



## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on the assessment of staff's capacity to work in a third language before first promotion**

Brussels, 21 January 2009 (Case 2008-0690)

### **1. Proceedings**

On 19 November 2008, the European Data Protection Supervisor (hereinafter 'EDPS') received from the Data Protection Officer (hereinafter 'DPO') of the European Parliament a notification for prior checking regarding the data processing operations that take place in the context of evaluating the capacity of European Parliament's officials and contractual agents in function group IV to work in a third language before first promotion ('the Notification').

On 14 January 2009, the EDPS sent the draft Opinion to the DPO of the European Parliament for comments. The DPO responded on 19 January 2009.

### **2. Facts**

Article 45.2 of the Staff Regulations<sup>1</sup> ("SR") states that officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language. Article 85(3) of the Conditions of Employment of Other Servants of the European Communities ("CEOS") poses a similar obligation on contractual agents before renewal of their contract for an indefinite period.

The European Parliament has implemented a "Promotion and Career Planning Policy"<sup>2</sup> which describes the criteria and the procedure for being eligible to a promotion, one of the criteria for the first promotion being the capacity of the person concerned to work in a third language. The reports procedure implemented by the European Parliament describing the process for evaluating staff was notified to the EDPS for a prior-check<sup>3</sup> which notification however did not include the evaluation of the ability of the person to work in a third language.

The *purpose* of the data processing operations that are subject to the present notification is to assess the capacity of European Parliament officials and contractual

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<sup>1</sup> Staff Regulations of Officials of the European Communities, adopted on 1.05.2004 (referred to as 'Staff Regulations').

<sup>2</sup> Promotion and Career planning Policy, Bureau decision of 6 July 2005 as amended by the Bureau decisions of 13 February 2006, 23 April 2007 and 21 April 2008.

<sup>3</sup> See Opinion of the EDPS in Case 2004-206 dated 3 March 2005.

agents in function group IV only to work in a third language. This evaluation is necessary in the case of officials in order to be eligible for the first promotion and in the case of contractual agents in function group IV for the renewal of their contract for an indefinite period.

The *primary responsibility* for the data processing lies with the Staff Management and Careers Unit of DG PERSONNEL.

The *data processing* operations that take place in the evaluation of the capacity of European Parliament officials and contractual agents in function group IV to work in a third language are both manual and electronic and can be summarised as follows:

(i) A Working Group in DG PERSONNEL identifies the population concerned and contacts them to check their situation. As a general rule, promotions in Parliament take place on 1st January of each year, and therefore the ability to work in a third language must be demonstrated by 31 December of the previous year.<sup>4</sup>

(ii) The Working Group in DG PERSONNEL determines whether the condition is met regarding the use of a third language and if not, the Working Group proposes to the official to take a language course or to pass a test organised by EPSO in order to meet the required standard. At the end of the procedure, officials are informed of the result by letter. The same procedure applies with respect to contractual agents in function group IV before renewal of their contract for an indefinite term.

(iii) The evaluation is made either on the basis of qualifications held or on the basis of tests:

- When evaluation is made on the basis of qualifications, the DG PERSONNEL Working Group assesses diplomas and certificates received from the concerned staff for the purpose of establishing if they are appropriate to prove the requested level of proficiency in the selected language. In case of doubt, the DG PERSONNEL Working Group forwards a copy of the diploma/certificate to EPSO, which will refer it to the appropriate EPSO assessment committee set up in accordance with article 8 of the interinstitutional common rules<sup>5</sup>. The results of the evaluation are communicated to the person concerned.
- In cases where individuals choose to pass a test, they are subject to a procedure organized by EPSO at the latest in December each year. The results of evaluation made by EPSO are communicated simultaneously to the Working Group and to the person concerned.

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<sup>4</sup> For promotions in 2009, this deadline has been put back to 31 March 2009. This is due to the fact that, in compliance with the common rules on the application of article 45.2 of the Staff Regulations, officials are required to have reached level 6 of the interinstitutional language training, instead of level 4 which was previously required.

<sup>5</sup> See *Avis sur la notification d'un contrôle préalable reçue du Délégué à la protection des données de la Commission européenne à propos du dossier "Evaluation de la capacité à travailler dans une troisième langue (application de l'article 45.2 du Statut)"*, Brussels, 4 September 2007 (Case 2007-088).

(iv) As a result of the evaluation of officials, five lists are published on the Intranet: Officials eligible for promotion, transferred officials eligible for promotion, officials eligible for promotion having attained the reference threshold, officials recommended for promotion by the promotions committees, and promoted officials. Promotion is granted according to the criteria set out in the Bureau decision on promotion and career planning policy of 6 July 2005, amended on 21 April 2008. Meeting the third language condition is a necessary but not the only condition for the first promotion. The promotion decision is published in accordance with the third paragraph of article 25 SR. A copy of the decision is kept in the personal file of the person concerned.

(v) As a result of the evaluation of contractual agents in function group IV, a letter is sent to the person regarding the outcome of the assessment and the decision of the AIPN. A copy of this letter is kept in the personal file of the person concerned.

The *types of data subjects* whose data are collected concerns all officials who have never been promoted, irrespective of the date of recruitment, as well as contract staff in function group IV before renewal of contract for an indefinite period.

The *categories of data* collected and further processed include the following: (i) Identification data, including surname, first name, personnel number; (ii) Recruitment and career data; and (iii) Education data, including qualifications, third language chosen for the purposes of the evaluation under Article 45.2 of the Staff Regulations, and outcome of the test (if applicable).

As far as the *conservation* of the data is concerned, according to the Notification, the final promotion decisions are kept in the personal files of the data subjects concerned and subject to those retention time limits.

The data will not be used for statistical purposes.

According to the Notification, the data controller may *transfer personal data* to recipients within the European institutions and bodies. Personal data are transferred to a working group within DG PERSONNEL for the purpose of making an assessment of the level of competence of the person concerned. The data controller also transfers certain personal data, such as copies of certificates/diplomas, to EPSO, which will forward it to the appropriate EPSO Assessment committee for the purposes of assessing whether a given diploma/certificate adequately proves the necessary language skills. In addition, identification information may also be sent to EPSO that is in charge of organizing language tests, when the assessment is made on the basis of a test.

As far as the *right to information* is concerned, the Notification explains that there have been general communications to staff on 6 June 2007, 21 September 2007 and 25 August 2008. There is individual contact with affected staff as required (samples of communications with the staff were provided).

As far as *access rights and rectification* are concerned, they are described in general terms in the European Parliament Bureau decision of 22 June 2005 implementing Regulation 45/2001.

As far as *security measures* are concerned, the Notification mentions that there are physical security measures in place, such as files kept in locked cabinets, as well as logical security measures, such as protected shared files. No confidentiality instructions are given by the European Parliament to the persons processing personal data.

### 3. Legal Aspects

#### 3.1 Prior Checking

***Applicability of the Regulation.*** Regulation (EC) No 45/2001 (the "Regulation") applies 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*" and to the processing "*by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part or which fall within the scope of Community law*"<sup>6</sup>. According to the facts described below, all elements that trigger the application of the Regulation are present here:

First, the assessment of the capacity of Parliament's officials and contractual agents to work in a third language entails the collection and further processing of *personal data* as defined under Article 2(a) of the Regulation. Indeed, as described in the Notification, personal data of individuals such as their name, career data, certificates/diplomas proving their language skills are collected and further processed. Second, as described in the Notification, the personal data collected undergo "*automatic processing*" operations, as defined under Article 2(b) of the Regulation as well as manual data processing operations. Indeed, most of the personal information is collected directly from concerned staff. Information is used for evaluation purposes, sometimes transferred, and it is kept in paper form. Finally, the processing is carried out by a Community institution or body, in this case by the European Parliament in the framework of Community law (Article 3(1) of the Regulation). Therefore, all the elements that trigger the application of the Regulation are present in the evaluation of staff's capacity to work in a third language.

***Grounds for Prior Checking.*** Article 27(1) of the Regulation subjects to prior checking by the EDPS "*processing operations likely to present specific risks to the rights and freedoms of data subject 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, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. The processing operations that occur in the context of assessing the capacity of Parliament's officials and contractual agents to work in a third language aim at evaluating the proficiency of each member of staff concerned to work in a third language. In order to carry out such an evaluation, the data controller will perform various assessment activities such as judging the certificates/diplomas submitted to them for the purposes of proving the language skills, also judging the performance of concerned staff in language tests. Taking the above into account, the EDPS considers that the data processing operations fall within Article 27(2) (b) and must therefore be prior checked.

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<sup>6</sup> See Article 3 of Regulation (EC) No 45/2001.

This EDPS opinion assesses the data processing undertaken by the European Parliament as it relates to the assessment of the capacity to work in a third language and does not analyse the general evaluation procedure for promotion implemented by the European Parliament, for which the opinion delivered on 3 March 2005 remains applicable (see Opinion of the EDPS in Case 2004-206).

***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 be given prior to the start of the processing operation. In this case, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

***Notification and due date for the EDPS Opinion.*** The Notification was received on 18 November 2008. The period within which the EDPS must deliver an opinion was suspended for a total of 6 days to allow for comments on the draft EDPS Opinion. The Opinion must therefore be adopted no later than 26 January 2009.

### **3.2 Lawfulness of the Processing**

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. In particular, Article 5(a) of the Regulation provides that personal data may be processed if 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*".

In order to determine whether the processing operations comply with Article 5(a) of the Regulation, two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controller are indeed necessary for the performance of that task.

***Legal Basis.*** In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations that take place in the context of assessing the European Parliament staff's ability to work in a third language, the EDPS takes note of Article 45(2) of the Staff Regulations. Pursuant to this provision officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language. In addition, Article 85(3) CEOS requires that contractual agents demonstrate their capacity to work in a third language before renewal of their contract for an indefinite period. Thus, Article 45(2) of the Staff Regulations and Article 85(3) CEOS require the European institutions, in this case the European Parliament, to engage in an assessment of the language skills to work in a third language of staff concerned for the purposes of enabling them to obtain a promotion in the case of officials or to obtain an indefinite term contract in the case of contractual agents. An interinstitutional agreement was signed in 2006, which entered into force on 1 January 2007 that further defines the rules for implementing Article 45(2) of the Staff Regulations.

The EDPS is satisfied that Article 45(2) of the Staff Regulations and Article 85(3) CEOS provide a legal basis for the European Parliament to engage in the data processing operations under examination.

***Necessity Test.*** According to Article 5(a) of the Regulation, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing is "*necessary*" for the performance of a task, in this case, for assessing the skills of concerned staff to work in a third language. As outlined above, under the Staff Regulations and CEOS, staff concerned must be required to demonstrate their skills in a third language before first promotion or before an indefinite term contract is awarded. To put into practice this provision, it is necessary for the European Parliament to collect and further process personal information that proves such proficiency. Thus, the EDPS considers that the data processing complies with the necessity test.

The EDPS is satisfied that the processing of personal data on the assessment of the ability to work in a third language is legitimate as it is necessary for performance of a task carried out in the public interest on the basis of Article 45(2) of the Staff Regulations and Article 85(3) CEOS and is therefore legitimate under Article 5(a) of the Regulation.

### **3.3 Data Quality**

***Adequacy, Relevance and Proportionality.*** Pursuant 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. This is referred to as the data quality principle.

The type of information requested from individuals concerned includes mainly identification information, career data, and certificates and diplomas that show the level of proficiency of staff concerned to work in a third language. The EDPS considers that the information collected and further processed complies with Article 4(1)(c) of the Regulation.

***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 which is further addressed in Section 3.7.

***Accuracy.*** According to Article 4(1)(c) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date*", and "*every reasonable step must be taken to ensure that the 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*". In this case, an important part of the data has been provided by the data subject himself/herself. This procedure itself helps to guarantee the accuracy of the personal data. However, other information is not provided directly by the individual but generated by the European Parliament and/or EPSO. In this regard, as further developed below, it is important for the concerned staff to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data held about them is accurate. In this respect, see also Section 3.6.

### **3.4 Conservation of Data**

Pursuant to Article 4(1)(e) of the Regulation personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

According to the Notification, all data relating to the assessment are kept in the personal files of the person concerned and subject to the retention time limits applicable to these files. No specific data retention periods have been established concerning the data of the staff whose capacities to work in a third language have been assessed. In particular, no distinction is being made by the Parliament between the retention of data relating to assessments for which the outcome is positive and the retention of data for those which outcome is negative. The EPDS therefore recommends that specific and reasonable data retention periods are set for the retention of data relating to positive assessments and to negative assessments which are proportionate to the purposes for which such data are kept.

In case of a negative assessment concerning an official, which may lead to the refusal of the promotion, it is particularly important to define an appropriate data retention period so that the data relating to the negative assessment is not retained for longer than is necessary in his/her personal file. To this end, it would seem legitimate and proportionate to retain the data relating to the negative assessment until a promotion is actually granted as it would allow the Parliament to understand the reasons why a promotion was not formerly granted to the person concerned.

### **3.5 Transfers of Data**

According to the Notification, personal data transfers are made by the data controller to Community institutions and bodies, thus, Article 7 of the Regulation applies. Article 7 of the Regulation requires personal data to be transferred "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary.

According to the Notification, the data controller may transfer personal data to a working group within DG PERSONNEL, who is in charge of assessing the level of competence of the person. The EDPS considers that this data transfer meets the two above-mentioned requirements: (i) the transfer occurs to recipients within the data controller's unit who have the task to evaluate the level of proficiency of the person in that language, and (ii) who have a need to know such data in order to make the said assessment.

The data controller may also transfer personal data to EPSO either (i) for the purpose of having EPSO/Assessment committee assessing a given diploma/certificate when the assessment of the capacity to work in a third language is made on the basis of qualifications, or (ii) in EPSO's capacity of organiser of the language test when the assessment of the third language is made on the basis of a test. The EDPS considers that the data transfer to EPSO complies with the first requirement. Indeed, the recipient has the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the certificate/diplomas and/or to organise the language test.

The EDPS also considers that the transfer is necessary since unless the transfer takes place it will not be possible for EPSO/Assessment committee to verify the adequacy of a particular diploma/certificate nor to organise the language test. The EDPS emphasises, however, that pursuant to Article 7(3), the recipients shall process the personal data they received from the European Parliament only for the purposes for which they were transmitted. The European Parliament should specify this to EPSO.

### **3.6 Rights of Access and Rectification**

According to Article 13 of the Regulation, the data subject shall have the right to obtain without constraint from the data controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

The rights of access and rectification are described in general terms in the European Parliament Bureau decision of 22 June 2005 implementing Regulation 45/2001. No privacy statement or any specific information is provided to the staff concerned in connection with this evaluation procedure that mentions their rights to access and rectify their data in the context of such evaluation. In particular, there is no specific procedure for access and rectification to data generated by EPSO (evaluation of the title and tests) in the context of the assessment of the third language.

The EDPS notes that a data subject request form is available on the Intranet of the European Parliament which allows individuals to effectively exercise their rights of access and rectification to data held by the European Parliament.

To guarantee the full exercise by individuals of their rights of access and rectification to their data, the EDPS recommends that a privacy statement be provided to the concerned staff in connection with this evaluation process that expressly mentions the right of the individuals, and the procedure, to access and correct their data (see also section 3.7 below). Such privacy statement should make a clear reference to the possibility for individuals to access to and rectify their data generated by EPSO and to the procedure for exercising such rights of access and rectification. In particular, the privacy statement should indicate in such case whether individuals shall exercise their rights of access and rectification to EPSO directly or whether they shall file an indirect recourse through the Parliament.

### **3.7 Information to the Data Subjects**

Pursuant to Articles 11 and 12 of the Regulation, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

According to the Notification, no specific information is provided to the affected staff concerning the data protection aspects of the assessment of the third language. Copies of general communications to staff were attached to the Notification, that relate to the



time line of the assessment process and which do not contain any of the information that is requested under Articles 11 and 12 of the Regulation.

The EDPS therefore recommends that a privacy statement be adopted by the European Parliament and provided to the individuals concerned in connection with the assessment which contains all the information required under Articles 11 and 12 of the Regulation, as well as the information concerning the exercise of the rights of access and rectification outlined in Section 3.6 above. Such privacy statement should be made readily available to the concerned staff, as part of the procedure for promotions, as well as posted on the Intranet of the European Parliament.

### **3.8 Security measures**

According to Article 22 of the Regulation, the data 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. According to the Notification, several security measures are implemented by the data controller to protect the files in accordance with Article 22.

The EDPS, however, notes that no confidentiality instructions are given to the persons processing personal data. The EDPS emphasizes that persons processing personal data should be made aware of their obligation to keep the data confidential, as required under Article 21 of the Regulation, and the EDPS therefore recommends that the European Parliament clearly informs persons processing personal data of their duty of confidentiality.

## **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 providing the considerations in this Opinion are fully taken into account. In particular, the European Parliament must:

- Define specific and reasonable data retention periods concerning the conservation of data relating to assessments, distinguishing between positive assessments and negative assessments, that are proportionate to the purposes for which the data are kept;
- Specify to EPSO that the data received from the European Parliament can only be used for the purposes for which it was transferred.
- Ensure that staff concerned have access to their data and implement a procedure ensuring the exercise by individuals of their rights of access and rectification;
- Draft a privacy policy as recommended in this Opinion, and make it available to the staff as part of the procedure for promotions as well as by posting it separately on the Intranet of the European Parliament;
- Remind the staff in charge of processing personal data of their duty of confidentiality.

Done at Brussels, 21 January 2009

(signed)

Peter HUSTINX  
European Data Protection Supervisor