

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Office for Harmonisation in the Internal Market on the Evaluation of the Members of the Linguistic Team**

Brussels, 12 November 2007 (Case 2007-475)

### **1. Proceedings**

On 20 August 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer at the Office for Harmonisation in the Internal Market (OHIM) a notification for prior checking relating to the evaluation of the members of OHIM's linguistic team.

Five other documents were enclosed:

- OHIM's internal "Notification to the Data protection officer of a processing operation containing personal data - Quality control of the linguistic team";
- "Fiche d'évaluation des juristes-linguistes";
- "Data Protection Statement - Quality control of the linguistic team";
- OHIM's internal "Notification to the Data protection officer of a processing operation containing personal data - Sycopat Table" and
- the extract of the "Sycopat" table.

The draft Opinion was sent to OHIM for comments on 19 October 2007 and these were received on 5 November 2007.

### **2. The facts**

Article 43 of the Staff Regulations provides for a procedure of evaluation of the ability, efficiency and conduct in the service of each official.

Members of the Linguistic Team of OHIM's General Affairs and External Relations Department are subject to evaluation of their translation or revision work by means of two processing operations of personal data aiming at making, on the one hand, a *qualitative assessment*, and on the other hand, a *quantitative assessment*. Both processing operations pursue the same purpose of evaluating both the team's performance and the individuals' work.

The evaluation procedure includes:

#### a) Qualitative assessment

Linguistic experts within OHIM, namely native of the language to be assessed, are submitted a proof sample of one individuals' work together with an evaluation form to be filled in. The evaluation form identifies the evaluator as well as the member of the linguistic team whose work is subject to assessment.

Once completed, the evaluation form is returned to the coordinator of the linguistic team (the controller) who transmits a copy to the person concerned and files the original. Evaluation forms are kept for a period not longer than 3 years in order to have a view on the progress made by the evaluated persons. These evaluations are used as qualitative input for the yearly appraisal exercise.

#### b) Quantitative assessment

All requests for translation and/or linguistic revision of documents are assigned to members of the linguistic team in accordance with their respective language profile. These assignments together with data concerning requests, title documents, number of pages, type of work (revision or translation) linguists who makes the revision/translation, department requesting the revision, fulfilment of the requested deadline, are recorded in a XL workbook referred to as the "SYCOPAT" table.

The number of pages translated and/or revised per individuals provides quantitative information as regard (i) the tendency of the workload according to the languages and/or type of work (proof reading, revision, translation, ...) and (ii) subsequent needs in terms of staff resources. This information is most important for organisational purposes. It is used as a planning tool in weekly meetings to discuss priorities, delays, ... with the whole team. This table is also used to get an objective indicator as to the work performed by each member of the linguistic team and is therefore also used in the yearly appraisal exercise.

The data that are processed include:

#### a) Qualitative assessment (evaluation sheet) :

- Name of evaluated staff members
- Name and language knowledge of evaluators
- Quality evaluation of work done by the linguists (see evaluation form in annex).

#### b) Quantitative assessment ("Sycopat" table):

- production data, including data concerning requests, title documents, number of pages, type of work (revision or translation), name of linguist who made the revision/translation, department requesting the revision, fulfilment of the requested deadline.

Data subjects are informed about the processing in the following way:

#### a) Qualitative assessment:

Data subjects are aware of all the details the evaluation process and of the names of their evaluators. They get a copy of the result. The evaluation form contains a data protection statement which includes:

- The identity of the controller (GAERD's Linguistic Team Coordinator);
- The purposes of the processing operation for which the data are intended (quality control of the work performed by the linguistic team, annual appraisal report and annual promotion exercise of the corresponding member of the linguistic team);
- The legal basis of the processing (Articles 43 and 45 of the Staff Regulations and applicable administrative decisions communicated by the Human Resources Department)
- The length of storage of the collected data (3 years);
- The possibility for evaluated staff as well as evaluators to have the right to access, rectify, erase, or block their respective personal data, in accordance with the provisions of Regulation 45/2001, by sending a written request to the GAERD's Linguistic Team Coordinator;
- The right to object to the above mentioned processing operations, in accordance with the provisions of Regulation 45/2001, should they have possible compelling legitimate grounds relating to their particular situation, by sending a written request to the GAERD's Linguistic Team Coordinator;
- The right to consult OHIM's Data Protection Officer or have recourse at the European Data Protection Supervisor.

b) Quantitative assessment ("Sycopat" table):

The "Sycopat" table is a tool used by all persons concerned for the organization of the translation/revision activity. The content of the table is discussed with all the concerned colleagues in regular team meetings. Therefore, they all have awareness of its existence, purposes and content. The personal data are rectified or erased without delay in accordance with the outcome of the linguistic team meetings where this table is discussed.

### **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.

The processing of personal data is carried out by OHIM, body created by Community Law, for the purposes of the evaluation procedures laid down by Community Law.

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 evaluation of the members of the linguistic team proposed by OHIM processes the data referred to above related to all members of the linguistic team. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

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 this case

the processing is carried out both on computer ("Sycopat" table) and in a structured paper filing system (individual evaluation sheets). 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)(b) *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct "*. The evaluation system on the quality of work of the members of the linguistic team clearly is designed with the intention to evaluate their ability and efficiency. Thus, the processing operations are likely to present specific risks to the rights and freedoms of data subjects in the sense of Article 27 (1) of the Regulation.

The notification of the DPO was received on 20 August 2007. According to Article 27(4) the present opinion must be delivered within a period of two months. The procedure was suspended during the month of August and for a period of 17 days for comments. Thus the opinion should be delivered no later than the 20 November 2007.

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

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5(a) is that the *"processing is necessary for 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"*.

Article 112 of Council Regulation (EC) 40/94 provides that the Staff Regulations and the rules adopted by the Institutions of the Europeans Communities for giving effect to those Staff regulations shall apply to OHIM.

Article 43 of the Staff Regulations provides the legal basis for the described ongoing evaluation procedure of the individual members of the linguistic team, both in quality and in quantity, as well as the periodical reports on their ability, efficiency and conduct made at least once every two years. This evaluation procedure aiming at periodical reports of all staff members was already notified by OHIM and prior checked by the EDPS<sup>1</sup>.

Control procedures involving the collection and processing of personal data concerning quantitative evaluation of workload constitute part of the legitimate exercise of the official authority vested in the institution.

The EDPS is satisfied that the processing described is necessary for the evaluation procedure established by the Staff Regulations, taking into account the specific nature of the tasks and work of the members of the linguistic team, and is therefore legitimate under Article 5(a) of Regulation 45/2001.

### **3.3. Data Quality**

---

<sup>1</sup> Opinion of 28 July 2005 on staff appraisal at OHIM (EDPS case n° 2004/293).

According to Article 4(1)(c) of Regulation 45/2001 *"personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed"*. After careful examination, the EDPS is of the opinion that the data listed in the notification and collected from the data subject for the purposes of the evaluation procedure comply with the criteria set out in Article 4(1)(c).

Data are collected for evaluating the overall quality of the work performed by the linguistic team as well as for evaluation the individual members of the team. The purpose of creating quantitative statistics is to control, plan and organise the sector. Eventually, statistics may be used as an objective input in the annual appraisal exercise. From the information presented to the EDPS it can be concluded that the categories of data processed in the evaluation reports and in the "Sycopat" table are adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed.

Article 4(1)(d) provides that personal data must be *"accurate and, where necessary, kept up to date"*. As a quality assurance in the process, data subjects are informed of all details of the evaluation process and the names of their evaluators. They also all have awareness of the existence and content of the quantitative table. Therefore the information will be systematically checked and eventually corrected or completed (see point 3.7). The EDPS is of the opinion that this ensures that the data are accurate and kept up to date throughout the process.

Article 4(1)(a) also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (see point 3.2). As to fairness, this must receive a great deal of attention in this sensitive context. It relates to the information which has to be transmitted to the data subject (see point 3.8).

### **3.4. 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"*.

Printed reports and the statistics generated on individual members of the linguistic team (and the related print outs) should then be conserved in a form which permits identification of data subjects for no longer than is necessary for the control/assessment purposes, and until the evaluation procedures and decisions can be contested.

The individual evaluation sheets in paper will be filed for 3 years in order to be able to evaluate the development of the quality of each linguist compared to past evaluation periods.

The quantitative "Sycopat" table will be stored for 3 years

The EDPS is satisfied that the 3 years storage period and the retention policy are compliant with the provisions of Article 4(e) of Regulation 45/2001.

### **3.5. Compatible use / Change of purpose**

Article 4(1)(b) of Regulation 45/2001 provides that personal data must be *"collected for specified, explicit and legitimate purposes and not further processed in a way incompatible*

*with those purposes*". OHIM uses the personal data collected in the evaluation/quality control procedure.

"Sycopat" table and individual evaluation sheets are processed for the purpose of evaluation of both the team's performance and the individuals' work. The data collected are used for the purpose of the annual appraisal exercise which was already submitted for a prior check. Thus, the data are processed for a purpose compatible with the purpose for which the data are collected. Therefore, Article 4 (1)(b) is fully respected.

### **3.6. Transfer of data**

Article 7(1) of Regulation 45/2001 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"*.

From the available information, it seems that there is a transfer of personal data to evaluators responsible for the annual staff appraisal exercise. Actually, "Sycopat" table and individual evaluation sheets are used as quantitative and qualitative input for the yearly appraisal exercise. The transfer of data to evaluators is necessary for the legitimate performance of tasks covered by the competence of the recipient and Article 7(1) is respected.

The use of the "Sycopat" table during the weekly staff meetings and the free access to that table should be regarded as forms of transfer of data contained in that table to all concerned staff members. In this regard it should be stressed that, according to Article 7(3) of the Regulation, the data contained in the "Sycopat" table are to be processed by the recipient only for the purposes for which they were transmitted.

### **3.7. Right of access and rectification**

Article 13 of Regulation 45/2001 provides a right of access for the data subject to personal data relating to him or her. Concerning the qualitative evaluation sheets, the Data Protection Statement attached to any evaluation form states that data subjects may send a written request to the GAERD's linguistic team coordinator (the controller) in order to access the data. The controller will grant access to the data in maximum 3 months. Concerning the quantitative "Sycopat" table, all the data subjects have direct and immediate access to it via the IT infrastructure.

Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data. Concerning the data contained in the evaluation sheets, the notification states that data subjects may send a written request to the GAERD's linguistic team coordinator. The rectification will be done immediately. Concerning the "Sycopat" table, which is discussed during the regular staff meetings, the personal data are rectified or erased without delay in accordance with the outcome of the linguistic team meetings where this table is discussed.

Blocking and erasure of data in accordance with the rights provided in Articles 15 and 16 respectively of Regulation 45/2001 are completed immediately upon a legitimate request to the GAERD's linguistic team coordinator.

The EDPS is of the opinion that the rights of the data subject are respected in the processing that occurs as part of the procedure.

### **3.8. Information to the data subject**

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the evaluation procedure personal data is not obtained directly from the data subject. Thus Article 12 will apply to the evaluated members of the linguistic team. Article 11 will also apply to the evaluators who are supposed to provide their names on the individual evaluation sheet.

Data subjects are informed about how their data will be processed. This is done through a specific Data Protection Statement attached to any evaluation form as well as to any nominative file where completed evaluation forms are stored.

The EDPS notes that all necessary information is provided via the Data Protection Statement to the data subjects and that Articles 11 and 12 of the Regulation are respected. Actually, the evaluators receive the Statement with each individual evaluation sheet. According to the information provided by the controller, the evaluated staff members also receive the Data Protection Statement. It has to be stressed that the controller has to inform the evaluated staff and provide them with the Statement at the time of undertaking the evaluation procedure (Article 12 of the Regulation). The controller must also make clear that the Data Protection Statement applies to the "Sycopat" table.

### **3.9. Security measures**

#### **Conclusion:**

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

- with regard to the information to the data subject (Article 12 of Regulation (EC) 45/2001), the controller must inform the evaluated staff and provide them with the Data Protection Statement at the time of undertaking the evaluation procedure. Moreover, the controller shall make clear that the Data Protection Statement also applies to the "SYCOPAT" table.
- with regard to the transfer of data, the controller shall implement appropriate measures to ensure an appropriate level of security.

Done at Brussels, 12 November 2007

Peter HUSTINX  
European data Protection Supervisor