



Opinion on a notification for prior checking received from the Data Protection Officer of European Court of Justice on "Personal files: report at end of probationary period and staff reports"

Brussels, 4 July 2005 (Case 2004-281)

Proceedings

On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested notification of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.

On 24 September 2004, the DPO of the Court of Justice of the European Communities (ECJ) listed this case as a case for ex-post prior checking notably since it included data relating to the subject as ability, efficiency and conduct (Article 27.2.b).

The EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking to be addressed. A staff appraisal is among these cases.

On 2 May 2005, the EDPS received a notification for prior checking by the Data Protection Officer (DPO) of the Court of Justice of the European Communities (ECJ) concerning the probationary report and staff reports called "personal files: report at end of probationary period and staff reports". The notification included several documents: the notification itself, annex 1 as "matrice de rapport de stage" and annex 2 as "rapport de notation".

A further request for information was made on 20 and 21 June 2005. The DPO replied by e-mail to these requests on 21 June 2005.

Facts

The name of the operation is "personal files: report at end of probationary period and staff reports". Nevertheless, the processing operation does not deal with personal files themselves but with probationary reports and staff reports, although, there are some links with the personal file.

Both probationary report and staff reports concern all staff members (officials, temporary agents and contractual agents).

According to the Staff Regulations of Officials of the European Communities (Staff Regulations) and to the Conditions of employment of other servants of the European Communities regarding the Conditions of employment (Articles 34, 14 and 84), officials, temporary agents and contractual agents are requested to serve a nine or a six month probationary period before they can be established or confirmed in their function. The Staff

Regulations (Articles 43, 15 and 87) also provide that officials, temporary agents and contractual agents shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110.

In accordance with the Staff Regulations, the Court of Justice of the European Communities established an appraisal procedure of its staff members and an appointment procedure of its staff members through the use of a probationary report and staff reports.

The forms are filled in by the appraisee and by the appraiser(s). The appraisers are the hierarchical superiors of the members of staff in question. The appraised person receives the reports and may keep copies.

The probationary report includes: Name, date of birth, status (official, temporary agent, contractual agent), grade, dates of beginning and end of probationary period, information regarding interruption of probationary period (if appropriate), name of reporting officer, summary of work carried out during probationary period, evaluation, linguistic knowledge, languages used in the carrying out of duties, considered proposal regarding appointment (titularisation) or dismissal or extension of probationary period, date of meeting with probationary official, names of others consulted, observations of appraiser.

Staff reports include: Name, date of birth, nationality, service, date of entry into service, status and grade (at the time of the recruitment and at present), summary of career (in the Court of Justice and outside the Court of Justice), linguistic knowledge, recently acquired skills, name of reporting officer, name of appeal officer, description of duties, languages used in the exercises of duties, appraisal, name of persons consulted, date of meeting between appraiser and official/agent, official/agent's observations; in the case of an appeal, information regarding the appeal.

Procedures are provided for appeal in both cases (see Articles 34 and 43 of the Staff Regulations and "la décision de la Cour du 18 octobre 2000, portant adoption des dispositions générales d'exécution relatives à la notation du personnel").

Both types of report are placed in the personal file of the official agent concerned. Measures are taken to ensure security of processing. The processing operation is manual.

Staff members, and former staff members, may consult their personal files at any time.

The recipients to whom the data might be disclosed in both cases are the following: the hierarchical superiors of the staff member in question (including the appointing authority); members of the personnel division, in the event of an appeal under Article 90 of the Staff Regulations, the legal advisor and the members of the complaints committee. Both reports could also be disclosed to the disciplinary committee and the joint advisory committee on professional incompetence.

The recipients of the probationary report might also be the members of the reports committee (see Article 34 (2) of the Staff Regulations), as for staff reports they might be the members of the promotions committee and in the event of an appeal against the assessment they might be the members of the joint committee competent to advise.

When a staff member applies for a vacancy in the Court of Justice, the relevant Head of Service may consult the staff reports and the probationary report.

Article 26 of the Staff Regulations provides that the personal file, in which the staff reports and the probationary report are placed, is transmitted to the Court of First Instance of the European Communities in the event of a staff case.

The personnel division has raised for discussion with the other institutions the question of the time during which personal data contained in administrative files should be kept (in the *comité de préparation des questions statutaires*).

When a staff member is transferred to another Community institution, the probationary report and the staff reports – which are contained in his personal file – are transferred to the other institution.

Legal aspects

1/ Prior checking

Probationary report and staff reports can clearly be considered as within the scope of Regulation (EC) 45/2001 since they involve the processing of personal data whether or not by automatic means. Processing of personal data otherwise than by automatic means, is covered by the scope of the Regulation, provided that the personal data form part of a filing system. In this case, the probationary report and staff reports forms are kept in paper version, but are kept in a structured system according to the name of the staff member. The processing therefore falls within the scope of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 subjects 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" to prior checking by the EDPS. Article 27 (2) of the Regulation contains a list of processing operations that are likely to present risks such as "processing operations intended to evaluate aspects relating to data subject, including his or her ability, efficiency and conduct" (Article 27.2.b). Probationary report and staff reports typically qualify as processing of personal data intending to evaluate personal aspects relating to the data subject and are therefore subject to prior checking.

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 processing operation has already been established. This is not a serious problem however since any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 2 May 2005. Further requests for information suspended the deadline for two days. According to Article 27(4) the present opinion must be delivered within a period of two months following receipt of notification. That is no later than 5 July 2005.

2/ Legal basis for and lawfulness of the processing

The legal basis of processing both reports can be found in Articles 34 and 43 of the Staff Regulation for Officials of the European Communities, and in Articles 14 and 15 of the Conditions of employment of other agents for temporary agents, and in Articles 84 and 87 of the Conditions of employment of other agents for contractual agents.

Alongside the legal basis in relation to Regulation (EC) No 45/2001 the lawfulness of the processing operation must also be considered. Article 5(a) of Regulation (EC) No 45/2001 stipulates that the processing shall be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution ...*".

As appraisal procedures which involve collecting and processing personal data relating to officials or other servants are necessary for the legitimate exercise of official authority vested in the institution, the processing operation is lawful. The legal basis found in the Staff Regulations of Officials of the European Communities (Articles 34 and 43) as the legal basis found in the Conditions of employment of other agents (Articles 14, 15, 84, 87) supports the lawfulness of the processing operation.

3/ Data Quality

The data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation to the processing operation. The data required are of administrative nature and necessary to assess the work of the official. The EDPS considers that the Article 4(1)(c) of Regulation (EC) No 45/2001 is fully respected in this respect.

According to the Article 4 (1)(d), the data must be accurate and when necessary kept up to date. The fact that staff members and former staff members may consult their personal files is a means of guaranteeing the accuracy of the data (see the right of access and rectification to the personal files in point 8).

4/ Compatible use

Article 4(1) (b) of the Regulation provides that "personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes". Even though the data collected for the appraisal do not seem to be processed for any other purposes than that of appraisal of staff member concerned, guarantees could be put into place to ensure the respect of this principle. The limitation on any further use by appraisers of personal data could be made more explicit: the appraisal forms containing staff data may not be used for any other purpose than that of appraisal of the staff member concerned or other compatible use.

5/ Data retention/conservation of data

According to Article 4(1)(e) of the Regulation, personal data must be kept in a form which permits 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.

Seeing that the appraisal forms are stored in the staff member's personal file, the rules applicable to the conservation of personal files apply. The controller mentioned that the personnel division has raised for discussion with the other institutions the question of the time during which personal data contained in administrative files should be kept (in the *comité de préparation des questions statutaires*).

The EDPS insists on the establishment of a time frame within which the data may be stored. In other similar case the EDPS has considered a conservation period after the moment when the staff member has left or after the last pension payment of 10 years as reasonable. Furthermore, the EDPS considers that data of purely informative nature no longer necessary for administrative reasons could be disposed of after a minimum period of 5 years.

6/ Transfer of data

According to the Regulation 45/2001, transfers of data within or between Community institutions or bodies must be compliant with the conditions laid down in Article 7. Personal data may only be transferred if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. The recipient may only process the data for the purposes for which they were transmitted.

As mentioned above, the data are transferred to the hierarchical superiors of the staff member in question, including the appointing authority, to the members of the personnel division, the members of the report committee and the members of the promotions committee. Data might also be transferred to the legal advisor and to the members of the complaints committee. In the event of a staff case, the personal file, in which the staff reports and the probationary report are placed, is transmitted to the Court of First Instance of the European Communities. These transfers are based on a legitimate purpose as they are necessary for human resource management or in the context of a disciplinary case or a legal claim.

The transfer of a staff member to another Community institution entails the legitimate transfers of the probationary report and the staff reports contained in his personal file. Transfers of reports are necessary for the legitimate performance of the tasks covered by the competences of the recipient.

7/ Information to the data subject

Articles 11 and 12 of the Regulation provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Since in this case information is obtained both from the data subject and from third parties, both Articles 11 and 12 apply.

No specific information on the processing of the data is provided. Having said this, part of the information is given in the probationary report form with the mention of the Article 34 of the Staff Regulation. The staff report form refers to Article 43 of the Staff Regulation. Both Articles provide the purposes of the processing operation for which the data are intended (Article 11(b)) and the categories of recipients of the data (Article 11(c)). To ensure better transparency, the Article 26 of the Staff Regulation, as concerns the personal files, should also be mentioned. Article 26 provides information on the existence of the right of access and rectification of the data subject.

Moreover, when filling in both forms data subjects must be informed as to whether replies are mandatory or not and the consequences of a possible failure to reply.

The EDPS is of the opinion that the information mentioned in Article 11 (f) of the Regulation, the legal basis of the processing operation for which the data are intended, the time-limits for

storing the data, the right to have recourse at any time to the European Data Protection Supervisor, should also be mentioned to guarantee fair processing in respect of the data subject.

To be compliant with Articles 11 and 12, information could be included in the probationary report form and in the staff report form or could be transmitted in any other acceptable way.

8/ Right of access and rectification

The right of access mentioned in Article 13 of Regulation (EC) 45/2001 is granted by Article 26 of the Staff Regulation. It specifies that *an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them.*

The right of rectification (Article 14 of Regulation 45/2001) is partly granted by Article 26 of the Staff Regulation which mentions that *the personal file shall contain any comments by the official on such document.* In the context of an appraisal procedure, the appraisee should be allowed to add his comments but also to ensure the completeness of his report. To be fully compliant with Article 14 of regulation 45/2001 the Court of Justice should ensure that the data subject have the right (in case of appeals, for example) to obtain from the controller the rectification of incomplete reports in his personal file.

9/ Security measures

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 as probationary report and staff reports are kept in the personal file of the person concerned. These personal files are stored in a locked room. Personal files of former staff are kept in locked cupboards.

In case of exchange of information contained in the forms or in case of transfer of the forms (by electronic means for e.g.), security measures should be taken to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and to prevent all other unlawful forms of processing of the data during and after the transmission.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account. This means in particular that:

- The limitation on any further use by appraisers of personal data could be made more explicit: the appraisal forms containing staff data may not be used for any other purpose than that of appraisal of the staff member concerned or other compatible use.

- The establishment of a reasonable time frame within which the data may be stored should be ensured.
- The Article 26 of the Staff Regulation, as it concerns the personal files, should be mentioned in both forms.
- The data subjects should be informed as to whether replies are mandatory or not and the consequences of a possible failure to reply.
- The information mentioned in Article 11 (f) should be mentioned so as to guarantee fair processing in respect of the data subject.
- The right of the data subject to obtain from the controller the rectification of incomplete personal data in his personal file should be ensured
- In case of exchange of information contained in the forms or in case of transfer of the forms (by electronic means for e.g.), security measures should be taken to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and to prevent all other unlawful forms of processing of the data during and after the transmission.

Done at Brussels, 4 July 2005

The Assistant Supervisor

Joaquín BAYO DELGADO