



Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Justice of the European Communities on data processing in the framework of disciplinary procedures

Brussels, 8 June 2006 (Case 2006-99)

1. Proceedings

On 20 July 2004 the European Data Protection Supervisor (EDPS) sent a letter to all Data Protection Officers (DPO) asking them to make an inventory of all cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of the Regulation No 45/2001 of the European Parliament and of the Council (hereafter: Regulation). 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 the basis of the inventories received from the DPOs, the EDPS identified priority topics, among them data processing operations in disciplinary files.

On 22 February 2006, a notification on disciplinary procedures for prior checking of a data processing operation with regard to Article 27 (2) of the Regulation was received by e-mail from the Data Protection Officer of the Court of Justice of the European Communities. On 17 March 2007 the notification was received by postal mail.

After requiring further details about the processing operation on 7 March, the EDPS received further information by electronic mail on 27 of March. The procedure was suspended on 29 May 2006 for a period of ten days to allow comments from the DPO.

2. Examination of the matter

2.1. The facts

Under conditions laid down in Article 86 of the Staff Regulation, the Court of Justice of the European Communities can take disciplinary proceedings against a member of staff and, applying these rules by analogy, against other agents, as provided for in Article 49 of Conditions of employment of other servants.

On the basis of Article 86 of the Staff Regulation "1. Any failure by an official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action. 2. Where the Appointing Authority or OLAF

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becomes aware of evidence of failure within the meaning of paragraph 1, they may launch administrative investigations to verify whether such failure has occurred".

Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX to the Staff Regulation.

The purpose of the data processing is to put together a file to enable the Appointing Authority to determine whether an official or other servant has failed to fulfil his/her obligations under the Staff Regulations and, where appropriate, impose a disciplinary penalty in accordance with the Staff Regulations. Disciplinary files kept by the Court of Justice contain all the relevant administrative documents related to disciplinary procedures. One file is opened for each procedure. All documents created in the course of the procedure are filed. There is no particular internal structure to the file. The Court of Justice manages a very small number of files.

According to Article 2 (3) of Annex IX to the Staff Regulations, "the institutions shall adopt implementing arrangements for this Article, in accordance with Article 110 of the Staff Regulations". The Court of Justice of the European Communities have not adopted, nor started drafting implementing provisions, yet.

Data included in disciplinary files might be disclosed to the Director of Personnel and Finance, the Head of the Personnel Division, the Head of Section within the Personnel Division; if necessary, to other members of the Personnel Division, the Legal Advisor for Administrative matters, to the members of the Disciplinary Committee, and to the Appointing Authority. At the request of the member of staff concerned, the file or part of it may be translated. In this case the file will be seen by a member of the Court's Translation Directorate. In the event of an appeal, the file may be seen by the Complaints Committee and may, on further appeal, be transferred to the Court hearing the appeal.

[...]

If the disciplinary procedure results in the imposition of a sanction, the sanction will appear in the personal file of the official of the Court of Justice of the European Communities. This document will remain in the files unless it is removed at the request of the official concerned (under the procedure provided for in Article 27 of Annex IX to the Staff Regulations). Personal files and disciplinary files are kept separately from each other.

An official against whom a disciplinary penalty other than removal from post has been ordered may, after three years in the case of a written warning or reprimand or after six years in the case of any other penalty, submit a request for the deletion from his personal file of all reference to such a measure. The Appointing Authority shall decide whether to grant this request¹. Disciplinary data are kept for an indefinite period of time if the Court of Justice of the European Communities does not grant the request for deletion.

Where new facts supported by relevant evidence come to light, disciplinary proceedings may be reopened by the Appointing Authority on its own initiative or an application by the official concerned.

¹ Article 27 of Annex IX to the Staff Regulations

2.2. Legal aspects

2.2.1. Prior checking

The management of disciplinary files constitutes processing of personal data, which consists of collecting, consulting and storage of personal data. The files contain personal data relating to a staff member. The Court of Justice carries out activity in the course of disciplinary procedures which falls within the scope of Community law. The processing in question constitutes manual processing. Data kept in paper documents are intended for inclusion in a filing system pursuant to the meaning of Article 2 (c) of the Regulation. On the basis of the foregoing the processing operation in question falls under the scope of Article 3 (2) of the Regulation.

Article 27 (1) of the Regulation 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.

Disciplinary files must be subject to prior checking for several reasons. The proceedings are to evaluate aspects of the personality of the person concerned, in particular their conduct, and accordingly are covered by Article 27 (2) (b). Furthermore, disciplinary files may contain data on suspected offences, offences, criminal convictions or security measures, as laid down in Article 27 (2) (a).

Prior checking covers the processing of personal data as part of a disciplinary procedure. The aim is not to provide an opinion on the disciplinary procedure as such.

It has to be noted that, in principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed *ex post facto*. However, this does not alter the fact that it would be desirable for the recommendations issued by the EDPS to be introduced.

The notification of the DPO was received on 22 of February 2006 via e-mail and on 17 March by postal mail. Under Article 27 (4), this opinion must be delivered within the following two months. Therefore the deadline was 18 May. As the process had been suspended until the EDPS has obtained further information from the DPO (for a period of twenty days), the Supervisor shall deliver his opinion by 8 June 2006.

2.2.2. Legal basis for and lawfulness of the processing

The legal basis of this case can be found in Article 86 of the Staff Regulations and Annex IX to the Staff Regulations. The future implementing arrangements, which have to be adopted according to the Staff Regulations as mentioned above, will also serve as a legal basis for the processing operations carried on disciplinary data. Implementing arrangements are of crucial importance with regard to data protection. The EDPS draws attention to the points below which should be considered when drafting the implementing arrangements.

With regard to the lawfulness of data processing in the context of disciplinary files, it is justified on the basis of Article 5 (a) of the Regulation insofar as it is necessary for the legitimate exercise of official authority vested in the Court of Justice of the European Communities as a Community institution.

2.2.3. Processing of special categories of data

In the context of disciplinary proceedings, the file of the data subject may reveal data which Article 10 of the Regulation qualifies as special categories of data.

Disciplinary files may contain data on offences and criminal convictions, which can be processed only if authorised by the legislative acts adopted on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards, in accordance with Article 10 (5) of the Regulation. Regarding processing of data on offences and criminal convictions, Annex IX to the Staff Regulation is to be considered as adequate legal basis.

If in the course of an enquiry personal data revealing political opinions or trade union membership, religious or philosophical beliefs, racial or ethnic origin, or data concerning health or sex life are processed as part of a disciplinary procedure and are relevant to the case and/or the way it is being handled, Article 10 (2) (b) may apply as far as the processing is relevant and necessary. Article 86 of the Staff Regulations could serve as a base for the processing of such data.

Implementing arrangements should include rules laying down the conditions of processing of these special categories of data.

2.2.4. Data Quality

Article 4 of the Regulation sets out certain obligations regarding the quality of personal data. The 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)).

Moreover, the data must be processed fairly and lawfully (Article 4 (1) (a) of the Regulation). Lawfulness has already been examined. As for fairness, in the context of a sensitive subject, it must be given careful attention. It is linked to the information which must be given to the data subject (see also point 2.2.9.).

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)).

Since implementing arrangements are missing, there are no systematic rules on the type of data which may be included in a disciplinary file. The nature of the data depends to a large extent on the case in question. That being the case, rules should be drawn up on the criteria to be applied before entering evidence or data in a disciplinary file in order to ensure that only relevant data are kept. Staff responsible for processing disciplinary files must be informed of these rules and comply with them.

The EDPS underlines that the data processing system should be designed in a way which makes updating, erasure and rectification part of the procedure. If the Court changes a disciplinary decision, for example, it should be included in the disciplinary file, and the decision in the personal file should be consequently replaced or removed.

It should be also mentioned that Article 14 of the Regulation ensures the right of rectification of the data subject, which is a means guaranteeing data quality (in this regard see also point 2.2.8.).

2.2.5. Conservation of data

Personal data must be kept in a form which permits identification of data subject 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 the Regulation, first sentence).

Personal data relating to disciplinary proceedings within the institution are kept in different files: in the personal files and the disciplinary files.

- personal files

The personal file of an official shall contain all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct, and also any comments by the official on such documents². In principle, data are kept throughout the entire career of the official concerned and after the end of the career for an indefinite period.

The Staff Regulations do not contain any rule governing the time limit of the storage of disciplinary files, however according to Article 27 of Annex IX to the Staff Regulations certain information may be removed from the personal file. This is at the discretion of the Appointing Authority. The data subject is therefore not granted with an automatic removal of the data after a certain lapse of time.

The fairness of data processing implies that the Appointing Authority must justify the reasons for which the data are being kept and any refusal to erase data where the data subject so requests. In any case, the EDPS would like a data retention period to be established in the light of Article 4 (1) (e) of the Regulation. The data concerning disciplinary measures in personal files should only kept until the end of the period during which an official in active employment, a retired official of his/her legal successor may claim entitlement.

- disciplinary files

One disciplinary file is opened for each disciplinary procedure. There are no provisions mentioning the documents that must be kept in the disciplinary files. Although the concept of a disciplinary file is not defined explicitly in the Staff Regulations, it is clear that all documents related to the disciplinary procedure must be stored in the disciplinary file and that under no circumstances should they all be kept in the data subject's personal file.

No time limit has been set regarding storage of disciplinary files since no implementing arrangements exist. Time limits for storing data in personal and disciplinary files must be established by the Court of Justice of the European Communities.

The notification does not specify whether disciplinary data are used for historical, statistical or scientific purposes. The EDPS draws the controller's attention to the fact that any Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is

² Article 26 of the Staff Regulations

not possible, only with the identity of the data subjects encrypted. In this case, the data shall not be used for any purpose other than historical, statistical or scientific purposes (Article 4 (1) (e) second and third sentence). If the Court of Justice would manage or, in the future, will manage data for the purposes in question, appropriate safeguards should be included in implementing arrangements.

2.2.6. Compatible use

Some of the data come from the staff database. The processing operation under consideration does not involve a general change in the purpose of staff-related databases and is not incompatible with that purpose. Article 6 (1) of the Regulation does not therefore apply and Article 4 (1) (b) is complied with.

2.2.7. Transfer of data

The transfer of data should be scrutinized under Article 7 (1) of the Regulation, which requires that "personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipients".

The data processing operation analysed involves data transfers within the Court of Justice of the European Communities, where different units and persons (the director of Personnel and Finance, the head of the Personnel Division, head of section within the Personnel Division, if necessary, other members of the Personnel Division, members of the Disciplinary Committee, legal advisor for administrative matters, the Appointing Authority, Complaints Committee) or the Translation Directorate may receive personal data. It may also involve data transfers to other Community bodies, for example when a disciplinary decision is challenged before the European Union Civil Service Tribunal or upon appeal on a question of law before the Court of First Instance, or a complaint of maladministration in relation to a disciplinary proceedings is made to the European Ombudsman, or to OLAF in cases where the disciplinary procedure is related to fraud. Transfer of personal data is necessary for the legitimate performance of the task of those units and institutions and covered by their competence. Article 7 is therefore respected.

The EDPS would like to note that he can receive personal data related to the disciplinary proceedings as well on various grounds of the Regulation. For example on the basis of Article 33 (complaints by community staff), or on the basis of Article 47 (2) (a) having the power to obtain from the controller or Community institution or body access to all personal data and to all information necessary for his enquiries.

Article 2 (g) of the Regulation defines the recipient as a "natural or legal person, public authority or any other body to whom data are disclosed, whether a third party or not; however authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients".

The parties referred to above are not regarded as recipients within the meaning of Article 2 (g) as they are covered by the exemption provided for in that article, given that they are likely to receive data in the framework of a particular investigation or a disciplinary procedure. All transfer of data must be regarded as taking place "in the framework of an inquiry". But, taken in context, Article 2 (g) is to be understood as an exception to the right to information rather than as an exception to the application of Article 7.

EDPS points out that the future implementing arrangements should state precisely who is entitled to receive disciplinary data.

2.2.8. Right of access and rectification

According to Article 13 of the Regulation: "*The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller: (a) confirmation as to whether or not data related to him or her are being processed; (b) 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; (c) communication in an intelligible form of the data undergoing processing and of the available information as to their source; (d) knowledge of the logic involved in any automated decision process concerning him or her.*" Article 14 provides: "*the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

In principle, the EDPS draws attention to the fact that access is essential not only for the right under the Regulation, but also to the right of defence. Restrictions may be made, where restrictions constitute a necessary measure to safeguard the various interests envisaged in Article 20 of the Regulation (in this aspect see also the following point, 2.2.9.).

The wording of the Article 13 (1) of Annex IX of the Staff Regulations deserves special attention. This paragraph provides for access to the *personal file*. The wording is misleading since it is beyond doubt that the purpose of this rule is to grant data subject with full access to documents which are, or may be of importance with regard to proper defence during a disciplinary procedure. These documents are included in the 'disciplinary file'. According to the correct interpretation of the paragraph in question the official concerned shall have the right to obtain his complete "personal" (i.e. on him/her) disciplinary file and take copies of all documents relevant to the proceedings, including exonerating evidence. Any other interpretation would lead to redundancy of Article 26 (7) of the Staff Regulations. This article stipulates 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". In this context, it is necessary to emphasise that a disciplinary procedure in progress does not affect the data subject's right of access to his or her personal file. In the course of a disciplinary procedure data subjects are granted full access to documents in their personal file without restriction.

By the same token the EDPS calls to the attention of the controller that in the context of an investigation and disciplinary procedure data related to data subjects other than the person under investigation may be present. The right of access of any person implied in the disciplinary procedure should also be taken into account. Any restriction to the right of access of these persons should be in line with Article 20 of the Regulation.

To exercise the right of rectification, the data subject should contact the controller. The EDPS notes that in the context of a "conduct evaluation" it is difficult to determine whether personal data are "inaccurate" or not. A means of guaranteeing rectification should be to allow the data subject to add his or her comments but also to ensure completeness of his or her disciplinary file, as decisions made during the recourse or appeal procedure should be included in the disciplinary file, and the decision should possibly be placed in the personal file, or should be replaced or removed.

2.2.9. Information to the data subject

Article 11 and 12 of the Regulation specify that the controller must provide information to the data subject. When the information is collected directly from the data subject, Article 11 provides that it must be provided at the time of the collection. If the data are not directly collected from the data subject, then it must be provided either at the time it is recorded or, if a disclosure to a third party is envisaged, no later than the time the data are first disclosed.

Personal data contained in the disciplinary files and previous administrative investigation may be collected from the data subject, but also from third parties. Information must therefore be given either at the time of collection of the data or before it is first recorded or transmitted to a third party.

In the course of drawing up implementing arrangements the following aspects have to be taken into consideration:

Article 20 of the Regulation provides for certain restrictions to inform notably where such restriction constitutes a measure necessary to safeguard: "a) the prevention, investigation, detection and prosecution of criminal offences; b) an important economic interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; c) the protection of data subjects or the rights and freedoms of others". Regarding the restriction in point a) the EDPS notes that Article 20 of the Regulation does not apply *strictu sensu*. In some cases, however it may be necessary not to inform the data subject so as not to harm the proper functioning of the investigation even though it is not a criminal investigation within the meaning of Article 20 of the Regulation.

The EDPS considers in line with his consistent application of Article 20 of the Regulation that account must be taken of the *ratio legis* of the provision and must allow for restrictions on the obligation to provide information during investigations. This is backed up by the fact that Article 13 of the Directive (EC) 95/46 makes a provision for limiting the right to information of the data subject when such a restriction "constitutes a necessary measure to safeguard [...] d) the prevention, investigation, detection and prosecution of criminal offences, or breaches of ethics, for regulated professions". Article 13 (d) is therefore wide-ranging and extends from prevention, investigation, detection and prosecution of criminal offences to breaches of ethics of regulated professions. Even though this is not explicitly stated, there is no reason to believe that breaches of discipline by public servants are also covered by the provision.

The Regulation must be read in the light of Directive (EC) 95/46. The twelfth recital of the Regulation encourages "consistent and homogenous application of the rules for protection of individuals' fundamental rights and freedoms with regard to the processing of personal data". Article 286 of the Treaty also provides "Community acts on the protection of individuals with regard to the institutions and bodies set up by, or on the basis of, this Treaty." There is therefore no reason to believe that a restriction on the right to information may not be justified by the fact that a disciplinary procedure is underway.

Nothing would therefore appear to stand in the way of application of a similar restriction, if necessary, on the duty to inform and the corresponding right of access during the investigation (see also point 2.2.8.).

In this aspect due account should be taken of the fact that the fair processing of personal data in an administrative investigation and subsequent disciplinary proceedings implies the exercise of

the right of defence. In order to exercise that right, the official must normally be in a position to know when proceedings have been initiated against him. Any exceptions must therefore be strictly limited and adopted on a case-by-case basis.

2.2.10. Security measures

[...] Appropriate security measures have been set up.

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, especially in the implementing arrangements for Article 2 of Annex IX to the Staff Regulations:

- Rules should be adopted laying down the conditions of processing of special categories of data;
- Rules on the criteria to be applied before entering evidence or data in a disciplinary file should be adopted in order to ensure that only relevant data are kept;
- The data processing system should be designed in a way which makes updating, erasure and rectification part of the procedure;
- Data conservation periods should be set in the light of Article 4 (1) (e) of the Regulation;
- Should the Court of Justice manage data for historical, statistical or scientific purposes, appropriate safeguards should be established;
- The rules must state precisely who is entitled to receive disciplinary data;
- If any restriction is decided upon the basis of Article 20 of the Regulation, it must be strictly limited and adopted on a case-by-case basis

Done at Brussels, 8 June 2006

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