

Opinion on the notification for prior checking from the Data Protection Officer of the European Ombudsman regarding the "Staff Assessment"

Brussels, 3 August 2007 (case 2007-406)

1. Proceedings

On 19 June 2007, the Data Protection Officer (DPO) of the European Ombudsman requested the prior checking of the new staff assessment procedure. The notification was accompanied by the following two documents:

- draft General Implementing Provisions (GIPs) applicable to Article 43 of the Staff Regulations of Officials and Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants approved by the Staff Committee and submitted to the Staff Regulation Committee that have to replace the current GIPs dating of 16 January 2001,
- template of the staff report (annex I to the GIPs).

2. Examination of the matter

2.1. Facts

The staff assessment procedure corresponds to an obligation to periodically evaluate the staff members' performance as set out in Article 43 of the Staff Regulations of Officials and Article 15 (2) of the Conditions of Employment of Other Servants.

The conditions for the collation of yearly evaluation reports concerning the ability, efficiency and conduct of officials, temporary and contractual agents working for the European Ombudsman are laid down in the General Implementing Provisions adopted in line with Article 110 of the Staff Regulations.

Procedural aspects of the evaluation exercise

Before the beginning of each evaluation exercise, a list of assessors is drawn up by the Secretary-General and brought to the attention of the staff.

The pre-draft of the evaluation report is prepared by the **first assessor**, that is by the immediate superior in function group AD of the staff member concerned, and submitted to that staff member at least three days before his individual staff assessment interview. The staff member concerned can be accompanied at the interview by another member of staff. Should it prove impossible to hold an interview, the evaluation procedure shall continue ("*report elaborated in irregular procedure*").

The draft evaluation report, where appropriate, amended following the interview, is forwarded to the staff member concerned and to the **final assessor**, that is to the immediate superior of

the first assessor in function group AD, who has ten working days to validate or modify it. If he intends to modify the report, he has to discuss it with the first assessor and - in case of less favourable modifications - with the staff member concerned. An interview with the final assessor can take place at the request of the staff member concerned who can be accompanied by another member of staff.

The staff member is informed that he has to collect the final evaluation report within five working days and that he has to sign it within ten working days in order to conclude the evaluation exercise. In case of duly justified absences, these time-limits can be prolonged.

In case the final report is not being collected within the time-limit provided, it is sent by registered mail with acknowledgement of receipt accompanied by a letter from the Head of the Administrative and Financial Department reminding the staff member concerned of his obligations under the Staff Regulations. In case the registered letter containing the final report is returned by the post office as unclaimed, the report is being put into the staff member's personal file with remark "*report not claimed by the staff member assessed*".

In case the signed report is not being returned by the staff member concerned, it is considered as being signed and the duplicate of the final report is being put into his personal file with remark "*report not returned by the staff member assessed*".

In case the duly signed and returned report is accompanied by comments, the final assessor has to reply within 10 working days. A failure to do so shall be considered as rejection of the staff member's comments.

The staff member concerned can lodge an appeal with Reports Committee within ten working days from

- the date of the signature of his evaluation report,
- the date of the receipt of the final assessor's reply to his observations or from the date of the expiration of the time-limit provided for the reply,
- the date appearing on the advice to collect an item of mail in case he has not claimed the registered letter.

The Committee has to deliver a reasoned opinion within one month of the referral, after having heard any party and obtained any necessary information. This opinion is transmitted to the staff member concerned, the final assessor and the Ombudsman acting as the **appeal assessor** who has to prepare the final report within eight working days and indicate reasons in case he is departing from the opinion of the Report Committee.

As stated previously, the evaluation reports are, in principle, prepared by two assessors, notably the immediate superiors of the staff member concerned and of the first assessor. Nevertheless, the Secretary-General can derogate from this rule (on a proposal from the heads of department in case there is no such a superior or for imperative service reasons).

Furthermore, the senior management staff and the Secretary-General have only one assessor, notably their immediate superior or the Appointing Authority respectively. The Ombudsman is exercising the role of the appeal assessor for the senior management staff without the prior consultation of the Report Committee.

Description of the processed data

The evaluation reports contain the following data:

- data concerning the identity, education, professional experience and language skills of the staff member concerned,
- evaluation of the ability, efficiency and conduct of the staff member concerned by his superior,
- data relating to the posts occupied by the staff member concerned, as well as description of his tasks, objectives and the degree of their accomplishment.

The first assessor shall provide the following information: name, grade and assignment of the staff member concerned, description of the attributed functions and the works carried out outside the typical post (executed tasks, exceptional works and participation in administrative committees or organs), analytical and general evaluation (special abilities, development of professional skills in comparison with the previous evaluation exercise, degree of realisation of the objectives set during the previous evaluation exercise, determination of objectives for the next evaluation exercise, including training objectives, career profile and language skills), as well as the names of other consulted superiors (if necessary) and the date of the interview.

The information concerning the staff member's assessment of his function, his assignment, his career and the work organisation in his service (level of satisfaction, desired evolution), as well as his comments concerning his ability, efficiency and conduct shall be filled in according to the indications given by the staff member concerned (during the interview). A separate note outlining the comments of the staff member concerned can be attached to the final evaluation report.

In addition, the staff member concerned shall provide the following information: personal number, nationality, date of birth and detailed information concerning previous education and career (including information dating from before the entry into service).

Data retention and security measures

The paper versions of the evaluation reports are stored by the Administrative Sector in the respective personal files until the staff member concerned reaches the age of 70 years. Such a retention period covers the whole career of the respective staff member and allows for further retention of data in view of the possible legal claims after the retirement that will take place at the age of 67 at the latest. The paper versions of the personal files are stored in a safe protected by an electronic code that is known only to three persons in the Administrative Sector.

The electronic versions of the final reports are destroyed, with exception of information not directly related to the conduct, efficiency and ability of the person concerned that appear in the same form each year. This information is stored within a secure computer environment in a way preventing reproduction, dissemination or unauthorised consultation and is accessible only to four persons in the Administrative Sector.

Possible recipients of the data processed

The consultation of the evaluation reports stored in the personal files is subject to prior registration and must serve the following finalities:

- evaluation of the staff member,
- promotion of the staff member,
- internal audit or other procedures foreseen in the Staff Regulations, such as the procedure for dealing with incompetence.

Consequently, the recipients of the data contained in the evaluation reports are the following: superiors of the staff member concerned, members of the Report Committee, members of the internal collegial entities taking part in the promotion procedure, members of the Joint Advisory Committee consulted within the procedure for dealing with incompetence, members of the Disciplinary Council and competent authorities in case of judicial proceedings.

In addition, the data contained in the evaluation report can be subjected to an internal audit. Finally, in case of an inter-institutional transfer of the staff member concerned, his evaluation reports stored in the personal files are transmitted to the respective institution.

Rights of access and rectification

The GIPs specify that the staff member concerned is entitled to have access to his personal data and may request rectification of this data by addressing the Head of the Administrative Sector directly or by using the assessment and appeal procedure foreseen in the present GIPs (Article 21).

In particular, the staff member concerned has access to the pre-draft of his evaluation report in order to provide comments to the first assessor concerning "assessment of his function, his assignment, his career and the work organisation in his service", as well as "comments concerning his ability, efficiency and conduct". A separate note outlining the comments of the staff member concerned can be attached to the final evaluation report. In addition, the staff member concerned can ask for access to the draft of his report modified after the interview with the first assessor.

A copy of the final report is provided to the staff member concerned who can also ask at any time for access to his evaluation reports by consulting his personal file.

The appeal procedure allows to the staff member concerned to rectify data contained in his evaluation report which in his opinion does not correspond to reality. Once the report becomes final in terms of exhaustion of all available remedies, the rectification is no longer possible.

Information to data subjects

Staff members are informed about the applicable GIPs when entering into service.

The actual evaluation report is being transmitted to the staff member concerned at the draft stage and is later subjected to his acceptance via signature at the final stage.

2.2. Legal aspects

2.2.1. Prior checking

The present notification relates to the processing of personal data ("*any information relating to an identified or identifiable natural person*", Article 2 (a) of the Regulation (EC) 45/2001) and concerns the collection, conservation, consultation and erasure of the personal data. The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation).

The processing of the evaluation reports is manual, but the processed data are intended to form part of a filing system. Article 3 (2) of the Regulation is applicable in the present case.

According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (b): "*processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct*".

The staff assessment procedure is clearly an operation involving the processing of personal data with the aim to evaluate personal aspects of the data subjects and is therefore subject to the prior checking by the EDPS.

The notification was received on 19 June 2007. According to Article 27 (4) of the Regulation, the EDPS opinion shall be delivered within two months after the reception. The procedure was suspended for seven days pending comments from the DPO. Consequently, the EDPS has to deliver the present opinion no later than on 27 August 2007.

2.2.2. Lawfulness of the processing

Article 5 (a) of the Regulation provides that "*the processing must be necessary for the performance of the 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 (...)*".

In addition, in line with recital 27 of the Regulation "*processing 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*".

The legal base for the processing in question can be found in Article 43 of the Staff Regulations of Officials and Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants, as implemented in the GIPs concerning the evaluation reports.

The evaluation procedures that imply collection and processing of personal data concerning the officials and other statutory agents fall within the scope of the legitimate exercise of public authority vested in the respective institution. The legal basis quoted above supports the lawfulness of the processing in question.

2.2.3 Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data revealing trade-union membership is prohibited, unless grounds can be found in the second paragraph of this Article.

As stated previously, in the present case, the assessor shall provide information about the participation of the staff member concerned in the administrative committees or organs ("*description of the attributed functions and the works carried out outside the typical post*"). This information can reveal the trade-union membership of the staff member concerned.

In the present case, the exceptions laid down in Article 10 (2) (a), (b) and (d) of the Regulation are applicable, according to which the prohibition to process trade-union related data can be lifted in case "*the data subject has given his express consent to the processing*",

"the processing 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 *"the processing relates to data which are manifestly made public by the data subject"*. The EDPS considers that the processing of the trade-union related data is justified.

2.2.4. Data quality

Article 4 of the Regulations lays down certain obligation in the area of data quality.

The personal data must *"be processed fairly and lawfully"* (Article 4 (1) (a) of the Regulation). Lawfulness have been already discussed (see point 2.2.2) and fairness will be dealt with in relation to information for data subjects (see point 2.2.10).

According to Article 4 (1) (c) of the Regulation, the personal data must be *"adequate, relevant and not excessive to the purpose for which they are collected and further processed"*.

As stated previously, the following data categories are being processed within the framework of the evaluation exercise at the European Ombudsman:

- administrative data (name, grade, assignment, personal number, but also nationality, date of birth and detailed information concerning previous education and career)
- job related data (attributed functions / tasks)
- evaluation related data (analytical and general evaluation concerning special abilities, the development of the professional skills in comparison with the previous evaluation exercise, degree of realisation of the objectives set during the previous evaluation exercise, determination of objectives for the next evaluation exercise, including training objectives, career profile and language skills, as well as the works carried out outside the typical post, including participation in administrative committees or organs).

A part of this data can be considered as complying with the data quality related requirements outlined above since they are of administrative nature and necessary for the evaluation of the statutory personnel.

However, the processing in question concerns certain data collected from the staff member concerned (nationality, date of birth, detailed information concerning previous education and career). The purpose of collection of these data needs to be clarified since these data are already available in the personal files.

Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and when necessary, kept up to date"*. In addition, *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."*

The staff members' evaluation carried out by the assessors is subjective by nature; it is therefore difficult to assess the accuracy of such data. In any case, the invitation to make use of the rights of access, rectification and appeal allows ensuring that the data are accurate and up to date (seeing point 2.2.9).

In addition, staff evaluation being a yearly exercise, the processing in question shall be performed upon data that are accurate and kept up to date.

2.2.5. Data retention

According to Article 4 (1) (e) of the Regulation, the data shall 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 evaluation reports (the paper versions and a part of the electronic versions without any comments concerning conduct, efficiency and ability of the respective staff member) are stored in the personal files until the staff member concerned reaches the age of 70 years. Such a retention period covers the whole career of the respective staff member and allows for further retention of data in view of possible legal claims following the retirement that will take place at the age of 67 at the latest.

In a similar cases, the EDPS has considered a data retention period of ten years as of the termination of employment or as of the last pension payment as reasonable¹.

The data storage until the age of 70 years cannot be deemed justified in case of an early termination of service. In such cases, the data contained in the evaluation report may well be stored for a period longer than ten years after the termination or last pension payment. Therefore, the EDPS invites to reconsider the storage period applicable to the evaluation related data in order to make it compatible with Article 4 (1) (e) of the Regulation.

The storage for historical, statistical or scientific purposes in terms of Article 1 (1) (b) of the Regulation is not planned.

2.2.6. Compatible use / Change of purpose

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

As stated previously, the purpose of the processing in question is the evaluation of the staff. The processing does not involve any general change of purpose. Therefore, Article 6 (1) of the Regulation is not applicable in this case and the conditions of Article 4 (1) (b) of the Regulation are complied with.

2.2.7. Transfer of data

The transfers of personal data between or within Community institutions and bodies shall comply with conditions laid down in Article 7 of the Regulation. Such transfers may only take place *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"* (paragraph 1) and *"the recipient shall process the personal data only for purposes for which they were transmitted"* (paragraph 3).

As it has been already mentioned, the data are transferred to the superiors of the staff member concerned, the members of the Report Committee, the members of the internal collegial entities taking part in the promotion procedure, the members of the Joint Advisory Committee

¹ EDPS opinion 2005-218 of 15 December 2005 ("SYSPER2: evaluation" - Commission)

and the members of the Disciplinary Council. In case of disputes, the personal file containing the evaluation reports may be transferred to the Civil Service Tribunal. In addition, the data contained in the evaluation report can be subjected to an internal audit. Finally, the data can be transferred to the EDPS. These transfers have a legitimate purpose because they are necessary for the human resources management, disciplinary procedure, judicial proceedings, internal audit or the exercise of supervisory tasks.

In case of an inter-institutional transfer of the staff member concerned, his evaluation reports stored in the personal files is transmitted to the respective institution. This transfer is necessary for the legitimate performance of tasks covered by the competence of the receiving institution.

2.2.8. Processing including the personnel or identifying number

Article 10 (6) of the Regulation provides that *"the European Data Protection Supervisor determines the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body"*.

The evaluation report contains the personal number of the staff member concerned. The CEPD considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates the follow-up.

2.2.9. Right of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. In addition, Article 43 of the Staff Regulations states that *"the evaluation report shall be communicated to the official who shall be entitled to make any comments thereon which he considers relevant"*.

Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

The EDPS considers that the opportunity have access to evaluation reports at the drafting stage, the right to provide comments et the right of appeal as described above constitute appropriate guarantees of compliance with Article 13 and 14 of the Regulation. In addition, the Staff Regulation provides for a right of access to documents stored in the personal file.

2.2.10. Information for data subjects

Articles 11 and 12 of the Regulations provide that the data subject must be informed where his personal data are being processed and outline the specific information that must be provided.

As stated previously, the staff member concerned is informed about the applicable GIPs when entering into service. In any case, according to the submitted draft GIPs, only information about the existence of the rights of access and rectification, the time-limits for the data storage and the legal basis of the processing may be provided, as well as a general information about the purpose of the processing ("procedures foreseen in the Staff Regulation").

Therefore, the EDPS considers that the following supplementary information must be provided to the data subjects:

- exact identity of the controller,

- exact purposes of the processing operation for which the data are intended,
- recipients to which the data may be transferred, including the EDPS,
- right to have recourse at any time to the EDPS.

In addition, the EDPS invites the Ombudsman to indicate how the data subjects are meant to be informed within the new staff assessment procedure.

2.2.11. Security

According to Article 22 of the Regulation on 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"*.

The EDPS considers that the security measures adopted in this case can be considered as appropriate within the meaning of Article 22 of the Regulation.

Conclusion

There is no reason to believe that proposed processing amounts to a violation of the Regulation (EC) 45/2001 provided that the following comments are fully taken into account:

- the purpose of the collection of certain personal data from the data subject is clarified,
- a reasonable storage period for the evaluation reports is set out,
- complementary information about the identity of the controller, the purpose of the processing, the recipients and the right to have a recourse at any time to the EDPS are provided to the data subjects,
- the way of communication of information to the data subjects within the new staff assessment procedure is clarified.

Done at Brussels, 3 August 2007

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