

Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Auditors concerning the "attestation procedure" dossier

Brussels, 10 October 2006 (2006-422)

1. Procedure

By e-mail received on 31 July 2006, a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was made by the Data Protection Officer of the Court of Auditors concerning the "attestation procedure" dossier.

The notification falls within the priority subjects identified by the European Data Protection Supervisor, in particular dossiers involving data in connection with the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)). The procedure is being implemented, but has not yet started.

Questions were submitted by e-mail on 6 September 2006 and received replies on 7 September 2006.

2. The facts

The Court of Auditors organises a procedure for selecting officials authorised to follow training as part of the attestation procedure (Article 10(3) of Annex XIII to the Staff Regulations). In this case, the procedure was established by Decision of the Court of Auditors No 50-2006 of 25 July. The attestation exercise will be held annually as from 2006. The processing subject to prior checking by the EDPS has not yet started. The objective of the procedure is to select those officials in categories C or D before 1 May 2004 who qualify for attestation under Article 10(3) of Annex XIII to the Staff Regulations.

Under the Decision all C and D officials who were in service before 1 May 2004 may become members of the AST function group without career restriction on the basis of an attestation procedure. Promotions for officials in grades C* and D* are currently limited to AST 7 and AST 5 respectively.

The attestation procedure, launched annually as from 2006, comprises three stages:

- determination by the Appointing Authority of the number of possible attestations and publication of a call for applications;
- identification of the eligible applicants and listing of those applicants in order of priority by a Committee (made up in the same way as the Joint Committee on Promotions). The value and weighting of each criterion are laid down in Decision No 51-2006 of the

- Appointing Authority of 25 July 2006, amended on 29 September 2006, on the ranking criteria for the attestation procedure;
- inclusion in the assistants' function group without career restriction by decision of the Appointing Authority.

It should be stressed that attestation does not give an automatic right to promotion. For this reason, each member of staff should decide whether it is in his or her interest to apply for the attestation procedure in the light of his or her own career situation.

Staff will be informed at a later date of the launch of the 2006 attestation exercise. An information meeting will be organised to explain the content and detailed arrangements of the procedure.

The attestation exercise will be organised each year from 2006 onwards. The administration will carry out a detailed examination of the procedure before 31 December 2009.

Establishment by the Appointing Authority of the number of possible attestations and the call for applications

Before 31 October each year the Appointing Authority establishes the number of attestations possible for the following year, as the budget allows and in accordance with estimated staffing requirements.

Following that decision, the Appointing Authority publishes a call for applications. Officials should include with their applications any information or documents concerning them that relate to the criteria laid down above.

Eligibility criteria for the procedure

Applications by officials to whom Article 1 applies are deemed eligible for the attestation procedure if the officials meet both of the following criteria: level of training and seniority

Drawing-up of the list of eligible officials and their ranking

During each attestation period the joint committee for the attestation procedure delivers its opinion on the applicants' eligibility and their ranking. Eligibility and ranking are determined in accordance with the following criteria.

Criteria for ranking applicants for attestation

The joint committee allocates points for the attestation exercise to each eligible official. Eligible applicants are ranked in order of priority on the basis of the following criteria: seniority in the AST function group¹, merit as evaluated on the basis of the last three staff reports available, level of training and experience/potential.

Officials need to obtain a minimum of fifty points in order to be included on the list of eligible officials. Eligible officials are ranked in descending order according to the number of points obtained. Where two or more applicants obtain the same number of points, the highest ranking on the list will be attributed to the applicant with the most points for experience and potential

¹ Categories C or D before 1 May 2004 and C* or D* before 1 May 2006.

or, failing that, to the applicant in the highest grade or, failing that, to the applicant with most seniority or, failing that, to the oldest applicant.

The value and weighting of each criterion are determined by the Appointing Authority after consulting the joint committee. They may be adjusted, by the same procedure, after consulting that committee. These decisions are published within the institution.

Attestation of officials

The Appointing Authority adopts the list of eligible applicants in order of ranking and the list is published.

The officials at the top of the list, down to the rank corresponding to the number of possible attestations established by the Appointing Authority in accordance with Article 4, are deemed to have been awarded attestation. They become members of the assistants' function group without career restriction.

The progress of these officials' careers remains conditional upon their working in an assistant function without career restriction that has been identified as such.

All applicants are notified of the outcome of their applications. Applicants who are deemed eligible are notified of their ranking on the list adopted by the Appointing Authority and the number of points obtained on the basis of the value and weighting of the criteria set out in Article 8.

The remaining officials on the list of eligible applicants who are not granted attestation shall automatically be deemed eligible if they submit a new application under a subsequent attestation exercise.

Joint committee for the attestation procedure

The joint committee with competence within the framework of the present procedure is the Court of Auditors of the European Communities' Joint Committee on Promotions.

Protection of personal data

The Court of Auditors considers that all the data compiled in connection with the attestation procedure will be processed in accordance with the provisions of Council Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data.

Other information from the notification

Categories of data: the data needed to select officials are: surname, first name, date of birth, title, administrative position in respect of Article 35 of the Staff Regulations, personal number, level of training, professional experience, seniority in the service and in the AST function group, periodic evaluation reports covering the last three years.

Information for data subjects is set out in Staff Note 45/2006 of 31 July 2006.

The rights of the data subjects consist in the option of checking and amending the individual entry for the attestation procedure on the basis of which the Appointing Authority draws up the list.

The data storage medium is as follows: physical storage (files) during the procedure. Individual entries for the attestation procedure: automated storage.

The recipients are the members and the secretary of the Committee on Promotions and the Appointing Authority. In the event of an appeal under Article 90 of the Staff Regulations: the Legal Service. In-house publication of the list of eligible applicants. The Appointing Authority's decision is forwarded to the persons whose task it is to implement it, to ex-ante control, to the administrative applications unit and to the accounts office.

Data storage policy is as follows: during the procedure the data are kept in a specific file locked in a secure cabinet. At the end of the exercise the documents are placed in the applicants' personal files. Individual files remain stored in an electronic format (available to the Appointing Authority) in a drive to which access is restricted.

The data in question are already to be found in personal files. They are sent to the data subjects for verification and any requested amendments are made. No provision has been made for blocking or erasing the data during the procedure.

Regarding historical, statistical and scientific purposes: their use for these purposes is envisaged during the following exercise to enable the Appointing Authority to ensure equal treatment of applicants over time.

Security measures

Only staff directly involved in the processing have access to the data. Documents are locked in a secure cabinet. Electronic files are stored on a drive within the Court of Auditors, which is not accessible from outside and to which access is restricted solely to those persons authorised to process the data. As for all computerised access in the Court of Auditors, where necessary, a log tracks all processing operations in connection with the files.

3. Legal aspects

3.1 Prior checking

The notification received on 31 July 2006 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The processing operation presented is carried out by an institution, in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing for the attestation procedure is manual, but individual entries for the attestation procedure are stored in an electronic filing system. This processing is manual but the content is intended to form part of a filing system. Article 3(2) therefore applies.

Consequently, such processing comes under Regulation (EC) No 45/2001.

Under Article 27 of Regulation (EC) No 45/2001, processing operations that present specific risks to the rights and freedoms of data subjects are subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to present such risks "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct". The attestation procedure for officials of the Court of Auditors is a personal data processing operation for evaluation purposes and is

thus covered by Article 27(2)(b) and subject to prior checking by the European Data Protection Supervisor.

Since the procedure has not begun, this case is considered as a true prior checking case. Consequently, the Court of Auditors must be in a position to have received the European Data Protection Supervisor's recommendations so as to be able to implement them before launching the attestation procedure.

Official notification was received by letter on 31 July 2006. In accordance with Article 27(4) of the Regulation, the European Data Protection Supervisor was to have delivered his opinion within two months. However, by e-mail on 21 September, the procedure was suspended for seven days to allow the DPO to provide additional information and the comments deemed appropriate. The European Data Protection Supervisor will deliver his opinion by 10 October 2006 at the latest, (1 October + 8 days' suspension) as laid down in Article 27(4) of the Regulation.

3.2 Lawfulness of the processing operation

The lawfulness of the operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides that "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 attestation procedure, which involves the collecting and processing of personal data on officials, comes within the legitimate exercise of official authority vested in the institution. The processing operation is therefore lawful.

The legal basis for the data-processing operation in question is to be found in Article 10(3) of Annex XIII to the Staff Regulations (attestation procedure) and in the two decisions² of the Court of Auditors on the implementation of the attestation procedure. The legal base is therefore in compliance and supports the lawfulness of the processing operation.

3.3 Data quality

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 satisfying these conditions as regards processing. The data required are administrative in nature and necessary to appraise the work of officials. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled in this respect.

The data must also be processed "fairly and lawfully" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.8 below.

Under Article 4(1)(d) of the Regulation, "data must be accurate and, where necessary, kept up to date". The system described above makes it reasonable to think that the data are correct and

² Decision No 50-2006 of the Court of Auditors of 25 July 2006 on the rules for implementing the attestation procedure and decision No 51-2006 of the Appointing Authority of 31 July 2006 on the ranking criteria for the attestation procedure.

up to date. The data subject has the right to access and the right to rectify data, so that the file can be as comprehensive as possible. This also makes it possible to ensure the quality of data. See point 3.7 below on the dual rights of access and rectification.

3.4 Data retention

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

The data are retained in a specific file throughout the procedure. At the end of the exercise the documents are placed in the relevant personal files. Individual entries are retained in an electronic filing system (available to the Appointing Authority) in a drive to which access is restricted. Retention of these entries must be the same as for paper-based data; there is no reason to keep them any longer.

It is estimated that the procedure will take six months, to which time must be added for an appeal under Article 90 of the Staff Regulations and a further three months to bring a judicial appeal before the Court.

Files of applicants who have not been selected will also be kept in the officials personal files and in electronic form with restricted access, in particular for future use should they re-apply.

Data are thus kept for a long, but unspecified period. The European Data Protection Supervisor considers that a period during which data may be retained needs to be set. In a similar case³, the EDPS considered that it was reasonable to fix the conservation period at 10 years, starting from the moment when the staff member leaves or after the last pension payment. The EDPS also considers that data of a purely informative nature no longer necessary for administrative reasons can be disposed of after a minimum retention period of 5 years, where this does not involve a disproportionate amount of work.

This long-term data conservation will have to be accompanied by appropriate guarantees. The data kept are personal. The fact that they are archived for long-term retention does not divest them of their personal nature. For that reason, even data conserved over a long period must be covered by adequate measures for transmission and retention, like any other personal data.

Data may be kept for historical purposes, in order to enable the Appointing Authority to ensure that candidates are given equal treatment over time. Data within this framework will be rendered anonymous so Article 4(1)(e) of the Regulation is complied with.

3.5 Change of purpose/Compatible use

Data are retrieved from or entered into the staff databases. The processing operation under review involves no general change to the stated purpose of staff databases, of which the attestation procedure is only one aspect. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

³ Case 2004/274 – Staff appraisal procedure – European Central Bank.

3.6 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 other 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 between various departments at the Court of Auditors. Personal data may be transferred within an institution only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

In the current case, transfer to members of the Joint Attestation Committee (the Appointing Authority's Promotions Committee), the Legal Service in the event of an appeal, the departments charged with implementing the Appointing Authority's decision, namely prior checking, the administrative applications unit and accounts office is in accordance with the legitimate performance of the tasks of those involved.

Finally, files may be sent to the Civil Service Tribunal in connection with appeals⁴. In this case such transfers are legitimate, since they are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

3.7 Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, data subjects have access to their evaluation files so that they can complete all the sections required for the procedure to take its course.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In the same way that the data subject has a right of access, he or she may also directly change factual personal data or have them changed, if necessary.

These rights are guaranteed by decision No xxx/2006 of the Appointing Authority implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data as part of the human resources policy, currently in draft form and submitted to the EDPS.

The draft decision should safeguard the rights of the data subject. However, the Staff Note does not refer to this decision of the Court of Auditors.

The European Data Protection Supervisor asks that the Staff Note should mention the Appointing Authority's decision as soon as it enters into force in order to present the rights available to data subjects.

⁴ The European Union Civil Service Tribunal, established by the Council Decision of 2 November 2004 (2004/752/EC, Euratom) is competent in place of the Court of First Instance. The latter is the appeal body.

3.8 Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed when his or her personal data are processed and lists a series of specific items of information that must be provided.

Article 11 (Information to be supplied where the data have been obtained from the data subject) on information to be given to the data subject applies in this case. Inasmuch as the official or staff member personally fills in the data required of him or her, the data subject provides the data himself or herself.

Article 12 (Information to be supplied where the data have not been obtained from the data subject) on information to be given to the data subject also applies in this case, since the information is collected from the different participants in the process (reporting officers, countersigning officer, committees, etc.).

In this case, the data subject is informed by the Staff Note "Implementation of the Staff Regulations – Attestation procedure, Article 10(3), Annex XIII" of 31 July 2006 and the two annexes thereto (Decision of the Court of Auditors No 50-2006 on detailed rules for implementing the attestation procedure of 25 July 2006 and Decision No 51-2006 of the Appointing Authority on the ranking criteria for the attestation procedure of 31 July 2006, amended on 29 September 2006).

All the provisions of Articles 11 and 12 of the Regulation are guaranteed by decision No xxx-2006 of the Appointing Authority implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data as part of the human resources policy.

The European Data Protection Supervisor recommends that this decision of the Appointing Authority should be mentioned in the various documents providing information on the attestation procedure.

3.9 Security

Under Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, "the controller shall 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".

Organisational and technical measures are taken to ensure maximum security of processing.

In the light of all these measures, the European Data Protection Supervisor considers that they can be considered as appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, account being taken of the observations made above. This means in particular that the Court of Auditors should:

1. determine a precise time-period for which data relating to successful applicants may be kept long-term on their personal files;
2. in connection with this long-term data retention, establish appropriate measures for the transfer and retention of personal data;
3. include in the Staff Note a reference to Decision No xxx-2006 of the Appointing Authority implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data as part of the human resources policy.

Done at Brussels, 10 October 2006

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