of the investigation procedure will be kept (according to the time specified in the decision) in the staff member's personal file. The EDPS would welcome the establishment of clear rules as concerns the conservation of such data in the personal file in accordance with Article 4 (1) (e) of Regulation (EC) 45/2001.

The EDPS would like to underline that it may be relevant for the HR Department to keep track of certain data so as to establish statistics in this field (number of complaints, types of complaints, nature of sanctions...) or to afford consistency in the decisions taken. However should this be the case, the data must be made anonymous in accordance with Article 4(1) (e) of the Regulation.

2.2.6. Compatible use

The use of the data in the frame of disciplinary procedures initiated at the close of the investigation procedure must be seen as a compatible use of the data in the continuation of the investigation procedure in accordance with Article 4(1) (b) of the Regulation.

Having said this, safeguards must be established in order to ensure that any data collected during a procedure in the frame of the Dignity at Work policy may not be processed for any other purpose.

2.2.7. Transfer of data

According to the information received from the DPO, it may be possible, in certain cases that requests are made for the transfer of data concerning an investigation in the frame of the Dignity at Work procedure from other international investment banks with whom the EIB exchanges staff.

If these recipients are subject to Directive 95/46/EC then Article 8 will apply. In most cases the transfer will be justified by the necessity of having the data transferred providing the data subject's legitimate interests are not prejudiced (Article 8 (b)).

If any transfers to third countries or international organisations not subject to Directive 95/46/EC are envisaged, it must be ensured that the provisions of Article 9 are respected.

2.2.8. Processing of special categories of data

The processing of personal data in the course of a procedure may involve the processing of special categories of data as foreseen in Article 10 of Regulation 45/2001 such as data concerning sex life.

The processing can be seen as necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by legal acts taken on the basis of the Treaty. Indeed the legal basis described above demonstrates that the institution as an employer has as a duty to ensure a working environment free from any form of psychological or sexual harassment. Processing of sensitive data during the procedure which are relevant for the case and proportionate to the purpose may be justified on this basis.

2.2.9. Information to the data subject

Articles 11 and 12 provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data.

A note to staff has been distributed on 16 December 2003 (Note to staff n° 592) describing the aim of the policy Dignity at Work. The note refers staff to the EIB intranet for further information on the policy and the procedures. A brochure has also been distributed to staff.

Staff members are informed of the identity of the controller (Human Resources Department) and the purpose of the processing. Information is also provided as concerns the possible recipients of the data (different parties concerned by the procedure).

The document informing staff which is available on the HR page of the Intranet "Policy on Dignity at work - Investigation procedure" stipulates "Record-keeping: To protect all parties concerned, the proceedings shall be kept strictly confidential and information will only be shared where strictly necessary. HR shall keep, confidentially and under the control of the Data Protection Officer, the names, dates, complaints and outcomes in order to review the policy and to ensure consistency and equity". No time limits are specified and the statement seems to imply that data may be kept indefinitely. The information must therefore be modified so as to correspond to the effective conservation period.

It must also be pointed out that the scope of the EIB Dignity at work policy also concerns third parties whose services are provided within the premises of the EIB by extension and insofar as their corresponding contract so provides. Since third parties are most likely not able to have access to the intranet of EIB, any contract with a third party which provides that the policy shall apply, must provide the person concerned with the relevant information.

2.2.10. Right of access

According to Article 13 of Regulation 45/2001, data subjects are entitled to obtain confirmation as to whether data related to him or her are being processed; information at least as to the purposes of the processing operations, the categories of data concerned, and the recipients to whom data are disclosed and communication in an intelligible form of then data undergoing the processing and any available information as to their source. This right may be restricted, according to Article 20 of the Regulation, notably where such a restriction constitutes a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences or the protection of the data subject or of the rights and freedoms of others.

According to the policy on Dignity at Work, Investigation Procedure (section on record keeping), the proceedings are kept strictly confidential and information will only be shared where "strictly necessary". Adequate rules should be adopted so as to provide the data subject with an access to his/her data save where restricted in accordance with Article 20 of the Regulation. Indeed, in most cases, the restriction to the right of access will be justified on the grounds of "the protection of the data subject or of the rights and freedoms of others" (article 20(1)(c) or "the prevention, detection and prosecution of criminal offences" which has been interpreted by the EDPS so as to include disciplinary investigations.

2.2.11. Security and confidentiality

According to Articles 22 and 23 of the Regulation 45/2001, the controller and the processor shall implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the following considerations are fully taken into account:

- The rule should be that Counsellors may process the data provided that the relevant data protection principles are respected;
- Once the Counsellor has carried out his role in the informal procedure, he should not retain any personal data unless the necessity of keeping this data can be demonstrated;

- Rules must be established as concern the criteria to place evidence or data in a file, such as only relevant data may be kept;
- Rules must also establish that any subsequent modifications or rectifications must be inserted in the file so as to ensure up-dated information;
- The EDPS would welcome the establishment of clear rules in accordance with Article 4 (1) (e) of Regulation (EC) 45/2001 as concerns the conservation of any sanction resulting from the President's decision at the term of the investigation procedure in the personal file;
- If the HR Department keeps track of certain data so as to establish statistics in this field or to afford consistency in the decisions taken, the data must be made anonymous in accordance with Article 4(1) e of the Regulation;
- Safeguards must be established in order to ensure that any data collected during a procedure in the frame of the Dignity at Work policy may not be processed for any other purpose;
- If any transfers to third countries or international organisations not subject to Directive 95/46/EC are envisaged, it must be ensured that the provisions of Article 9 are respected;
- The information provided to staff must be modified so as to correspond to the effective conservation period;
- Any contract with a third party which provides that the policy shall apply must provide the person concerned with the relevant information concerning the processing of personal data;
- Adequate rules should be adopted so as to provide the data subject with an access to his/her data save where restricted in accordance with Article 20 of the Regulation.

Done at Brussels, 20 April 2005

The European Data Protection Supervisor

Peter HUSTINX