



Opinion on a notification for prior checking received from the Data Protection Officer at the Court of Auditors on the issue of harassment

Brussels, 20 July 2005 (Case 2005-145)

1. Proceedings

On 13 May 2005 the Data Protection Officer at the Court of Auditors (Mr KILB) informed the Assistant European Data Protection Supervisor by email that the Court of Auditors had decided to adopt a text concerning the protection of staff who are the victims of harassment, and asked whether this text came within the scope of prior checking on the basis of Article 27(2) of Regulation (EC) No 45/2001.

On 13 May 2005 the Assistant European Data Protection Supervisor informed Mr KILB by email that this type of prior check had already been carried out, and referred to the Internet site of the European Data Protection Supervisor; he stated that in any case the text could not come into force until a prior check had taken place.

In a letter dated 30 May 2005, Ms Rose-Marie WEGNEZ (Head of the Human Resources Division at the Secretariat-General of the Court of Auditors) sent the Assistant European Data Protection Supervisor the draft decision of the Court of Auditors on the protection against harassment of staff working at the Court of Auditors.

On 7 June 2005 the Data Protection Officer at the Court of Auditors enquired by email whether transmission of the text was sufficient to initiate prior checking.

On 9 June 2005 the Assistant European Data Protection Supervisor indicated in an email that some information was lacking as regards the actual notification, and asked for notification as such to be given.

The notification for prior checking concerning the protection against harassment of staff at the Court of Auditors was sent to the European Data Protection Supervisor by email on 13 June 2005.

2. Examination of the matter

2.1 Facts

The Court of Auditors wishes to establish a policy to protect any person working at the Court against harassment. The arrangements for implementing this policy and the roles of those involved are set out in a specific decision, which is the subject of this prior check.

The proposed procedure applies to anyone working at the Court of Auditors. As well as a formal procedure, the proposed policy includes the establishment of an informal procedure intended to prevent conflict situations and to attempt to resolve them amicably as soon as they arise. The aim is to avoid a deterioration in the working atmosphere and to promote the use of amicable solutions rather than administrative procedures.

The informal procedure consists of the following stages:

- In the first instance the alleged victim should try to resolve any problem amicably. If he feels that any kind of harassment has occurred or that certain kinds of behaviour are inappropriate, he should frankly express his disapproval and should not be afraid to make it clear that such behaviour is unacceptable.
- The contact person could be the first person to contact for that purpose.
- The alleged victim may also contact a line manager, the Welfare Officer, the Medical Officer or the Human Resources Division.
- There shall be no formal consequences for the alleged victim if he contacts any of the above individuals. The latter may help the alleged victim to decide how to find the solution best suited to his particular case. The members of the support network can all help in different ways and it shall therefore be for the alleged victim to decide who he thinks is best qualified to help him.
- In many cases, the informal procedure will produce a satisfactory solution. However, the person whom the alleged victim asks for assistance shall remain at the latter's disposal in order to monitor the situation, as required.

The role of the contact person is as follows:

- Contact persons are members of the Court's staff who have undergone special training. The Secretary-General shall draw up a list of contact persons, making every effort to ensure adequate coverage of all the various parts of the Court's organisational structure. The list of contact persons shall be made available to everyone working at the Court.
- The contact person's role shall primarily be to advise the person who has asked for help and to discuss the options available. Whether the person concerned wishes to follow up the matter formally or informally, the contact person shall ensure that the person concerned can count on his support and advice. The contact person may not be involved in the subsequent procedure, especially not as a witness.
- Contact persons must observe a policy of strict confidentiality and may contact third parties only with the express agreement of the person who has requested their assistance.

The formal procedure is as follows:

- Any person who believes that he is a victim of harassment may also formally lodge a confidential written complaint with his line manager, to be forwarded through the official channels. If, for any reason, the person concerned does not wish to submit a formal complaint through the official channels, the complaint may be forwarded direct to the Secretary-General, who will investigate the matter as soon as possible.

- The Secretary-General shall inform the alleged harasser that a complaint has been lodged against him.

After the investigation mentioned above, the Secretary-General may decide to:

- reject the complaint if it is unfounded;
- initiate the disciplinary proceedings provided for in Article 86 and Annex IX to the Staff Regulations or refer the matter to the Court in cases where the latter is the Appointing Authority;
- take appropriate action, within the framework of the Staff Regulations, against the person who lodged the complaint if it is established that the complaint was made in bad faith.
- The Secretary-General shall inform the parties of the decision reached as soon as possible.

Besides the contact person, others may be involved in this process, including the Welfare Officer, the Medical Officer, line managers and the Human Resources Division. All those who may be involved, including witnesses, are protected by the institution in that the Secretary-General is to take appropriate action if it appears that involvement in a case of harassment has been prejudicial to the person making the complaint, or to a witness, whistleblower or contact person.

The parties shall be entitled to submit a complaint to the Appointing Authority under Article 90(2) of the Staff Regulations. Appeal to the Court of Justice of the European Communities is admissible only if the Appointing Authority has previously had a complaint submitted to it pursuant to Article 90(2). Anyone involved in the procedure who is also subject to the Staff Regulations shall be entitled, at any stage, to submit a request for assistance under Article 24 of the Staff Regulations.

If a false accusation is found to have been made deliberately, the Appointing Authority shall take appropriate action.

Those involved shall be kept informed as follows: when the formal procedure is initiated, those concerned - the complainant, the person against whom the complaint is made, and the witnesses - will be informed that the procedure has been opened. At the end of the investigation, the parties concerned will be informed of the decision taken.

The data to be transmitted are the surname, first name, civil status, family situation, situation under the Staff Regulations or conditions of employment, and where appropriate medical data.

The information may be transmitted to the line manager, the Secretary-General, the Director and Head of the Human Resources Division, the person appointed to head the investigation, the disciplinary board, the Appointing Authority and where appropriate the Legal Service.

2.2 Legal aspects

2.2.1 Prior checking

The notification received by email on 13 June 2005 concerns the processing of personal data ("any information relating to an identified or identifiable natural person" - Article 2(a)) and therefore comes within the scope of Regulation (EC) No 45/2001.

Also, the present processing operation falls within the scope of Regulation (EC) No 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 discussed below (2.2.2).

Article 27(1) of Regulation (EC) No 45/2001 makes subject to prior checking by the European Data Protection Supervisor 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 the "processing of data relating to health and to suspected offences, offences, criminal convictions or security measures" (Article 27(2)(a)), or "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). The case in hand concerns the processing of personal data to evaluate personal aspects relating to the data subject (notably his conduct), but also personal data relating to suspected offences (Article 27(2)(a)). This case therefore falls within the scope of the prior checking procedure.

Notification was received from the Data Protection Officer on 13 June 2005 by email. Under Article 27(4), this opinion must be delivered within two months following that date.

Some questions were asked by email on 30 June 2005. In accordance with Article 27(4) of Regulation (EC) No 45/2001, the two-month period within which the European Data Protection Supervisor must deliver his opinion was suspended while replies to those questions were obtained. Replies to the questions were provided by email on 8 July 2005. The European Data Protection Supervisor will therefore deliver his opinion by 22 August 2005 at the latest.

2.2.2 Processing of data by contact persons

The Regulation applies to the processing of personal 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 are intended to form part of a filing system (Article 3(2) of Regulation (EC) No 45/2001). The Regulation defines a personal data filing system as "any structured set of personal data which are accessible according to specific criteria". Written notes must therefore be considered as personal data once they are archived in a structured manner.

The decision provides for two phases: an informal procedure and a formal procedure. During the formal procedure and the related investigation, processing of personal data indubitably occurs, since the Secretariat-General will collect and store data. This formal procedure alone

is the subject of this prior check. Any disciplinary procedures which might be initiated will be the subject of another notification for prior checking.

In the framework of the informal procedure, it seems that contact persons do not take notes on the case or retain them. However, if notes were to be taken and retained, Regulation (EC) No 45/2001 would have to be complied with. If contact persons process personal data, the way in which Regulation (EC) No 45/2001 is complied with will have to be established.

The Regulation is not intended, in cases such as this, to prohibit the processing of personal data during the informal phase of the procedure. On the contrary, it permits such data to be processed, provided that certain measures intended to guarantee the protection of the personal data are complied with. For example, the contact person might be authorised to retain a record of the names of the persons who have consulted him, and of the dates of their visits, so as to be able to report on his own activities.

These principles may for example include the contact person only being able to collect personal data if he certifies that this is necessary (for example in a particularly long or complex case). Once his role in the informal procedure is over, the contact person should not retain any item of personal data unless he is able to prove that it is necessary, which means that such data should normally be destroyed.

The European Data Protection Supervisor recommends that a procedure be drawn up taking account of the principles to be observed by contact persons in the context of the informal procedure.

2.2.3 Legal basis and lawfulness of processing

The legal basis for such processing stems from Article 12a of the Staff Regulations of Officials of the European Communities, which requires that officials must refrain from any form of psychological or sexual harassment.

Article 86 of the Staff Regulations concerning disciplinary measures states that "any failure by an official [...] to comply with his obligations under these Staff Regulations [...] shall make him liable to disciplinary action". The relevant rules and procedures are set out in Annex IX to the Staff Regulations. Article 90(2) of the Staff Regulations refers to the official's right to submit to the Appointing Authority a complaint against any act adversely affecting him.

Lastly, Article 24 of the Staff Regulations provides that the Communities will assist any official who is subjected to "threats, insulting or defamatory acts or utterances, or any attack to person or property".

On the basis of all these Articles, the legal basis is therefore correct.

As regards the legal basis for the prevention of harassment of a person or perpetrated by a person from outside working at the Court of Auditors, this is not explicitly set out in the draft decision, but may be constituted by the agreements or contracts by which such persons are working at the Court. This aspect should be included in the decision.

The analysis of the legal basis in relation to Regulation (EC) No 45/2001 relates to the

analysis of the lawfulness of the processing. Article 5(a) of Regulation (EC) No 45/2001 provides that personal data may be processed if "*processing is 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*". The decision of the Court of Auditors concerning harassment, covering all staff working at the Court, falls within the legitimate exercise of official authority vested in the Community institution, and hence the processing is lawful.

Health-related data are described in Article 10 of Regulation (EC) No 45/2001 as "special categories of data".

2.2.4 The processing of special categories of data

The processing of personal data during a procedure may require the processing of special categories of data as provided for in Article 10 of Regulation (EC) No 45/2001, for example data relating to health or sex life.

The processing of such data may prove 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 instruments adopted on the basis of the Treaty. The legal basis mentioned above shows that, as an employer or by extension as an institution welcoming other workers, the institution has a duty to ensure that the working environment is free of all forms of psychological or sexual harassment. The processing, during the procedure, of sensitive data which are relevant to the case in question and proportionate to the intended aim may therefore be justified on this basis.

2.2.5 Data quality

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 an essential point as regards the data collected and retained during the procedure. Steps must be taken to ensure that it is complied with throughout the procedure and for all data kept on the personal file. Staff who need to handle such files must be aware of these rules and act on them.

Personal data must also be "accurate and, where necessary, kept up to date". The Regulation also 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 concerning the sort of data which may appear in a file concerning the formal procedure. Such data depend to a large extent on the case in question. Firstly, rules must be established on the composition of the file for the formal procedure, and then principles must be set down for the criteria to be applied before evidence or data are included in the file, so that only relevant data are kept.

Rules must also be adopted requiring any changes or corrections to be incorporated in the file, to guarantee that the information appearing there is up to date.

The European Data Protection Supervisor recommends that rules should be established concerning:

- compliance to ensure that data appearing on the file are adequate, relevant and not excessive;
- the composition of the file for the formal procedure;
- the criteria to be applied before evidence or data are included in a file for the formal procedure, so that only relevant data are kept;
- the right to correct data included in the file so as to ensure that the information found there is up to date.

2.2.6 Conservation of data

Article 4(1)(e) of Regulation (EC) No 45/2001 sets out the principle that 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 were collected or for which they are further processed"*.

It appears from the notification sent to the European Data Protection Supervisor and the Annex thereto that this question will be dealt with in the wider framework of the general provisions for implementation of Article 86 and Annex IX of the Staff Regulations.

All documents relating to a formal procedure, including the investigation, must be kept by the Human Resources Division in a file to which access is strictly limited. A five-year period would seem adequate.

The European Data Protection Supervisor would stress that it could be useful for the Human Resources Division to keep a record of certain data, so that statistics can be drawn up in this area (number of complaints, type of complaint etc) or to ensure consistency of decisions. However, in this case, the data are to be kept in a form which renders them anonymous, in accordance with Article 4(1)(e) of the Regulation.

As regards the retention of data for historical, scientific or statistical purposes, the European Data Protection Supervisor recommends that the data to be retained should be rendered anonymous.

2.2.7 Change of purpose/compatible use

The use of data in the context of disciplinary proceedings launched at the end of the formal procedure is deemed to be compatible within the meaning of Article 4(1)(b) of the Regulation, as part of the continuing proceedings.

The European Data Protection Supervisor recommends that safeguards be put in place to ensure that any information collected during a procedure conducted under the terms of the Court of Auditors' decision on the protection of staff from harassment cannot be processed for other purposes.

2.2.8 Transfer of data

Processing must be examined in the light of Article 7(1) of Regulation (EC) No 45/2001. Processing under Article 7(1) concerns the transfer of personal data within or between Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The question here is of the transfer of data within an institution (from the line manager, Secretary-General, Director, and Head of the Human Resources Division, to the person appointed to conduct the investigation, the disciplinary board, the Appointing Authority and where appropriate the Legal Service).

It must therefore be ensured that the conditions of Article 7(1) are complied with, which is the case here since the data collected are necessary for carrying out processing, and the data are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". It should be noted that only relevant data are to be transferred. Thus this transfer is lawful, insofar as the purpose is covered by the competences of the recipients. Article 7(1) is therefore complied with.

In the context of decisions taken during the formal investigation or at its end regarding complainants in bad faith or alleged harassers who do not belong to the staff of the Court, the data may be transmitted to the employer; this would then be covered by Article 8 of Regulation (EC) No 45/2001. This possibility of transfer should be provided for in the decision adopted.

2.2.9 Information to be given to the data subject

The provisions of Article 11 of Regulation (EC) No 45/2001 (*Information to be supplied where the data have been obtained from the data subject*) on the information to be given to the data subject apply in this case. The information mentioned in paragraph 1 under (a) (the identity of the controller), (b) (the purposes of the processing operation), (c) (the recipients or categories of recipients of the data), (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply), and (e) ("*the existence of the right of access to, and the right to rectify, the data concerning him or her*") should be provided for in an internal note informing everyone working at the Court of Auditors of the Court's decision, or by the establishment of internal rules on this matter.

The same applies to the provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) regarding the information to be given to the data subject, which are also applicable in this case, since information may be collected from other sources including clinics and medical officers. The provisions involved are points (a) (the identity of the controller), (b) (the purposes of the processing operation), (c) (the categories of data concerned), (d) (the recipients or categories of recipients) and (e) ("*the existence of the right of access to, and the right to rectify, the data concerning him or her*").

Paragraph (f) of each of these Articles, concerning the provision of non-obligatory information (*legal basis of the processing operation, time-limits for storing the data, rights to have recourse at any time to the European Data Protection Supervisor*), could also usefully be mentioned, so that the transparency of the processing operation is fully observed.

The European Data Protection Supervisor recommends that all information on the retention of data should be the subject of a note addressed to all persons working at the Court of Auditors, indicating in particular the period for which documents relating to an investigation will be kept.

The information note must further indicate the persons to whom information is likely to be

transmitted. The document should also specify the conditions under which data will be kept and how they will be processed. It should also mention data retained, data transmitted and data kept long-term and therefore anonymously, and the time for which data will be kept.

The European Data Protection Supervisor recommends that, as regards information provided to those working at the Court, all the information contained in Articles 11 and 12 of Regulation (EC) No 45/2001 should be mentioned, along with the length of time for which data relating to the data subject will be kept, the persons to whom data are likely to be transmitted, the conditions under which data will be kept, the way in which they will be processed, and the data retained, transmitted and kept long-term and therefore anonymously.

Also, any contract or agreement concluded with a third party in which it is stipulated that the policy applies must state that the relevant information will be communicated to the data subjects.

2.2.10 Right of access and rectification

In accordance with Article 13 of Regulation (EC) No 45/2001 on the right of access, the data subject has the right to obtain confirmation as to whether or not data relating to him or her are being processed; information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed, as well as the communication in an intelligible form of the data undergoing processing and of any available information as to their source. In the current case, this information is provided to the data subjects.

Article 14 of Regulation (EC) No 45/2001 lays down a right of rectification for the data subject as described in section 2.2.5 above, in the sense that the data subject may ensure that the data are accurate and up to date.

These two rights may be restricted by virtue of Article 20 of the Regulation, particularly where such a restriction constitutes a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences, or to safeguard the protection of the data subject or of the rights and freedoms of others.

The European Data Protection Supervisor recommends that appropriate rules be adopted to enable persons to have access to the data concerning them except where there is a restriction under Article 20 of the Regulation. In certain cases restrictions on the right of access may be justified by the need to safeguard "the protection of the data subject or of the rights and freedoms of others" (Article 20(1)(c)) or "the prevention, investigation, detection and prosecution of criminal offences", which the European Data Protection Supervisor interprets as covering investigations as part of the formal procedure, followed by disciplinary proceedings.

2.2.11 Security

Article 22 of Regulation (EC) No 45/2001 lays down that the controller should implement 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 shall 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.

In the current case it is specified that the data will be kept in the strictest confidentiality and will only be divulged to the persons concerned.

Besides the confidentiality aspect, no other security measures are planned. The European Data Protection Supervisor recommends that a set of security measures be drawn up to ensure the strict confidentiality of the procedure and of the data processed under it.

Conclusion

The proposed processing operation as described does not seem to entail any violation of the provisions of Regulation (EC) No 45/2001, as long as account is taken of the above observations. This means in particular that the Court of Auditors should:

- develop a procedure to take account of the principles to be observed by contact persons in the informal procedure framework, should the Regulation come to apply because data processing occurs;
- incorporate in the decision to be adopted the necessary amendments concerning the legal basis for the processing operation, the transfer of data and the information to be given to data subjects in relation to persons working at the Court who are not part of its staff;
- establish rules concerning:
 - compliance with the provisions to ensure that data appearing on the file are adequate, relevant and not excessive;
 - the composition of the file for the formal procedure;
 - the criteria to be applied before evidence or data are included in a file for the formal procedure, so that only relevant data are kept;
 - the right to correct data included in the file so as to ensure that the information found there is up to date;
- draft a note addressed to all those working at the Court of Auditors on all information relating to the retention of data, indicating in particular the length of time for which documents relating to an investigation will be kept;
- render anonymous any data to be kept for historical, scientific or statistical purposes;
- put safeguards in place to ensure that any information collected during a procedure conducted under the terms of the Court of Auditors' decision on protection from harassment cannot be processed for other purposes;
- mention, as regards information for persons working at the Court, all the information contained in Articles 11 and 12 of Regulation (EC) No 45/2001, the length of time for which data relating to the data subject will be kept, the persons to whom data are likely to be transmitted, the conditions under which data will be stored, the way in which they will be processed, and the data retained, transmitted

and kept long-term and therefore anonymously;

- adopt appropriate rules to enable individuals to have access to data concerning them, except where restrictions apply under Article 20 of the Regulation;
- draw up a set of security measures to ensure the strict confidentiality of the procedure and of the data processed under it.

Done at Brussels, 20 July 2005

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