

Opinion on the notification for prior checking received from the Data Protection Officer at the Translation Centre for the bodies of the European Union regarding the "Promotion procedure" dossier (Cdt-DA-3)

Brussels, 7 April 2006 (Case 2005-122)

1. Procedure

On 20 July 2004 the European Data Protection Supervisor (EDPS) sent a letter to the Data Protection Officers (DPOs) asking them to prepare an inventory of data processing operations that might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001 (hereinafter referred to as "the Regulation"). The EDPS requested notification of all processing operations subject to prior checking, including those that commenced before the Supervisor was appointed and for which checking could never be regarded as prior, but which would be subject to "ex post facto" checking.

On the basis of the inventories received from the Data Protection Officers, the EDPS identified priority topics, namely data processing operations in disciplinary, staff evaluation and medical files.

On 8 November 2005, the European Data Protection Supervisor received the notification for prior checking regarding the "Promotion procedure (Cdt-DA-3)", which comes under the "staff evaluation" priority topic.

On 15 November 2005, the Data Protection Officer at the Translation Centre was asked for further information. The Data Protection Officer replied on 2 December 2005.

Additional information was requested on 8 December 2005. The Data Protection Officer replied on 6 February 2006. The deadline was suspended on 23 March 2006 at the request of the Data Protection Officer in order to be able to discuss various issues further at a meeting on 6 April 2006.

2. Examination of the case

2.1. The facts

The purpose of processing the data is to be able to draw up the promotion list (the list of staff promoted) in accordance with the provisional arrangements on promotion, which are based on Article 45 of the Staff Regulations of Officials of the European Communities and on the third paragraph of Article 10 and Article 15(1) of the Conditions of employment of other staff of the European Communities.

The data subjects are the officials and temporary staff employed at the Translation Centre.

The data are processed manually and the intermediate and definitive lists are stored on computer. The promotion forms are processed manually, and the lists electronically.

The following data are collected:

- for the promotion forms: surname, first name, grade, starting date in that grade, number of points awarded per criterion;
- for the list of staff eligible: surname, first name, category and grade, personnel number, status;
- for the list of staff put forward for promotion, in descending order as drawn up by the heads of department: surname, points;
- for the general list of staff put forward for promotion: surname and first name;
- for the detailed report attached to the general list of staff put forward for promotion giving reasons for the choices made by the heads of department: various personal data justifying the promotion of the staff concerned (person's merits, length of service, etc.);
- for the list of staff promoted: surname and first name.

The data are stored for 7 years. The Translation Centre set this period for storing data in line with Article 49 of the implementing rules for the Financial Regulation, which provides that authorising officers may keep supporting documents for 5 years. The period can be extended for documents relating to operations that have not been definitively closed.

Data stored for the purpose of annual statistics are kept in aggregate form per category.

The possible recipients of the data contained in the promotion forms are: the director, the head of department (the direct superior of the staff member concerned), the Staff Committee, the head of the Human Resources Department and the person responsible for the administrative management of the file. Furthermore, all staff at the Translation Centre receive: the list of staff eligible in the correct order, the list of staff put forward for promotion and the list of those promoted (surname and first name). The Internal Audit Service and the Court of Auditors may access the data in the event of an audit or financial control.

The data subjects are given general information on personal data protection via the institution's intranet INFOKIOSQUE. The intranet points out, inter alia, that the institution is obliged to inform the data subject. Details are given on how the data subject can obtain information: questions can be put by e-mail directly to the DPO or to the controller (whose name was given when the data were collected or can be found in the notification when this is published on INFOKIOSQUE); the various registers of processing operations notified to the DPO are published on the Translation Centre's intranet. Recourse to the EDPS is also mentioned. The provisional arrangements for the promotion procedure are available on the Centre's intranet.

As for security measures, files are kept in locked cupboards and archives are accessible only to staff from the Human Resources Department. The computer files are stored in an area where only the above recipients can view them.

Procedure for drawing up the list of promotions for officials and temporary staff:

The list of people eligible is published one month before the procedure commences, by means of an e-mail sent to every member of staff. During that month data subjects may ask for any anomalies they find to be corrected. After this period the list is closed and the promotion procedure is carried out on the basis of this list.

Every staff member's eligibility for promotion is assessed every year by his/her direct superior, on the basis of objective evaluation criteria in accordance with the Staff Regulations and Community case law. The head of department fills in an evaluation form (promotion form) for every staff member. It enables each staff member to be given a number of points. The promotion form contains not only the number of points awarded, the surname and the first name of the staff member, but also the grade and the date on which he/she started in that grade. Each head of department then draws up a list of staff put forward for promotion in decreasing order of the promotion points awarded (name and number of points).

The points for eligibility for promotion are awarded on the basis of the staff report or the probation report. Priority points can also be awarded according to a procedure for assessing the person's merits. Lastly, other specific elements may be taken into account: the fact that the person was on the previous list of staff recommended for promotion but was not actually promoted, length of service at the end of one's career, the fact that the person has passed a selection test at the Translation Centre for a higher grade or category than that held.

The heads of department meet to finalise the draft general promotions list (combining all categories), which gives the number of staff who have obtained the best marks; this number must be no more than 40% higher than the number of promotions available under the budget, as decided by the Director. The head of the Human Resources Department is present at the meeting and ensures that the rules are applied correctly but has no decision-making power. A detailed report is attached to the list giving reasons for the choices made by the heads of department.

The Director approves the "general promotions list" (the list of staff put forward for promotion), which is then published (surnames and first names only) and sent together with the detailed report to the Staff Committee. Once it receives the list, the Committee has two weeks to analyse the report and the list, make possible suggestions and submit its opinion to the Director and the Human Resources Department.

The Director chooses from among the staff proposed. The decision to promote a member of staff is in the form of an individual act which is signed by the Director and forwarded to the person concerned. This act states the date as of when the promotion takes effect and the step within the new grade. Following the decision by the Director, the Human Resources Department publishes the list of staff promoted (surnames and first names) at the Translation Centre.

2.2. Legal aspects

2.2.1. Prior checking

The notification received on 8 November 2005 relates to the processing of personal data ("any information relating to an identified or identifiable natural person" - Article 2(a) of Regulation (EC) No 45/2001) by a Community body in the exercise of activities all or part of which fall within the scope of Community law. The management of data for the staff promotion procedure involves the collection, recording, organisation, storage, retrieval, consultation, etc. of personal data (Article 2(b)). These activities constitute partial automatic processing and, when processing is manual, the data are contained in a filing system within the meaning of Article 3(2). The data processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of 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 likely to present such risks. The present case is subject to prior checking (Article 27(2)(b)) since it involves "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct". In fact, data are processed in order to assess the efficiency of officials and temporary staff with a view to their being promoted or otherwise.

In principle, the check by the European Data Protection Supervisor is made prior to the data processing operation. In this case, as the European Data Protection Supervisor was appointed after the system was set up, the check necessarily has to be performed *ex post facto*. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The opinion on the notification for prior checking concerns the promotion procedure as described by the Translation Centre. However, the Centre has not yet adopted the definitive arrangements for the promotion procedure. If the definitive arrangements contain any new elements, compared with those already provided, they will have to comply with this opinion. If substantial changes were to be made, the processing operation would have to be notified to the EDPS for consultation as to the need for further prior checking, pursuant to Article 27(3) of Regulation (EC) No 45/2001.

The DPO's notification was received on 8 November 2005. In accordance with Article 27(4), this opinion had to be delivered within two months, i.e. by 9 January 2006. The deadline was suspended for 17 + 60 days; the Supervisor therefore had to deliver his opinion by 28 March 2006. As the deadline was suspended on 23 March 2006 at the request of the Data Protection Officer in order to be able to discuss various issues further at a meeting on 6 April 2006, the opinion had to be delivered by 11 April 2006.

2.2.2. Legal basis and lawfulness of the processing operation

The legal basis for the processing operation is contained in Article 45 of the Staff Regulations of Officials of the European Communities (the Staff Regulations) and the third paragraph of Article 10 and Article 15(1) of the Conditions of Employment of other staff of the European Communities (CEOS). Once the provisional arrangements for the promotion procedure have been adopted by the Translation Centre they will supplement the legal basis for processing operations.

Article 45 of the Staff Regulations provides that: "1. Promotion shall be by decision of the Appointing Authority in the light of Article 6(2). It shall be effected by appointment of the official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the Appointing Authority shall in particular take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) and, where appropriate, the level of responsibilities exercised by them."

The third paragraph of Article 10 of the CEOS states that: "Assignment of temporary staff to a post carrying a higher grade than that at which they were engaged shall be recorded in an agreement supplementary to their contract of service." Furthermore, Article 15(1) provides that: "Where a member of the temporary staff is assigned to a post corresponding to a higher grade, as provided for in the third paragraph of Article 10, his grading shall be determined in accordance with Article 46 of the Staff Regulations.¹".

The articles of the Staff Regulations and of the Conditions of Employment of other staff have been adapted by the Translation Centre in provisional arrangements for the promotion procedure. These arrangements will be adopted in 2006.

Alongside the analysis of the legal basis in relation to the Regulation, the lawfulness of the processing operation must also be considered. Article 5(a) provides that "Personal data may be processed only 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 other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed." In the present case, the legal instruments mentioned above relate to the exercise of a task carried out in the public interest, such as drawing up the list of officials and temporary staff for promotion. That being so, the processing operation proposed is therefore lawful.

The possibility that sensitive data within the meaning of Article 10 of Regulation (EC) No 45/2001 might be processed cannot be ruled out, especially in the context of the detailed report attached to the general list of staff put forward for promotion. In this case the EDPS stresses that processing must be provided for under one of the exceptions in Article 10(2) of Regulation (EC) No 45/2001, derogating from the processing ban.

2.2.3. 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) of Regulation (EC) No 45/2001). Most of the data processed in the case in hand, described under section 2.1 of this opinion, should be regarded as fulfilling these conditions for processing, since they do not include data other than those directly connected with identifying the official or staff member, his/her grade and report. However, the EDPS would like to add a word of warning concerning the Committee's report, to make sure that the data it contains satisfy the requirements of Article 4(1)(c).

Moreover, the data must be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in paragraph 2.2.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see section 2.2.9 below; information to be given to the data subject).

Finally, the data must be "accurate and, where necessary, kept up-to-date; 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) of the Regulation). The procedure itself must ensure that data are

¹ Article 46 provides that: "An official appointed to a higher grade in accordance with Article 45 shall be placed in the initial step in that grade. However, officials in grades AD 9 to AD 13 carrying out the duties of head of unit who are appointed to a higher grade in accordance with Article 45 shall be placed in the second step of the new grade. The same arrangement shall apply to any official: (a) who upon promotion is appointed director or director-general, or (b) who is director or director-general and to whom the last sentence of the second paragraph of Article 44 applies.".

accurate. Giving the data subject right of access and the right to rectify inaccurate or incomplete data is one way of ensuring that data are accurate and up-to-date (see section 2.2.8 on right of access). The EDPS would like to emphasise that it is difficult to prove the accuracy of "assessment" data in the context of a promotion procedure where the exercise comprises subjective elements. The EDPS therefore welcomes the fact that the Translation Centre has drawn up strict objective criteria for awarding promotion points.

2.2.4. Change of purpose, compatible use

Data are retrieved from or entered into the staff data bases. The processing being reviewed involves no general change to the specified purpose of staff data bases, and the promotion procedure is only part of that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 is not applicable to the case in point and Article 4(1)(b) of the Regulation is complied with.

2.2.5. Retention of data

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 (...)" (Article 4(1)(e) of Regulation (EC) No 45/2001).

In the case in point, all data relating to the promotion procedure (promotion forms, detailed reports and lists of eligible staff, those put forward for promotion and those promoted) are stored for 7 years. This time-limit is justified under Article 49 of the implementing rules of the Financial Regulation applicable to the general budget of the European Communities, which stipulates that supporting documents may be kept by authorising officers for 5 years. Furthermore, documents relating to operations not definitively closed are kept until the end of the year following that in which the operations are closed. The EDPS therefore approves of the 7-year time-limit set by the Translation Centre for keeping documents.

Data are also kept for statistical purposes, but in aggregate form, which makes it impossible to identify individuals. Article 4(1)(e) is therefore complied with.

2.2.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is 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 data will be circulated among various people within the Translation Centre. Personal data may not be transferred within an institution unless they are necessary for the legitimate performance of tasks covered by the competence of the recipient. In the case in point, the transfer of the promotion form and the general list of staff put forward for promotion (surnames + points) to directors, the heads of department, the Staff Committee, the head of the Human Resources Department and to the person responsible for the administrative management of the file in accordance with the legitimate performance of the tasks of the various parties. The EDPS emphasises that access to the detailed report is limited strictly to those who need to be acquainted with it within the framework of their competence. All the staff at the Centre receive the lists of eligible staff, those put forward for promotion and those promoted, and this enables the Translation Centre to conduct its promotion procedure in full transparency.

The data on promotions might also be communicated to other institutions or agencies in the case of transfers or applications to another institution. Such transfers are necessary for the legitimate performance of tasks covered by the competence of the recipients.

Data may also be transferred to the Internal Audit Service (IAS) or to the Court of Auditors during an audit. Such transfers also comply with Article 7, as they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

Lastly, Article 7(3) of Regulation (EC) No 45/2001 provides that "the recipient shall process the personal data only for the purposes for which they were transmitted". It must be explicitly guaranteed that any person receiving and processing data in the context of the annual promotion exercise within the Translation Centre may not use it for any other purpose. This is particularly important in the case of the Committee report. The European Data Protection Supervisor would like the Translation Centre to draw attention to the fact that personal data should be processed strictly for promotion purposes.

2.2.7. Processing including the personnel or identifying number

The Translation Centre uses the personnel number – staff number – in the list of staff eligible. Use of the personnel number may allow the linkage of data processed in different contexts. The point here is not to establish the conditions under which the Translation Centre may process the personnel number (Article 10(6) of the Regulation), but rather to draw attention to that provision of the Regulation. In the case in point, the Translation Centre's use of the staff number is reasonable as it is used for the purposes of identifying the person and keeping track of the file. The EDPS considers that this number may be used in the context of the promotion procedure.

2.2.8. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for right of access at the request of the data subject. Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification. In the case in point, the data subject has access to the list of staff eligible so that he/she can point out any errors or omissions which can then be rectified before the promotion procedure commences. It must therefore be concluded that Article 14 of the Regulation is complied with; the data identifying the data subject can be rectified.

The data subject must be given right of access to the detailed report attached to the list of staff put forward for promotion. The only restrictions on the right of access are those set in accordance with Article 20(1)(c) in order to guarantee the rights and freedoms of others.

2.2.9. Information to be given to the data subject

Under Articles 11 and 12 of the Regulation, whenever personal data are processed, data subjects must be sufficiently informed of the operation. This information should usually be given at the latest, when the data are collected from the data subject if the data subject has not already been informed (Article 11). If the data are not collected directly from the data subject (Article 12), the information must be provided as soon as the data are recorded or, if the data are to be communicated to a third party, when the data are first communicated, at the latest.

In the case at hand, the personal data are not collected from the data subject; the human resources department collects them from staff reports, probationers' reports and from administrative data or data concerning the previous promotion.

The EDPS welcomes the Translation Centre's intranet web page (INFOKIOSQUE) on data protection.

The fact that notifications are published enables data subjects to find out, proactively, about the following: the controller, the purposes of the data collection, the recipients, right of access and rectification, the legal basis and the time-limits for storing the data. The EDPS approves of the fact that information is available. The EDPS would nevertheless like to make it clear that the data subject must be informed at the time the data are collected. The individually addressed message containing the list of staff eligible that is sent to staff and officials before the promotion procedure commences could offer a means of informing data subjects of the recipients of the processing operation, of their right of access and rectification, the legal basis for the processing, the time-limit for storing data and data subjects' right to have recourse to the EDPS at any time. This is important to guarantee that data subjects are duly informed of all the means open to them. The introduction of the definitive arrangements for the promotion procedure offers another possible means of informing data subjects.

2.2.10. Security

The EDPS considers that the security measures described in section 2.1 are adequate in the light of Article 22 of the Regulation.

Conclusion

The processing operation proposed does not appear to violate the provisions of Regulation (EC) No 45/2001, so long as account is taken of the observations set out above. This means, in particular, that:

- the definitive arrangements for the promotion procedure must comply with this opinion. If substantial changes were to be made in the definitive arrangements, the processing operation would have to be notified to the EDPS for consultation as to the need for further prior checking;
- if sensitive data within the meaning of Article 10 of Regulation (EC) No 45/2001 are processed, the processing operation must be provided for under one of the exceptions in Article 10(2) of the Regulation;
- a word of warning should be added concerning the Committee's report, to make sure that the data it contains satisfy the requirements of Article 4(1)(c);
- the data subject must be given right of access to the detailed report attached to the list of staff put forward for promotion. The only restrictions on the right of access are those set in accordance with Article 20(1)(c) in order to guarantee the rights and freedoms of others;
- at the time the data are collected, data subjects must be informed of the identity of the controller, the purposes of the processing operation, the recipients, their right of access

and rectification, the legal basis, the time-limit for storing the data and their right to have recourse to the EDPS at any time. This is important to guarantee that data subjects are duly informed of all the means open to them.

Done at Brussels, 7 April 2006

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