



Comments by the European Data Protection Supervisor on the draft Common Conservation List (CCL)

The CCL consists of a draft note and annexes thereto. The annexes consist of a retention schedule which specifies how long each category of file must be kept (Annex 1) and lists the legal bases, sets out the opinions of the Legal Service and of the EDPS (Annex 2) and lists the administrative practices relating to the disposal of documents (Annex 3).

(1) Comments by the EDPS on the draft note

- **The conservation principles according to Regulation 45/2001**

The EDPS would point out that whenever files included in the CCL contain personal data, Regulation (EC) No 45/2001¹ must apply.

The data conservation principle set out in Regulation (EC) No 45/2001 (Article 4(1)(e)) is that personal data must be kept in a form which permits identification of the 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 also specifies that the Community institution or body shall lay down that personal data which are to be stored for historical, statistical or scientific use should be kept either only in anonymous form or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data must not be used for any purpose other than historical, statistical or scientific purposes.

The principle is, therefore, that data should be kept only for the period necessary for the purposes for which they were collected. If they are kept for historical, statistical or scientific purposes they must be kept in anonymous form or encrypted.

- **General comments**

The EDPS welcomes the fact that the objectives of the CCL are to set a conservation period taking account of a file's administrative usefulness (DAU) to departments as well as of legal obligations (see point 2 "Objectives of the CCL") and that reference has been made to the EDPS opinions on the duration of conservation. He will detail the conservation periods established by the CCL for different files (see below).

The purpose of the CCL is to establish administrative practices for the disposal of documents to be applied by the DGs/departments to certain categories of files. Furthermore, it lays down the action to be taken by a DG/department with regard to the various categories of files once

¹ Since the concept of personal data as defined in this Regulation is particularly broad, it is highly likely that any file included in the CCL will contain personal data.

the DAU has expired ("post-DAU action or First Sorting"). Three courses of action are possible once the DAU has expired: transfer to the Commission's historical archives, sampling² and/or selection³. Files earmarked for conservation in the form of sampling or selection are transferred to the Commission's historical archives. Files intended for transfer to the historical archives (in their entirety or in the form of selection/sampling), may then be stored on a permanent basis or undergo a second sorting procedure, depending on an evaluation of their historical value by the Commission's historical archive service which determines whether they should be stored permanently or disposed of.

The EDPS is satisfied that administrative practices for the disposal of documents have been put in place at the end of the DAU.

With regard to conservation on the basis of the "potential historical value" of the file (point 2 "Objectives of the CCL"), the EDPS considers that a distinction must be made between files or documents whose historical value does not depend on the presence of data which allow the data subjects to be identified, and files or documents whose historical value depends precisely on the presence of data which allow the data subjects to be identified.

The conservation of data for historical purposes in anonymous form or with the identity of the data subject encrypted as provided for in Article 4(1)(e) is justified only in the case of the first type of document or file. Indeed, if the historical value of a document depends on the presence of personal data, that value is lost when those data are deleted when the document is made anonymous.

Thus, when conservation for historical purposes justifies the presence of data which allow the data subjects to be identified, and provided that conservation is compatible with the initial purpose, the EDPS considers that the general rule on conservation as laid down in Article 4 applies to that new historical purpose. For that reason, as laid down in Article 4(1)(b), the controller must ensure that data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual.

The EDPS underlines the fact that archiving may not serve to extend the data conservation period beyond the period required for the purpose that was initially stated.

These principles must be included in the implementing rules "Sorting and transfer of files to the historical archives" which are currently being drawn up.

- **Duration of administrative usefulness (DAU)**

The principle laid down in the note with regard to the duration of administrative usefulness provides that DGs and departments are obliged to retain their files for the DAU fixed by the CCL. The DAU starts on the date on which the file is closed; however, by agreement the duration is calculated starting from January 1 of the year following that in which the file is closed⁴.

The principle for storing files for the duration of administrative usefulness is based on the same approach as the principle laid down in Regulation (EC) No 45/2001, namely a duration that is limited in time. However, the EDPS wishes to emphasise that conservation of a file in

² "Sampling" is a special sorting procedure which seeks to retain a certain number of files in accordance with objective criteria. These files are considered representative of the whole.

³ "Selection" is a special sorting procedure which seeks to retain a certain number of files in accordance with objective criteria (importance of the file, media impact).

⁴ A file is closed when no further documents have to be added to it.

its entirety does not mean that all documents and personal data contained in it are necessary for the purpose pursued. On that basis, the EDPS is satisfied that an administrative practice for the disposal of documents has been established (point 5.3). He recommends that the Commission adopt a systematic approach to keeping documents in a file for a limited period of time as much as possible.

In the view of the EDPS, the extension of the duration of administrative usefulness as described in the note (p. 5), is justified on the basis of Article 20(1) of Regulation (EC) No 45/2001, in particular if a dispute is in progress or if documents have to be kept to protect the Community's financial or economic interests.

The note sets out special rules for calculating the DAU for certain categories of files, in particular Cabinet office files, personal files and medical files. In this regard, the EDPS would like the Commission to justify its keeping personal files for up to eight years after the extinction of all rights of the person concerned and of his dependants but until at least 120 years after his date of birth. As for medical files, the EDPS would refer to the note sent to the Collège des Chefs d'Administration concerning the conservation of medical files⁵.

- **Revision of the CCL**

The EDPS wishes to be consulted on the basis of Article 28(1) whenever the CCL is revised. That should be explicitly mentioned in the note.

- **Specific Conservation List**

The EDPS also wishes to be consulted when the Specific Conservation List (SCL) is adopted. That should be explicitly mentioned in the note.

(2) Comments by the EDPS on Annex 1: CCL retention schedule

4.7 Protection of the EU's financial interests - Inquiries

The EDPS is satisfied that reference has been made to his opinion of 23 June 2006 on prior checking relating to internal inquiries carried out by OLAF. He wishes to underline that, with reference to that opinion, the retention period of twenty years must be evaluated ten years after OLAF was set up.

12.3 Disciplinary files

The EDPS welcomes the fact that the conservation period for disciplinary files has been set at twenty years after closure of the file, which is in keeping with the opinion he delivered on 20 April 2005 relating to the case "Internal administrative inquiries and disciplinary procedures within the European Commission" - IDOC (2004- 187). However, he wishes to emphasise, as stated in the abovementioned opinion, that information deleted from personal files under Article 27 of Annex IX to the Staff Regulations should not be kept in disciplinary files; that is covered by the Court of Justice's ban on the keeping of parallel files in which the data is not perfectly consistent⁶.

⁵ Opinion of 26 February 2007 on the conservation periods for medical documents.

⁶ See *Baltsavias against Commission*, T-39/93 and T-553/93.

7.1.2 Calls for proposals

The EDPS is fully satisfied that the CCL provides for the disposal of files three years after the non-acceptance of all proposals.

7.1.4 Procurement procedures

The EDPS is fully satisfied that the CCL provides for the disposal of files five years after the non-acceptance of all tenders.

9.3.3 Visits to the Commission

The EDPS would like to know the justification for keeping files containing administrative and financial data on the organisation of information conferences organised by the Commission's Visitors Service for groups of external disseminators and "general public" groups for ten years.

9.5.6 Transmission of information to OLAF (by Freephone or other means)

The EDPS is about to deliver an opinion on information collected by the Freephone service and would therefore refer to the views put forward in that opinion on the retention of information⁷. In any event, as already mentioned above, the conservation period of twenty years must be evaluated ten years after OLAF was set up. Moreover, no information concerning any *prima facie* non-case may be kept for twenty years⁸.

12.2.2 Implementation of HR policies

The EDPS would like to know the justification for keeping files implementing HR policies for ten years when such files contain personal data within the meaning of Regulation (EC) No 45/2001.

12.2.4 Competitions

The EDPS welcomes the fact that reference has been made to his opinions on notifications for prior checking in the area of selection (2004-236 and 2005-365). He would, however, point out that as far as non-recruited candidates are concerned, the EDPS holds the view that the conservation period could reasonably be reduced in the light of the purposes for which the data has been collected (see opinion 2005-365).

12.2.7 Personal files

As already mentioned, the EDPS would like the Commission to justify its keeping personal files for up to eight years after the extinction of all rights of the person concerned and of his dependants but until at least 120 years after his date of birth.

12.2.8 Traineeships

The conservation period for the files of recruited trainees is set at fifty years from the end of each traineeship. With regard to trainees who are not recruited, the period is set at two years. The EDPS welcomes the fact that a different conservation period has been set for trainees

⁷ See EDPS opinion on OLAF's "Freephone service" currently being drawn up (2007-0074)

⁸ See EDPS opinion on "Non cases and prima facie non cases" currently being drawn up (2007-205)

who are not recruited. However, with respect to the conservation period of fifty years, he considers that while it is reasonable to retain a limited number of data, in view of the need to provide trainees with certificates after the traineeship period, that does not justify retaining an entire file for fifty years⁹.

12.2.9 Files of recipients of social benefits and wage packages

The PMO will adopt a specific conservation list for the files on this subject. The EDPS calls on the PMO to consult him on the data conservation period when this list is being adopted.

12.2.10 Medical records

With regard to medical files, the EDPS has sent a note to the Board of Heads of Administration concerning the retention of medical files and would therefore refer to the content of that note¹⁰.

12.2.12 Psychosocial aid, social aid, practical aid

The EDPS assumes that the reference "L₆" should be replaced by a reference to "L₇", which concerns the EDPS opinion on prior checking relating to social and financial aid (Case 2004-223).

12.3 Professional conduct and discipline

The EDPS assumes that the reference "L₇" should be replaced by a reference to "L₈", which concerns the EDPS opinion on notification for prior checking relating to the case "Internal administrative inquiries and disciplinary procedures within the European Commission" - IDOC (Case 2004-187). He is satisfied that that opinion has been complied with.

12.5.1.B Procurement procedures

The EDPS is satisfied that any tenders not accepted will be disposed of after five years. He would, however, like an explanation of the need to keep the files for ten years.

Justification for retaining data on the basis of Article 49 of Commission Regulation (EC) No 1248/2006 of 7 August 2006.

In some sections (7.1.3, 7.1.5, 7.2.2., 7.3, 12.5.C, 12.5.E) the retention of files is justified on the basis of Article 49 of Commission Regulation (EC) No 1248/2006 of 7 August 2006. The EDPS recognises the need to keep files for the purposes of that budgetary control. However, he would like an explanation of the need to keep files for ten years, which is longer than the

⁹ See in particular: Opinion on a notification for prior checking received from the Data Protection Officer of the European Economic and Social Committee on the management of applications for paid traineeships, Brussels, 15 December 2005 (Case 2005-297)

¹⁰ Opinion of 26 February 2007 on conservation periods for medical documents.

seven years provided for in the aforementioned Article 49: the five years provided for in Article 49(d) plus two years by virtue of the fact that "documents relating to operations not definitively closed shall be kept for longer than provided for in point (d) of the first subparagraph, that is to say, until the end of the year following that in which the operations are closed".

Done at Brussels, 7 May 2007.

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