



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Anti-fraud Office on the Early Warning System

Brussels, 4 October 2007 (Case 2007-243)

1. Proceedings

On 30 March 2007 the European Data Protection Supervisor (EDPS) received a notification for prior checking from the Data Protection Officer (DPO) of the European Anti-fraud Office (OLAF) concerning the information processing preceding the establishment of a request for Early Warning System (EWS) flagging. The EDPS requested further information on 10 May 2007, the DPO answered on 3 July. An e-mail was sent to extend the delay for one month due to the complexity of the file. The procedure was suspended for 11 days to allow comments from the DPO.

The EWS itself has already been prior checked by the EDPS¹. The processing covered by the present notification deals with OLAF's specific role in the EWS.

2. The facts

According to Article 95 of the Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (hereafter: "Financial Regulation") a central database shall be set up and operated by the Commission in compliance with Community rules on the protection of personal data. The database shall contain details of the candidates and tenderers who are in one of the situations referred to in Articles 93, 94 96(1)(b) and 96(2)(a) of the Financial Regulation.

As stipulated in Article 1(2) of the Commission Decision on the Early Warning System No C(2004) 193/3 as last amended by the 2007 internal rules (hereafter: "EWS Decision") the purpose of the EWS is to ensure the circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities, with respect to which the Commission has a reasonable chance of entering, or has already entered, a contractual/conventional relationship with them. The information may also include co-beneficiaries/co-contractors in multi-beneficiary/multi-contractor grant award or procurement procedures, their subcontractors and the natural persons with powers of representation, decision making or control over the legal persons concerned.

¹ Opinion on a notification for prior checking received from the Data Protection Officer of the Commission on the Early Warning System (EDPS case number: 2005-120).

As regards OLAF's function in the EWS, one has to differentiate between two separate roles:

- OLAF in its capacity as an investigative body may provide information leading to W1a and b flagging under Article 2(1) and (2) of the EWS Decision and W2a and W3b flagging under Article 3 and 4 of the EWS Decision.
- Like other DGs of the European Commission OLAF is eligible to initiate different flaggings not covered by its capacity as an investigative body. These flaggings are not analysed in the present opinion. OLAF's relation to the EWS as a 'normal Directorate-General' of the European Commission has already been prior checked² by the EDPS. Access to the warnings also does not fall within the scope of this opinion.

According to Article 2(1) of the EWS Decision depending on the nature of the information and the warning, information in the EWS is divided into five categories of warning of ever increasing risk, classified as W1 to W5.

1. A W1 flag is entered where information obtained gives sufficient reason to believe that findings of fraud, serious administrative errors or other irregularities will be recorded against third parties. OLAF is involved in two categories of W1 flaggings:

- W1a: OLAF (at the level of Director general or Director) is responsible for requesting the activation of a W1a warning by the service referred to under Article 8 after having informed the AOD(s)³ concerned, where its investigations give at an early stage sufficient reason to believe that findings of serious administrative errors or fraud will be recorded in relation to a third party benefiting or who has benefited from Community funds.
- W1b: OLAF and Internal Audit Service IAS (in both cases at the level of Director general or Director) are responsible for requesting the activation of a W1b warning after having informed the AOD(s) concerned, where their investigations (OLAF)/audits (IAS) give sufficient reason to believe that final findings of serious administrative errors or fraud will be recorded in relation to a third party benefiting or who has benefited from Community funds.

2. A W2 flag is entered when third parties are subject to findings of serious administrative errors or fraud. OLAF is concerned in W2a flaggings:

- W2a: OLAF and IAS (in both cases at the level of Director General or Director) are responsible for requesting the activation of a W2a warning where their investigations lead to findings of serious administrative errors or fraud involving a third party.

3. A W3 flag is entered when third parties are subject to pending legal proceedings. OLAF is involved in W3b flaggings:

- W3b: The AOD (or AOSD of the rank of Director) requests the activation of a W3b warning where third parties, especially third parties benefiting or who have benefited from Community funds under his/her responsibility, are known to be the subject of judicial proceedings for serious administrative errors or fraud. Where OLAF investigations lead to judicial proceedings or OLAF offers assistance or follows up proceedings, OLAF (at the level of Director General or Director) requests the activation of the corresponding W3b warning.

² See footnote n°1.

³ AOD and AOSD for authorising officer by delegation or by sub-delegation

Procedure leading to notification of flaggings

Once the facts giving reason to notify one of the above flaggings by OLAF have been detected, the investigator/follow-up agent (requestor) completes a form requesting a legal or natural person to be flagged in the EWS. This form is sent to the OLAF EWS officer (Head of Unit C.2) and a copy to a deputy EWS officer. The information provided in the form is assessed by the deputy EWS officer to establish the need for and correctness of the flagging level requested. The form requesting a flagging (RESTREINT UE) to be sent to the Commission's Accounting Officer at DG Budget is prepared according to the model in Annex 3 of the EWS Decision.

This form includes the ABAC⁴ Legal Entity File⁵ reference number, name, address and project reference. The form must also indicate which flagging is requested, briefly presenting the facts justifying it. For individuals a copy of the identity card, residence permit or passport has to be attached. For 'public entities' copy of the resolution, law, decree or decision establishing the entity in question or any other official document with regard to this particular entity must be enclosed. Finally for 'private entities' an extract of registration (or its equivalent) needs to be enclosed.

A copy of the internal form, the request note to the Accounting Officer and possible supporting documentation are kept in a file which is stored in a locked cupboard. A spreadsheet is completed for all EWS requests drawn up by the deputy EWS officers and the records are regularly verified against the entries in the Commission Accounting System ABAC by a deputy EWS officer. The spreadsheet is stored on a separate stand-alone computer. Paper print-outs are kept in a locked cupboard.

Once the entry in the EWS has been confirmed by the Accounting Officer, evidenced by the entry in ABAC, the deputy EWS officer sends a SECEM email to the requestor informing him/her that the EWS request has been implemented and indicating the validity period. The deputy EWS officer prints out once a month a list from ABAC sorted according to validity date and reminds the original requestors that an EWS is about to expire. These print-outs are also kept in locked cupboards.

In case of a W1 entry, OLAF notifies in advance the DGs concerned by the flagging. As from summer 2007 the follow-up agent will have the possibility to complete a record in the Case Management System with the following information: ABAC legal entity number, type of warning and the expiry date in order to keep information on current flaggings easily available and up to date.

The Head of Unit for Fraud Prevention and Intelligence is declared to be the controller.

Data retention policy

OLAF keeps different documents containing details related to EWS flaggings. These documents include the internal form, the request to the Accounting Officer, supporting

⁴ ABAC for Accrual Based ACcounting. ABAC is a transversal, transactional information system allowing for the execution and monitoring of all budgetary and accounting operations by the Commission, an Agency or Institution.

⁵ LEF (legal entity file) records all third parties with which the Commission conducts revenue and expenditure transactions.

documentation and paper print-outs of the spreadsheet's content. Print-outs of the monthly list received by the EWS officer are also kept.

Depending on the category of warning, an active time limit is applied to the EWS warning. In such cases, the EWS flag is deactivated as soon as the fixed time period has elapsed.

- Any W1 warning remains active for a maximum of six months, after which it is deactivated automatically. If the alert in the EWS needs to remain and cannot be replaced by another type of warning, OLAF can request a new warning from the Commission's Accounting Officer.
- Any W2 warning remains active for a maximum of six months, after which it is deactivated automatically. If the alert in the EWS needs to remain and cannot be replaced by another type of warning, OLAF can request a new warning from the Commission's Accounting Officer.
- W3 warnings remain active until a judgment having the force of res judicata is rendered or the case has otherwise been settled.

All the documents, print outs and data are kept for the same period which is 7 years from the end of the year in which the OLAF flagging ends. This period is based upon art. 49 and 65 of the Implementing Rules of the Financial Regulation, which specify that documents are to be kept for at least five years after the date on which the European Parliament grants discharge for the budgetary year (which is normally 2 years after the end of the budgetary year to which the documents relate). Once this period has elapsed, data are made anonymous. For example, if OLAF flags a legal entity from 03/11/2006-03/05/2007, then the data will be made anonymous on $31/12/2007 + 7 = 31/12/2014$.

Data are not kept for historical, statistical or scientific purposes.

Purpose of the processing

The purpose of the processing is a) to ensure that accurate information is transmitted to the Accounting Officer when an entry in the EWS is requested, b) to make sure that OLAF has a register of entries requested but not yet implemented by the Accounting Officer, c) to enable OLAF to reply to questions from other services concerning the motives for requesting an entry in the EWS and d) to enable OLAF to timely request a new warning in case of automatic deactivation whereas the need for the entry remains.

Information to the data subjects

Data subjects are informed about the data processing through the privacy statement placed on the OLAF website⁶. This document contains information on the following points: the purpose of the EWS, the warnings which can be initiated by OLAF in its function as an investigative body, the data processed, the means of data storage, access to data, the retention periods. The privacy statement informs data subjects about the right of access to, and rectification or deletion of the data processed related to them. Furthermore, the controller is indicated as well as the possible recipients and the right of data subjects to have recourse at any time to the EDPS.

⁶ Privacy statement for OLAF's processing of personal data pursuant to the Commission Decision C(2004)193/3 of 03/02/2004 on the Early Warning System.

Categories of data processed and transfers

Data processed include identification and contact data (name, address of the individual, copy of identity document, if available), case related data (OLAF case number, project/contract the individual is connected with, Commission service involved, identified infringement), accounting system data (legal entity number, legal entity name, legal form, address) and EWS data (type of warning, validity period).

Data processed in the frame of the EWS are forwarded to the OLAF EWS officer, deputy EWS officer, EWS officers of the DGs concerned and the Accounting Officer of DG Budget. In case of activation of a W1 warning, the data are also forwarded to the AOD of the DG concerned (in accordance with Article 2.2 of the EWS decision).

3. Legal aspects

3.1. Prior checking

The notification received on 30 March 2007 relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of Regulation (EC) No 45/2001 (hence: the Regulation). Indeed, the Early Warning System (EWS) includes data relating to natural persons not only in their capacity to represent a legal person, but also in their capacity as individual liable to be subject to an evaluation under the EWS.

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).

Processing under the registration procedure for data subject in the Early Warning System is partially automated within the meaning of Article 3(2) of the Regulation, but the content is intended to form part of an automated system. The Regulation therefore applies in accordance with Article 3(2).

Article 27(1) of the Regulation subjects processing operations likely to present specific risks to the rights and freedoms of data subjects to prior checking by the EDPS. Article 27(2) contains a list of processing operations likely to present such risks including, in Article 27(2)(d) "*processing operations for the purpose of excluding individuals from a right, benefit or contract*". The registration of a natural person⁷ in the EWS can lead notably to the exclusion from a contract, granting of an award or refusal of funds and therefore is covered by Article 27(2)(d) and as such subject to prior checking by the EDPS.

The Regulation also subjects to prior checking: "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). The EWS is clearly linked to an evaluation procedure by OLAF and to this effect must be prior checked.

Furthermore, the processing involves data relating to suspected offences or offences. This makes prior checking justified under Article 27(2)(a) of the Regulation.

⁷ As well as legal persons (not covered by the Regulation 45/2001).

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up the check necessarily has to be performed ex post. However, this does not alter the fact that the recommendations issued by the EDPS should be implemented.

The notification of the DPO was received on 30 March 2007. 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 two months period was suspended for 54 days for requesting further information. An e-mail was sent to extend the delay for one month due to the complexity of the file. The delay was suspended for 11 days to allow comments from the DPO, altogether for 65 days (+ month of August). Thus the present opinion must be delivered by 4 October 2007.

3.2. Lawfulness of the processing

The lawfulness of the processing must be considered in the light of Article 5(a) of the Regulation which provides that personal data may be processed only 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..."*.

Processing of personal data in the EWS falls within the legitimate exercise of official authority vested in OLAF as it aims at ensuring circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation, should the Commission enter, or if it has already entered, a contractual/conventional relationship with them.

The legal basis of the processing is the EWS decision of the Commission which goes into details not foreseen in Article 95 of the Financial Regulations and in the Implementing Rules which contain similar provisions. For OLAF in its capacity as an investigative body the rules specifically refer to the warnings in categories W1, W2 and W3. The legal basis supports the lawfulness of the processing.

3.3. Processing of special categories of data

Among other data, OLAF processes special categories of data related to the EWS flaggings initiated as referred to in Article 10(5) of the Regulation: *"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 or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards"*. These data include information relating to suspected offences and offences, basically concerning fraud, kept by OLAF.

The legal basis mentioned above shall be considered as the special legal basis for processing special categories of data. The EDPS considers that the processing of data on suspected offences and offences by OLAF complies with Article 10(5) of the Regulation.

3.4. Data Quality

Article 4 of the Regulation sets out a number of obligations regarding the quality of personal data.

The data must be "*processed fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing has already been discussed (see point 3.2. above). As regards fairness, this relates to the information given to the data subjects (see point 3.8. below on this point).

Personal data should be collected for "*specified, explicit and legitimate purposes*" (Article 4(1)(b)). This provision implies that processing of personal data may only be carried out for a determined purpose. It also implies that a balanced approach must be carried out between the need to process personal data and the intrusion it may cause in the private lives and other legitimate interests of the persons concerned. The introduction of a warning against a person can have serious adverse effects for a data subject and for this reason specific safeguards must be in place to uphold the data subject's legitimate interests. These safeguards should notably be found in the data subject's right to be informed and to have access to data relating to him/her, which is to be the case by giving the rights of access and rectification, by explaining how information is protected and safeguarded and by stating who has access to this information. (see below point 3.8.). Article 4(1)(b) is thus respected.

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)). The processed data described in the facts should be regarded as satisfying these conditions. The data required are necessary for the proper functioning of the various stages of the procedure for EWS flaggings. The EDPS considers that Article 4(1)(c) of the Regulation is respected.

Under Article 4(1)(d) of the Regulation, data must be "*accurate and, where necessary, kept up to date*". Furthermore, "*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*". As described above, the procedure leading to notifying a flagging in the EWS requires that numerous persons are involved in order to establish with certainty that the flagging is in fact justified.

In some cases warnings are deactivated either because investigations do not lead to anything (W1 flags) or because a judgement having force of res judicata clears the person concerned (W3 flags). The EDPS points out that OLAF in its special role in the EWS is not only responsible for activation of flags but also for deactivation of them. It is thus recommended that OLAF notifies DG BUDGET without delay once these W1 or W3 flags are no longer accurate so that it can remove any trace of the flag from the EWS available to the common users⁸, which is mentioned in the privacy statement (see also point 3.5). OLAF should also request DG BUDGET to deactivate flags not only when the fixed period has elapsed, but as soon as the flag has no more reason to exist.

The right of access as provided by Article 13 of the Regulation should serve to guarantee the quality of data. This will be further discussed below (see point 3.7.). The EDPS considers that the procedure itself guarantees the quality of the data.

⁸ See also opinion of the EDPS on the EWS of the Commission, 2005-120, point 3.4 (data quality), sixth paragraph.

3.5. Conservation of data/ Data retention

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)).

The period for which the warning remains active must be differentiated from the time during which relevant data are kept by OLAF. This has an impact on the information given to the data subject and will be mentioned below (point 3.8.).

Documents containing data related to the EWS flagging are kept as a rule for 7 years from the end of the year in which the flagging ends. This retention period is in line with Articles 49 and 65 of the Implementing Rules for the Financial Regulations. The EDPS considers that Article 4(1)(e) is respected.

It is mentioned in the facts above that, in case of W1 and W2 flags, OLAF has the opportunity to request a new warning from the Commission's Accounting Officer, if the alert in the EWS needs to remain and cannot be replaced by another type of warning. In this case, the EDPS recommends that this new request has to be used very carefully and not as a mean of circumventing a deletion. Thus EPDS recommends also that, whenever a second flag of 6 months is introduced, it has to be analysed if it can be deleted before the new period of 6 months.

As refer to in point 3.4, the 6 months period for W1 and W2 is a maximum and data should be deactivated before the end of 6 months if appropriate.

Data are not kept for statistical, historical or scientific purposes. Thus paragraphs (2) and (3) of Article 4(1)(e) are not applicable in this case.

3.6. Compatible use / Change of purpose

The Regulation (EC) 45/2001 (Article 4.1.b) provides that personal data must be collected for specified, explicit and legitimate purposes and not be further processed in a way incompatible with those purposes. OLAF's use of personal data from its own investigation is compatible with the general purpose for which these data were collected, which is the protection of EU's financial interests.

3.7. Transfer of data

Article 7 applies to all transfers of personal data between Community institutions or bodies or even within the same institution. Article 7(1) of the Regulation stipulates: "*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 processed in the framework of the OLAF investigations are forwarded to the OLAF EWS officer or deputy EWS officer, the EWS officers of the DGs concerned and the Accounting Officer of DG Budget. In case of activation of a W1 warning, the data are also forwarded to the AOD of the DG concerned.

The EDPS considers that the data transferred are necessary for the tasks covered by the competence of the recipients mentioned and thus Article 7 of the Regulation is respected.

3.8. 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. 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 privacy statement informs data subjects about the possibility to have access to personal data held about them. It is also mentioned that this access may be restricted according to Article 20(1) (a) and (b) of the Regulation. According to the notification this restriction may be applied by OLAF on a case by case basis.

Article 20 provides for certain exemptions or limitations to the right of access notably when such a restriction constitutes "*measures to safeguard an important economic or financial interest of ... the European Communities, including monetary, budgetary and taxation matters*" (Article 20(1)(b) of the Regulation).

Should any of these restrictions be invoked, Article 20(3) has to be considered and respected by OLAF: "*If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his right to have recourse to the European Data Protection Supervisor.*" Concerning the right to information, this provision has to be read jointly with Articles 11 and 12 of the Regulation (see below point 3.9).

If a restriction to the right of access is imposed, the data subject has a right to request indirect access through recourse to the EDPS (Article 20(4)).

Article 20(5) establishes that "*Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.*" It may be necessary for OLAF to defer such information in accordance with this provision, in order to safeguard the financial interests of the Community. The restrictions to a fundamental right cannot be applied systematically. Indeed, as foreseen in Article 20 of the Regulation, the measure has to be "necessary". This requires that the "necessity test" has to be conducted on a case-by-case basis. Then, for instance, the nature of certain cases, will not always justify the denial of access and rectification during the processing.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. Given the sensitivity, in most cases, of these investigations, this right is of a key importance, in order to guarantee the quality of the data used, which, in this specific case, is connected to the right of defence. Any restriction, as provided in Article 20 of the Regulation, has to be applied in the light of what has been said regarding the right of access in the paragraphs above.

OLAF undertakes that upon request from the data subject data will be corrected and, if duly justified, erased. On the one hand, it is in the data subjects' interest for the flagging to be deleted as soon as possible in order not to be excluded further from being awarded contracts.

On the other hand, any inaccurate flagging could lead to unjustified exclusions from contracts and would have detrimental effects on the data subjects' interests. In the framework of initiating EWS flaggings data subjects' requests for rectification or deletion must be dealt with special attention. OLAF ensures that this right (expressly stipulated in the privacy statement) can be exercised by data subjects. The requests in question are handled with special care and personal data are rectified only when and if necessary.

The EDPS considers that Articles 13 and 14 are properly applied during the procedure under scrutiny.

3.9. Information to the data subject

The Regulation states that data subjects 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.

Information used during the analysed procedure partly and indirectly stem from the data subject (via the ABAC Legal Entity File). Other pieces of information are nevertheless coming from other sources. Thus both Articles 11 and 12 of the Regulation apply in this case.

Data subjects are informed about the processing in the privacy statement of OLAF. This document gives information on the purpose of the EWS, the legal basis, the warnings which can be initiated by OLAF in its function as an investigative body, the data processed, the means of data storage, access to data. The privacy statement informs data subjects about the right of access to, and rectification or deletion of the data processed related to them. Furthermore, the controller is indicated as well as possible recipients and the right of data subjects to have recourse at any time to the EDPS. Taking into account that information is given to the data subject through the privacy statement of the LEF, where the OLAF flags are indirectly mentioned, OLAF should make sure that there is a link in the privacy statement given to data subjects in the context of LEF to its own privacy statement.

Under point 5 "How long do we keep your data" in the privacy statement data subjects are informed about the periods for which different flaggings remain active. This information is crucial. However, data subjects are not informed about the retention period of all documents related to flaggings. The EDPS recommends including this information in the privacy statement.

3.10. Security measures

The EDPS notes that the security measures set forth in the context of the information processing preceding the establishment of a request for EWS flagging are the same as those used in other data processing operations that have been notified to the EDPS for prior checking. 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 analysis. 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.

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. OLAF should:

- request DG BUDGET to deactivate a flag as soon as it has no more reason to exist;
- use very carefully a new request of flagging and not as a mean of circumventing a deletion;
- whenever a second flag of 6 months is introduced, analyse if it can be deleted before the new period of 6 months;
- make sure that there is a link in the privacy statement given to data subjects in the context of LEF to its own privacy statement;
- include information relating to data retention in the privacy statement.

Done at Brussels, 4 October 2007

Peter HUSTINX
European Data Protection Supervisor