

Opinion on the notification for prior checking received from the Data Protection Officer of the Council on the "Staff Guidance and Reinstatement Group"

Brussels, 23 February 2009 (Case 2008-0746)

1. Procedure

On 11 December 2008 the European Data Protection Supervisor (EDPS) received a notification pursuant to Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the Council concerning the "Staff Guidance and Reinstatement Group".

Enclosed with the notification were: the blank form of the individual data record, the blank information and consent form and an extract from Special Report No 3/2003 of the Court of Auditors on the invalidity pensions scheme of the European Institutions (OJ C 109 of 7.5.2003, pp. 1-28).

On 27 January additional information was requested, which the DPO supplied on 2 February 2009. The draft opinion was sent to the DPO for comment on 12 February 2009. His comments were received on 19 February 2009.

2. Facts

Purpose of the processing operation

The purpose of the processing is conflict prevention in the workplace and the resolution of individual professional problems.

Description of the processing operation

A multidisciplinary group (composed of the medical officer, examining doctor, welfare officer, psychologist, a member of the Careers and Development of Competencies Unit, a member of the Staffing and Mobility Unit and the Head of the Social Unit) was set up. The Group does not have its own secretariat but uses the secretariat of the Human Resources Director.

Following a written request from a member of staff, the Group aims to prevent conflicts in the workplace and resolve individual professional problems by:

- coaching individuals experiencing professional problems;
- while also providing support to managers;
- and identifying dysfunctional situations.

The Group may not take the initiative to intervene in an individual case.

Each Group member will put forward solutions in his/her specific area of competence (mediation, search for a new job, coaching, social support, etc.). The Group cannot in its own right conduct investigations. However, one of the Group's members may conduct investigations within his/her specific area of competence, subject, in all cases, to the prior consent of the person concerned.

The controller is the Director of DGA 1B (Personnel and Administration).

Legal basis for the processing

Article 23(2) of the Council's Rules of Procedure lays down that:

"2. The Council shall decide on the organisation of the General Secretariat. Under its authority the Secretary-General and the Deputy Secretary-General shall take all the measures necessary to ensure the smooth running of the General Secretariat."

No specific decision was taken to set up the Staff Guidance and Reinstatement Group. Its composition, powers and operating arrangements are informal insofar as they are not regulated by any internal act of the institution.

The Group was set up to apply the measures advocated in Special Report No 3/2003 of the Court of Auditors (see points 73 and 80 in Annex 2) on a policy based on prevention and on the reintegration and management of staff.

Data subjects

Potential data subjects are any person working at the Council and governed either by Staff Regulations of Officials of the European Communities or the Conditions of Employment of other servants of the European Communities (this covers officials, temporary staff, auxiliary staff, contract staff, local staff and special advisers). Trainees, seconded national experts and persons working under a contract governed by national law are not concerned.

The categories of data subjects are:

- persons who contact the Group (persons "in difficulty");
- persons they have complained about;
- witnesses or other persons somehow involved.

Data relating to data subjects

Individual data record:

When opening a case, the Group's secretariat creates an "individual data record" and sends it to the other Group members.

The individual data record contains the following data:

- name and forename of the "person in difficulty";
- age of the "person in difficulty";
- post held by the "person in difficulty";

- name of the Group member who created the file and who is responsible for action;
- nature of the problem, case history and action to be taken;
- name of the contact person in the hierarchy.

Depending on the case, the record may contain information on the person's career plan, working conditions, the data subject's interpersonal relations at work or even medical data (medical absences) without mentioning the condition diagnosed.

The agenda for the Group's meetings does not contain any personal data.

The Group does not draw up any data records on persons other than "persons in difficulty". That does not, however, preclude the possibility, in certain cases, of data of other persons involved appearing in the data record of the "person in difficulty".

Information to be given to the data subject

The "person in difficulty" is orally briefed during the first meeting with one of the Group's members on the functioning of the Group and the purpose of its action. The Group informs other persons whose names come up when working on a particular case (e.g. colleagues involved in a workplace conflict, the data subject's superiors) only with the prior consent of the data subject.

When a "person in difficulty" requests the Group to intervene, he/she is given an information and consent form to sign.

This form contains information on:

- the identity of the controller;
- the purpose of the processing;
- the existence of the right of access, right of rectification, right to erase and right to block personal data;
- the possibility of appealing to the EPDS;
- the fact that answering the questions is optional;
- the data storage period.

It is planned to publish a staff note mentioning the EDPS notification.

Data storage medium

Documents are kept both on paper (individual data records) and in electronic form (agendas for meetings of the Group and notifications, by e-mail, of meetings).

Recipients or categories of recipients to whom data may be transmitted

Under the informal procedure, Group members may be required to transmit certain data to other bodies. The Group always asks the data subject for permission before sending such data/information about them outside the Group.

Certain information on steps to be taken may be sent to the directorate/administrators and/or heads of unit concerned (Mobility Unit, specific training, etc.).

Where staff members are on sick leave because of professional difficulties which were referred to the Group, relevant data may be transmitted via the examining doctor to the

doctor certifying unfitness for work or via the psychologist to the psychotherapists dealing with the case.

Personal data retention policy

Personal data (individual data records, e-mails, personal notes) are kept by the Group secretariat until the end of active service of "persons in difficulty" for the purpose of compiling anonymous statistics (limited to the number of cases and their typology).

The Group members keep the most recent, updated individual record and, as and when steps are taken, destroy earlier records.

The data subject may, at any time, request that data be destroyed.

Measures taken to ensure security of processing

[...]

3. The legal aspects

3.1. Prior checking

The notification describes the processing of personal data. The personal data of the "person in difficulty" but also any other persons involved are collected and processed within the meaning of Article 2(a) and 2(b) of Regulation (EC) No 45/2001. The processing in question is carried out by the Council in the exercise of activities which fall within the scope of Community law (Article 3(1)). The processing operation is both manual and automated; the data will form part of a filing system, as defined in Article 2(c) of the Regulation: *"any structured set of personal data which are accessible according to specific criteria"*. The processing therefore falls within the scope of Regulation (EC) No 45/2001.

The written notes made by the Group members must also be considered as a personal data processing operation as they are filed in a structured system (Article 3 (2)). Even if they are "personal" notes, these notes may not be equated with, for instance, the processing of personal data *"by a natural person in the course of a purely personal or household activity"* as described in Article 3(2) of Directive 95/46/EC. The notes are processed as part of an institutionalised informal procedure, and it therefore follows that they are covered by the Regulation.

Article 27(1) of Regulation (EC) No 45/2001 makes subject 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) lists the processing operations likely to present such risks, such as *"processing of data relating to health and to suspected offences, offences, criminal convictions or security measures"* (Article 27(2)(a)) and *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"* (Article 27(2)(b)). The case in point concerns personal data processed in order to evaluate personal aspects relating to the data subject (in particular their behaviour) but also, in the case of alleged harassers, personal data processed in cases

of suspected offences (Article 27(2)(a)), and also data relating to health, where the mental state of the data subject is an issue. This case therefore falls within the scope of the prior checking procedure on several counts.

This prior checking thus relates only to the informal procedure put in place by the "Staff Guidance and Reinstatement Group" and does not concern the processing of data by Group members and the departments they work for as part of their specific competences.

In principle, checks by the EDPS should precede the setting-up of the processing operation. In this specific case, the check necessarily has to be performed *a posteriori*. This does not alter the fact that recommendations issued by the EDPS should be implemented.

The DPO's notification was received on 11 December 2008. Under Article 27(4) this opinion had to be delivered within two months. The time limit within which the EDPS was to deliver his opinion was suspended for 13 days; the EDPS would therefore deliver his opinion by 24 February 2009 at the latest.

3.2. Lawfulness of processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that processing must be *"necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution"*.

Although this procedure is informal, insofar as it has not been instituted by a specific legal act, it is part of a policy based on prevention and on the reintegration and management of staff, which constitutes performance of a task carried out in the public interest on the basis of legislative acts adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of official authority vested in the Community institution. The condition of the lawfulness of the processing operation is therefore fulfilled.

As regards the legal basis for the processing, the EDPS notes that no specific legal basis has been laid down by the Council. Nevertheless, in the view of the EDPS, the absence of a specific legal basis does not make this processing unlawful since (i) the processing basically consists of data exchange within the various departments of the institution which, in principle, already have that data and/or are competent to process them (ii) the purposes of this processing are lawful and (iii) the processing is strictly voluntary and initiated at the request of the "person in difficulty" concerned.

3.3. Processing of special categories of data

The processing of personal data by the Group may require the processing of special categories of data as provided for in Article 10 of Regulation (EC) No 45/2001, for example data concerning health and sex life. In principle, the processing of this type of data is prohibited.

However, processing in this case is justified because the "person in difficulty" concerned has given his/her express consent to such processing (Article 10(2)(a) of the Regulation). It

is therefore essential that the data controller requests and obtains that consent before processing sensitive data (see point 3.8 below).

In addition, the processing of sensitive data may be justified if it is proportional to the stated aim i.e. the need to comply with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties (Article 10(2)(b) of the Regulation).

3.4. Data quality

Personal data must be "*adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed*" (Article 4(1)(c)). This point is crucial as regards the data collected by Group members and kept during the procedure. Given that individual situations vary widely, there is no systematic rule regarding the types of data that may be kept in a file in a specific case. The EDPS recommends that officials who handle these files should be informed of the general rule of proportionality and necessity which governs the collection and further processing of data. It is essential that only data which are *adequate, relevant and not excessive* in relation to the purposes for which they are processed are written into individual records and kept.

Data must also be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). Lawfulness has already been discussed in point 3.2 of this opinion. The issue of fairness is linked to the information which must be transmitted to the data subject (see point 3.8 below).

Personal data must also be "*accurate and where necessary kept up to date*". The Regulation also stipulates that "*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)). The system described should help to ensure that data are accurate and kept up to date, as data subjects can approach the controller to request access to the data and make use of their right to rectify them.

For a detailed discussion of these two rights see point 3.7 below.

3.5. Data storage

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

As mentioned earlier, Group members keep the most recent, updated individual record and, as and when steps are taken, destroy earlier records. The EDPS considers that the practice of keeping the last, updated record in the course of working on a specific case is in line with the Regulation. However, it recommends instructing Group members to destroy the last individual data record immediately the case in question has been definitively closed. It is essential that Group members do not retain any personal data beyond the time necessary for the performance of their duties.

Storage of personal data (individual data records, e-mails, personal notes) by the Group's secretariat until the end of active service by the "person in difficulty" concerned is clearly excessive in relation to the purposes of the processing. The EDPS notes that any action by

the Group is informal and that if it results in a specific measure (for instance the transfer of the official in question) the related data are kept by the department responsible for that measure. Consequently, in the case of personal data relating to closed cases, only short-term storage is justified. The EDPS notes, however, that a certain period of data storage might be necessary in order not to undermine the effectiveness of the Group's work. It is not unusual for the same case to resurface at a later stage and it would be detrimental if the information collected were no longer available to the Group's members. Based on the above, the EDPS considers a storage period of three years, calculated from the closure of a case, to be appropriate and compatible with Article 4(1)(e) of the Regulation. That period may be extended only in specific, exceptional cases, especially if legal proceedings related to the case being dealt with are underway.

Article 4(1)(e) authorises unlimited storage of data for historical, statistical or scientific use provided that such data is kept in anonymous form. There is nothing to prevent the Group's secretariat from compiling anonymous statistics on the number of cases and their typology before destroying data.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with, as only transfers within the institution between Group members take place in this instance. If data needs to be transferred to persons other than Group members, for instance to the data subject's superiors, such a transfer can only be considered lawful if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. As regards the transfers, only relevant data must be transferred. The Group must assess on a case-by-case basis whether or not transfers are appropriate.

The EDPS and the Council's DPO may also be sent data under Article 47(2) of Regulation No 45/2001 and point 4 of the Annex thereto. The Ombudsman and the Civil Service Tribunal may also be sent data in the event of a dispute.

3.7. Right of access and rectification

Article 13 of the Regulation establishes a right of access upon request by the data subject and lays down the arrangements for exercising it. Article 14 of the Regulation deals with the data subject's right of rectification. These two rights are safeguarded in the processing operation under discussion. The information and consent form indicate when these rights may be exercised. Articles 13 and 14 of the Regulation are thus respected.

The EDPS observes, however, that the data subject should have access to and, where applicable, request the rectification of all his/her personal data and not just the identification record. However, these rights - of access and rectification - must also be guaranteed not only for the "person in difficulty" but to any other person involved in the processing.

3.8. Information to be given to data subjects

Article 11 of Regulation (EC) No 45/2001 (information to be supplied where the data have been obtained from the data subject) on information to be given to the data subject applies in this case as does Article 12 (information to be supplied where the data have not been obtained from the data subject), as information may be collected from other sources, including Group members, but also from persons outside the Group.

As has been noted, the "person in difficulty" is orally briefed during the first meeting with one of the Group members. On that occasion, he/she is given an information and consent form to sign.

The form does not contain all the information required by Articles 11 and 12 of the Regulation. Information should be added on:

- the purposes of the processing;
- the data recipients (the Group members and any third parties);
- the periods of data storage (the information that the data will be automatically erased upon completion of the Group's work seems not to be accurate).

Referring the data subject to the data controller's secretariat in order to familiarise themselves with the above points fails to meet the requirements laid down in the Regulation.

The EDPS also notes that, in the event that the Group processes data pertaining to persons other than the "person in difficulty", those persons must, in principle, be informed of the processing. In deciding on whether or not those persons should be informed, the Group should take account of Article 20 of the Regulation on exceptions and restrictions to the application of Articles 11 and 12 of the Regulation. While the opinion of the "person in difficulty" should also be taken into account, that opinion may not constitute the sole grounds for refusing to inform, in accordance with Article 12 of the Regulation, a third person whose data are processed.

3.9. Security

Article 22 of Regulation (EC) No 45/2001 states that the controller must 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 security measures must, among other things, prevent any unauthorised disclosure or access.

In the case in point, information is kept under conditions of strict confidentiality and is disclosed only to the data subjects.

In the light of the information available, the EDPS sees no reason to believe that the Council has not put in place the security measures required by Article 22 of Regulation (EC) No 45/2001.

4. Conclusion

The proposed processing operation does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001, provided that the comments made above are taken into account. This implies, in particular, that the Council should:

- review the data storage period in light of point 3.5 of this opinion;
- in the case of all data transfers to persons outside the Group, check the appropriateness of the transfer on a case-by-case basis and ensure that only relevant data are transferred;
- apply the right of access and rectification to anyone whose personal data are processed;
- give fuller information to the data subject in line with point 3.8 of this opinion and, if necessary, inform other persons whose data are being processed.

Done at Brussels, 23 February 2009.

(Signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor