

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on the procedure for early retirement without reduction of pension rights

Brussels, 18 February 2009 (Case 2008-748)

1. Proceedings

On 11 December 2008, the EDPS received the formal prior checking notification under Article 27 by regular mail from the Data Protection Officer (DPO) of the European Parliament on the procedure for early retirement without reduction of pension rights.

On 9 February 2009, the EDPS sent the draft opinion for comments to the data controller, with copy to the DPO. These comments were received on 16 February 2009.

2. The Facts

In accordance with Article 9(2) of Annex VIII of the Staff Regulations (hereafter "SR") and Article 39 of the Conditions of Employment of Other Servants, each year a limited number of officials and temporary agents are allowed to retire before the pensionable age without reduction of pension rights. The European Parliament's decision of 6 October 2004 establishes the general provisions implementing a scheme for early retirement without reduction of pension rights for officials and temporary staff (hereafter "General Implementing Provisions" or "GIP").

The **purpose** of the data processing operations that are subject to the present notification is to manage the applications for early retirement without reduction of pension rights submitted yearly by officials and temporary agents.

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 assessment of an early retirement without reduction of pension rights are both manual and electronic and can be summarised as follows:

- (i) At the request of the Appointing Authority (AA), the Staff Management and Careers Unit of DG PERSONNEL shall invite interested parties to apply for early retirement with effect during the course of the period of the year specified in the call for applications. This call for applications shall indicate: the number of places available; the deadline for applications and the rules governing this matter; and the conditions of eligibility.

(ii) Applicants will fill in a standard application form designed for the purpose of the procedure. To be eligible, the official or temporary agent must fulfil, on the date specified in the call for applications, the criteria set out in article 4 of the General Implementing Provisions.

(iii) The Staff Management and Careers Unit of DG PERSONNEL shall verify the compliance with the eligibility criteria and draw up a list of eligible candidates and forward it to the services/political groups concerned which shall assess the interests of the service. Eligible candidates shall be placed in three groups by order of priority. Priority is in particular given to an official who is subject to a reorganisation measure; the length of service of the candidate in the European Parliament and his age; the positive contribution of the candidate to the work of the service and/or the European Parliament; a special personal or family situation referred to by the candidate requiring his/her presence at home or at a place other than the place of assignment. The list shall be returned to DG PERSONNEL.

(iv) The Director of DG PERSONNEL shall forward to the Secretary-General the list of officials and temporary agents whom he is putting forward for early retirement, as well as a reserve list. In drawing up the proposal, high priority should be given to candidates who are unable to retire without a reduction in their pension rights within the following two years, and to those who have at least 15 years' seniority.

(v) The proposal shall be submitted to the Joint Committee for its opinion. DG PERSONNEL's final proposal is then put to the Secretary-General for a decision.

(vi) Unsuccessful candidates shall be informed in writing of the rejection of their application and reasons for this decision. Successful candidates shall be notified in writing. The retirement decision is published in accordance with Article 25(3) SR, and kept in the personal file of the person concerned.

The **types of data subjects** whose data are collected are officials and temporary agents who meet the eligibility conditions to apply for early retirement which are set forth in the General Implementing Provisions.

Most of the **personal data** are collected directly from the data subject via a form, available on the Intranet of the European Parliament. The categories of data collected on the form are: the staff number; identity of the applicant (name, birth date); affectation (service, place of work); career (date of taking up post, grade); reasons for the request; date and signature. Other data relating to the personal or family situation may be collected where necessary, which may include data relating to the health of the data subject or of a family member (such as medical certificates). Other data are collected indirectly from the database ARPEGE/RAPNOT, such as career data and data relating to the social security and pensions of the persons concerned.

As far as the **conservation** of the data is concerned, according to the Notification, data are kept in manual files for the duration of the procedure, which are then archived at the end of the procedure and subject to a retention period of three years. Data stored on computer files are kept for one year. Data and documents that are included in the personnel file are subject to the retention periods applicable to these files, i.e. 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 data are used for statistical purposes. Only the data concerning the number of officials and temporary staff having benefited from this procedure are kept. This information is provided to the Pension Unit of the European Parliament, which transfers it to the Pensions Service of the European Commission.

According to the Notification, the data controller may **transfer personal data** to recipients within the European institutions and bodies. Certain personal data are transferred to services/political groups (name of candidates) for classification of the candidates by order of priority, the Joint Committee for the purpose of rendering an opinion on the candidates selected by DG PERSONNEL, and to the Secretary-General for decision. Application forms are not transmitted to recipients outside Staff Management and Careers Unit of the DG Personnel.

As far as the **right to information** is concerned, the Notification indicates that no information relevant to the purpose of Articles 11 and 12 of Regulation (EC) no. 45/2001 is provided to data subjects. Individuals are informed about the procedure for early retirement without reduction of pension rights by the General Implementing Provisions of 6 October 2004. The European Parliament has also published FAQs with respect to such procedure.

As far as **access rights and rectification** are concerned, the Notification indicates that there is no specific procedure to ensure the rights of access and rectification. Such rights 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 [...]

3. Legal aspects

3.1. Prior checking

Applicability of the Regulation. Regulation (EC) no. 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 (hereinafter "the Regulation") applies to the processing of personal data by Community institutions and bodies.

Personal data is defined as "any information relating to an identified or identifiable natural person" (Article 2(a) of the Regulation). 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 procedure for early retirement clearly involves the processing of personal data.

The processing of the data is carried out by a Community body, the European Parliament, and is carried out in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation).

The Regulation applies notably 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 (Article 3(2) of the Regulation). Applications are submitted either by email or by post mail, and processed in a structured filing system. The evaluation processes are both manual (forms) and electronic (data from STREAMLINE/RAPNOT). The processing is therefore both manual and automated. Regulation (EC) no. 45/2001 therefore applies.

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) contains a list of processing operations that are likely to present such risks.

Article 27(2)(b) notably 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 procedure under examination is intended to select officials and temporary agents who may be eligible for an immediate pension without reduction. The criteria established in the General Implementing Provisions notably includes ongoing reorganisation measures, the positive contribution of the candidate to the work of the service/European Parliament, a special personal or family situation. Therefore there is an appraisal of the ability and/or the personal or family circumstances of the applicants which justifies submitting the procedure to prior checking by the EDPS.

In addition, according to Article 27(2)(a) of the Regulation, the processing of data relating to health is subject to prior checking by the EDPS, which might also be the case here as some data relating to health might be collected as described in section 3.3 below.

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.

Notification and due date for the EDPS Opinion. The Notification was received on 11 December 2008. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The deadline for rendering the opinion was suspended during a period of seven days for comments by the data controller. Thus, the Opinion must be rendered no later than 19 February 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 the case in point, the procedure is established in accordance with Article 9(2) of Annex VIII of the Staff Regulations and of Article 39 of the Conditions of Employment of Other Servants, which allows each year a limited number of officials and temporary agents to retire before the pensionable age without reduction of pension rights. The General Implementing Provisions of 6 October 2004 establish a scheme for early retirement without reduction of pension rights.

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 ability of a candidate to benefit from early retirement without reduction of pension rights. As outlined above, the General Implementing Provisions define the criteria that must be demonstrated by candidates to be eligible for such measure. To put into practice these provisions, it is necessary for the European Parliament to collect and further process personal information that evidence that the candidate meets the criteria set out in the GIP. Thus, the EDPS considers that the data processing complies with the necessity test.

The EDPS is satisfied that the processing described is necessary for the procedure established by the European Parliament in accordance with the Staff Regulations and is therefore lawful under Article 5(a) of Regulation (EC) no. 45/2001.

3.3. Processing of special categories of data

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited unless grounds can be found in Article 10(2) of the Regulation and Article 10(3) for data relating to health.

Applicants are asked to provide the reasons for their application in an empty box in their application form. One cannot exclude therefore that data relating to the health of the person concerned or of a third party such as a family member be included. This is not, however, an issue as Article 10(2)(a) permits the processing of such data when the "the data subject has given his or her express consent to the processing of such data", which is the case here.

In addition, the form indicates that any medical certificate must be sent directly to the Medical Service in the applicant's place of work. The Medical Service then renders an advice to DG PERSONNEL concerning such medical certificate. The EDPS is satisfied with this measure but wishes to outline to the European Parliament that, for full compliance with Article 10(3) of the Regulation, medical data concerning the applicant or a member of his/her family shall only be disclosed to recipients who are subject to an obligation of professional secrecy, and that personnel working for the Medical Service should be reminded of this obligation.

3.4. Data Quality

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

The data needed for evaluating the application are collected by means of a specific application form. The EDPS considers that the data collected are adequate and not excessive in the light of the purpose of the processing.

Fairness and Lawfulness. Data must also be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has already been discussed in paragraph 3.2 above. Concerning fairness, this relates to the information which is to be communicated to the data subject (see below, paragraph 3.9).

Accuracy. Finally, 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 " (Article 4(1)(d) of the Regulation). The fact that the applicant fills in the form him/herself and that a new form must be completed each year for any new application, contributes to keeping the data accurate and up to date. Furthermore, as will be seen below in section 3.8, the data subject shall also have access and rectification rights in order to ensure that the file is as complete as possible.

3.5. Conservation of data

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 (...)*".

The notification mentions that data are kept in manual files for the duration of the procedure, and then archived at the end of the procedure and subject to a retention period of three years. The reason behind the retention period of three years is to be able to respond to any legal claim from a staff member in connection with such procedure. The claim may be made either to the appointing authority (3 months), to the European Union Civil Tribunal (3 months deadline), or to the Ombudsman (2 years deadline). The EDPS is satisfied that the retention period set forth for keeping manual files is in line with the purpose for which the data are kept, namely the time bar within which a staff member may take legal action against decisions relating to the early retirement procedure.

Data stored on computer files are kept for one year. The EDPS is satisfied with such data retention period, which is proportionate to the purpose of the processing, namely the yearly assessment of applications to determine who may benefit from the said measure.

Data and documents that are included in the personal file are subject to the retention periods applicable to these files. 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.

As concerns statistical use of the data, such processing is very limited as it only concerns the number of officials and temporary staff having benefited from this procedure. The EDPS is satisfied that the statistical use made by the European Parliament is compliant with the Regulation so long as no personal data is kept nor transferred for the purpose of statistics.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation which covers the transfer of personal data within or between Community institutions or bodies. These transfers may only take place "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

According to the notification, certain personal data are transferred to services/political groups for whom the data subject works (names of candidates), the European Parliament Joint Committee and to the Secretary-General. The European Parliament informed the EDPS that only limited information is transferred to these recipients, and in particular that application forms are not transmitted to recipients outside Staff Management and Careers Unit of the DG Personnel.

The purpose of such transfers is to enable a decision to be taken on the dossier submitted in the light of the Staff Regulations. Article 7(1) is therefore complied with. Furthermore, the General Implementing Provisions provide in Article 3.3 that "an application which has been submitted may not be taken into account for any other purpose concerning the career of the candidate." The EDPS is therefore satisfied that Article 7(3) of the Regulation, which specifies that the recipient shall only process the data for the purposes for which they were transmitted, is also complied with.

3.7. Processing of personal number or unique identifier

In the form filled in by the applicants, the staff number is requested. In itself, the use of an identifier is simply a means – in this case, a legitimate means – of assisting the work of the data 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 European Parliament's use of an identifying number is reasonable because it is done for the purposes of identifying the person and following up the dossier, thereby simplifying processing. The EDPS considers therefore that this number can be used in the procedure for early retirement.

3.8. Rights of access and rectification

Article 13 of the Regulation establishes a right of access upon request by the data subject. Article 14 of the Regulation provides the data subject with a right of rectification.

Articles 8 to 13 of the European Parliament's Bureau decision of 22 June 2005 implementing the rules relating to Regulation (EC) no. 45/2001 set forth the general rules governing the exercise of rights by data subjects, in particular the rights to access, rectify, block or delete data relating to them and the right to object to the processing of their data.

The EDPS however notes that neither the call for applications nor the General Implementing Provisions mention the rights of data subjects to access, rectify and block their data upon request. The EDPS recommends that individuals are clearly informed about their rights of access, rectification, blocking and erasure under Regulation (EC) no. 45/2001 and on how to exercise such rights. This could be done as described in section 3.9 below.

With respect to the right of relatives to access, correct and block their own data, the European Parliament shall clearly indicate that it is the duty of the staff member to inform his/her relative of the right to access, correct, and block data relating to him/her, and the European Parliament shall ensure that such rights are granted when exercised by the person concerned.

In addition, the right of access should include access to the opinion of the Joint Committee, subject to certain limitations based on Article 20(1)(c). The right of access may notably be denied to comparative data included in the opinion of the Joint Committee or to the individual opinions of the members of the Committee.

3.9. Information to the data subject

Regulation (EC) no. 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific pieces of information that must be provided. In the present case, some of the data are collected directly from the data subject and therefore Article 11 of the Regulation applies. Since data are also collected indirectly from other sources than the data subject or from other persons involved in the procedure, Article 12 of the Regulation also applies.

According to these provisions, data subjects shall be informed by the data controller, i.e. in this case the Staff Management and Careers Unit of DG PERSONNEL, of the purposes of processing personal data; that the processing is carried out in accordance with the GIP; the recipients of the data and the fact that these recipients will not process the data for any other purpose nor disclose the data to any other recipient; the period of conservation of the data; the fact that applicants have a right of access, rectification, blocking and erasure and to whom they may submit this request; and the right to consult the DPO or contact the EDPS.

According to the notification, no information relevant to the purposes of Articles 11 and 12 is provided to data subjects at the moment. The EDPS finds that there is a breach of Articles 11 and 12 of Regulation (EC) no. 45/2001. The EDPS strongly advises the European Parliament to adopt relevant data protection information notices to inform the data subjects about the data processing taking place during the procedure for early retirement without reduction of pension rights.

The European Parliament shall ensure that all the necessary information is provided to all data subjects, including to the relatives of the staff member. This could for example be taken care of by indicating in the data protection information notice that it is the duty of the staff member to provide this information to his/her relative when the staff member discloses personal data relating to a relative.

The EDPS suggests that the European Parliament considers providing the relevant data protection information in the call for applications and the General Implementing Provisions themselves, or perhaps even adopting a specific privacy statement which would be materially distinct from the call for applications and the GIP but handed over together with them at the same time the persons receive the calls for applications.

3.10. Security measures

Under Article 22 of the Regulation, 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*".

[...]

On the basis of the available information, the EDPS does not see any indication to believe that the European Parliament has not applied the security measures required in Article 22 of the Regulation.

4. Conclusion:

The EDPS finds that there is a breach of Articles 11 and 12 of Regulation (EC) no. 45/2001.

The EDPS recommends that the following recommendations are taken into account:

- for full compliance with Article 10(3) of the Regulation, medical data concerning the applicant or a member of his/her family shall only be disclosed to recipients who are subject to an obligation of professional secrecy, and personnel working for the Medical Service shall be reminded of this obligation;
- concerning the use of data for statistical purposes, ensure that only the number of persons having benefited from the procedure is kept and transferred, and that no personal data is kept nor transferred for statistical purposes;
- data subjects shall be granted the right to access to the opinion of the Joint Committee, subject to certain limitations based on Article 20(1)(c);
- with respect to the right of relatives to access, correct and block their own data, the European Parliament shall clearly indicate that it is the duty of the staff member to inform his/her relative of the right to access, correct, and block data relating to him/her, and the European Parliament shall ensure that such rights are granted when exercised by the person concerned;
- the European Parliament shall adopt relevant data protection information notices to inform the data subjects about the data processing taking place during the procedure for early retirement without reduction of pension rights, as described in section 3.9 above. This could be done either by inserting relevant data protection information in the call for applications and in the General Implementing Provisions, or by adopting a specific privacy statement which would be materially distinct from the call for applications and the GIP but handed over together with them at the same time the persons receive the calls for applications.

Done at Brussels, 18 February 2009

(signed)

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