

Opinion on a notification for prior checking received from the Data Protection Officer of the EMCCDA concerning the "*Staff Evaluation/Assessment exercise*"

Brussels, 11 January 2008 (Case 2007-334)

1. Procedure

On 25 May 2007, the European Data Protection Supervisor (EDPS) received a notification for prior-checking within the meaning of Article 27(3) of Regulation 45/2001 on "*Staff evaluation/assessment exercise*" from the Data Protection Officer of the European Monitoring Centre for Drugs and Drug Addiction (EMCCDA).

The EDPS requested further information on 26 June 2007 as well as on 26 July 2007 and the information was provided on 22 November 2007. The draft opinion was sent for comments on 17 December 2007. The DPO's comments were received on 10 January 2008.

2. The facts

The EMCDDA carries out an assessment of staff's probationary periods with recommendation to retain the staff member or not and an annual staff appraisal subsequently to be used as a basis for the annual staff promotion exercise. These processing operations are carried out by the Human Resource Service (HR), a sector within the Administration Unit of the EMCDDA.

Data subjects

The data subjects are permanent, temporary and contractual staff working in the EMCDDA, namely the persons assessed.

Purpose

According to the Guide adopted by the EMCDDA regarding the assessment of probationary staff, the assessment of staff's probationary period has the objective to establish a relevant dialogue on the performance of the duties between a staff member and the assessor. It also provides an objective summary assessment of the staff member's performance and achievements.

In the light of the Guide regarding EMCDDA staff reports, the exercise of the staff's annual appraisal is intended to be

- a human resource management tool;
- a time to stop and think about the career of each staff member, and in particular to draw attention to the most significant features;
- a means for individuals to compare themselves with others (particularly for the purposes of career development);
- a tool for monitoring professional development.

Legal basis

The legal basis of the staff's probationary period assessment is Article 34 of the Staff Regulations of the European Communities (SR) in the case of permanent staff members, Article 14 of the Conditions of Employment of Other Servants of the European Communities (CEOS) in the case of temporary agents and Article 84 of CEOS for contract agents.

In the case of staff appraisal, article 43 of SR and article 15(2) of CEOS are applicable.

Procedure

Within the framework of staff's assessment, (probationary period and annual appraisal) the following terms need to be defined so that the procedure of the processing operations can be better understood:

The person assessed is the established EMCDDA staff member (official, temporary agent or contractual agent) who is being assessed.

The assessor is a senior manager, i.e Head of unit. He/she is the established EMCDDA staff member responsible for undertaking the assessment and to whom the person assessed is assigned at the time of the reports exercise.

The Director is the appointing authority and is responsible for assessing staff directly attached to him/her and heads of units. The assessor makes a recommendation to the Director who takes the final decision regarding confirmation of appointment or termination of contract of staff whose work has not proved adequate to justify retention in the post.

The appeal assessor is the established EMCDDA staff member designated by the Appointing Authority/authority authorised to conclude contracts of employment (AHCC) to carry out appeal assessment.

A/ Staff's probationary period assessment

One month after the entry into service, the HR service, which is composed of 5 staff members sends the probationary report form to the assessor (i.e. Head of unit) with a copy to the person assessed (probationer). The '*Guide to the assessment of probationary staff*' is available on the EMCDDA intranet under the heading HR Portal – Rules and regulations.

The assessor shall either immediately appoint a supervisor and give him/her the probationary report form and a copy of the probationer's job description or simply carry on the procedures himself/herself.

The data collected for the probationary report cover the following elements:

- personal details (surname, forenames, personal number, date of birth, start and end of probationary period, grading and job title);
- work accomplished during the probationary period;
- aptitude of duties, performance and conduct/behaviour indicating "very good, good, unsatisfactory and comments";
- principal languages used at work;
- summary appraisal
- probationer's strengths, limitations, areas for improvement;
- recommendation whether the employee's contract should be confirmed, whether the probationary period should be extended in the same or in a different unit/service and

whether the person assessed should be discharged at the end or before the probationary period;

- date, forename and surname of the Head of unit,
- probationer's comments, agreement or refusal, date, forename and surname of the person assessed and
- decision of the Director to follow or not the assessor's recommendation.

The probationary report form, copy attached, must be sent back duly filled in to HR at the very latest one month and a half before the end of the probationary period. The assessor must show and discuss the report with the probationer, after which the probationer has the right to make written comments. The probationary report must be signed by the assessor or by the supervisor (if one is appointed) and by the probationer.

The probationer shall not be presented with either a positive or negative report which is a *fait accompli*. Hence,

- a) The assessor or supervisor could give the probationer the draft written probationary report prior to their meeting and have a short discussion with a fuller discussion being held a day or so later. Any matters referred to should be supported by factual examples of work performed during the probationary period.
- b) Should the probationer wish to make a written response following the discussion, a reasonable time period should be allowed for its preparation. When the written response has been received, the supervisor or assessor can reply in writing or discuss the comments with the probationer.

The assessor makes a recommendation in the final report to the Director who takes the decision subject to the provisions of the SR. The Head of the HR addresses a letter to the data subject informing him/her of the outcome of the probationary period.

B/ Staff's annual appraisal

Stages of the procedure:

a) Prior consultation where required

If the staff member being assessed is or has been assigned to any other unit(s) during the reference period, the assessor will establish the nature of the duties performed there.

In particular, in drawing up the report, the assessor will consult, where appropriate

- the immediate superior of the person assessed and
- the immediate superiors in the other units to which the person assessed has been assigned during the reference period.

b) Dialogue

The objectives of the dialogue between the assessor and the person assessed should include:

- reviewing the staff member's work and duties during the reference period (including any performed in other departments) and any problems that may have been encountered;
- assessing the staff member's strengths and identifying any areas where there is a need for improvement;
- identifying problems and looking for solutions;
- considering the particular wishes of the person assessed and all aspects of professional development.

c) Assessment report

The appraisal/evaluation report includes the following information:

i) Personal and professional information of the assessor and of the person assessed

The data collected are the following: surname, first name, staff number, status, category, grade and current job title of the assessor and the person assessed. This information will be checked by both of them as part of the dialogue.

ii) Duties of post currently held

The data collected are related to the current job profile of the person assessed and the information contained in the relevant job description will represent the reference point for this. Other information which is required concerns the career of the person assessed at the EMCDDA (programme/service, period of assignment, status, category and grade) and the results of the previous appraisal/evaluation exercises (awarded points and year).

iii) Planned objectives for the period

Information must be completed by the assessor and the person assessed regarding the objectives set in relation to the EMCDDA work programme and if necessary the objectives relating to different assignments/jobs.

iv) Self-assessment

This section will show the achievements of/main results obtained by the person assessed during the reference period. The person assessed will have the option to comment on his/her working environment and which aspects of the career/competences he/she would like to develop further.

v) Analytical assessment

This section will describe and assess the efficiency (performance), the abilities (essential and management competencies) and the conduct of the person assessed in the service during the reference period. It is concerned with identifying and highlighting the most significant features.

vi) Overall assessment

On the basis of the elements of the analytical assessment the assessor should present his/her general assessment indicating any training and development needs.

vii) Potential/outlook

The assessor will evaluate and indicate, where appropriate, the potential of the person assessed to develop his/her duties and responsibilities, also referring to any wishes expressed by the person assessed in this regard.

viii) Training/development plan

Following the dialogue between the assessor and the person assessed, this plan will indicate the training needs of the person assessed and the actions proposed in response.

d) Carryover of staff reports

By agreement between the assessor and the person assessed, the staff report can be carried forward on the basis of a written statement signed by the assessor and the person assessed.

e) Finalisation of staff reports

Except in the event of carryover, the person assessed has five working days following receipt of the report, signed by the assessor, to

- sign and indicate acceptance without comment, or
- sign and indicate acceptance with comments in the section reserved for this purpose, or
- sign and indicate rejection, providing reasons for this rejection and requesting appeal assessment in the section reserved for this purpose.

If accepted by the person assessed, the report will be finalised and considered adopted. If the person assessed does not respond within the above deadline, the report is to be considered accepted. Finalised reports are immediately forwarded to the human resources department.

Any rejection of the report by the person assessed and request for appeal assessment is to be referred to the EMCDDA Appointing Authority/AHCC. The person assessed will immediately inform the Appointing Authority/AHCC of this situation and the Appointing Authority/AHCC will designate the appeal assessor within three working days following signature of the report by the person assessed.

Within five working days of being designated, the appeal assessor will confirm the report or amend it, after having heard, where appropriate, the person assessed and the assessor, as well as any other person as he/she thinks fit. The report will then be finalised. It will be immediately forwarded to the human resources department and the person assessed, the assessor and the Appointing Authority/AHCC will be informed.

Processing operation and data storage

The processing operation is manual. The empty forms which are relevant to the probationary period and the staff appraisal are in Word document, they are printed out and they are sent out at the beginning of the procedure through a general e-mail. The appraisal/end of the probationary period reports are then stored in a sealed envelop in the personal file of the staff member concerned. A copy of the letter sent to the data subject from the Head of the HR about the outcome of the probationary is kept in the personal file of the staff member. No other relevant document is stored.

Recipients

In the case of the processing operation regarding the staff's probationary period assessment, the following recipients are involved:

- ❖ the assessor, who is the head of unit. He/she will receive the form already filled in (section related to personal data only) by the HR;
- ❖ the supervisor, who might be appointed by the assessor and give him/her the probationary report form and a copy of the probationer's job description;
- ❖ the Director who receives the recommendation of the assessor in his/her the final report. The Director takes the decision subject to the provisions of the SR;
- ❖ the human resources officer in charge. The HR person responsible for the management of the processes has full access to the whole assessment. He/she is the responsible person to follow up the procedure to inform the concerned staff member of the output of the assessment and make any other relevant administrative arrangement.

In the case of the staff's annual appraisal, the recipients are

- ❖ the assessor,
- ❖ the immediate superior of the person assessed will be consulted by the assessor,
- ❖ the appeal assessor who will be appointed by the Appointing Authority/AHCC,
- ❖ the human resources officer in charge and the
- ❖ other EU institutions and bodies in case of inter-institutional transfer of officials, in accordance with article 29 of the Staff Regulations.

Right of access and rectification

Requests for access, rectification, blockage or erasure may be introduced in any written way such as e-mail, memo, note, etc. Access to the personal file is granted in the light of Article 26 of the SR upon request of the staff member concerned at any moment and without any rigorous formality. The data subject can consult his/her personal file at the offices of the administration under supervision of one of the HR members within the available periods according to the procedure. The requests for rectification and erasure of data take place without delay upon acceptance of the request.

Right of information

According to the notification and the relevant documents attached, there is no specific information on this aspect.

Retention policy

Both the probationary report and the annual appraisal report are conserved in a sealed envelope in the personal file of the data subject, until he/she has exhausted all possible legal remedies, in accordance with article 26 of the SR. The data are kept in the file for life.

Security measures

The files of the data subjects are all locked in a cupboard in one of the offices of the HR management sector. The EMCDDA is analysing the possibility to purchase a safe with a combination and a key to be installed in the new premises; it is foreseen by the beginning of 2008. Moreover, EMCDDA management board has adopted in July 2007 a security rulebook entitled "*EMCDDA provisions on security - principles and minimum standards of security for management of classified information*". It defines staff members' obligations for discretion and respect of confidentiality and in cases of breach of confidentiality disciplinary actions are foreseen.

3. Legal aspects

3.1. Prior checking

Regulation 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1) of the Regulation). The procedure for staff evaluation/assessment clearly involves the processing of personal data. It is carried out by a Community agency (EMCDDA) in the exercise of activities which fall within the scope of Community law.

The Regulation applies to the processing of personal data wholly or partly by automatic means, and to the processing of personal data 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 the present case, the empty forms which are relevant to the probationary period and the staff appraisal are in Word document, they are printed out and they are sent out at the beginning of the procedure through a general e-mail so that the evaluation can take place. The processing of the evaluation reports is manual, but the processed data are intended to form part of a filing system. Article 3(2) of the Regulation therefore applies.

In the light of Article 27(1) of the Regulation 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 shall be subject to prior checking by the EDPS". Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) in particular qualifies as subject to prior checking by the EDPS "*processing operations intended to evaluate personal aspects relating to the data subject including his or her ability, efficiency and conduct*". The procedures under examination are intended to evaluate the persons assessed at the end of their probationary period and once a year. The personal data which are processed for that purpose are related to the abilities, the efficiency and the conduct of the staff member. Therefore there is an appraisal of the ability and skills of the persons assessed which justifies the submission of the procedure to prior checking by the EDPS.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to processing of personal data. In this case although the procedure has already been established, any recommendations made by the EDPS should still be adopted accordingly in future exercises.

The notification was received on 25 May 2007. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The two months period was suspended for 118 days for requesting further information, plus the month of August and for 24 days to allow comments from the DPO, altogether for 173 days. Thus the present opinion must be delivered no later than 15 January 2008.

3.2. Lawfulness of the processing

Article 5(a) of Regulation 45/2001 provides that "*the 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 other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution*". In the present case, the HR service of EMCDDA carries out a task in the public interest on the basis of the relevant provisions of the SR.

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*". Indeed, the staff's evaluation/assessment is necessary for the management and good functioning of the agency.

The lawfulness of the processing operation is therefore justified.

The legal base for the probationary period assessment can be found in Article 34 of the SR and Articles 14 and 84 of CEOS. The legal basis of the staff annual appraisal can be found in Article 43 of the SR and Article 15(2) of CEOS.

It follows that the legal basis is clear and it supports the lawfulness of the processing operation.

3.3. Data quality

According to Article 4(1)(c) of the Regulation, data must be "*adequate, relevant and not excessive*". The data required are collected by means of specific forms. The processed data as described at the beginning of this opinion concern administrative data, job related data (current functions and tasks) and evaluation related data (skills, abilities, performance, conduct) and they are all necessary for the evaluation of the staff members. The EDPS

considers that these data are adequate and not excessive in the light of Article 4 of the Regulation.

The data must also be processed "*fairly and lawfully*" (Article 4(1)(a) of Regulation No 45/2001). The lawfulness of the processing has already been discussed (see point 2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.9 below on this point.

According to Article 4(1)(d) of the Regulation, "*data must be accurate and, where necessary, kept up to date*" and "*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*". Taking into consideration that the data subject fills in part of the form himself/herself directly, the probationary period assessment takes place six or nine months after the data subject is recruited and the staff appraisal takes place once a year, these elements contribute to keeping the data accurate and up to date. It is evident that the evaluation carried out by the assessors is subjective by nature and it is therefore difficult to assess the accuracy of such data. In any case the fact that the rights of access and rectification are granted at any moment and the right to appeal is foreseen in the case of staff's annual appraisal, these elements ensure accuracy of the data processed (see more about the right of access and rectification, point 3.8).

3.4. Conservation of data

Article 4(1)(e) of Regulation 45/2001 outlines the principle that "*personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed*".

The EMCDDA keeps the probationary report as well as the annual appraisal report in a sealed envelope in the personal file of the data subject, until he/she has exhausted all possible legal remedies, in accordance with Article 26 of the SR. The data are kept for life in the personal file.

Indeed, Article 26 of the SR is applicable, in particular: "*an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them*". Data are thus stored for a long period which is necessary from the date on which the staff member or his legal successors are entitled to claim pension rights or the date of the last pension payment. However, keeping data for life is excessive to the purpose for which they are collected. Therefore the EDPS underlines the need to establish a time-limit for the conservation of the data. In the light of other similar cases¹, the EDPS recommends that it is reasonable to set the data storage period at 10 years, starting from the time when the staff member leaves or from the last pension payment.

Long-term retention of data in the personal file of the data subject must be accompanied by appropriate safeguards. The data stored are personal. The fact that they are archived for long-term storage does not divest them of their personal nature. For that reason, even data stored over a long period must be covered by adequate measures for transmission and storage, like any other personal data.

¹ EDPS Opinion of the 3 August 2007 ("Staff Assessment by the Ombudsman"), case 2007-406, Opinion of the 25 October 2007 ("*certification procedure by the Ombudsman*"), case 2007-414, EDPS Opinion of the 15 December 2005, ("*SYSPER2: evaluation*" - Commission), case 2005-218.

3.5. Compatible use/Change of purpose

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

As stated previously, the purpose of the processing in question is the evaluation of the staff. 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 of Article 4 (1) (b) of the Regulation are complied with.

3.6. Transfer of data

The processing operation should also be examined in the light of Article 7(1) of the Regulation 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

As it has already been mentioned, the data are transferred within the EMCDDA, more specifically to the assessors, the supervisor(s) of the persons assessed, the appeal assessors, the Director of the agency and the HR service of the agency.

In case of an inter-institutional transfer of the staff member concerned, his/her evaluation reports stored in his/her personal file are transferred to the institution concerned. In case of dispute, the evaluation reports may be transferred to the Civil Service Tribunal. In addition, the data contained in the evaluation report may be subjected to an internal audit. Finally, the data can be transferred to the EDPS on the basis of Article 33 and 47(2)(a) of Regulation 45/2001 or to the European Ombudsman also in the context of a complaint.

All the above transfers either within the EMCDDA or to other institutions or bodies 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. Article 7(1) is therefore complied with.

In Article 7(3) of the Regulation, it is also stated that *"the recipient shall process the personal data only for the purposes for which they are transmitted"*. The EDPS recommends that the EMCDDA informs all potential internal recipients that they should process the data they receive only for the purposes for which they are transmitted in the light of Article 7(3).

3.7. 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 personal number is collected and processed within the framework of the evaluation reports. In itself, the use of an identifier is simply a means – in this case, a legitimate means – of assisting the work of the controller, although it can have important consequences. This is why the European legislator regulated the use of identifying numbers in Article 10(6), which provides for the intervention of the EDPS. In the present case, the agency's use of an identifying number is reasonable, because it is done for the purposes of identifying the person concerned and facilitates the follow-up of the processing operation. There is no reason to set

other conditions in this case.

3.8. Rights of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. In addition, Article 43 of the Staff Regulations states that *"the evaluation report shall be communicated to the official who shall be entitled to make any comments thereon which he considers relevant"*. Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

According to the facts, the data subject may consult his/her evaluation data at any moment within the available periods according to the procedure, may submit requests for rectification, blocking and erasure in any written way, may provide comments and may exercise the right of appeal. These constitute appropriate guarantees of compliance with Article 13 and 14 of the Regulation and the EDPS is satisfied that the rights of access and rectification are respected.

3.9. Information to be given to the data subject

Articles 11 and 12 of the Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

In this case, Article 11 (*Information to be supplied where the data have been obtained from the data subject*) applies where data have been provided directly by the data subjects themselves. For example in the case of the probationary period assessment, the probationer may provide comments on the assessor's report. In the case of the staff's annual appraisal, the data subject must fill in himself the information regarding the objectives set, his/her achievements and his/her acceptance or not with or without comments of the assessor's report.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) applies in this case as well, since information is collected from different participants such as the HR, the assessors, the data subject's supervisor, the agency's Director and the appeal assessor.

According to the notification, no information concerning Articles 11 and 12 of the Regulation is available within the framework of the processing operation.

The EDPS therefore recommends that a note should be prepared referring clearly to all elements provided in Articles 11 and 12 of the Regulation. The EMCDDA should also ensure that the data subjects are informed of this note before the exercises of the probationary period assessment and of the staff's annual appraisal begin.

3.10. Security

According to Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"*.

The EDPS is satisfied that the evaluation reports are kept in sealed envelopes in the personal files which are locked in a cupboard in the offices of the HR management sector. The adoption of the security rulebook is also a positive initiative since it outlines minimum standards of security and confidentiality.

In the light of all these measures, the EDPS considers that they can be considered as appropriate within the meaning of Article 22 of the Regulation 45/2001.

Conclusion

There is no reason to believe that there is any breach of the provisions of the Regulation 45/2001, provided that the above considerations are fully taken into account: In particular, the EMCDDA should:

- set the data storage period at 10 years, starting from the time when the staff member leaves or from the last pension payment;
- adopt adequate measures for storage of all data kept in the personal file of the data subject for a long period;
- inform all potential internal recipients that they should process the data only for the purposes for which they are transmitted;
- prepare a note referring clearly to all elements provided in Articles 11 and 12 of the Regulation and make sure that the data subjects are informed of this note before the exercises of the probationary period assessment and of the staff's annual appraisal begin.

Done at Brussels, 11 January 2008

Peter HUSTINX
European Data Protection Supervisor