



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission concerning "EAS (European Administrative School) - Emotional Intelligence 360 degree assessment"

Brussels, 30 October 2009 (Case 2009-100)

1. Proceedings

On 3 February 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer of the European Commission a Notification for prior checking concerning "EAS - Emotional Intelligence 360 degree assessment".

The EDPS requested additional information on 3 March, 22 May, 5 June, 6 July and 9 September 2009. The responses were received on 19 May, 26 May 2009, 6 June, 29 July and 20 October 2009 respectively. A meeting between the controller, the DPO of the European Commission and EDPS staff members took place on 7 October 2009 in order to clarify certain factual aspects. The EDPS sent the draft opinion to the Data Protection Officer for comments which were received on 30 October 2009.

2. Facts

- Purpose of processing

The purpose of the processing is to allow participants in the European Administrative School (EAS) training courses to obtain feedback, in the form of a report, to help them enhance their competences in the areas of self-management, relationship management and communication. The exercise is conducted with the use of a web-based tool: the "Emotional IntelligenceView 360". The report is generated automatically in response to the answers completed by the participants and his/her colleagues (see below) and does not reveal the way in which the colleagues completed the answers.

This type of tool is commonly used internationally by training providers for coaching and in courses on management and leadership. The data will not be used in any form of evaluation (appraisal) process of any of the persons involved.

The EAS considers that the processing is useful in helping staff of the EU institutions, agencies and offices to fulfil their management functions carried out in the public interest on the basis of legal instruments adopted on the basis of the treaties establishing the European Communities.

- Description of Emotional IntelligenceView 360 degree assessment

Course participants are offered the opportunity to use a feedback tool in the form of a web-based self-assessment of their skills and an assessment by colleagues that they choose to be

Postal address: rue Wiertz 60 - B-1047 Brussels

Offices: rue Montoyer 63

E-mail : edps@edps.europa.eu - Website: www.edps.europa.eu

Tel.: 02-283 19 00 - Fax : 02-283 19 50

consulted. Participation in this activity by the person concerned and their colleagues is entirely voluntary (no negative consequence will derive if the participant choose not to take part in the web-based test) and, as already mentioned, participants are free to choose the persons whom they wish to invite to take part in this activity. The persons so invited may choose whether or not to take part. It is a facility offered by the EAS to help participants learn about their professional skills and enhance their own personal development in a professional context.

The Emotional IntelligenceView 360 measures 17 critical competencies, helping participants to recognise, understand and manage their interpersonal behavior and emotions effectively. This web-based tool contains 70 behavioral questions comparing self-perceptions to those of other raters (e.g. the participant's manager, direct reports, team members or peers).

Emotional IntelligenceView 360 assesses key competencies in the areas of: Self-management, Relationship Management and Communication.

The comprehensive feedback report is designed to enhance both self-awareness and relationship management skills. Emotional IntelligenceView360 is suitable for coaching, leadership and professional development programs.

The different steps for collection and processing of personal data are the following:

1. The course participant is given full information about the feedback activity and invited by the course trainer (on behalf of EAS) to choose whether or not to participate. If they so choose, EAS will provide a list of interested participants (name and electronic address) to Consulting Tools Limited¹ (the contractor)². This data serves purely to identify the course participant and those colleagues participating in the exercise and to allow the contractor to contact them. The course participant is provided by the EAS, at this stage, with full information about the exercise and the nature and steps of data processing. The participant is provided with an information sheet giving the same information, which is to be given to colleagues who agree to participate in the exercise. The participant is also asked to indicate whether he/she would prefer to receive the final report from the exercise individually, or whether it can be shared with the trainer from the training course. There is no obligation for the participant to share the final report with the trainer.
2. The contractor will receive a list from EAS of participants (first name and last name and e-mail address) who expressed interest in the exercise. Once this process has taken place an invitation e-mail is sent to these participants which includes a password in an embedded link. This provides straight access to the site to nominated respondents so that they can provide the contact details (first name and last name and e-mail address) of the colleagues they have chosen. In this site they can also complete the self assessment. The process is the same for those colleagues completing the assessment (an invitation e-mail is sent to them which includes a password in an embedded link). It has to be noted that even if the colleagues have agreed to participate, they can withdraw their agreement. The participant will not be informed about that.
3. The course participant provides input to the activity. These data takes the form of filling in an on-line questionnaire regarding their competences. The data collected take the form of numerical data i.e. answering yes or no to a series of set questions, and textual data where

¹ Consulting Tools Limited does not provide the actual training course, which is run exclusively by another contractor of the EAS.

² Any change in or addition to the company providing this service will result in an update to the information provided on the EAS website (privacy statement).

the participant can choose to complement the numerical data with individual comments. The participant has the option to provide these comments or not.

4. The colleagues of the course participants provide their input to the activity by completing an on-line questionnaire regarding their feedback on the competences of the participant. The data collected take the form of numerical data i.e. answering yes or no to a series of set questions, and textual data where the colleagues can choose to complement the numerical data with individual comments.
5. When participants/colleagues have completed and submitted the questionnaire, they cannot go back and change anything. This is important for the finalisation of the report. However, they are able to save a partially completed questionnaire with the save-as-you-go function. They can then come back and complete it.
6. The contractor process the data supplied by the participant and their colleagues. The numerical data from the different sources are amalgamated into a single report (including the comments added in the open fields verbatim). This is done automatically. The report thus generated is then sent to the participant to the e-mail address that they have chosen to supply. Furthermore, it can also be sent to the trainer from the training course, if the participant has previously provided his or her consent for that.

When asked about the possibility of making reports anonymous, the controller answered that it may be possible to make the completion of questionnaires anonymous, but this would require the current system to be changed and customised for the EAS.

- Data subjects

The data subjects concerned are the officials and other staff (particularly Heads of Unit) of the EU institutions, offices and agencies participating in this course organised by the EAS, as well as the colleagues who agree to participate in the exercise.

- Categories of data

The categories of personal data are the following:

- Data allowing the identification of the staff member concerned -participants or colleagues- (name, given name, electronic address);
- Information provided by the course participant on their own perception of their competences in the areas of self-management, relationship management and communication.
- Information provided by colleagues on their perception of the participant's competences in the areas of self-management, relationship management and communication.

- Information to the data subjects

The data subjects will be provided by the EAS with the following information:

- the identity of the controller;
- the purposes of processing;
- the recipients of the data;
- the fact that the reply to questions is purely voluntary
- the existence of the right of access and rectification;

- the legal basis of the processing
- the time limits for storing the data;
- the right to have recourse at any time to the EDPS.

The participants will receive this information directly from EAS. The colleagues will receive this information from the participant who has chosen them. It will also be available on the EAS Intracomm website.

- Procedures to grant rights of data subjects

Data subjects concerned may send a request to EAS to indicate any changes to their personal data (for the data held by the EAS, that is, the list of interested participants).

For the data held by the contractor, the data subject will have to exercise the right of access and rectification directly with the contractor. The data subject may also choose to send the request to the EAS. In this case, the EAS will forward the request to the contractor to arrange for the access and possible rectification as necessary. A functional e-mail address has been established for this purpose. The data subject may obtain a copy of his or her personal data as registered by the contractor, to allow them to check that the information they supplied was accurately recorded. The contractor would do this directly with the participant without passing through the EAS to ensure that EAS has no access to any data.

Colleagues providing input may also obtain a written copy of the information which they provided in the form of feedback to allow them to check that the information they supplied was accurately recorded. The same procedure as for the participant will be followed.

- Type of processing (automated and/or manual)

The processing activity conducted is automated.

- Storage media

There is a database cluster to support the on-line applications and hold data. The cluster provides an automatic fail over in the event of a server failure. The Database Servers run Windows 2003 Server Standard Edition, and SQL Server 2005.

- Recipient(s) of the Processing

The contractor of the EAS receives and processes the data. The contractor will receive first, from the EAS, a list of participants who expressed interest in taking part in this exercise. Then, it will receive, directly from the participants and colleagues, the information provided in the exercise itself.

Furthermore, if the participant so wishes, the course facilitator (trainer) also receives the amalgamated report of the feedback. The trainer is not part of the EAS, but part of another contractor.

- Retention policy

The retention period is of 3 months. The controller mentioned that this allows the participant to request a further copy of their report should they lose it after the course.

- Time limit to block/erase data on justified legitimate request from the data subjects

For all justified legitimate requests received by the EAS, a response will be given within 15 working days from the day that the responsible service receives the correspondence, which may however send a justified holding reply, in the circumstances set out in point 4 on the Code of Good Administrative Conduct.

- Security and organisational measures

(...)

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The assessment done with the use of the Emotional Intelligence View 360 tool constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The feedback received by the participant will not reveal the way in which the colleagues completed the answers ("who said what"). Nevertheless, these data can not be considered "anonymous" because the contractor has the possibility to link the answers with the colleagues who have produced them (see Recital 26 of Directive 95/46/EC: "*(...); whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonable to be used either by the controller or by any other person to identify the said person; (...)*").

The EDPS recommends that the EAS explores the possibilities for making the use of this web-tool an anonymous exercise from the processor perspective. In this regard, variables such as IT development, procedures and cost will have to be taken into account.

The data processing is performed on behalf of a Community body, in this case, the EAS, in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation).

It has to be noted that even though the EAS has no access to the data processed by the contractor (data used for performing the Emotional Intelligence View 360), the contractor has to act according to the instructions given by the EAS. The EAS is the data controller of this processing activity because it determines the purposes (as specified under point 2 above) and the means (the use of the web-based tool) - Article 2 (d) of the Regulation. The contractor is therefore not authorised to make any further processing activity beyond what is determined by the EAS and specified in the contract.

The processing of the data is done electronically. 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 assessment done with the use of the

Emotional Intelligence View 360 tool clearly represents such a processing operation and is therefore subject to prior checking by the EDPS.

Deadlines: The notification of the DPO was received on 3 February 2009. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The deadline was extended for two months due to the complexity of the case. The procedure was suspended for a total of 150 days to require additional information and to allow for comments from the data controller. Consequently, the present opinion must be delivered no later than on 1 November 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).

Article 1 of the Decision on the organisation and running of the European Administrative School stipulates its duties as follows: *"1. The European Administrative School (...), shall design, organise and evaluate, on behalf of the signatory institutions to the Decision setting up the School (...), the following types of training: (a) management courses for officials and other servants who are called upon, or may be called upon, to perform management functions; (b) induction courses for new members of staff; (c) compulsory training as provided for in Article 45a of the Staff Regulations as part of the process for transferring between function groups. (...)"*.³ Nevertheless, even if the assessment conducted in the context of the Emotional Intelligence View 360 tool might be useful, it is not "necessary" for the performance of the task described in the mentioned rule. This is demonstrated by the fact that that participation in this activity is optional.

Therefore, the processing activity under analysis has to be based on Article 5(d) of the Regulation, which states that personal data may be processed only if *"the data subject has unambiguously given his or her consent"*. The *"data subject's consent"* is defined in Article 2(h) of the Regulation as follows: *"any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed"*.

In the present case, the data subject is specifically informed about the processing activity in the light of Article 11 of the Regulation and the fact that he or she is free to participate or not in the exercise. Furthermore, no negative consequences can affect the data subject if he or she decides not to participate.

3.3. Data Quality

³ Decision of the Secretaries-general of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions and the Representative of the European Ombudsman of 26 January 2005 on the organisation and running of the European Administrative School, OJ L 37/17, 10.2.2005.

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 appears, *prima facie*, to meet those requirements.

The controller has to instruct the processor to respect this principle in regard to the web-tool's questions.

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, an important part of the information processed is provided by persons other than the participant (colleagues). In this respect, it is important that the data subjects (participant and colleagues) 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). In any event, it has to be noted that most of the data processed is of a subjective nature, and therefore, it is difficult to evaluate the "accuracy", particularly in the context of the present case.

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*".

The EDPS is of the view that the three months retention period is reasonable *vis-à-vis* the purpose of processing.

3.5. Transfer of data

In line with Article 8 of the Regulation, personal data shall be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC "*(...) (b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced*".

The necessity of having the data transferred is proven by the fact that if the personal data is not communicated to the provider of the web-test and the trainer, these recipients are not able to perform the tasks requested by the controller with the consent of the data subject. As to the legitimate interests of the data subject, compliance with the data quality principle, as well as with the obligations of the controller and the rights of the data subject, as described in the present Opinion, ensure that there is no reason to assume, in principle, that they might be prejudiced. Furthermore, the data can not be used in any evaluation procedure by the institutions and bodies, and the data subject has given his consent to the processing. As a consequence, there is no reason to believe that the transfer would affect the data subject's legitimate interests.

3.6. Right of access and rectification

Article 13 of Regulation 45/2001 grants the data subject the right of access to personal data being processed. Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

As described in point 2 above, procedures have been established to grant these rights to the data subjects. It has to be noted that, when the request of access will be done directly to the functional mailbox of the EAS, the EAS will have to forward the request directly to the contractor, and will not receive an answer with the content of it. The contractor has nevertheless to inform EAS that it has provided access and proceeded to rectify the data, if appropriate.

Regarding the right of rectification, the EDPS points out that given the subjectivity involved in the feedback reports and the purpose that these reports are intended to serve, the room for rectification is relatively limited. For example, the person concerned providing feedback may later realize that he or she made a mistake in providing feedback. Therefore, a case-by-case analysis is recommended should there be a request for rectification.

3.7. Information to the person concerned

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed unless the data subject already has this information. 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.

The EDPS received a copy of a draft Privacy Statement, where most of the requirements are specified. However, some further points have to be mentioned, as follows:

- the statement has to specify that the data subject will suffer no negative consequences if he or she fails to reply or to participate in the web test;
- regarding the "purpose of processing", it has to be clarified that "anonymous feedback" means that the colleagues who have contributed will not be identified, neither in the feedback received by the participant, nor in the feedback received by the trainer (when they so chose);
- taking into account the way in which the system is set up so far, the following statement is not appropriate: "Participation is entirely (...) anonymous", therefore, this part has to be amended;
- it has to be mentioned that the course facilitator is also a contractor to the EAS, therefore, another recipient;
- the retention period mentioned in the statement is 2 months, however, the controller has informed the EDPS that it is of 3 months. Then, this reference has to be corrected;
- as to the right of access and rectification, it has to be mentioned, that even if the request of access could be made directly to EAS, EAS will forward the information to the contractor, and will not receive an answer with the content of it.

3.8. Processing of personal data on behalf of the controller

In the present case, the processing activity is mainly conducted by a processor, Consulting Tools Limited, on behalf of the EAS. Article 23 of the Regulation stipulates that: *"1. Where a processing operation is carried out on its behalf, the controller shall choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and ensure compliance with those measures."*

2. *The carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:*
- (a) the processor shall act only on instructions from the controller;*
 - (b) the obligations set out in Articles 21 and 22 shall also be incumbent on the processor unless, by virtue of Article 16 or Article 17(3), second indent, of Directive 95/46/EC, the processor is already subject to obligations with regard to confidentiality and security laid down in the national law of one of the Member States.*
3. *For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in Article 22 shall be in writing or in another equivalent form".*

The EDPS received a copy of the draft contract with Consulting Tools Limited, which is in line with this rule. The EDPS recommends, nevertheless, the inclusion of a clause specifying that the applicable law for the obligation of confidentiality and security of the processing is the law of the Member State where the processor is established, in this case, the United Kingdom.

3.9. Security measures

According to Article 22 of Regulation (EC) No 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 security 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"*.

(...)

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 EAS should:

- explore the possibilities for making the use of this web-tool an anonymous exercise. In this regard, variables such as IT development, procedures and cost will have to be taken into account;
- instruct the processor to respect the data quality principle (adequacy, relevance, proportionality) in regard to the web-tool's questions;
- conduct a case-by-case analysis should there be a request for rectification;
- amend the Privacy Statement as recommended above;
- include a clause in the contract with the processor specifying that the applicable law for the obligation of confidentiality and security of the processing carried out by the processor is the law of the Member State where the processor is established, in this case, the UK;

(...)

Done at Brussels, 30 October 2009

(signed)

Peter HUSTINX
European Data Protection Supervisor