

Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the European Ombudsman regarding the "Promotion of permanent staff"

Brussels, 22 October 2007 (Case 2007-407)

1. Procedure

On 19 June 2007 the EDPS received a notification for prior checking regarding data processing operations in relation to the "Promotion of permanent staff".

On 23 July 2007, the DPO of the European Ombudsman was asked for further information. The DPO replied on 23 September 2007.

On 12 October 2007 the draft opinion was sent to the DPO for comments, which were provided on 18 October 2007.

2. The facts

The purpose of the data processing is to draw up the promotions list (the list of staff promoted) in accordance with the proposed rules on promotion ("*Decision of the European Ombudsman on promotions policy and career planning*"), which are based on the Staff Regulations of Officials of the European Communities (Article 45) and on the Conditions of employment of other staff of the European Communities (the third paragraph of Article 10 and Articles 15(1) and 87(3)).

The data subjects are the officials, temporary staff and contract staff employed by the European Ombudsman. As regards temporary and contract staff, only staff with contracts for an indefinite period are concerned.

The following data are collected:

- surname and first name
- grade and seniority in the grade
- staff reports and career progress reports from previous years.

The data processing involves manual and automated procedures. Every official and member of staff is evaluated every year. The staff reports form the basis for drawing up the list of promoted staff.

Every year, after the reporting procedure has been completed and at the latest by 31 May, the administration draws up a list of officials and staff who on 1 January or 1 July of the current year have or will have at least two years' seniority in the grade, and who may therefore be

eligible for promotion. The list of officials and other staff eligible for promotion is drawn up on the basis of seniority in the grade, calculated automatically on the basis of information taken from the European Parliament's personnel management application, ARPEGE. The list is published so that those concerned are able to contest it. Complaints about the list are admissible for one month after its publication. After that period, the list is closed and the promotion procedure is conducted on that basis.

The final list is sent to heads of department, with information about the budgetary possibilities for promotion for each grade and function group. After consulting the immediate superiors concerned, the heads of department propose a list of the officials and other staff who are promotable. The list is accompanied by notes evaluating the merits of the officials or other staff. Those notes are drawn up and compared by the competent head of department, where necessary with the assistance of the Administration Sector, and are then sent to the Ombudsman. The final decision on promotion is taken by the Ombudsman on the basis of those notes. He draws up the final list by 31 September, and has wide discretionary powers. The final decision contains the list of promoted officials and other staff, and the date of their promotion (1 January or 1 July of the current year). The list thus produced is the subject of financial verification. The officials and other staff concerned are informed. The list is also displayed in a place provided for that purpose in the premises of the Ombudsman's Office. The lists of promotable and promoted staff are drawn up manually and kept on paper. Individual promotion decisions are included in the personal files of the officials and other staff concerned.

The notes containing a comparative evaluation of the merits of eligible officials or other staff are communicated to heads of department and to the Ombudsman. The official or member of staff concerned may ask to be sent the comments appearing in the notes concerning him or her. However, those notes are not sent in full. The Administration Sector sends the documents to the person concerned, but first renders illegible any comment relating to other persons. These comparative notes may be sent to the institution's internal joint bodies in connection with appeals against promotion decisions, to the internal audit service or to the competent authorities if legal proceedings are brought. Furthermore, all the Ombudsman's staff receive the list of eligible staff and the list of promoted staff.

The officials and other staff concerned may contest the Ombudsman's decision using the procedure laid down in Article 90 of the Staff Regulations. Before responding to a complaint of this type, the Ombudsman must seek the opinion of the Committee provided for in Article 9(1)(a) and in Articles 10 and 11 of Annex II to the Staff Regulations.

The Administration Sector plans to put the information to be provided to data subjects (identity of the data controller, purposes of the processing operation, categories and origin of the data concerned, recipients, rights of access and rectification, legal basis for the processing, time-limit for storing data, right to have recourse to the EDPS at any time) in a footnote to the list of eligible staff displayed each year. This information will thus be available both to the officials and other staff appearing on the list and to those who do not appear on it, correctly or not.

The data are stored by the Administration Sector for 50 years, which is the maximum length of career for officials and other staff concerned by promotion.

The data which are kept for annual statistical purposes are stored in an aggregated form by category (grade, seniority in grade and sometimes sex and area of activity).

As regards security measures, [...].

3. Legal aspects

3.1. Prior checking

The notification received on 19 June 2007 relates to the processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of Regulation (EC) No 45/2001) by a Community body in the exercise of activities all or part of which fall within the scope of Community law. The management of data for the staff promotion procedure involves the collection, recording, organisation, storage, retrieval, consultation, etc. of personal data (Article 2(b) of the Regulation). These activities constitute partial automatic processing and, when processing is manual, the data are contained in a filing system within the meaning of Article 3(2) of the Regulation. The data processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of 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 likely to present such risks. The present case is subject to prior checking (Article 27(2)(b)) since it involves "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". In this case, the data are processed in order to assess the ability, efficiency or conduct of officials and other staff with a view to their being promoted or otherwise.

The DPO's notification was received on 19 June 2007. Under Article 27(4) of the Regulation, this opinion must be delivered within two months of that date. On 23 July 2007, the DPO of the European Ombudsman was asked for further information. The DPO replied on 21 September 2007. On 12 October 2007 the procedure was suspended for six days to allow the DPO and the controller to comment. The EDPS will therefore deliver his opinion by 23 October 2007 (2 months + the month of August + 29 days' suspension + 6 days for comments).

3.2. Lawfulness of the processing operation

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides that processing must be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities (...) or in the legitimate exercise of official authority vested in the Community institution*".

The promotions procedure, which involves collecting and processing personal data relating to officials and other staff, falls within the legitimate exercise of official authority vested in the institution.

The legal basis for the processing operation is contained in Article 45 of the Staff Regulations of Officials of the European Communities (Staff Regulations) and in the third paragraph of Article 10 and Articles 15(1) and 87(3) of the Conditions of Employment of other staff of the European Communities (Conditions of Employment). Once the rules for the promotion

procedure have been adopted by the Ombudsman they will supplement the legal basis for processing operations.

Article 45 of the Staff Regulations provides that: *"1. Promotion shall be by decision of the Appointing Authority in the light of Article 6(2). It shall be effected by appointment of the official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the Appointing Authority shall in particular take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) and, where appropriate, the level of responsibilities exercised by them."*

The third paragraph of Article 10 of the Conditions of Employment provides that: *"Assignment of temporary staff to a post carrying a higher grade than that at which they were engaged shall be recorded in an agreement supplementary to their contract of service."* Furthermore, Article 15(1) of the Conditions of Employment provides that: *"Where a member of the temporary staff is assigned to a post corresponding to a higher grade, as provided for in the third paragraph of Article 10, his grading shall be determined in accordance with Article 46 of the Staff Regulations¹."*

Article 87(3) of the Conditions of Employment provides that: *"In the case of contract staff referred to in Article 3a, classification in the next higher grade in the same function group shall be by decision of the authority referred to in the first paragraph of Article 6. It shall be effected by classifying such contract staff in the first step of the next higher grade. Such advancement shall be exclusively by selection from among contract staff referred to in Article 3a with a contract of at least three years who have completed a minimum period of two years in their grade, after consideration of the comparative merits of such contract staff eligible for advancement to a higher grade and of the reports on them. The last sentence of Article 45(1) of the Staff Regulations shall apply by analogy."*

The provisions of the Staff Regulations and of the Conditions of Employment have been adapted by the Ombudsman in rules for the promotion procedure, of which a draft was attached to the notification. Those rules were adopted on 5 September 2007 and will be applied for the 2008 promotions exercise, and hence to officials and other staff eligible for promotion on 1 January 2008. The legal basis, which is sufficiently clear, raises no particular issues.

The legal basis complies with the Regulation and supports the lawfulness of the processing.

3.3. Processing of special categories of data

The possibility that special categories of data within the meaning of Article 10 of Regulation (EC) No 45/2001 might be processed cannot be ruled out, particularly in the context of the notes containing a comparative evaluation of the merits of the officials and other staff eligible for promotion. It might therefore be assumed that, for that comparative evaluation of merit,

¹ Article 46 provides that: *"An official appointed to a higher grade in accordance with Article 45 shall be placed in the initial step in that grade. However, officials in grades AD 9 to AD 13 carrying out the duties of head of unit who are appointed to a higher grade in accordance with Article 45 shall be placed in the second step of the new grade. The same arrangement shall apply to any official: (a) who upon promotion is appointed director or director-general, or (b) who is director or director-general and to whom the last sentence of the second paragraph of Article 44 applies."*

time devoted to work in a trade union or spent on sick leave may be taken into consideration. That would mean the processing of data relating to trade-union membership or to the health of the person concerned. In this case the EDPS stresses that processing must be provided for under one of the exceptions in Article 10(2) of the Regulation, derogating from the processing ban.

3.4. Data quality

Article 4 of Regulation (EC) No 45/2001 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 provided to data subjects (see point 3.9 below).

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)). The processed data described at the beginning of this opinion should be regarded as satisfying these conditions. The staff reports, as presented in point 2 above, are necessary for the proper functioning of the various stages of the promotions procedure. Nonetheless, as regards the notes containing a comparative evaluation of the merits of the officials or other staff eligible for promotion, the EDPS wishes to emphasise that care must be taken to ensure that the data appearing in the report are adequate, relevant and necessary.

Regarding the publication of the lists of eligible and promoted staff, the EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been complied with, as those lists do not contain any information other than that directly linked to the identification of the official or other staff member and to his grade. Besides the data directly connected with the identification of the official or member of staff, the seniority in the grade (list of staff eligible for promotion) or grade (list of promoted staff) also appear.

Article 4(1)(d) of the Regulation stipulates that data must be "*accurate and, where necessary, kept up to date*". The procedure itself must ensure this accuracy of the data. The EDPS would like to emphasise that it is difficult to prove the accuracy of "evaluation" and "comparison" data in the context of a promotions procedure, since they involve a subjective view. The EDPS therefore welcomes the fact that the Ombudsman has laid down that these decisions should be accompanied by written notes, which apparently give the grounds for the decisions taken. The right of access and rectification as provided by Article 13 of Regulation (EC) No 45/2001 should also serve to guarantee the quality of data. This aspect will be discussed further below (see point 3.8).

3.5. Retention of data

Under Article 4(1)(e) of Regulation No 45/2001, 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*". (...)"

In the case in point, the notification states that all data relating to the promotions procedure (detailed notes and lists of eligible and promoted staff) are to be stored for 50 years. According to the Ombudsman, this is the maximum length of an official's career.

The EDPS considers this period to be excessive. The purpose of the processing operation, in this case conducting the promotions procedure, cannot justify the retention of data for the maximum length of an official's career. A reasonable period should be set in relation to that purpose, for example to correspond to the period during which officials may make a complaint or claim relating to the promotions procedure.

The data are also kept for annual statistical purposes but in an aggregated form by category (grade, seniority in the grade and sometimes sex and area of activity). Given the small size of the institution and thus the small number of persons concerned by promotion, it may be possible to identify the officials and other staff in question, even after the data have been aggregated. However, the EDPS recognises the need to keep this sort of data, particularly for budgetary purposes. Moreover, with the passage of time, it will become increasingly difficult to identify the persons concerned. Article 4(1)(e) has thus been complied with, as regards data retention for statistical purposes.

3.6. Compatible use/Change of purpose

Under Article 4(1)(b) of Regulation (EC) No 45/2001, personal data must be collected for "*specified, explicit and legitimate purposes*". This provision means that personal data may only be processed for a specific purpose.

Data are retrieved from or entered into personal files. The processing under review here involves no general change to the specified purpose of staff databases, and the promotions procedure is only part of that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 is not applicable to the case in point and Article 4(1)(b) of the Regulation is complied with.

3.7. Transfer of data

The processing operation must also be examined in the light of Article 7(1) of Regulation (EC) No 45/2001, which concerns the transfer of personal data between or within Community institutions or bodies. Personal data may not be transferred within an institution unless they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

In this case, the data are for circulation between various individuals in the Ombudsman's Office. The transfer to heads of department and to the Ombudsman (and where appropriate also to the Administration and to the joint appeal bodies) of the list of officials and other staff proposed for promotion and of the detailed notes is in keeping with the legitimate performance of the tasks of the various parties. The EDPS emphasises that access to the detailed notes must be limited strictly to those who need to be acquainted with them in the context of their tasks. All the Ombudsman's staff receive the lists of eligible and promoted staff, which enables the Ombudsman to conduct the promotions procedure in full transparency.

The data on promotions might also be communicated to other institutions, bodies or agencies in the context of the transfer of the member of staff to another institution. In such cases, the transfer of the person also means the transfer of the whole of his or her personal file, including individual promotion decisions. Such transfers are necessary for the legitimate performance of tasks covered by the competence of the recipients.

Data may also be transferred to the internal audit service or to the Court of Auditors during an audit. The EDPS may also receive the data if a check is made. Such transfers also comply with Article 7 of the Regulation, as they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

Lastly, Article 7(3) of Regulation (EC) No 45/2001 provides that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*. There must be an explicit guarantee that no-one receiving and processing data in the context of the promotions procedure can use them for other purposes. This is particularly important in the case of the detailed notes. The European Data Protection Supervisor would like the Ombudsman to pay particular attention to the fact that the personal data should be processed strictly in the context of promotions.

3.8. Right of access and rectification

The right of access is the right of the data subject to be informed that personal data relating to him or her is being processed by the data controller and to obtain the communication of such data in an intelligible form. Respect for rights of access and rectification is directly linked with the principle of data quality described above (point 3.4).

Under Article 13 of Regulation (EC) No 45/2001, *"the data subject shall have the right to obtain, without constraint, and at any time within three months from the receipt of the request and free of charge from the controller (...) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients (...) to whom the data are disclosed [and] communication in an intelligible form of the data undergoing processing and of any available information as to their source"*. Article 14 provides that *"the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

In the current case, the list of persons eligible for promotion is published. The data subject thus has access to the list and is able to point out any errors or omissions which can then be rectified before the promotions procedure commences. Similarly, the list of promoted staff is published at the end of the promotions procedure, allowing the data subjects to see it and if necessary to contest the (non-) promotion decision.

Regarding the detailed notes, the official or member of staff concerned may ask to be sent the comments appearing in the notes concerning him or her. However, these notes, which contain a comparative evaluation, are not sent in full. The Administration Sector sends the documents to the person concerned, but first renders illegible any comment relating to other persons. This condition is based on the restriction laid down in Article 20(1)(c) of the Regulation, namely the protection of the rights of others, which here means the other officials and staff concerned by the promotions procedure. Article 20(1)(c) states that *"The Community institutions and bodies may restrict the application of (...) Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others"*. As all the opinions on the members of staff concerned appear in the same note, the EDPS believes that it is appropriate to protect the opinions relating to other officials, if the data subject asks to have access to his or her own data. It is also difficult to verify the accuracy of the data in question, since they are the result of a subjective evaluation of the person concerned.

It must therefore be concluded that Articles 13 and 14 of the Regulation are complied with.

3.9. Information to be given to the data subject

Under Articles 11 and 12 of the Regulation, whenever personal data are processed, data subjects must be sufficiently informed of the operation. This information should usually be given at the latest when the data are collected from the data subject, if the data subject has not already been informed (Article 11). If the data are not collected directly from the data subject (Article 12), the information must be provided as soon as the data are recorded or, if the data are to be communicated to a third party, at the latest when the data are first communicated.

In this case, the personal data are not collected from the person concerned but are taken from the personal files containing the evaluation reports, and from the European Parliament's personnel management application, ARPEGE.

Data subjects must also be informed at the time the processing operation begins about the identity of the data controller, the purposes of the processing operation, the categories and origin of the data concerned, the recipients, the rights of access and rectification, the legal basis, the time-limit for storing the data and their right to have recourse to the EDPS at any time. The Administration Sector plans to put this information in a footnote to the list of eligible staff displayed each year. This information will thus be available both to the officials and other staff appearing on the list and those who do not appear on it, correctly or not. Articles 11 and 12 of the Regulation are therefore complied with.

3.10. Security measures

[...]

The EDPS considers that these measures are adequate in the light of Article 22 of the Regulation.

Conclusion

The processing operation proposed does not appear to violate the provisions of Regulation (EC) No 45/2001, so long as account is taken of the observations set out above. This means, in particular, that:

- if sensitive data within the meaning of Article 10 of Regulation (EC) No 45/2001 are processed, the processing operation must be provided for under one of the exceptions in Article 10(2) of the Regulation;
- a reasonable limit must be set for the period for which data relating to the promotions procedure may be retained;

- a word of warning should be added concerning the detailed evaluation notes, to make sure that the data they contain satisfy the requirements of Article 4(1)(c);
- at the time the data are collected, data subjects must be informed of the identity of the controller, the purposes of the processing operation, the categories and origin of the data concerned, the recipients, the right of access and rectification, the legal basis, the time-limit for storing the data and their right to have recourse to the EDPS at any time.

Done at Brussels, 22 October 2007

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