

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Economic and Social Committee on periodical staff reports for officials and temporary agents

Brussels, 19 October 2006 (Case 2006-297)

1. Proceedings

On 13 June 2006, the Data Protection Officer (DPO) of the European Economic and Social Committee (EESC) requested by e-mail the prior checking of the periodical staff reports for officials and temporary agents. The notification included (a) the EESC's Decision No. 511/04 A, amending Decision No. 238/01 A setting up a Joint Promotion Committee, and (b) the Decision No. 410/04 A adopting general implementing provisions on periodical staff reports.

On 14 July 2006 the European Data Protection Supervisor (EDPS) requested further information. The DPO replied on 29 August. The DPO attached to her answers (a) the current form of the periodical staff report, (b) the format of the report by the appeal assessor and (c) the "Instructions for assessors".

2. Examination of the matter

2.1. The facts

All permanent officials and temporary agents who have been in service for the entire assessment period are subject to a performance report. The performance reports are drawn up on the basis of a common timetable by the officer's or temporary agent's director or head of unit (depending on the grade of the official concerned) for a reference period of one year. Staff reports covered by the Decision No. 410/04 A adopting general implementing provisions on periodical staff reports (Decision No 410/04 A) are drawn up independently from the end-of-probation reports provided for in Article 34 of the Staff Regulations. All members of the institution's temporary staff who have been in service throughout the entire reference period without interruption and who are still in service at the end of that period are subject to a performance report under the same conditions as those laid down for officials. The report is drawn up by the assessor for the department in which the temporary member of staff has spent the greatest proportion of the reference period.

For each yearly staff report procedure, the secretary-general draws up a list of the names of the assessors and appeal assessors together with a list of the officials and other servants who are the subject to a performance report during the current year. These lists are made available for everybody within the institution as an appendix to the "Instructions for assessors".

The layout of the report is established by the secretary-general. The person assessed may obtain a translation of the assessor's comments in another official language of the European Union if the report is written in a language which he does not understand well.

Each assessor has a points quota equal to four times the number of officials to be assessed by him. Where appropriate, he has separate quotas for the temporary and/or contractual staff. Each assessor also has a number of extra points in accordance with the "Guide for assessors". In addition, the secretary-general has a reserve quota of points that cannot exceed 1.25 % of the total number of points created and allocated to assessors. The point quotas for officials, temporary staff and contract staff must be distinct and separate.

According to the "Instructions for Assessors", the staff report must, inter alia, provide a clear and precise description of the task performed so that a file can be drawn up justifying the existence of the relevant post and suggesting ways to improve competence, output and conduct by recommending, if necessary, a personalised training plan. The report must relate exclusively to the reference period. The assessor must justify any substantial change in the assessment since the previous assessment.

The Directorate of Financial and Human Resources Recruitment (DRHF) sends the performance report forms to the assessors after the secretary-general has adopted the list of the names of the assessors and appeal assessors as well as the lists of officials, temporary staff and contract staff to be assessed. Before drawing up the performance report, the assessor consults the immediate superior of the official being assessed. In addition, the assessor has a preliminary interview with the official to be assessed, who will have already received a draft of the performance report. The person being assessed may be accompanied at this interview by a staff member of his choice.

The assessor compiles the report and communicates it to the official being assessed, who has 10 working days to (a) either countersign the report, if necessary with any comments he considers relevant, and return it to the assessor or (b) refer the matter to the appeal assessor. If the official being assessed has neither countersigned the report nor referred the matter to the appeal assessor, he is deemed to have given his tacit approval and the assessor writes the words "no comments by the official being assessed" on the report. In this case the report becomes final, the official in charge encodes the number of points obtained in an electronic table (this document is locked with a password on a secure drive), and forwards the report to the DRHF Archives and Personnel Files Unit to be placed in the official's personal file. Since 2005 the scanned reports are also stored on a CD, which is kept in a locked cupboard.

If an official decides to refer to the appeal assessor, he must forward his request to the DRHF, together with the performance report and any comments he considers relevant. Before referring the matter to the appeal assessor, the DRHF forwards this request, together with the performance report and any comments made by the person being assessed, to the Joint Reports Committee (JRC). The chairman or the members of the JRC must not participate in a decision about a staff report in which they have been or may be involved, either as persons being assessed, assessors, appeal assessors or immediate superiors consulted. In such cases, they must be replaced by alternates. The JRC must issue a reasoned opinion on each report referred to it within a specified time limit. It may hear the assessor and the person being assessed, either separately or together, and carry out any consultations and request any document or written information that it considers relevant. The JRC may not take the place of the assessors as regards assessing the performance of the person being assessed, but its actions must be completely independent. The reasoned opinion of the JRC is sent to the

person being assessed, the assessor, the appeal assessor and the secretary-general via the DRHF.

After receiving the opinion of the JRC, the DRHF forwards the request for an appeal to the appeal assessor, together with the performance report and the reasoned opinion of the JRC. The appeal assessor hears the assessor and the official being assessed, either separately or together. He may carry out any consultation that he considers relevant. He has the option of confirming the first report or modifying it. If the appeal assessor decides to endorse the first report, he adopts the performance report as final and sends it to the DRHF. The assessor and the person being assessed are informed and the report is placed in the personal file of the person being assessed. If the appeal assessor considers it appropriate for the first report to be modified by improving the assessment of the assessor and/or granting more performance points, he sends a duly motivated request to the secretary-general. If the view of the appeal assessor differs from the recommendations contained in the opinion of the JRC, he must give reasons for his decision.

After receiving all the motivated requests of the appeal assessors, and in the light of the opinions issued by the JRC, the secretary-general decides whether or not, as an exceptional measure, to allocate appeal points or half-points to the various appeal assessors. On the basis of the decision to allocate appeal points to the appeal assessors, each appeal assessor adopts the final performance report and sends it to the DRHF. The report is placed in the personal file of the person being assessed and the person being assessed is informed.

The Decision No 410/04 A foresees special rules regarding officials who have been transferred to another institution during the evaluation period. When an official of the EESC moves to another Community institution during the reference period, an interim report compiled in accordance with the Decision No 410/04 A is added to his file on transfer, if the assessment covers at least nine months. An official transferred from another Community institution to the EESC during the reference period is assessed in accordance with the general implementing provisions for the period during which he has worked for the EESC, provided that this period covers at least six months.

The staff report is one of the instruments that enable the Appointing Authority (AA) to compare the merits and aptitudes of officials qualified to carry out duties and responsibilities at a higher level. Once finalized, these reports are processed by a member of the DRHF to prepare the work for the promotions' committee. The processing enables the committee to propose the most promotable candidates for promotion by comparative merits. For that purpose, lists with points given in the performance reports (and sums of points in the grade of the official) are drawn up. Since 2005 performance reports are scanned and stored on CDs, which are kept in a locked cupboard in the personal unit. Lists containing the officials' name and merit points are stored on a secured drive for several years, on the grounds that sometimes an official stays in one grade for many years and wants to obtain information about the lawfulness of his position within the grade.

The information included in the reports is used exclusively in the framework of the promotion procedure. The following data are processed in the course of the staff appraisal: name, category and grade of the official, description of duties carried out by the official, knowledge of languages and new knowledge acquired during the reference period, assessment of the official (ability, efficiency and conduct in the service), objectives for the next reporting period. The processing in this framework implies operations such as collecting, storing, copying and distributing these reports to members of the promotion committee, as well as destroying these copies directly after consulting them.

The main purpose of processing in this phase is to draw up the list of promotable officials ranked based on merit. The official with the highest sum of all marks obtained in the staff report since the last promotion is ranked first. These lists facilitate finding the officials proposed for promotion. The following lists are made available for officials and other servants of the institution: (a) the list of promotable officials, (b) list of promotable officials by order of the total number of points they have obtained (without the numbers of points obtained, but in the right order), (c) list of officials considered by the AA being worthy of promotion, (d) list of officials proposed for promotion by the promotions' committee, (e) final list of officials who are promoted. All personal data requested from the data subjects in this framework are used to facilitate the promotion procedure.

In order to prepare the work of the promotions committee, paper copies of performance reports for all promotable officials per grade are made. Members of the promotions committee receive the lists by e-mail (with the reference "confidential") and examine the paper copies distributed to them only in the meetings. The lists contain the following information for each promotable official: name, age, service, grade seniority, number of points obtained and the mark given during the current appraisal exercise. Hard copies are returned to the secretariat after the promotions committee's meetings and destroyed immediately, but the originals of performance reports are kept in the archives and personal files unit. The points obtained in the performance reports are added up from the date of seniority in the current grade until the next promotion. In case of promotion the sum is moved back to "0". In this case the old performance reports do not play a role any more. They are, nevertheless, preserved.

Officials can at any time request their number of accumulated points at the DRHF. Data subjects will be provided with information ("privacy statement") about the processing (purpose, disclosure, confidentiality, right of access and rectification, legal basis of the processing operations, conservation of data, contact persons, recourse to the EDPS). The privacy statement will be first handed to data subjects in the course of the next evaluation after the notification for prior checking by the EDPS.

Data processed in the framework of the staff appraisal and promotion procedure are not forwarded outside the institution. Statistics are established for average waiting time for promotion per grade and given to the Budget Authority.

According to the notification the processing is necessary to carry out the human resources policy of the EESC. The controller is the Head of Unit for Recruitment, Career and Training. This unit forms part of the Directorate of Financial and Human Resources Recruitment.

2.2. Legal aspects

2.2.1. Prior checking

The notification constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of the Regulation (EC) No 45/2001). The processing implies collection, storage, consultation and erasure of personal data which qualifies the operation as processing of personal data (Article 2(a) of the Regulation). The processing operation is carried out by an institution, in the exercise of activities which fall under the scope of Community law (Article 3(1)).

Processing of data is carried out partly by automatic means. The appraisal procedure is processed manually but the content is intended to form part of a filing system. Thus Article 3(2) applies in this case.

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. 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 processing in question aims to draw up a report on the general evaluation of the officials regarding their performance of duties.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly, notably following evaluation exercises.

The notification of the DPO was received on 13 June 2006. It has to be mentioned that the notification includes "periodical staff report for officials and temporary agents" as the name of the processing. In fact, the present opinion analyses the processing related to the periodical staff reports and the promotion procedure.

The EDPS requested further information on 14 July 2006, the DPO answered on 29 August. According to Article 27(4) the EDPS must deliver his opinion within two months following receipt of the notification. This period is suspended until the EDPS has obtained any further information he may have requested. Thus the present opinion must be delivered by 19 October 2006 (two months + 60 days suspension).

2.2.2. Lawfulness of the processing

Article 5(a) of the Regulation stipulates that personal data may be processed if "*the 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.*"

Furthermore, according to the recital 27 of the Regulation the "*[p]rocessing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies*". This processing operation is performed in the framework of the everyday activity of the EESC and the EDPS considers it to be necessary for the performance of tasks carried out in the public interest.

The legal basis of the processing can be found in Article 43 of the Staff Regulations (and Article 15(2) of the Conditions of Employment of Other Servants). As mentioned above, Article 43 states that "*[t]he ability, efficiency and conduct in the service of each official shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110*". These provisions are implemented by (a) the Decision No. 511/04 A amending Decision No. 238/01 A, of 23 July 2001, setting up a Joint

Promotion Committee and (b) the Decision No. 410/04 A adopting general implementing provisions on periodical staff reports.

2.2.3. Data Quality

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 the Regulation). The information presented to the EDPS on the data processed during the evaluation and promotion procedure appears to meet those requirements. The data required are administrative in nature and necessary to appraise the work of officials. The EDPS considers that Article 4(1)(c) has been fulfilled in this respect.

Article 4(1)(d) provides that the data must be accurate and where necessary kept up to date. The Regulation further provides that "*every reasonable step must be taken to ensure that the 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*". The system itself is designed to guarantee the accuracy of the data. The invitation to exercise the right of access and rectification and the right to appeal the appraisal are means of guaranteeing the accuracy and keeping the data up to date (see right of access and rectification under section 2.2.7. below).

In addition, the data must be processed "*fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (See 2.2.2. above). As regards fairness, this relates to the information given to the persons concerned (See 2.2.8. below).

2.2.4. Conservation of data

According to Article 4(1)(e) of the Regulation personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*". The purpose of the processing operation is the appraisal and promotion of officials. However, no exact conservation periods have been set for either the electronic copies kept on CDs (scanned copies of the staff reports) and on PCs (lists containing the officials' name and merit points), or for paper copies kept in the officials' personal file.

The EDPS recommends establishing a reasonable time frame within which the appraisal and promotion data in electronic form can be kept. This time limit must be proportionate to the purposes for which the data have been collected.

As regards the paper copies kept in the officials' personal file, a definite time frame must also be established within which the data may be stored. In similar cases the EDPS has considered a conservation period of 10 years as of the termination of employment or as of the last pension payment as reasonable.

According to the notification, statistics are compiled for the average waiting time for promotion per grade. Statistics are forwarded to the budgetary authority via the European Commission. Statistics compiled and transferred to the budgetary authority do not contain personal data, only anonymous data. Thus Article 4(1)(d) is complied with.

2.2.5. Compatible use

Article 4(1)(b) of the Regulation provides that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

As already mentioned, the purpose of the processing is the appraisal and promotion of the officials. The processing operation under review involves no general change to the stated purposes of the data collected and processed. For the sake of this processing operation, data coming from personal files are used but this use is not incompatible. Accordingly, Article 6(1) of the Regulation does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

2.2.6. Transfer of data

Processing must be examined in the light of Article 7(1) of the Regulation. Processing under Article 7(1) concerns transfers 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 current case concerns mainly transfers within one institution in the case of an appeal. The data are transferred to the Joint Reports Committee, to the appeal assessor, and to the secretary-general.

A staff report can be forwarded to another institution if an official moves to another Community institution. The staff report has to be added to the official's file on transfer. Although this is not mentioned in the notification, appraisal reports may be also communicated to other institutions or agencies in the case of applications to another institution. Finally, it has to be noted that the files may be sent to the European Union Civil Service Tribunal, upon request, in the context of proceedings before it¹ and other institutions or bodies can also require access to the personal data if it is needed during an investigation.

Subsequently, it must be ensured that the conditions in Article 7(1) are fulfilled, which is the case here, since the data collected are necessary for processing to be carried out and also the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. Thus Article 7(1) is complied with.

2.2.7. Right of access and rectification

Article 13 of the Regulation establishes a right of access and the arrangements for exercising it upon request by the data subject. Furthermore, Article 43 of the Staff Regulations provides that "*the report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant*". Article 14 of the Regulation provides that "*the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

The right of the data subject to see the information contained in his report is ensured several times in the course of the assessment procedure. In the context of the appeal procedure, the

¹ Although the Court of First Instance is referred to in the Annex to the staff note RH/Dir/2005-0064 of 22 July 2005, we point out that it is the European Union Civil Service Tribunal (established by the Council Decision of 2 November 2004 - 2004/752/EC, Euratom) which is the competent first instance body and not the Court of First Instance. The Court of First Instance is the appeal body in these matters.

procedure ensures that the data subject has the opportunity to correct his data, whether administrative data or data inherent to the appraisal. However, it is difficult to determine whether the data are accurate or not, since the data involved consist of a subjective evaluation of the data subject. In this aspect, the EDPS considers that Article 14 (right of rectification) does not extend to subjective data such as included in a periodical staff report.

Following the promotion procedure, the paper copies of staff appraisal will be included in the official's personal file. *"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"* - as provided by Article 26 of the Staff Regulations.

The future privacy statement - which seems to describe the present practice - will state that "[y]ou have the right to obtain access to your personal data as well as rectification of any inaccurate or incomplete personal data". The privacy statement foresees no restrictions provided in Article 20.

The EDPS considers that the possibility to have access to the staff reports being drawn up and the right to make comments on it or appeal to the appeal assessor guarantee that Article 13 and 14 of the Regulation are complied with. In addition, the Staff Regulations provide one's right to have access to the documents included in his personal file. Accordingly, the EDPS decided not to make any comments on this point.

2.2.8. Information to the data subject

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

The document "Instructions for assessors" has to be regarded as information given to the data subject since it is available to each official of the institution. In addition, the EESC will provide the officials with a privacy statement at the time of the next appraisal. This statement is intended to include all relevant information which has to be given to the data subjects. The EDPS has reviewed the draft privacy statement (point 8 of the notification).

Having regard to Articles 11 and 12 of the Regulation, the EDPS suggests adding the following points to the draft privacy statement: the accurate identity of the controller; the exact categories of data concerned; the indication that data related to appraisal and promotion procedure may be forwarded inside the institution to the JRC and to the secretary-general, and to other Community institutions or bodies (e.g. to the European Union Civil Service Tribunal) in the framework of a specific legal procedure, if necessary; the precise specification of the legal basis of the processing (Article 43 of the Staff Regulations, Article 15(2) of the Conditions of Employment of Other Servants); the exact time limits for storing the data.

2.2.9. Security measures

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of the Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 providing the considerations are fully taken into account. This means in particular that the European Economic and Social Committee:

- should establish a time limit proportional to the purposes for which the data have been collected both for data kept in electronic form and on paper documents in the officials' personal file;
- should add the following points to the privacy statement to be adopted: the accurate identity of the controller; the exact categories of data concerned; the indication that data related to appraisal and promotion procedure may be forwarded inside the institution to the JRC and to the secretary-general, and to other Community institutions or bodies (e.g. to the European Union Civil Service Tribunal) in the framework of a specific legal procedure, if necessary; the precise specification of the legal basis of the processing (Article 43 of the Staff Regulations, Article 15(2) of the Conditions of Employment of Other Servants); the exact time limits for storing the data.

Done at Brussels, 19 October 2006

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