



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament concerning "Report on Probation Period"

Brussels, 21 January 2009 (Case 2008-0604)

1. Proceedings

On 20 October 2008, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Parliament a notification for prior checking concerning the evaluation of officials, temporary and contract agents during their probation period.

The notification was accompanied by a Note from the DPO concerning a Report on probation periods dated 17 October 2008, a copy of the Vade-mecum provided to new staff, as well as the templates for the "Report on the probationary period".

On 24 October 2008, the EDPS sent a request for additional information to the DPO. Additional information was received on 12 November 2008. The draft opinion was sent to the DPO for comments on 19 December 2008 and these were received on 19 January 2009.

2. Facts

The present case deals with evaluation of officials, temporary and contract agents during the initial period of their employment at the European Parliament, as foreseen in Article 34 of the Staff Regulations (**SR**) and in Articles 14 and 84 of the Conditions of Employment of Other Servants of the European Communities (**CEOS**). The processing operations are carried out under the supervision of the Head of the Staff Management and Careers Unit of DG PERSONNEL, who is the Data Controller.

The *purpose* of the data processing is to assess the performance of newly recruited officials and temporary/contractual agents. In order to fulfil this purpose, a Report on the probationary period is elaborated at the end of this initial period, which serves as a basis for the confirmation or dismissal of the respective official or agent, as well as for the possible extension of the probation period.

The *data processing* is both automated and manual and can be described as follows:

- i. At the latest one month before the end of the probation period, the staff member's superiors are required to complete a Report, which is automatically generated in STREAMLINE, on the performance of the staff member during the probation period.
- ii. The Report is signed by the Director-General concerned (or Secretary-General) with an indication of other persons consulted (who are normally intermediate superiors, i.e. Heads of Units or Directors).

- iii. The report is sent to the probationer, who is asked to counter-sign it and to return it to DG PERSONNEL.
- iv. If there is a possibility of a negative probationary Report, the probationer is given a warning in good time by registered letter. A negative probationary Report is issued when there is a recommendation to extend the probation period or to dismiss the staff member at the end of the period (or exceptionally during the probation period). The probationer may submit written comments within a period of eight days of receipt of the Report.
- v. The procedure for taking the decision differs for officials and for temporary agents:
 - a. With respect to officials, the negative probationary Report is forwarded to the Reports Committee. The proceedings of the Reports Committee are secret. It may interview the probationer and the superior(s) or other persons likely to provide relevant information. The Reports Committee submits its reasoned opinion to the Appointing Authority with a recommendation for further action. The Reports Committee's opinion is communicated to the probationer. If the probationary period is extended, the Reports Committee is consulted again before a final decision is taken. The decision to establish or dismiss the official is taken by the Appointing Authority and is published in accordance with Article 25§3 of the Staff Regulations.
 - b. Concerning temporary agents, the negative probationary Report is forwarded to the Authority authorized to conclude contracts which may decide, exceptionally, to extend the probationary period for a maximum of six months or to dismiss the person with one month's notice. If the probationary period is extended, the performance of the probationer will be assessed again.

The *categories of data processed* include: (i) probationer's details: surname, first name(s), staff number, category and grade, place of employment, department, type of duties; (ii) period of appraisal (beginning and end dates of probationary period) and any break in probationary period if applicable (period of absence and reasons); (iii) reporting officer's details: surname, first name(s); (iv) reporting officer's comments concerning efficiency, competencies and conduct of the jobholder as well as linguistic knowledge; (v) recommendation on the probation evaluation signed and dated by the respective Director-General/Secretary-General.

Regarding the conservation periods, the Reports are kept in the paper based personal file of the respective employee in line with Articles 11 (1) and 81 CEOS¹. The Reports and information concerning the date of establishment or dismissal are stored in STREAMLINE, and kept for as long as the personal file.

The information provided in this notification did not mention a specific time-limit for the storage of personal files at the European Parliament (this was subsequently clarified as ten years after the date on which the last payment of a salary or a pension to the official or to the successor takes place or after the date on which the entitlement to one arises, whichever is later).

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

¹ Article 26 of the Staff Regulations is applicable per analogy.

Individuals are *informed* of the probation period process through the Vade-mecum that is distributed to all the newly recruited staff members when they join the institution. The Vade-mecum describes the procedure for the evaluation, including (i) the probationer's right to provide comments and (ii) the probationer's right to ask for a verbal explanation of the reasons for the negative assessment. The forms used for the evaluation are available on the Intranet. The Vade-mecum also contains a section relating to data protection, which provides the contact details of the Data Protection Officer and links to the European Parliaments' Internet and Intranet URLs where more information on data protection is available.

Regarding the *rights of the data subjects*, Articles 8 to 13 of the European Parliament Bureau Decision of 22 June 2005 implementing the rules set forth in Regulation (EC) 45/2001 provide for the rights of individuals to access, rectify, have data blocked or deleted, and to object to the data processing. The Bureau Decision and the form for exercising these rights are available on the European Parliament's Intranet.

The data processed within the evaluation officials and temporary and contract agents on probation can be *disclosed* to the following recipients: (i) the hierarchical superiors of the probationer including the Director General who must decide on the result of the probationary period; (ii) the members of the Reports Committee; and (iii) the members of the Human Resources unit in the DG of the individual concerned. The procedures within the Reports Committee are secret, and the reasoned opinion delivered by the Reports Committee is only disclosed to the data subject and the Appointing Authority concerned.

The paper documents are kept in files in locked cabinets in the Staff Management Unit. Access to Reports stored in STREAMLINE is protected by access controls and restricted to the data subject, managers in the chain of approval, and certain staff in DG PERSONNEL who have a need to know. To preserve the confidentiality of the opinions of the Reports Committee, access to these opinions is password protected at document level.

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The evaluation of the initial performance of officials, temporary and contract agents 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 this case, the European Parliament, in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation). The processing of the data contained in the respective Probationary Period Reports is both electronic and manual; in the latter case the data form a 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 initial

performance of officials, temporary and contract agents 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 in that any recommendations made by the EDPS may still be adopted accordingly.

Deadlines: The notification of the DPO was received on 20 October 2008. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 50 days. Consequently, the present opinion must be delivered no later than on 9 February 2009.

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"*. The 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"* (recital 27).

The evaluation of the initial performance of officials, temporary and contract agents is a part of the legitimate exercise of official authority vested in the European Parliament. The legal basis provided in Articles 34, 43 and 44 of the Staff Regulations and Articles 14 and 84 CEOS confirms the lawfulness of the processing.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*. The information presented to the EDPS on the data processed during this initial evaluation exercise (as described in point 2) appears to meet those requirements. The processed data are of administrative nature and necessary to evaluate the initial performance of the officials, temporary and contract agents.

Concerning the data field of the probationary Report "Reasons for break in probationary period" which is left open, the EDPS recommends that, in light of Article 10 of the Regulation prohibiting the processing of sensitive data relating to health, only generic types of reasons for the break are mentioned (such as sick leave, maternity leave, etc.). This could be made clear to the reporting officer(s) by indicating in the Report form itself the possible data fields to choose from.

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 above, all data processed within the initial evaluation exercise are provided by persons other than the data subject (apart from the job holder's 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 3.6 in detail).

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 3.7).

3.4. 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, no exact time-limits for the storage of the personal files have been mentioned in the notification. Further to the EDPS request for information, the DPO of the European Parliament clarified that the general data retention period for personal files is ten years after the date on which the last payment of a salary or a pension (to the official or to the successor) takes place or after the date on which the entitlement to one arises, whichever is later. The EDPS is satisfied with such data retention period, which is consistent with the recommendations of the EDPS in similar cases.

3.5. 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 respective agent (Head of Unit, Director General, Secretary General), as well as to certain members of the Human Resources Unit of the Directorate General concerned.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. In fact, the data transmitted are necessary for the human resources management, as well as for the performance of the respective supervisory tasks. 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 European Parliament internal recipients are reminded of their obligation not to use the data received for any further purposes than the one for which they are transmitted. This does not need to be done for each individual assessment. Instead, it can be done once, for example, through an information letter addressed to relevant superiors and members of the Human Resources Unit concerning their obligation vis-à-vis the data received for evaluation purposes.

3.6. Rights of access and rectification

The following provisions are applicable in the present case:

- Article 13 of Regulation 45/2001 that provides a right of access to personal data being processed;
- Article 14 of Regulation 45/2001 that provides a right to rectification without delay of inaccurate or incomplete data;
- Articles 34 and 43 of the Staff Regulations stating that the Report shall be communicated to the person concerned who shall have the right to submit his/her comments in writing;
- Articles 14 and 84 CEOS stating that the Report on the Probationary Period shall be communicated to the person concerned who shall have right to submit his/her comments in writing;
- Articles 11 (1) and 81 CEOS read together with Article 26 of the Staff Regulation providing for a right of access to all documents contained in the statutory agents' personal files even after leaving the service.

As indicated above, each official, temporary and/or contract agent is given a copy of the Report, thus giving pro-active access to the information contained in the Report. Probationers may also ask the respective Head of Unit for a verbal explanation of the reasons for a negative assessment. The EDPS notes that the full exercise by individuals of their right of access in accordance with Article 13 of the Regulation also requires that individuals are provided with the right to access to their personal data at a later stage, which right is set forth in Articles 8 and 9 of the European Parliament Bureau Decision of 22 June 2005. To ensure the full exercise of this right by probationers, the EDPS recommends that the Report expressly mentions the probationer's right to access to his/her personal data at any time with a reference to the Bureau Decision (see section 3.7 below).

Regarding the right to rectification, probationers are asked to add their comments directly on the Report Form so that these comments are clearly visible, including to the hierarchical superior of the probationer and/or the director of department who must decide on the result of the probationary period. The EDPS welcomes the fact that probationers concerned are allowed to add comments related to their (by nature subjective) evaluation data provided by their hierarchical superior. For full compliance with Article 14 of the Regulation, the EDPS recommends that probationers may further obtain the modification of any inaccurate or incomplete administrative or purely factual data contained in the Report. This could be achieved by making a clear reference in the Report to the right of the probationer to rectify his/her personal data, the exercise of which is described in Article 10 of the European Parliament Bureau Decision of 22 June 2005.

The EDPS therefore recommends that the right of probationers to access and rectify personal data relating to them is further improved by adding in the Report a specific reference to the right of individuals to access, correct, and delete personal data concerning them in accordance with the modalities set forth in the European Parliament Bureau Decision of 22 June 2005. Such reference should include a reference to the URL address where the European Parliament Bureau Decision can be found.

3.7. 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/she already is in possession of such information).

As mentioned above, in the present case, the persons concerned will be informed through the following separate documents, namely:

- the Vade-mecum, which contains information concerning the probationary period procedure and a general data protection section;
- the European Parliament Bureau Decision of 22 June 2005 implementing Regulation (EC) 45/2001 posted on the Intranet webpage.

The Vade-mecum provides some specific information relating to the probationary report, such as the purposes of the processing, the right to provide comments and to ask for a verbal explanation of the reasons for the negative assessment, the legal basis of the data processing, and the recipients of the data. The rights of access and rectification are formulated separately and in a broad manner in the European Parliament Bureau Decision.

In order to ensure the transparency and fairness of the processing in question, the EDPS recommends that the following information is added in section 5 of the Vade-mecum:

- the time limits for the data storage;
- the existence of the rights of access and rectification, including information on how these rights can be exercised and a clear reference to the Bureau Decision of 22 June 2005.

In addition, as indicated in section 3.6 above, the EDPS recommends that the Report itself provides specific information on the probationer's right of access and rectification concerning his/her personal data and on how to exercise these rights, with a clear reference to the European Parliament Bureau Decision and the URL address where it can be found.

3.8. Security measures

According to Article 22 of Regulation (EC) 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 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"*.

As indicated above, the relevant data are kept in a secured environment. Access to paper and on-line information is limited on a need-to-know basis. The opinion of the Reports Committee is password protected at document level.

The EDPS has no reason to believe that these and other additional implemented measures are not adequate in 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 the above considerations are fully taken into account. In particular, the European Parliament should:

- ensure that no sensitive data relating to health is processed in the Report (Article 10 of the Regulation). This could be done by pre-defining generic data fields indicating the types of reasons for the break of the probationary period, such as "sick leave", "maternity leave", etc., that can be chosen from by the reporting officer(s);
- remind all recipients of their obligation not to use the data received for any further purpose than the one for which they were transmitted (Article 7 (3) of the Regulation);
- revise section 5 of the Vade-mecum as it relates to the probationary period procedure in light of Article 12 of the Regulation to include information about applicable time limits, the probationers' rights of access and rectification, and a reference to the European Parliament Bureau Decision implementing Regulation (EC) 45/2001;
- modify the Report form to add an explicit reference to the right of individuals to access, correct, and delete personal data concerning them and the reference to the European Parliament Bureau Decision implementing Regulation (EC) 45/2001.

Done at Brussels, 21 January 2009

(signed)

Peter HUSTINX
European Data Protection Supervisor