

Opinion on a notification for Prior Checking received from the Data Protection Officer of the Community Plant Variety Office (CPVO) on the annual appraisal procedure

Brussels, 14 April 2008 (Case 2007-403)

1. Proceedings

On 19 June 2007, the European Data Protection Supervisor (EDPS) received a notification for prior checking by regular mail from the Data Protection Officer at the CPVO relating to the annual appraisal procedure for staff. Three other documents were enclosed:

- Decision of the President of the Community Plant Variety Office on general provisions for implementing Article 43 of the Staff Regulations;
- A copy of the Career development report; and
- A copy of the CPVO Appraisals Guide.

The EDPS requested further information on 20 June 2007. Due to a long unforeseen leave of the DPO, this information was delayed and provided only on 24 January 2008.

The draft opinion was sent for comments on 17 March 2008 and these were received on 4 April 2008.

2. Examination of the matter

2.1. The facts

2.1.1. Description of the processing activity

In accordance with Article 43 of Staff Regulations (SR) the ability, efficiency and conduct in service of each official shall be the subject of a periodic report. The CPVO proposes to conduct an appraisal exercise every calendar year for each CPVO staff member concerned, the "jobholder".

i) The Human Resources department completes section 1 of the report and sends it to the reporting officer who requests the jobholder to complete sections 2, 3, and 4. The President is the reporting officer for his secretary and the Heads of Unit. The Vice-President is the reporting officer for the staff members directly reporting to him. Each Head of Unit is the reporting officer for all staff in his/her unit. Work objectives are set every year for the following year and are evaluated only in the following year. Work objectives can be set several years in a row. In this case, they will be evaluated several years in a row as well.

ii) Once completed by the jobholder, the report is sent to the reporting officer who sets a date for a formal dialogue. Both the jobholder and the reporting officer meet for a formal dialogue which covers the future development plan in sections 5, 6 and 7. After the formal dialogue has been held, the reporting officer draws up a draft career development report. This report

includes appraisals of efficiency, abilities and conduct in the service, consistent with the indications given during the formal dialogue (sections 8, 9, 10 and 12). In section 9 candidates are marked on their intellectual skills, specialist skills, management skills, standard of work, approach to work, communication skills and language skills. Candidates can be marked in each of these areas separately and receive an overall assessment as "outstanding", "performance significantly above requirements", "performance fully effective in all respects", "performance sufficient for the needs of the job", "improvements to performance required in some respects" or "unsatisfactory". The report is distributed to the contributors electronically.

iii) The draft report is transmitted to the countersigning officer who finalises the career development report with the reporting officer and transmits the final version to the jobholder.

iv) The jobholder is allowed up to 5 working days to accept the appraisal without adding any comment, accept it after adding some comments in sections 14 or refuse to accept it, stating in the reasons for request. If the jobholder accepts the career development report, the report is considered as being final. If the jobholder fails to react within the time limit, he shall be deemed to have accepted the career development report. The jobholder can ask for a time extension in duly justified cases.

v) If the jobholder refuses to accept the career development report, additional time is given for further dialogue with the Vice-President and possibly the reporting officer. If no solution is found, the matter will be referred to the Joint Evaluation Committee "JEC". The JEC has 10 working days to deliver an opinion. The report shall then be final.

vi) The President signs the report when the procedure is over. Once the report is final it cannot be modified.

vii) The jobholder is notified that the appraisal has been finalised and receives a copy of the final report. The original is kept in his/her personal file in the HR department. The report is also kept in electronic format in the reporting officer's and jobholder's computers.

Data are not transferred to anyone outside the CPVO except the jobholder moves to another European institution or agency, lodge a complaint with the European Ombudsman or the EDPS, or appeals to the European Civil Service Tribunal.

2.1.2. Purpose of the processing activity

The appraisal exercise is aimed at evaluating the jobholder's efficiency, abilities and conduct in service, identify training needs and is used as a career development tool.

2.1.3. Controller

The Director of Human Resource Services has the responsibility as controller of the processing operations.

2.1.4. Data subjects

All members of the CPVO staff (officials and temporary agents) who worked for a continuous period of at least three months during the reporting period are subject to the annual appraisal procedure, excluding staff members who were in their probationary period during the evaluated year. In the case of members of staff who:

- will retire in the year following the reporting period,
- are the subject of a CPVO decision leading to termination of service,
- have been granted an invalidity pension, or

- have either left the service of the Community Institutions permanently during the reporting period or will do so in the year following the reporting period, report need to be drawn up only if they submit an express request to that effect.

The evaluation by the appraisal exercise does not apply to either the President or the Vice President of the CPVO.

2.1.5. Categories of Personal Data

Personal data are collected on the career development report under the following 15 sections:

1. Personal information (name, grade and personnel number of the jobholder);
2. Job description;
3. Work objectives and personal development during the reporting period;
4. Attestation and certification procedure;
5. Forward job and development plan - job to be done;
6. Forward job and development plan - work objectives;
7. Personal development and training needs;
8. Assessment of performance;
9. Aspects of performance (comments, mark achieved and overall assessment);
10. Suitability for attestation or certification procedure;
11. Comments of countersigning officer;
12. Management action needed;
13. Signature of reporting officer;
14. Jobholder's comments;
15. Signature of the President of CVPO.

2.1.6. Information given to the data subjects

All CPVO staff members concerned receive a copy of the "CPVO appraisal guide" before the appraisal exercise starts. The "CVPO appraisal guide" includes information on:

- the identity of the controller;
- the purpose for which personal data are collected;
- the sources of the data;
- the recipients of the data, that is the reporting officer and the countersigning officer (Vice President);
- the legal basis of the processing operation,
- that participation in the appraisal process is mandatory;
- that the final version of the appraisal report will be held on the jobholder's personal file;
- details of the report's content, the data collected and the marking scheme.

The "CPVO appraisal guide" does not include information on the right of the data subject (right to rectify, to erase, to block, to object), on the right of recourse to the EDPS, and on time limits, data retention.

Once signed the draft Decision of the President of the CPVO on general provisions for implementing Article 43 of the SR will be added to the "Vademecum of the CPVO procedures". This Vademecum is available to all staff on the CPVO intranet.

2.1.7. Rights of the data subjects

Upon request, the jobholder may always have access to his/her personal file and receive a copy of the appraisal report. Once finalised and signed, the final report cannot be modified.

2.1.8. Recipients to whom the data may be disclosed

The data may be disclosed to the jobholder subject of the appraisal report, the reporting officer and the counter signing officer, as well as the President, the Vice-President and the HR Officer.

2.1.9. Retention policy

The draft “Decision of the President on general provisions for implementing Article 43 of the SR” states under item 18 of Article 5 that “President shall adopt rules on retention of evaluation reports. CPVO has not yet issued these rules.

2.1.10. Security measures

[...]

3. Legal aspects

3.1. Prior checking

3.1.1. Applicability of the Regulation

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 (“the Regulation”) applies to the processing of personal data by Community institutions and bodies.

a) Data being processed qualify as personal data

According to Article 2(a) of the Regulation 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 CPVO annual appraisal procedure processes data on the ability, efficiency and conduct in service of each official. The data therefore qualify as personal data according to Article 2(a) of the Regulation.

b) Personal data are being processed by a Community institution or body

According to Article 3(1), the *“Regulation shall apply to processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of the activities all or part of which fall within the scope of the Community law”*.

The CPVO is a decentralised Community agency which has its own legal status. It has been established by the Community legislation relating to the protection of plant variety rights.

c) Personal data are being processed by automatic or other than automatic means

According to Article 3(2), the *“Regulation 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 partially electronically, as the report is distributed to the contributors, and is intended to form part of the personal file in a structured paper filing system.

Having regard to the above, the Regulation applies.

3.1.2. *Grounds for prior checking*

Article 27(1) of the Regulation 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 CPVO annual appraisal scheme evaluates the ability, efficiency and conduct of each member of staff and thus has to be prior checked.

3.1.3. *"Ex post" prior-check*

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 of the DPO was received on 14 June 2007. According to Article 27(4) of the Regulation the present opinion must be delivered within a period of two months. However, the deadline has been suspended for 205 days, plus the month of August, so the opinion must be delivered no later than 14 April 2008 (12 April being Saturday).

3.2. Lawfulness of the processing

Article 5(a) of the Regulation provides that personal data may be processed if *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties ... or other legal instrument adopted on the basis thereof"*.

The first issue under Article 5(a) is to determine whether there is a specific legal basis for the processing: a Treaty provision or another legal instrument adopted on the basis of the Treaties. The second issue is to determine whether the processing operation is necessary for the performance of a task carried out in the public interest. To address this second issue in the present case, Recital 27 of the Regulation needs to be taken into account, which specifies that *"processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies"*. Thus, the second issue in the present case is whether the processing is necessary and proportionate for the management and functioning of CPVO.

With regard to the first issue, Article 43 of the Staff Regulations (SR) places a duty on Community institutions and bodies to ensure that the ability, efficiency and conduct of each staff member is subject of a periodical report at least once every two years. The *"Decision of the President of the Community Plant Variety Office on general provisions for implementing Article 43 of the Staff Regulation"* implements the requirements of Article 43 of the SR into the CPVO. Thus, specific legal instruments adopted on the basis of the Treaties allow and provide the detailed conditions for the notified processing operations. With regard to the second issue, the EDPS is also satisfied and does not challenge that the notified processing operation is necessary and *in abstracto* proportionate for the management and functioning of CPVO.

The EDPS is satisfied that the processing of personal data in the CPVO annual appraisal report is legitimate as it is necessary for performance of a task carried out in the public interest on the basis of Regulation 43 of the Staff Regulations and the CPVO implementing decision and is therefore legitimate under Article 5(a) of the Regulation.

3.3. Data Quality

Fairness and lawfulness. Article 4(1)(a) of the Regulation requires that “*data must be processed fairly and lawfully*”. The issue of lawfulness was analysed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 3.8 below).

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*”.

Based on the information provided to him, the EDPS does not challenge the adequacy, relevance and proportionality of the data collected during the appraisal procedures. With that said, the EDPS emphasizes that compliance with these three principles always requires an analysis *in concreto* on a case by case basis.

Accuracy. According to Article (4)(1)(d) of the Regulation “*personal data must be ...accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*”. As a quality assurance in the process, jobholders complete the first section themselves and have the possibility to provide comments on the completed report before it is finalised. They also have the opportunity to challenge the content of the report both informally with the countersigning officer and formally through the JEC. In effect, by consulting the jobholder at the beginning, during and at the end of the annual appraisal procedure, there is a built in quality control of accuracy. Based on the information provided to him, the EDPS finds the system appropriate to guarantee as much as possible the accuracy of the data collected during the appraisal procedures.

3.4. Data retention

Article 4(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*”.

The EDPS is concerned that CPVO has not yet adopted rules on retention of evaluation reports, and recommends to adopt these rules.

3.5. Compatible use/Change of purpose

Article 4(1)(b) of the Regulation provides that “*personal data must be collected for specified, explicit and lawful purposes and not further processed in a way incompatible with those purposes*”. The CPVO annual appraisal procedure collects data from personal files and keeps them there as well after each exercise.

The EDPS is satisfied that this is compatible with the purpose of the processing of personal data as part of the CPVO annual appraisal procedure and is therefore in accordance with Article 4(1)(b).

3.6. Transfer of data

Article 7(1) of the Regulation states *"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."*

The categories of recipients include the jobholder's superior, the countersigning officer, the President of CPVO and, in the case of a dispute over the content of the report, the JEC. The EDPS is satisfied that transfer is limited within CPVO and necessary for the recipients to fulfil their responsibilities as part of the CPVO annual appraisal procedure. Therefore the transfers are in accordance with the provisions of Article 7(1).

The controller should inform the jobholders of the exceptional transfers (see 2.1.1.-vii) and that the recipients shall process the personal data only for the purposes they were transmitted for in accordance with the provision of Article 7 (3).

3.7. Right of access and rectification

Right of access. Article 13 of the Regulation provides for the right of access of the data subject to his or her personal data.

The data subject is provided with a copy of the report before it is finalised. Once finalised, the data subjects can access the report as part of their personal file at any time in accordance with the provisions of Article 26 of the SR.

The EDPS is satisfied that data subjects may exercise their right of access in accordance with the Regulation.

Right of rectification. Article 14 of the Regulation provides for a right of rectification of any inaccurate or incomplete data.

Each member of staff has the opportunity to rectify any inaccuracies in the annual appraisal report once the report has been completed. If a dispute cannot be resolved the matter is referred to the JEC for a decision.

Once the career development report is signed by the President, it can not be modified (see 2.1.1 - vi) in accordance with SR. The EDPS points to the fact that the right of rectification is guaranteed, as it has its own specific way to be exercised within the appraisal procedure.

3.8. Information to the data subject

Article 11 and 12 of the Regulation require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 is applicable to data obtained from the data subject, whereas Article 12 is applicable to cases where the data have not been obtained from the data subject.

During the CPVO annual appraisal procedure data are obtained from the data subject and their superior. Some comments are also provided by the countersigning officer (in this case the Vice President and the President). Articles 11 and 12 will therefore apply to the processing of personal data during the CPVO annual appraisal procedure.

Timing and format of the information. Article 11 provides that when the data are obtained from the data subject, the information must be given at the time of collection. For the case when the data have not been obtained from the data subject, Article 12 provides that the information must be given when the data are first recorded or disclosed, unless the data subject already has it.

The EDPS welcomes CPVO's good practice that staff members receive a copy of the "CPVO appraisal guide" before the time of the collection. The EDPS also welcomes that "Vademecum of the CPVO procedures" added to the Decision of the President of the CPVO on general provisions for implementing Article 43 of the SR, will be available to all staff on CPVO intranet.

Content of the data protection notice. Articles 11 and 12 of the Regulation provide a detailed list of information that needs to be provided to data subjects. In essence, the controller must inform data subjects about who processes what data and for what purposes. The information must also specify the origins and recipients of data, must specify whether replies are obligatory or voluntary and must alert the data subjects to the existence of the right of access and rectification. Further information, including the legal basis of processing, the time limits for storing the data and the right of recourse to the EDPS must also be provided if necessary to guarantee fair processing. This may depend on the circumstances of the case.

The EDPS points out that information in the "CPVO appraisal guide" merely exists in a form in which data subjects may become aware of the essence of the information by way of deduction. The EDPS is concerned that information on the right of the data subject (right to rectify, right to block, right to erase, right to object), the right of recourse to the EDPS, and time limits is not provided to the data subject and recommends that the "CPVO appraisal guide" should be amended.

3.9. Security measures

According to Article 22 of the Regulation, the controller must implement the 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. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The EDPS considers that security measures adopted by the CPVO are adequate in the light of Article 22 of the Regulation.

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the recommendations in this opinion are fully taken into account. This means in particular that CPVO should:

- Adopt rules on retention of evaluation reports;
- Ensure that recipients are made aware that they shall process personal data only for the purposes they were transmitted for;
- Ensure that more specific and accurate information is provided to data subjects regarding the data transfer, right of data subjects, the right of recourse to EDPS and the data retention. The "CPVO appraisal guide" should therefore be amended.

Done at Brussels, 14 April 2008

(signed)

Peter HUSTINX
European Data Protection Supervisor