



Opinion on a notification for prior checking received from the Data Protection Officer of the European Maritime Safety Agency concerning "Annual career development exercise".

Brussels, 17 December 2007 (Case 2007-568)

1. Proceedings

On 17 September 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Maritime Safety Agency (EMSA) a notification for prior checking concerning annual career development exercise.

The notification was accompanied by the "Decision of the Administrative Board of the EMSA of 24 November 2006 on general provisions for implementing Article 43 of the Staff Regulations" as well as the templates for the "Career development report form" and the "Interim Career development report form". The EDPS requested further information on 8 November 2007. The DPO answered on 5 December 2007. The draft opinion was sent to the DPO for comments on 7 December 2007 and these were received on the same day.

2. Facts

The present notification concerns the evaluation of staff members of EMSA as foreseen in Article 43 of the Staff Regulations of Officials and Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants of the European Communities.

The conditions for the drafting of yearly evaluation reports concerning the ability, efficiency and conduct of officials, temporary and contractual agents working for the EMSA are laid down in the "Decision of the Administrative Board of the EMSA of 24 November 2006 on general provisions for implementing Article 43 of the Staff Regulations" adopted in line with Article 110 of the Staff Regulations.

2.1. Description of the data processing operations

Every year, an annual report is drawn up for every staff member of EMSA (with the exception of the Executive Director) who has been in active employment or seconded in the interest of the service for a continuous period of at least one month during the reporting period (*jobholder*).

The appraisal is conducted by the *reporting officer*. As a general rule, the reporting officer is a jobholder's Head of Unit. In specific circumstances the Head of Unit can delegate the role of reporting officer to another official or a temporary staff member.

The *countersigning officer* shall ensure that the appraisal standards defined by the agency are consistently applied to all the carrier development reports for which he or she is responsible.

In case of disagreement with the reporting officer, final responsibility for the review shall rest with the countersigning officer. As a general rule, the countersigning officer is a superior of the jobholder's Head of Unit.

The *career development officer* shall implement from the administrative point of view the annual career development review. This means launching the exercise by sending the relevant career development forms to the reporting officers with personal details, job description and objectives already completed in order to facilitate the work of the reporting officers. In addition, the career development officer follows up the procedure ensuring that the appropriate deadlines are kept, gives assistance to the reporting officers in relation to competence framework and collects the completed reports to be forwarded to the countersigning officers and at the end of the exercise files the reports in personnel files. Should there be any appeal, the career guidance officer prepares the files for the Joint Evaluation Committee.

The *Human Resources Officer* and the *Head of Unit "A"* are direct supervisors of the career development officer and are responsible for overall personnel policy. Their task is to ensure consistency, equal treatment of all staff members and the appropriate execution of the exercise.

The annual appraisal exercise starts with the request of the reporting officer to the jobholder to produce a self-assessment report which is included in the career development report.

Within ten working days of the jobholder submitting a self-assessment, the reporting officer and the jobholder shall engage in a formal dialogue. The dialogue shall cover three aspects:

- appraising the jobholder's performance during the reporting period;
- setting objectives for the year following the reporting period and
- drawing up a training map

Immediately after the formal dialogue has been held, the reporting officer shall draw up a draft career development report, which shall include appraisals of efficiency, competencies and conduct in the service which is consistent with the indications given during the formal dialogue and submit it to the countersigning officer. The reporting officer and the countersigning officer shall finalise and sign the report and transmit it to the jobholder who has five working days to accept it without adding any comments, accept it after adding some comments or to refuse it.

If the jobholder accepts the report it has to be considered final. If the jobholder refuses it, the countersigning officer shall hold a dialogue with him or her within ten working days. The jobholder may arrange for another official to assist him or her during the dialogue. No later than five working days after this dialogue the countersigning officer shall either confirm or amend the report and transmit it to the jobholder who has ten working days to accept it without adding any comments, accept it after adding some comments on the report or to refuse it.

If the jobholder accepts the amended report, it has to be considered final. If the jobholder refuses it, the matter is automatically referred to the Joint Evaluation Committee (JEC). The JEC is composed by a Chair who is a senior official appointed by the Executive Director and by four members: two designated by the Executive Director and two designated by the Staff Committee. The JEC may not substitute to the reporting officer or to the countersigning officer as regards appraising the jobholder's performance. It shall verify that reviews have been drawn up fairly and objectively, in particular if the procedure has been followed. The

JEC shall deliver an opinion by a simple majority vote and within ten working days of the matter being referred to it. The opinion of the JEC shall be transmitted to the jobholder, reporting officer and the countersigning officer.

The reporting officer and the countersigning officer shall confirm or amend the evaluation report in question within five working days. Where they depart from the recommendations set out in the opinion of the JEC they shall provide reasons for that decision. The report has to be considered final and be communicated to all the parties concerned.

2.2. The purpose of the processing

The purpose of the data processing in question is the performance, management and follow-up of the development of the career of the staff members. In practice this means follow-up of individual training plans, subsequent career development review, promotion/reclassification exercise and renewal of temporary agent or contract agent contract.

2.3. Categories of data processed

The "Career development report form"¹ contains the following information:

- jobholder's details: personnel number, surname, first name(s), office telephone number, category and grade;
- jobholder's career history (in EMSA only): previous status, previous category and grade and previous unit;
- type of report (interim or annual);
- period of appraisal (from - to);
- reporting officer's details: surname, first name(s), personnel number, function;
- previous reporting officer(s)'s details (if applicable): surname, first name(s), personnel number, function;
- countersigning officer's details: surname, first name(s), personnel number, function;
- job description of the jobholder;
- content of the "initial dialogue" (planning of the objectives for the period of appraisal) including objectives in relation to the unit objectives in order of priority and assessment criteria and (optional) the personal development goals and assessment criteria;
- self-assessment report containing achievement of objectives, description of contribution to other activities and description of personal development;
- reporting officer's assessment containing assessment of efficiency, abilities, conduct in service, overall summary, assessment of the potential as well as his signature;
- countersigning officer's assessment and signature;
- jobholder's eventual comments and signature;
- countersigning officer's further review and signature (if applicable);
- opinion of the Joint Evaluation Committee (if applicable);

2.4. Data retention

The "Career development report forms" are kept in the personal file of the respective employee in line with Article 26 of the Staff Regulations.

According to the information provided in the notification, no time-limit for the storage of personal files at the EMSA has been established so far (even though it is clear that it should

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That form will be applicable in 2008. The *Interim* "Career development report form" (applicable until 2007) is identical excepted the "data protection disclaimer" which was added in the 2008 version of the form.

be for a certain period after the termination of the service). EMSA is awaiting the results of the Working Party on Time Limits and Blocking before taking any decision in this matter.

Storage for historical, statistical or scientific purposes is not being envisaged.

2.5. Information provided to the data subjects

The concerned persons are informed by the following ways:

- There is a general “data protection clause” on the Intranet page of the Human Resources section which is the following:

Any personal data provided by EMSA staff members in relation to the operations performed by the Human Resources is processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data.

The staff members can have access to their data and can exercise their rights in relation to this data as provided in the Art. 13-20 of Regulation (EC) No 45/2001. For this reason they can address themselves to the Delegated Controller of the data, Head of Human Resources section.

The staff members can also access the notifications on the processing of personal data submitted by the Delegated Controller to the Data Protection Officer. The notifications are kept in a file in the DPO's office.

The Data Subjects shall have right of recourse at any time to the European Data Protection Supervisor.

- As from the 2008 evaluation exercise, the following data protection disclaimer will be added to the (Interim) "Career development report form":

Any personal data provided by the Job Holder shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data. It shall be processed solely for the purposes of the performance, management and follow-up of the development of the career of the Job Holder. The Job Holder shall have the right of access to his/her personal data. Should the Job Holder have any queries concerning the processing of his/her personal data, (s)he shall address them to the delegated controller of the data, Head of Human Resources section. The Job Holder shall have right of recourse at any time to the European Data Protection Supervisor.

- A separate Internet page of the DPO was created which informs EMSA staff about the personal data protection policy.

2.6. Rights of the data subjects

As already indicated above, each jobholder receives a copy of his "Career development report form" (CDR).

According to the information provided in the notification, "if the data subject requests the controller orally, by email or by letter to exert his/her rights, the controller will facilitate the applicant the exercise of his rights in relation to the access and acknowledgement of the data. However, the evaluation data in the CDR form cannot be changed".

In addition, in line with Article 26 of the Staff Regulations, the staff members have right of access to all the documents contained in their personal files even after leaving the service.

2.7. Data transfers

The data processed within the career development exercise can be disclosed to the following recipients:

- Head of Unit A;
- Human Resource Officer;
- Career Guidance Officer;
- Hierarchical superiors of the Job Holder evaluated;
- Countersigning Officer;
- Executive Director;
- In case of appeal, the members of the Joint Evaluation Committee and the secretary.

2.8. Security measures

[...]

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The evaluation of the staff members constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a Community body in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation)². The processing of the data contained in the respective "Career development report form" is manual, but the data form part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". 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 ability, efficiency and conduct*". The evaluation of the staff members clearly represents such a processing operation and is therefore subject to prior checking by the EDPS.

Ex-post prior checking: Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should have been given prior to the start of the processing operation. In this case however the processing operation has already been established. This is not a serious problem here in that any recommendations made by the EDPS may still be adopted accordingly.

Deadlines: The notification of the DPO was received on 17 September 2007. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two

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Cf. Regulation (CE) n°1406/2002 establishing a European Maritime Safety Agency, amended by the Regulations (CE) n° 1644/2003 and 724/2004, in particular Article 6.

months. The procedure was suspended for a total of 27 days. Consequently, the present opinion must be delivered no later than 17 December 2007 (15 December being Saturday).

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 or in the legitimate exercise of official authority vested in the Community institutions or body"*.

In addition, in line with recital 27 of the Regulation *"processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*.

The legal base for the processing in question can be found in Article 43 of the Staff Regulations of Officials and Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants, as implemented in the Decision of the Administrative Board of the EMSA of 24 November 2006.

The evaluation procedures that imply collection and processing of personal data concerning the officials and other statutory agents fall within the scope of the legitimate exercise of public authority vested in the EMSA. The legal basis quoted above confirms the lawfulness of the processing in question.

3.3. Processing of special categories of data

As stated previously, in the present case, the jobholder shall provide information about his or her participation in "other activities" (*"describe your contribution to other activities which went beyond your own work plan"*). This information can reveal the trade-union membership of the staff member concerned.

Under Article 10 of the Regulation, the processing of personal data revealing trade-union membership is prohibited, unless grounds can be found in the second paragraph of this Article.

In the present case, the exception laid down in Article 10 (2) (a) of the Regulation is applicable, according to which the prohibition to process trade-union related data can be lifted in case *"the data subject has given his or her express consent to the processing"*. The EDPS considers that the processing of the trade-union related data is justified.

3.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"*.

As stated previously in point 2.3, the following data categories are being processed within the framework of the evaluation exercise at the EMSA:

- administrative data
- job related data
- evaluation related data

A part of these data can be considered as complying with the data quality related requirements outlined above since they are of administrative nature and necessary for the evaluation of the statutory personnel.

However, the processing in question concerns certain data collected from the staff member as previous reporting officer(s)'s details. The EDPS recommends reconsidering the need to collect these data, since they are not necessary in the context of the purpose of the processing.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". As indicated in point 2, data processed within the evaluation exercise are provided in principle by persons other than the data subject, except the jobholder's self-assessment and comments. In this respect, it is important that the data subjects can make use of their rights of access and rectification to ensure the accuracy of their personal data processed (cf. point 3.9).

In addition, the evaluation carried out by the reporting officer and the countersigning officer is subjective by nature. It is therefore difficult to assess the accuracy of such data. In any case, the invitation to make use of the rights of appeal allows ensuring that the data are accurate and up to date (cf. point 3.9).

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.10)

3.5. Data retention

Article 4 (1)(e) of 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*".

As indicated above, the "Career development reports" are kept in the personal file of the respective employee and no exact time-limits for the storage of the personal files have been established so far³. EMSA is aware of the need to establish a storage period consisting of a certain time after the termination of the service.

The EDPS recommends the establishment of a reasonable time frame for the storage of documents kept in the personal files. The results of the Working Party on Time Limits and Blocking could give an indication in this regard. In similar cases, the EDPS has considered a data retention period of ten years as of the termination of employment or the last pension payment as reasonable⁴.

³ It should be noted that EMSA was established in 2003 and that the evaluation procedure in the current form started in 2007.

⁴ Cf. the following opinions concerning evaluation of statutory personnel: EDPS **2007-406** of 3 August 2007 (European Ombudsman), EDPS **2006-297** of 19 October 2006 (ECOSOC), EDPS **2005-218** of 15 December 2005 (Commission), EDPS **2004-293** of 28 July 2005 (OHIM), EPDS **2004-281** of 4 July 2005 (ECJ)

3.6. Compatible use / Change of purpose

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

According to the information provided in the "data protection disclaimer", to be added to the (Interim) "Career development report form", the data collected during the evaluation procedure "*shall be processed solely for the purposes of the performance, management and follow-up of the development of the career of the Job Holder*". As clarified by the controller, in practise this means follow-up of individual training plans, subsequent career development review, promotion/reclassification exercise and renewal of temporary agent or contract agent contract.

The processing does not involve any general change of purpose. Therefore, Article 6 (1) of the Regulation is not applicable in this case and the conditions set out in Article 4 (1) (b) of the Regulation are complied with.

3.7. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other Community institutions or bodies "*if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient*" (paragraph 1). The recipient can process the data "*only for the purposes for which they were transmitted*" (paragraph 3).

As mentioned above, the data are transferred to the hierarchical superiors of the staff member concerned, as well as to certain members of the Human Resources Unit (Head of the Human Resources Unit, Human Resources Officer section and the Career Guidance Officer). In case of appeal the members of the Joint Evaluation Committee and the secretary can also have access to data.

In addition, in case of disputes, the personal file containing the evaluation reports may be transferred to the Civil Service Tribunal. The data contained in the evaluation report can also be subjected to an internal audit. Finally, the data can be transferred to the EDPS and to the European Ombudsman.

These transfers have a legitimate purpose because they are necessary for the human resources management, disciplinary procedure, judicial proceedings, internal audit or the exercise of supervisory tasks.

In case of an inter-institutional transfer of the staff member concerned, his evaluation reports stored in the personal files are transmitted to the respective institution. This transfer is necessary for the legitimate performance of tasks covered by the competence of the receiving institution.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. Therefore, Article 7 (1) of the Regulation is being complied with.

In order to ensure the full compliance with Article 7 (3) of the Regulation, the EDPS recommends that all EMSA internal recipients are reminded of their obligation not to use the data received for any further purposes than the one for which they were transmitted.

3.8. Processing including the personnel or identifying number

Article 10 (6) of the Regulation provides that "*the European Data Protection Supervisor determines the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body*".

The "Career development report" contains the personal number of the staff member concerned. The EDPS considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates the follow-up in an appropriate way. There is no reason to determine any further conditions in this case.

3.9. Right of access and rectification

Right of access: Article 13 of Regulation 45/2001 provides a right of access to personal data being processed.

As indicated above, each staff member receives a copy of her/his completed "Career development report" and, upon a request, can obtain access to his personal file even after leaving the service.

In addition, pursuant to Article 43 (3) of the Staff Regulations the "Career development report form" shall be communicated to the person concerned who shall be entitled to make any comments thereon he considers relevant.

Finally, in terms of Article 26 of the Staff Regulations, the officials have a right of access to all documents contained in their personal files even after leaving the service.

Right of rectification: Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

As already mentioned above, staff members are being asked to add their comments directly on the "Career development report" so that these comments are clearly visible to the recipients of the report.

In addition, they can address a rectification request to the delegated data controller seeking the modification of *factual* data contained in the "Career development report". The evaluation data in the CDR cannot be changed in that way.

Moreover, in order to rectify the *evaluation* data, the staff member in question can refuse the evaluation report and have the matter automatically referred to the Joint Evaluation Committee (JEC). However, the reporting officer and the countersigning officer can depart from the recommendations set out in the opinion of the JEC if providing reasons for that decision. In any case, the jobholder can make written comments on the evaluation report.

The EDPS is of the opinion that in the context of the EMSA staff evaluation procedure, the concerned agent is able to correct his factual data, as well as to add comments related to his (by nature subjective) evaluation data provided by his hierarchical superior in an appropriate

way. In view of the above, the EDPS considers that Articles 13 and 14 of the Regulation are fully complied with.

3.10. Information to the person concerned

Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data processed have not been obtained from the person concerned (unless he or she already is in possession of such information).

According to the information provided, as from the 2008 evaluation exercise, the "data protection disclaimer" will be added to the "Career development report form" providing information about the identity of the controller, the purpose of the processing, the existence of the rights of access and rectification and the right to address the EDPS (cf. point 2.5).

In view of the above, the EDPS notes that the person concerned will be in possession of certain information outlined in Article 12 of the Regulation. Nevertheless, in order to ensure the transparency and fairness of the processing in question, the EDPS recommends that the following information is added to the data protection disclaimer:

- the exact purpose of the processing (follow-up of individual training plans, subsequent career development review, promotion/reclassification exercise and renewal of temporary agent or contract agent contract);
- the legal basis of the data processing;
- the recipients in case of possible data transfers;
- the time limits for the data storage (once established in line with comments provided in point 3.4).

In addition, the information provided about the rights of access and rectification shall be amended as to provide information on how these rights can be exercised (at least by indicating a functional mailbox).

Finally, the EDPS recommends that the disclaimers on the Intranet page of the Human Resources section and on the Internet page of the DPO should also be modified accordingly.

3.11. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected"*. These security measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

[...]

The EDPS considers that these measures are adequate in the light of Article 22 of Regulation 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations in this opinion are fully taken into account. In particular, EMSA shall:

- set out an appropriate time-limit for the storage of data;
- reconsider the need to collect some data;
- complete the data protection disclaimer.

Done at Brussels, 17 December 2007

Peter HUSTINX
European Data Protection Supervisor