

## **Opinion on the notification for prior checking from the Data Protection Officer of the Court of Justice of the European Communities regarding the "harassment procedure"**

Brussels, 4 October 2007 (Dossier 2007-440)

### **1. Procedure**

On 27 June 2007, the European Data Protection Supervisor (EDPS) received notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the Court of Justice of the European Communities regarding the "harassment procedure" (dossier 2007-440).

The following were attached to the notification: a description of the processing operation, a document relating to information under Articles 11 and 12 of Regulation (EC) No 45/2001 and Note No 18/06 on respect for human dignity (Article 12a of the Staff Regulations of Officials of the European Communities).

Additional information was requested on 7 August 2007, and the DPO replied the same day. The DPO was given a period of 7 days to comment on the EDPS's draft opinion.

### **2. Examination of the case**

#### **2.1. Facts**

The Court of Justice has instituted a policy of respect for human dignity in order to prevent psychological and sexual harassment at work and to set up a structure and procedures to deal with alleged cases. The arrangements for implementing this policy and the roles of those involved are dealt with in Note No 18/06 on respect for human dignity. Article 12a of the Staff Regulations of Officials of the European Communities (Staff Regulations) provides: "Officials shall refrain from any form of psychological or sexual harassment" (Articles 11, 54 and 81 of the Conditions of Employment of Other Servants (CEOS)).

The procedure covers anyone working at the Court of Justice. As well as a formal procedure, the policy includes the establishment of an informal procedure designed to prevent conflict and to try to resolve such situations amicably as soon as they arise.

The informal procedure is as follows:

- If circumstances permit, the alleged victim may initially try to resolve the problem himself by approaching the colleague or superior concerned directly and explaining in clear and precise terms that their conduct is unacceptable and asking them to stop it

immediately. The alleged victim may also inform his line manager, or, if the line manager is the person concerned, the manager's superior.

- If the person considers that this option is not appropriate or if his approach has not succeeded in ending the unwanted behaviour, he may ask for help from a counsellor.
- Counsellors are chosen from among officials and other staff of the Court, appointed by the Appointing Authority after consultation of the Staff Committee, bearing in mind the languages they speak, their duties and affinities. There are five counsellors; they have to follow an appropriate training course. The alleged victim may be accompanied by a colleague on visits to the counsellor. Conversations are held in the strictest confidence.
- The counsellor will close the informal procedure if: (i) the situation is resolved to the satisfaction of the person who consulted the counsellor, (ii) if the latter so requests, or (iii) if he decides to lodge an official complaint against the alleged perpetrator to the Appointing Authority.

The formal procedure is as follows:

- Anyone who believes himself to be the victim of harassment may lodge an official complaint with the Appointing Authority, which will assess what action to take. In particular, it will assess whether the alleged facts are such as to warrant disciplinary proceedings against the person accused of harassment, as laid down in Article 86/Annex IX of the Staff Regulations.
- The formal procedure is closed: (i) if the situation is resolved to the satisfaction of the complainant, (ii) if the latter so requests, or (iii) at the close of any disciplinary procedure.

The personal data which is processed relates to allegations by persons who believe they are being harassed or by other data subjects (the accused, colleagues and witnesses) which are processed in connection with procedures relating to psychological or sexual harassment. Some data may reveal the state of mental health of the person complaining of harassment or the sexual life of the person accused of sexual harassment.

The processing is done manually. The data are kept in files.

The counsellor does not gather personal data unless he certifies that they are necessary. Once the counsellor's role in the informal procedure is finished, he may not keep any personal data unless he can demonstrate that it is necessary, which means that such data are normally destroyed unless they are relevant for the formal phase of the procedure. The counsellor keeps a record of the names of the persons who have consulted him and the dates of their visits. The Court has not ruled out the idea of compiling statistics on the subject, in order to ensure that decision-making is consistent. In such cases, data will be rendered anonymous.

The social worker and the medical officer may receive the data if the data subject so requests. The EDPS and the Court's DPO may also receive the data, pursuant to Article 47(2) of Regulation (EC) No 45/2001 and point 4 of the Annex to Regulation (EC) No 45/2001.

Right of access to the counsellor's personal notes is granted on direct application to the counsellor; for access to other data, application must be made to the controller. The deadline for blocking and erasure of the data is 15 days.

Information for data subjects is provided in two stages. Firstly, general information on the processing operation is available on the Court's Intranet. Secondly, specific information is provided to data subjects by the counsellor and/or the Appointing Authority, primarily to the individual who is complaining of harassment and to the accused.

The data are kept in a specific file in a secure cupboard. Only the staff directly responsible for processing have access to the data.

### **3. Legal aspects**

#### **3.1. Prior checking**

The notification received on 28 June 2007 describes the processing of personal data, since the personal data of the complainant, and also the data of the accused and of witnesses are collected and processed within the meaning of Articles 2(a) and (b) of Regulation (EC) No 45/2001. The data processing described is carried out by the Court of Justice in the exercise of activities which fall within the scope of Community law (Article 3(1)). The processing is manual, and the data are intended for inclusion in a filing system as defined by Article 2(c) of the Regulation: "any structured set of personal data which are accessible according to specific criteria". Counsellors' written notes must be deemed to constitute processing of personal data, since they are archived in a structured manner – files in the case in point – (Article 3(2)). This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS any "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) gives a list of processing operations likely to present such risks, such as "processing of data relating to health and to suspected offences, offences, criminal convictions or security measures" (Article 27(2)(a)) or "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). In the case in point, the processing operations are designed to evaluate aspects of data subjects' personalities (notably behaviour) but also relate to suspected offences (Article 27(2)(a)) by the individual accused and lastly to data on health, since the data subject's mental state is concerned. This case therefore falls within the scope of the prior checking procedure on several counts.

During the formal procedure, the Appointing Authority is to assess whether the alleged facts are such as to warrant the opening of a disciplinary procedure. This prior check therefore covers the informal procedure, while the formal procedure comes within the more general framework of the administrative investigation (which enables the Appointing Authority to make its assessment). The EDPS notes that processing concerning administrative investigations has not yet been notified to him. The EDPS urges the Court to notify this processing as well. The section "opening of a disciplinary procedure" has already been studied by the EDPS in his opinion of 8 June 2006 on "disciplinary procedures" (2006-099).

Although the Court has not yet implemented the processing of personal data as such, Note No 18/06, describing the procedure, was adopted on 20 November 2006. For practical reasons, it would have been preferable to notify the processing for prior checking before adoption of the note, in order to include any recommendations from the EDPS. Fortunately,

this is of no consequence in the case under scrutiny, since Note 18/06 complies with Regulation (EC) No 45/2001.

Notification was received from the DPO by post on 28 June 2007. Pursuant to Article 27(4), this opinion must be given within two months. The DPO has been granted 7 days to comment on the EDPS's draft opinion. The EDPS will therefore deliver his opinion by 6 October 2007 at the latest (29 September 2007 (the month of August is not included) plus 7 days for comments).

### **3.2. Lawfulness of processing**

The lawfulness of processing has to be considered in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides that "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".

The Court's note on respect for human dignity, which is designed to prevent psychological or sexual harassment at work, may be deemed to be in performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities in the legitimate exercise of official authority vested in the Community institution. The processing is therefore lawful.

The legal basis for this processing operation derives from Article 12a of the Staff Regulations and Articles 11, 54 and 81 of the CEOS, which require officials or other members of staff to refrain from any form of psychological or sexual harassment. Lastly, the Court's Note No 18/06 on respect for human dignity sets out the detailed rules for implementing the procedure on psychological or sexual harassment.

On the basis of all these Articles and the Court's Note No 18/06, the legal basis is therefore correct.

In addition, data on health or sex life are described in Article 10 of Regulation (EC) No 45/2001 as "special categories of data".

### **3.3. Processing of special categories of data**

The processing of personal data during a procedure may require the processing of special categories of data as provided for in Article 10 of Regulation (EC) No 45/2001, for example data relating to health or sex life.

The processing of such data may prove 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 legal instruments adopted on the basis of the Treaty (Article 10(2)(b) of the Regulation). The legal basis mentioned above shows that, as an employer, the institution has a duty to ensure that the working environment is free of all forms of psychological or sexual harassment. The processing, during the procedure, of sensitive data which are relevant to the case in question and proportionate to the intended aim may therefore be justified on this basis.

### **3.4. 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)). This is an essential point as regards the data collected by the counsellor and retained during the procedure. Staff who need to handle such files must be aware of these rules and act accordingly. On the other hand, there are no systematic rules as regards the sort of data which may appear in a file under the informal procedure. Such data depend to a large extent on the case in question. The EDPS welcomes the fact that the counsellor does not gather personal data unless he certifies that it is necessary, so that only relevant data are retained. Article 4(1)(c) therefore seems to be duly complied with.

Moreover, the data must be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has been reviewed in section 3.2. of this opinion. As for fairness, this relates to the information to be given to the data subject (see section 3.9 below).

Personal data must also be "accurate and, where necessary, kept up to date". The Regulation also provides that "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" (Article 4(1)(d)). The system described helps to ensure that data are accurate and up to date, given that the data subject is allowed access to the confidential counsellor's personal notes, and to other data on application to the controller, and that he can have the data corrected. For these two rights, see section 3.8 below.

### **3.5. Data retention**

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle 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".

For the record, once the counsellor has performed his duty under the informal procedure, he does not retain any personal data unless he can show that they need to be kept, which means that these data are normally destroyed unless they are relevant for the formal phase of the procedure. The counsellor keeps a record of the names of the people who have consulted him and the dates of their visits for three years. The EDPS holds these retention periods to be compatible with Article 4(1)(e).

The Court has not ruled out keeping statistics on the subject, in order to ensure that decision-making is consistent. Such data will be kept in anonymous form, in keeping with Article 4(1)(e).

### **3.6. Change of purpose/compatible use**

If data are also used for statistical purposes to ensure that the Court's decisions are consistent, this is quite compatible with the initial purpose of the processing, as the production of statistics is conducive to consistency in the management of harassment cases. This means that Article 6(1) of Regulation (EC) No 45/2001 does not apply in the case in point and that Article 4(1)(b) of the Regulation is complied with.

### 3.7. Data transfer

The processing should be considered in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing operation covered by Article 7(1) is the transfer of personal data 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".

The requirements of Article 7(1) have been met, since in this case data is transferred only within the institution, to persons with a role in the informal procedure on harassment (the medical officer, the welfare officer and the Appointing Authority). The EDPS and the Court's DPO may also receive the data, in keeping with Article 47(2) of Regulation (EC) No 45/2001 and point 4 of the Annex to Regulation (EC) No 45/2001.

As regards these transfers, it should be remembered that only relevant data must be transferred. Such transfers are therefore lawful insofar as the purpose comes within the competences of the recipients. Article 7(1) is therefore duly complied with.

### 3.8. Right of access and of rectification

Article 13 of the Regulation establishes a right of access - and the detailed rules for its exercise - at the request of the data subject. Article 14 of the Regulation allows the data subject a right of rectification. Both these rights are guaranteed in the processing under scrutiny.

These two rights may be restricted under Article 20 of the Regulation, especially where necessary for the prevention, investigation, detection or prosecution of criminal offences, or the protection of the data subject or of the rights and freedoms of others. The fact that the restriction has to be a necessary measure implies that when the measure is no longer necessary, the Court must lift the restriction.

### 3.9. Information for data subjects

Article 11 of Regulation (EC) No 45/2001 (Information to be supplied where the data have been obtained from the data subject) on the information to be given the data subject is applicable in this case. The same applies to Article 12 (Information to be supplied where the data have not been obtained from the data subject), since information may be collected from other sources, including the medical officer but also from the complainant in the case of the individual accused.

**For the record, in the case under scrutiny, the information is provided in two stages. General information on the processing available on the Court's Intranet is complete; it sets out the various references in Articles 11 and 12 of the Regulation. Specific information is given to the data subjects by the counsellor and/or Appointing Authority, primarily to the person complaining of harassment and the individual accused. Articles 11 and 12 are therefore duly complied with.**

### 3.10. Security

Article 22 of Regulation (EC) No 45/2001 provides that the controller should 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. Amongst other things, these security measures must prevent any unauthorised disclosure or access.

In this case it is stated that the data will be kept in the strictest confidence and that it will be divulged only to the parties concerned.

Given all the security measures and other organisational and technical measures taken to ensure maximum processing security, the EDPS considers that they are appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

**4. Conclusion:**

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001.

Done at Brussels, 4 October 2007.

(signed)

Peter HUSTINX  
European Data Protection Supervisor