

Opinion on a notification for Prior Checking received from the Data Protection Officer of OLAF on non-cases and prima facie non-cases

Brussels, 3 October 2007 (Case 2007-205)

1. Proceedings

On 26 March 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the European Anti-Fraud Office (OLAF) a notification for prior checking relating to the processing of personal data in non-cases and prima facie non-cases. Included in the notification was a copy of the privacy statement in relation to non-cases and prima facie non cases which OLAF intends to place on their web pages on the EUROPA website.

The case was suspended while further information was sought on 29 March 2007 and this was provided on 8 May 2007. The case was suspended again pending comments on the draft opinion from the DPO on 9 July 2007 and these were provided on 25 September 2007.

2. The facts

All information received by OLAF which alleges illegal or irregular conduct or acts is registered in the Case Management System (CMS) and subject to initial assessment.

When the information received clearly and unequivocally does not fall within the competence of OLAF, the matter is classified as a non-case prima-facie without the need for further assessment.

Following an assessment of initial information received, OLAF may decide to classify a matter as a non-case if it determines that there is no need to open an investigation, or a coordination, assistance or monitoring case. The reason for doing so may be that EU interests appear not to be at risk and thus the matter is not within OLAF's competence, or for other reasons (e.g. the matter is a disciplinary matter or the suspicions are not sufficiently serious).

A case management system (CMS) record will be opened for each non-case and each prima-facie non-case.

The purposes of the processing include:

- To decide on the treatment to be given to information submitted to OLAF;
- To decide whether an investigation, or a coordination, monitoring or criminal assistance case, or other action should be undertaken in relation to information submitted to OLAF;

- To retain information submitted to OLAF but not leading to the opening of an investigation or other case for a reasonable period, in the event that additional information is received which necessitates re-evaluation of that information;
- To retain information received by OLAF for a reasonable period to ensure accountability and verification of the work of the Office.

Data subjects include whistleblowers, informants, "persons concerned", staff of the EU institutions, bodies and agencies, staff of international organisations, and staff of Member State and third-country administrations.

The data collected include the name, company name, address, telephone number, fax number, e-mail address, date of birth, nationality, profession, passport number, employer, and statements by or concerning the data subject relating to the allegation communicated to OLAF. This will be processed in categories such as identification data, professional data and data relating to the allegation communicated to OLAF.

Data subjects are informed of their rights through the privacy statement on the OLAF pages of the Europa website. This statement includes details as to:

- the identity of the controller;
- the purposes of the processing operation for which the data are intended;
- a statement that personal data will be forwarded to the appropriate organisation in the event that OLAF receives evidence of an offence not related to the protection of the Communities financial interests;
- the existence of a right of access and a right to rectification;
- the categories of data concerned; and
- some further information on retention periods and the fact that measures have been taken to ensure that the personal data are protected.

When a decision is taken that information received by OLAF will be classified as a prima facie non-case or a non-case, if appropriate, information about possible offences which is not related to the protection of EU interests or where the suspicions are not sufficiently serious for opening a case may be transmitted to other services of the Commission or other EU Institutions or the authorities in the Member States or third countries or an international organisation. Categories of recipients will include Staff of Commission Services or Member State administrations, staff of third countries or international organisations.

Once a case is classified as a non case or a prima facie non-case the information is retained by OLAF for a period of 5 years. For analytical or statistical purposes, non-cases and prima-facie non-cases may be kept in anonymised form for a period of 50 years.

Rights of access and rectification to personal data processed as part of non-cases and prima facie non-cases are granted in response to requests made to OLAF. These rights may be restricted where it is necessary to safeguard the prevention, investigation, detection and prosecution of criminal offences, or to safeguard an important economic or financial interest of a Member State or of the European Communities.

3. Legal aspects

3.1 Prior checking

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The data processed in non-cases and prima facie non-cases therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by OLAF and bodies in activities which fall within the scope of Community law.

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In these cases, the personal data are held as part of a paper filing system and electronically.

Regulation 45/2001 therefore applies.

Article 27 (1) of Regulation (EC) 45/2001 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. This list includes:-

- Article 27(2)(a) "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*"; and
- Article 27(2)(b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct*".

In the case of non-cases and prima facie non-cases the processing of personal data may relate to suspected offences, offences or convictions, at least at the initial stages of assessment. Again at the initial stage of assessment the personal data may be used to evaluate the conduct of a natural person. Thus the processing operations defined for each module have to be prior checked by the EDPS.

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 event, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The EDPS notes that the security measures set forth in the context of non-cases and prima facie non-cases are the same as those used in other data processing operations that have been notified to the EDPS for prior checking or will be notified. In order to ensure a consistent approach to OLAF security measures, the EDPS has decided to analyse the security measures

in a horizontal way, rather than doing it in the context of each particular prior checking notification. Accordingly, this Opinion will not deal with security measures and the analysis will be carried out in a different Opinion which will address security issues only.

The notification of the DPO was received on 26 March 2007. Further information was sought on 29 March 2007 and a response was received from OLAF on 8 May 2007. The case was suspended again pending comments from the DPO on 9 July 2007 and these were received on 25 September 2007. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 3 October 2007.

3.2. Lawfulness of the processing

Article 5(a) of Regulation 45/2001 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"*.

Article 5(b) of Regulation 45/2001 stipulates that personal data may be processed if *"the processing is necessary for compliance with a legal obligation to which the controller is subject"*.

OLAF has the duty to contribute to the design and development of the fight against fraud and any other illegal activity affecting the financial interests of the European Community¹. This must be interpreted to mean that any information referred to the Office must be kept for a sufficient amount of time to enable the Office to check it with information which may subsequently come to OLAF and may make it necessary to reopen the case, and for accountability and transparency (see 2.7).

Section 3.2.1 of the OLAF Manual states that *"OLAF can decide to open a case only if it has competence to act and if the grounds for suspicion are sufficiently serious"*.

At least one of these two conditions for opening a case is not met in relation to prima facie non-cases. Where a case is considered irrelevant and unequivocally outside the competence of OLAF then it cannot be said that OLAF either has competence to act, or sufficiently serious grounds for suspicion.

Non-cases are slightly more complicated, as it may not immediately be clear whether the information supplied is relevant or not, or is sufficiently substantial, so further assessment will be required. However, after initial assessment the information may be found not to fall within OLAF's remit, or the grounds for suspicion may not be sufficiently serious to open a case.

OLAF records both non-cases and prima facie non-cases in the Case Management System, which is OLAF's system for recording operational data. Notwithstanding their recording in the CMS, neither non-cases nor prima facie non-cases are effectively "opened as a case" by an investigator after the initial assessment of the information provided.

After considering all of the above factors, the EDPS is satisfied that the processing of personal data in relation to non-cases and prima facie non-cases is necessary in respect of the

¹ Article 1(2) of Regulation 1073/99

core functions of OLAF as established by Article 1(2) of Regulation 1073/99 and is therefore in accordance with the provisions of Article 5(a) of Regulation 45/2001.

However, there does appear to be a lack of clarity in the processing of non-cases and prima facie non-cases on the CMS and the EDPS recommends that the OLAF Manual is amended to reflect the fact that while non-cases and prima facie non-cases are recorded in the CMS, they should not be considered as "cases opened by OLAF".

3.3. Processing of special categories of data

Article 10(5) of Regulation 45/2001 states that *"Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof..."*

In this instance the legal instrument provides for processing where a potential criminal offence has been reported and thus the processing of special categories of data is in accordance with the provisions of Article 10(5).

3.4 Data Quality

Article 4(1)(c) of Regulation 45/2001 states that personal data must be *"adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed."* In this case the data collected and processed for the purposes of establishing non-cases and prima facie non-cases are the name, company name, address, telephone number, fax number, e-mail address, date of birth, nationality, profession, passport number, employer, statements by or concerning the data subject relating to the allegation communicated to OLAF.

These data fields are broadly split into three categories, personal identification data, professional data and data related to the allegation communicated to OLAF.

The EDPS does not regard the processing of this personal data as excessive in relation to the identification of the individual or to the measures laid out by the legislative provisions detailed in 2.4 insofar as this relates to the initial assessment.

Article 4(1)(d) of Regulation 45/2001 states that personal data must be *"accurate and, where necessary, kept up to date; 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."*

Articles 13 and 14 provide that the data subject has the right to access and the right to rectify data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data.

The privacy statement states clearly that the data subject has a right of access and a right to rectification. However, the EDPS is concerned that the data subject may not be sufficiently aware of his rights of access and rectification to ensure the quality of the data. This is dealt with further under Information to the data subject.

The EDPS is satisfied that, subject to the recommendations under Information to the data subject being implemented, the OLAF system ensures the quality of personal data processed.

3.5. Conservation of data/ Data retention

Article 4(e) of Regulation 45/2001 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. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific purposes should be kept in an anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes"*.

OLAF may keep electronic files relating to non-cases and prima facie non-cases for a period of 5 years.

OLAF has the duty to contribute to the design and development of the fight against fraud and any other illegal activity affecting the financial interests of the European Community². This must be interpreted to mean that any information referred to the Office, even if it does not lead to the opening of a case, must be kept for a sufficient amount of time to enable the Office to check it with subsequent information. OLAF also needs to be aware which informants send valuable information and which do not, as part of its management of the caseload. OLAF also needs to keep the information for a sufficient amount of time should a complaint arise or should there be a need to justify why an investigation was not opened. This may happen over a period of the 5 years Commission or Parliament life cycle.

The EDPS is convinced that the retention of data in a form which permits identification of the data subject is necessary for the five year period stated in the notification and is therefore in accordance with the requirements of Article 4(e) of Regulation 45/2001.

OLAF will keep anonymised data for a period of up to 50 years for statistical purposes. The EDPS is convinced that this is in accordance with the provisions of Article 4(e) of Regulation 45/2001.

3.6. Compatible use / Change of purpose

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

OLAF may use personal data relating to non-cases and prima facie non-cases in the event that additional information is received which necessitates re-evaluation of that information and, if necessary, the opening of a case for investigation.

The EDPS is convinced that the purposes described above are specified and lawful and compatible with the role of OLAF and therefore in accordance with the provisions of Article 4(1)(b).

² Article 1(2) of Regulation 1073/99

3.7. Transfer of data

Article 7(1) 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"*.

OLAF transfers information to the competent Community institutions and bodies when it is deemed relevant to their mandate, and is therefore consistent with the requirements of Article 7(1).

Article 8 provides that *"personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or, (b) if the recipient establishes the necessity of having data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced"*.

OLAF will only transfer personal data from prima facie non-cases and non-cases to competent authorities from Member States where it is necessary for the performance of a task those authorities carry out in the public interest. These transfers are consistent with the principle of loyalty established in Article 10 of the EC Treaty and the EDPS is convinced that they are in accordance with the requirements of Article 8 of Regulation 45/2001.

This opinion will not analyse data transfers covered by Article 9 of Regulation (EC) No 45/2001 (i.e., transfers of personal data to recipients other than Community institutions, and bodies, which are not subject to Directive 95/46/EC). This is because this issue is being dealt with in the context of case 2005-0154 and case 2006-0493, in the framework of which the EDPS analyses the conformity of OLAF international transfers taken as a whole with Regulation (EC) No 45/2001.

3.8. Right of access and rectification

The privacy statement which OLAF intends to publish on its website states clearly that upon request, data subjects may be sent a copy of their personal data and correct or complete them, as well as providing a contact name to whom data subjects may address their requests.

In certain circumstances OLAF may restrict the right of access or rectification to personal data. This will only be done where it is a necessary measure to safeguard the interests specified in Article 20(1)(a) and (b) of Regulation (EC) 45/2001.

The EDPS is satisfied that, subject to the recommendations in section 4, the right of access and rectification to personal data is provided in accordance with the Regulation.

3.9. Information to the data subject

Article 12 of Regulation (EC) 45/2001 makes provision for information which is to be supplied to the data subject when the controller receives data from another source.

In light of the fact that OLAF receives several hundred allegations each year, they consider the supply of this information to the data subject to involve disproportionate effort.

In order to provide adequate safeguards in cases such as this, the EDPS considers it good practice to produce a privacy statement which can be posted on the Community institution or body's website. OLAF has already drafted this statement, which they intend to publish on the OLAF Data Protection page of the "Europa" Website.

Article 2(g) of the Regulation stipulates that "*authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients*". Article 2(g) is to be understood as an exception to the right to information and as such the EDPS is satisfied that the privacy statement does not require a list of recipients in relation to data transferred in connection with a particular inquiry.

However, the EDPS would want to ensure that the privacy statement is made as readily accessible as possible on the Europa website. Therefore the EDPS recommends that a direct link be established from the web pages which deal with reporting of allegations to the OLAF privacy statement on non-cases and prima facie non-cases.

3.10. Security measures

As stated in previously, security measures shall be dealt with in another opinion.

4. Conclusion:

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

- The EDPS recommends that the OLAF Manual is amended to reflect the fact that while prima facie non-cases and non-cases are recorded in the CMS, they should not be considered as "cases opened by OLAF".
- The EDPS recommends that a direct link be established from the web pages which deal with reporting of allegations to the OLAF privacy statement on non-cases and prima facie non-cases.

Done at Brussels, 3 October 2007

P. HUSTINX
European Data Protection Supervisor