

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on remedial procedure for incompetence

Brussels, 10 April 2007 (Case 2006/572)

1. Proceedings

On 7 December 2006 the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Parliament a notification for prior checking relating to the remedial procedure for incompetence. The DPO enclosed with the notification a) the Bureau Decision of 3 July 2006 on internal rules on the remedial procedure to identify, deal with and remedy potential cases of incompetence on the part of the officials ("Internal rules on the remedial procedure"), b) the Guide to the remedial procedure to identify, deal with and remedy potential cases of incompetence on the part of officials ("the Guide"), c) the forms of the remedial plan, explanatory note, interim report and special report, d) the notification sent by the controller to the DPO and e) an article appeared in the Newshound on the topic. Later on, the DPO sent to the EDPS the General implementing provisions applicable to Article 43 of the Staff Regulations and Articles 15(2) and 87(1) of the Conditions of Employment of Other Servants adopted by the decision of the Bureau of 6 July 2005 ("GIPSR") and a note of DG Personnel concerning the new implementing rules on the remedial incompetence procedure.

The EDPS requested further information from the DPO on 21 December 2006. The DPO sent the requested information to the EDPS on 9 February 2007. The procedure was suspended on 19 March 2007 for 7 days to allow comments from the DPO.

2. Examination of the matter

2.1. The facts

Under Article 51(1) of the Staff Regulations "*[e]ach institution shall define procedures to identify, deal with and remedy cases of incompetence in a timely and appropriate fashion*". The European Parliament established these procedures (henceforth: remedial procedure) by adopting the Internal rules on remedial procedure, the Guide and GIPSR.

In line with the purpose of the Staff Regulations, the remedial procedure for incompetence is intended to ensure that each case of incompetence is dealt with at an early stage and systematically in order to help the official concerned to bring his performance back to the level required for the purpose of carrying out his tasks and to avoid the necessity to take measures with regard to him as provided by Article 51(1) of the Staff Regulations. According to this Article, once the procedures established by the institution have been exhausted, an

official, in case of incompetence, "*may be dismissed, downgraded or classified in a lower function group at the same grade or a lower grade*".

The remedial procedure shall apply to any established official. In the case of probationary officials, the assessment of their performance shall be carried out pursuant to Article 34 of the Staff Regulations. Any failure by an official to comply with his obligations under the Staff Regulations whether intentionally or through negligence on his part will be dealt with in the frame of disciplinary procedure.

The remedial procedure shall be applied in parallel with the staff report procedure laid down in the GIPSR¹. The remedial procedure consists of one or two consecutive periods². The first assessor of the official³, shall be responsible for identifying the potential incompetence of an official. He shall be also responsible for keeping all documents relevant to the remedial procedure ("the remedial file") until the closing of it. The final assessor⁴ shall make all the decisions regarding all measures to be taken as part of the remedial procedure.

Whenever the remedial procedure is initiated, and the final assessor so requests, the Directorate for Human Resource Strategy (DG Personnel) shall appoint an adviser whose role is to enable the remedial procedure to operate harmoniously and uniformly throughout the institution.

As soon as any signs of incompetence are identified, the first assessor shall summon the official to an interview. Before the interview, the official concerned has to be given information in writing about his rights. The official may, at all stages of the procedure, contest the assessments of his performance and arrange to be advised and accompanied by a member of the Staff Committee or any other official. The official shall receive a copy of every document drawn up concerning him.

After the interview with the official, the first assessor shall inform the final assessor, copying the official concerned, about the conclusions drawn by him/her on the reasons for the inadequacies and suggesting any support measures to be taken. The final assessor shall immediately summon the official for an interview by a written note stating that the interview may conclude with initiation of the remedial procedure. The official has also to be informed that he/she has the right to be accompanied by any staff member of the institution. The interview has to be attended by the first assessor and the adviser, if appointed. During the interview, the official may comment on all the points raised by the first assessor.

The date of the second interview shall be considered as the starting date of the remedial procedure. The first assessor shall set out the remedial plan following the interview. The official may add comments. The remedial plan shall include a description of the inadequacies that have been observed and their origin, specifying the official's ability, efficiency and

¹ The reports and promotions procedure has been already prior checked, and the EDPS issued his *Opinion on the notification for prior checking received from the Data Protection Officer of the European Parliament relating to the reports procedure and the RAPNOT system* on 3 March 2005 (Case 2004-206)

² The first period begins with the decision of the final assessor initiating the remedial procedure and ends on 31 December of the same year. Should the first period start less than three months before 31 December, it shall end on 31 December of the following year. The second period starts on 1 January of the year following the first period and shall end on 31 December of the same year.

³ The first assessor is the staff member's immediate superior with rank NOT+1 in function group AD, who is directly responsible for supervising the staff member's work.

⁴ The final assessor shall in principle be the staff member's superior with rank NOT+2 in function group AD. However, under specific circumstances, the Director-General concerned may derogate from the rules regarding the first and final assessor, in agreement with the Secretary-General.

conduct, and list, after discussing it with the official and the other participants the measures to be taken to remedy the situation. These measures may include, for example, any training needed to develop relevant skills, social support of the official, appointment of a mentor or specific duties for the first assessor. The remedial plan may also suggest the official to be transferred to another Directorate-General. The remedial plan shall take account of the proposals made by the official if they might contribute to improving his/her performance. The remedial plan may be changed at any time if a change in the official's performance makes this necessary. The official must be interviewed before any decision on a substantial change is taken. The remedial plan shall be approved by the adviser, if appointed. The final assessor shall inform his/her hierarchy of the initiation of the remedial procedure.

If, during the second interview, the final assessor concludes that the signs observed on the part of the official may be due to difficulties of medical nature or if the official mentions difficulties of this kind, he/she shall immediately seek information from the Medical Service. The Medical Service replies in writing to the final assessor, the official concerned and the adviser whether or not the difficulties of the official are due to health problems and whether the situation should be dealt according to the provisions of the Staff Regulations concerning sickness. If the Medical Service replies that the situation of the official should be dealt with solely pursuant to the provisions of the Staff Regulations relating to the state of health, the final assessor shall not initiate the remedial procedure. Otherwise, the final assessor shall again summon the official, the first assessor and the adviser in order to initiate the remedial procedure and draw up the remedial plan.

The Medical Service, however, may subsequently intervene at any time by communicating in writing to the final assessor and the official its assessment of the state of health of the official and the conclusions it has drawn from it. On the basis of these conclusions, the final assessor may decide to initiate the remedial procedure, or to close it in the case it has already been opened. None of the implementing provisions stipulates any rule regarding the health related data of the official to be transferred, however, at this point, the medical ethics provide for guidelines.

The first assessor shall implement the remedial procedure by giving the necessary instructions and advice to the official. He shall regularly convene with the official. During December of the year in which the first period is to expire, the two assessors and the adviser shall hold an interview with the official in order to review the situation. If the final assessor concludes that the official keeps displaying signs of incompetence, he/she shall confirm in writing to the official that the remedial procedure is to continue for a second period. The final assessor shall ask the first assessor to draft the explanatory note referred to in Article 17 of the GIPSR. The explanatory note shall be drawn up on the basis of the remedial plan specifying the inadequacies observed, the reasons identified for the inadequacies, measures taken by the first assessor before the initiation of the remedial procedure as well as measures taken as part of the remedial plan and the outcome of the first period. The explanatory note may be complemented with additional measures to be taken during the second period and the official may add comments. The original copy of the explanatory note is kept by the first assessor together with the remedial plan and the staff report.

If, during the December interview, the final assessor concludes that the official is not displaying any more signs of incompetence, he/she shall close the remedial procedure and inform the official by a written note. The first assessor and the adviser receive a copy of this decision.

During the second period, the first assessor shall continue with the remedial plan, which may be modified on the basis of the explanatory note. In July, following an interview attended by the two assessors, the adviser and the official concerned, an interim report shall be drawn up. The report shall include the same points as the earlier reports, complemented with the general assessment. The official may add comments. The adviser shall receive a copy. If the interim report concludes that the official is no longer displaying signs of incompetence, the final assessor shall close the remedial procedure. Otherwise, after getting the opinion of the adviser, the remedial procedure shall continue until the end of the reference year. In either case, the official shall be informed in writing. Subsequent to the July interview, the original copy of the interim report shall be placed in the official's personal file. A copy has to be given to the official.

In December, an interview shall take place which shall be attended by the same persons as the one in July. In the interview, the official concerned shall be reminded of the various measures that may be taken concerning him pursuant to Article 51 of the Staff Regulations. If the final assessor concludes that the official is no longer displaying signs of incompetence, he shall inform the official in writing that the remedial procedure is being closed without further consequences.

If the final assessor concludes that the official is incompetent, the first assessor shall draw up the special report provided for in Annex 4 of the GIPSR, which shall include the outlining of the case, the conclusions and a proposal to the Appointing Authority (AA) concerning the measures to be taken with regard to the official. The special report shall be given to the adviser. A copy of the special report accompanied by all relevant documents shall be forwarded to the AA. The original of the special report shall be placed in the official's personal file, who shall receive also a copy of it. Before coming to a decision, as provided for by Article 51 of the Staff Regulations, the AA must seek the opinion of the Joint Advisory Committee (JAC).

The JAC shall hear the official concerned and the staff member representing the AA. It may hear witnesses, if necessary. In the light of the proposal put forward by the AA, the JAC shall deliver a reasoned opinion stating the measure which it considers appropriate. This decision is forwarded to the AA and the official concerned. Within two months of receipt of JAC' opinion and after hearing the official, the AA shall take a substantiated decision on the measures to be taken. The AA's decision may dismiss, downgrade or classify the official in a lower function group or a lower grade. The decision is placed in the official's personal file.

The implementing provisions do not yet foresee any rules for cases when the official concerned at any stage of the remedial procedure is transferred to another unit or Directorate-General and he/she does not want the procedure to come to an end. According to the designed practice outlined by the DPO, the remedial file will be forwarded to the new first assessor in such cases and will be kept until the upcoming evaluation during which the remedial procedure may be continued. If the next staff report establishes that the official is 'deserving', the remedial file shall be destroyed. Should it not be the case, the remedial procedure shall be continued.

In connection with the staff reports procedure, staff members shall enjoy the right of appeal, a right which must be exercised prior to the submission of a complaint pursuant to Article 90(2) of the Staff Regulations. The staff member concerned shall have 10 working days in which to lodge an appeal with the Reports Committee. This right does not specifically relate to the remedial procedure, as it is open to all officials being evaluated. However, officials under remedial procedure may present to the Report Committee any document drafted within the

context of the remedial procedure and annexed to his/her staff report. The proceeding of the Reports Committee shall be secret. Within one month of the referral, the Reports Committee shall deliver a reasoned opinion on the report submitted to it. The opinion of the Reports Committee shall be forwarded to the staff member concerned, the final assessor and the Secretary-General. The Secretary-General shall draw up the final staff report, which may 'deserving' or 'non deserving'. If the Secretary-General departs from the Reports Committee's opinion, he or she must give grounds for that decision. Depending on the final staff report drawn up by the Secretary-General, the remedial procedure shall be continued ('non deserving') or shall be closed ('deserving'). As regards the documents produced during the Reports Committee's procedure, no specific provisions exist.

Subsequent to the end of the remedial procedure, original copies of the interim report, the special report and the final decision are stored in the personal file. The remedial file including copies of the mentioned reports and decision and all related documents is kept in the archives. Officials downgraded or classified in a lower function group on grounds of incompetence by the AA's decision may after a period of six years ask for all references to that measure to be deleted from their personal file, as provided for in Article 51(8) of the Staff Regulations. Neither the Staff Regulations nor the implementing provisions include any rules on retention periods of documents related to documents stemming from remedial procedures leading to the dismissal of the official.

The official concerned is informed about his/her rights at the beginning of the procedure, and at all stages of the procedure about the steps taken and to be taken. This information is provided by the assessors. Additionally, the internal rules laid down by Bureau decisions are available on the Parliament's website ('Inside') including crucial information on the processing.

Data produced during the remedial incompetence procedure may be forwarded to the first and final assessor, the Reports Committee, the JAC, the adviser appointed by DG Personnel, the AIPN, if one of the measures in Article 51 has to be applied and to the Secretary-General. The Director-General for Personnel (DG Personnel) is regarded to be the controller. The Staff and Careers Management Unit, which is part of DG Personnel, is entrusted with the processing of data.

2.2. Legal aspects

2.2.1. Prior checking

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

The processing of personal data is carried out by not automatic means. The remedial procedure is processed manually but the content forms 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) contains a list of processing

operations that are likely to present such risks, among others the "*processing operation intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)) and "*processing of data relating to health*" (Article 27(2)(a)). The remedial procedure is clearly designed to evaluate personal and professional aspects of the officials and it may imply processing of health related data. Thus the processing has to be prior checked by the EDPS.

Since prior checking aims addressing 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 the internal implementing rule has already been established, however, no procedure has yet been initiated. Thus the current opinion constitutes a real prior check.

The notification of the DPO was received on 7 December 2006. According to Article 27(4) of the Regulation, the present opinion must be delivered within a period of two months following the receipt of the notification. The EDPS requested further information on 21 December 2006, the DPO answered on 8 February 2007. The two months period was suspended until the EDPS has obtained further information he requested in accordance with Article 27(b), and for 7 days to allow comments from the DPO, altogether for 56 days. Thus the present opinion must be delivered by 10 April 2007 (being 5 April and the consecutive days public holidays).

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.*" The remedial procedure implying processing of personal data related to the staff of the European Parliament falls within the scope of the legitimate exercise of official authority vested in the institution. Thus the lawfulness of the processing is respected.

The legal basis of the processing can be found in Article 51(1) of the Staff Regulations. It is necessary to add Article 9(6) of the Staff Regulations, according to which "*[t]he opinion of the Joint Advisory Committee on professional incompetence shall be sought for the application of Article 51*". Section 5 (Joint Advisory Committee for professional incompetence) and Article 12 of the Annex II to the Staff Regulations should be also mentioned. Similarly, Article 43, in the context of the staff evaluation, must also be referred to. The legal basis supports the lawfulness of the processing.

2.2.3. Processing of special categories of data

"*The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life are prohibited*" unless grounds can be found in Articles 10(2) and 10(3) of the Regulation. The processing of special categories of data is lawful under Article 10(2)(b) of the Regulation if it is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, insofar as it is agreed upon by the EDPS, subject to adequate safeguards.

Should the insufficient performance of the official be due to health-related difficulties, the provisions related to the remedial procedure do not apply and the case will be dealt with in accordance with the provisions of the Staff Regulations on sickness. Thus further health-related data are not needed for the remedial procedure. Provided that the situation requires processing of supplementary health-related data, the case will be dealt with in the frame of another procedure of the Staff Regulations. Consequently, the only relevant health-related information in the context of the remedial procedure is whether or not the insufficient performance is a consequence of difficulties related to the official's state of health. The EDPS therefore is of the opinion that the 'reply' provided by the Medical Service shall be confined to say if there is, or there is no health reason to be taken into account, as it is suggested by the implementing provisions. The EDPS considers that beyond that information the processing of additional health-related data is not necessary in the given context.

2.2.4. 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 the Regulation).

During the remedial procedure data related to the assessment of the official's performance are collected and stored. The data processed cover information related to the ability, efficiency, conduct of the official, reasons for the inadequacies, the measures taken concerning the official, the outcome of the application of the remedial plan and conclusion drawn by the assessors. Nevertheless, it is difficult to establish every possible category of data which may be of importance in the course of the remedial procedure. It must be, however, ensured, that only relevant data are processed. The EDPS is of the opinion that the remedial incompetence procedure as designed will comply with the criteria set in Article 4(1)(c). As regards data concerning health, see EDPS' point of view in point 2.2.3.

The Regulation also provides for that *"personal data must be accurate and, where necessary, kept up to date"* (Article 4(1)(d)). The assessment made by the assessors and the adviser are by nature of subjective character. However, the official concerned is always granted the opportunity to comment the observations made on his/her performance. In addition, the remedial procedure provides number of stages which makes it possible for the assessors and the adviser to reconsider their assessment, or make it up to date, if appropriate. It has also to be mentioned that all of the reports drawn up in the course of the remedial procedure must be signed by both the first and the final assessor. Thus consensus is required between the assessors and this also contributes to the accuracy of the data. From the foregoing, the EDPS concludes that the procedure itself guarantees the accuracy and up to date nature of the data.

The EDPS welcomes the provisions on the remedial file (Article 1(2) of the Internal rules on the remedial procedure), stipulating that all relevant documents are kept by the first assessor in order to ensure the accuracy of the file and guaranteeing that it is complete.

The data must also be *"processed fairly and lawfully"* (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 2.2.2.). As regards fairness, this relates to information given to the data subject (see point 2.2.9).

2.2.5. Conservation of data

The Regulation states 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"* (Article 4(1)(e)).

In this regard it must be borne in mind, as it will be discussed in point 2.2.6., that data stemming from the remedial procedure may serve two, partly overlapping purposes at the same time. It means that the rules of the remedial and the staff appraisal procedures must be taken into consideration when it comes to data retention. Data relating to the remedial procedure are serving both procedures. This requires that a maximum data retention period shall be set, which fulfils the needs of the two procedures in question. The EDPS considers that in this aspect the period of 6 years shall be respected as the longest possible data retention, and Article 51(8) of the Staff Regulations shall apply even if the remedial procedure will be interrupted or not.

It means that following the end of the remedial procedure, the documents defined above as parts of the remedial file, kept during the remedial procedure by the first assessor, are forwarded to the archives. Original copies of the interim report, the special report and the final decision are stored in the personal file. Despite that the implementing rules do not refer to this provision, it has to be reminded that after a period of six years, officials, who are downgraded or classified in a lower function group, may ask for all references to be deleted from their personal file related to that measure (Article 51(8) of the Staff Regulations). Such requests made by officials concerned must be complied with without restriction. The EDPS points out that once the references are deleted from the personal file, there is no need to keep these data in the archives and consequently the remedial file kept in the archives must be destroyed, too.

Article 51(8) does not apply to officials dismissed as a consequence of the remedial procedure. Thus data are conserved for a long and unspecified period in the personal file. The EDPS considers that the retention of the decision of the AA dismissing the official remains being of importance in the future and it shall be kept for the regular conservation period. It means that it is reasonable to fix the conservation period at 10 years, starting from the date when the staff member or his/her legal successors may claim entitlement or after the last pension payment. Documents other than the final decision relating to the remedial procedure leading to the official's dismissal shall be destroyed in a reasonable time limit. Subsequently, the EDPS recommends establishing a justified retention period in this regard which should be no more than 6 years, and making sure that this retention period will be respected.

Further to this issue, officials transferred during the remedial procedure to other unit or DG have the right to decide on whether or not they would like the remedial procedure to come to an end before being transferred. The officials concerned cannot make use of this option once the remedial procedure includes a staff appraisal and a staff report is approved before the transfer. In this case the personal file will include the relevant documents of the remedial procedure (interim report and/or special report) accompanying the staff report. Accordingly, the period of 6 years as longest retention period has to be respected in this case, too.

If, however, the remedial procedure is interrupted before drawing up the staff report, the processing related to the remedial procedure and related to the staff appraisal shall be separate. The EDPS approves in this aspect the designed practice as it was outlined by the DPO and the controller that if the remedial procedure is interrupted, the file will be kept by the first assessor until the end of the next period of assessment. This would make it possible to consult the remedial file provided that the official's performance has deteriorated and there is a need of initiating the remedial procedure anew. Nevertheless, if the remedial file is not any more needed for this purpose, it shall be erased without delay.

Finally, provided that the official concerned is transferred to another unit or Directorate-General and he/she does not want the procedure to come to an end, the remedial file is

forwarded to the new first assessor. The EDPS approves the intended practice, as it was outlined by the DPO, that in these cases the remedial file will be kept by the new first assessor until the upcoming evaluation, during which the remedial procedure may be continued. Otherwise the file must be destroyed without delay. The EDPS recommends guaranteeing data subjects this right in the same manner if they are transferred to another Community Institution.

As regards the remedial file and documents sent to the numerous recipients, no specific rules on the retention periods exist. The EDPS recommends complementing the implementing provisions of the Staff Regulations with provisions laying down exact time limits for the remedial file and the documents sent to the various recipients, falling under the scope of the implementing rules (including the Reports Committee and the JAC). The time limit shall not exceed the six years retention period foreseen for the documents in the personal file.

Since the data stemming from the remedial procedure are not kept for statistical, historical or scientific purposes, the second and third sentences of Article 4(1)(e) of the Regulation do not apply in this case.

2.2.6. 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*". The European Parliament does not use the data processed in the analysed context for any purposes other than assessing the performance of the official concerned. The later inclusion of data in the personal file is in accordance with the above provisions. Moreover, the administrative data are collected from existing databases. The purpose of conducting remedial procedure involves no general change of the specified purposes of the various databases at issue and is not incompatible with those purposes. Thus Article 4(1)(b) is fully respected.

Nevertheless it has to be added as it was pointed out among the facts and in point 2.2.5. above, the remedial procedure and the staff appraisal run parallel with each other. Both procedures are aiming at evaluating the performance of the official. As a consequence, the two procedures can not be separated entirely from each other. Once during the remedial procedure a staff report is drawn up, the data supporting findings of the remedial procedure are considered during the staff evaluation. The EDPS agrees with the controller in this regard and acknowledges that if the remedial procedure covers a staff evaluation procedure the documents produced in the course of the remedial procedure are supporting documents of the staff appraisal, too. It has an impact on the data retention policy, which was explained above.

2.2.7. Transfer of data

Article 7 of the Regulation provides 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 recipient*".

Data originating from the remedial procedure are forwarded to numerous recipients. The EDPS considers that the data made accessible to persons listed above is necessary for the legitimate performance of tasks carried out by the recipients. Thus, requirements provided in Article 7 of the Regulation are met.

2.2.8. 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. The remedial procedure guarantees that the official receives a copy of all documents arising from the procedure. At the same time, the data subject has a coexistent access to his/her data in his/her personal file. This access is provided for by the Staff Regulations (Article 26).

The wording of the Article 51(3) of the Staff Regulations deserves special attention. This paragraph provides for access to the official's *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 to ensure that the official is fully informed during the remedial procedure. These documents are kept by the first assessor. According to the correct interpretation of the paragraph in question, the official concerned shall have the right to obtain his/her complete "personal" (i.e. on him/her) "remedial" file and take copies of all documents relevant to the proceedings. 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 remedial procedure in progress does not affect the data subject's right of access to his/her personal file. In the course of a remedial procedure data subjects are granted full access to documents in their personal file without any restriction. The EDPS welcomes the provisions laid down assuring full access to relevant documents by data subjects and considers that requirements of Article 13 are met.

By the same token, the EDPS calls the controller's attention to the fact that in the context of a remedial procedure data related to data subjects other than the person concerned may be present (e.g. witnesses). The right of access of any person implied in the remedial 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.

Under Article 14 of the Regulation the data subject has the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data. The EDPS notes that in the context of the remedial procedure it is difficult to determine whether or not personal data are inaccurate or incomplete. It is due to the fact that any statement and evaluation regarding the insufficiency of the official's performance are by nature of subjective character. A means of guaranteeing rectification is to allow the data subject to add comments. At the same time, in order to ensure completeness of the file, it must be warranted that any document will be included in the remedial file which the data subjects find to be of relevance. Thus the 'right of comment' must be interpreted as including adding documents. As regards factual statements, however, it has to be made sure that the right of rectification can be exercised by data subjects.

2.2.9. Information to the data subject

The Regulation states that a data subject must be informed of the processing of data relating to him/her and lists a range of compulsory items of information which must be provided (identity of the controller, categories of data concerned, purposes of processing, recipients, whether replies to the questions are obligatory or voluntary, origin of the data, right of access). Insofar as such information is necessary to guarantee the fair processing, additional information has to be supplied regarding the legal basis, time-limits and the right to have recourse at any time to the EDPS. Since the data have been obtained both from the data

subjects and from other staff members, and possibly from the Medical Service, both Articles 11 and 12 of the Regulation apply in this instance.

Prior to the first interview, the official concerned must be given information in writing about the purpose of the procedure and his/her rights (Article 7(1) of the Internal rules on the remedial procedure). From this point on, the official concerned is informed regularly by his/her assessors about the steps taken and to be taken. At the same time, internal rules laid down by Bureau decisions are available on the Parliament's website ('Inside') including crucial information on the processing. The EDPS recommends making sure that the information handed to the official prior to the first interview also specifies the controller as well as the time limits of the storage. Furthermore, the data subject must be informed whether replies to the questions are obligatory or voluntary and about the right to have recourse at any time to the EDPS.

Taking into consideration the highly sensitive nature of the procedure and the fact that the failure to prove that the official's insufficient performance is not a consequence of incompetence leads to downgrading, classification in a lower function group or even dismissal, the controller shall ensure that the official concerned is entirely notified with all relevant information. The EDPS points out that the obligation to provide all information as foreseen in the Regulation is supporting the official, who, by the very nature of the procedure, is in a position defending him/herself. This right of defence, which is also expressly mentioned by the implementing provisions, must be therefore ensured by providing all information in order to assure fair procedure.

2.2.10. Security measures

The notification did not specify any security measures, which may be due to the fact that no remedial procedure has yet been completed. The EDPS recommends establishing appropriate security measures that are adequate in the light of Article 22 of the Regulation.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account:

- The 'reply' provided by the Medical Service shall be confined to say if there is, or there is no health reason to be taken into account;
- A time limit for storing the decision on the official's dismissal should be established;
- The EDPS recommends establishing a justified retention period regarding documents, except the final decision, related to remedial procedures resulting in dismissal of the official, which should be less than 6 years, and making sure that this retention period will be respected;
- The implementing provisions should be complemented with provisions laying down exact time limits for the remedial file and the documents sent to the various recipients. The time limits shall not exceed the six years retention period;
- It must be warranted that any document will be included in the remedial file which the data subjects find to be of relevance;
- It has to be made sure that the information handed to the official specifies the controller, the time limits of the storage as well as whether replies to the questions are obligatory or voluntary and about the right to have recourse at any time to the EDPS;

- The EDPS recommends establishing appropriate security measures that are adequate in the light of Article 22 of the Regulation.

Done at Brussels, 10 April 2007

P. HUSTINX
European Data Protection Supervisor