



Opinion on the notification for prior checking received from the Data Protection Officer of the Council on the "Reporting procedure for officials" case.

Brussels, 15 December 2009 (Case 2009-0042)

1. Procedure

On 20 January 2009, the European Data Protection Supervisor (EDPS) received notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (hereinafter "the Regulation") from the Data Protection Officer (DPO) of the Council concerning the "reporting procedure for officials".

Questions were submitted by e-mail on 11 February 2009 and replies given on 19 February 2009. Additional questions were put on 6 March 2009 and the answers were given on 2 September. On 15 September 2009 the European Data Protection Supervisor's draft opinion was sent to the DPO for comment.

2. The facts

The reporting procedure meets the obligation to assess staff as laid down in Article 43 of the Staff Regulations of EC officials. Under the terms of Article 43 of the Staff Regulations, the ability, efficiency and conduct in the service [of officials and other servants] are the subject of a periodical report made at least once every two years. The main data processed in the reporting procedure are the relevant qualitative and quantitative assessments (number of performance points awarded).

The Council introduced a staff reporting procedure via the General instructions on the preparation of staff reports (Staff Note No 99/89 dated 28 July 1989).

The various **categories of data subjects** and persons involved in data processing in the context of the reporting procedure are officials and other agents of the Council, the assessors, the reportees and the persons consulted.

The **personal data processed** in the context of the reporting procedure are as follows:

- surname, first name, personnel number, unit of assignment, any period(s) of leave on personal grounds, length of service, date and place of birth, grade, date of promotion to grade, incremental step (administrative data obtained from the ARPEGE database using GPWIN), choice of language for the report, report reference period,
- assessment data: duties, languages, assessors' assessments (13 marks spread over three categories): ability, efficiency and conduct in the service and general assessment, newly acquired knowledge, publications, remarks by the persons consulted, name of the assessors.

Information to be given to data subjects: staff are informed of the reporting procedure by a Staff Note (CP) – most recently CP 14/08 – which refers to the "General instructions on the preparation of staff reports". It should be noted that this Staff Note does not include all the information laid down in Articles 11 and 12 of Regulation No 45/2001 – this will be rectified for the next reporting exercise.

The **rights of data subjects** are guaranteed by Section 5 of Council Decision 2004/644/EC of 13 September 2004 (OJ L 296, 21.9.2004, p. 20). The staff reports instructions and the Staff Note explicitly refer to the rights of data subjects to contest each stage of the procedure. Any incorrect information may be corrected immediately, except if verification is required.

The **recipients of the data** are all assessors (first and second). At the end of the reporting procedure, the forms are printed and kept in the reportee's personal file. Promotion boards have access to the most recent performance reports and, in certain circumstances, some joint committees may also have access to the reports of certain staff (Mobility Committee, Reports Committee in the framework of the appeal procedure laid down in the staff reports instructions).

Other information arising from the notification

Automated/manual processing:

1. The Personnel Unit draws up on paper a list of assessors in a Staff Note. That note is accompanied by the guide to staff reports incorporating the general instructions and the procedures to follow when making assessments and the time limits to be respected.
2. On the basis of the paper list of assessors for the various units, DGA5 draws up electronic lists. Each assignment to a specific post in the staff note corresponds to one or more detailed assignments to a post in the DOMUS organisational chart. Each person under a detailed assignment to a post is assigned a first/second assessor in the Staff Note.
3. As soon as all staff have been assigned a first/second assessor, a preliminary list of persons and their assessor is transmitted to DGA1 B – Personnel Management Dept. Lists are drawn up taking account of the six-month rule mentioned above.
4. The Personnel Unit proposes its recommendations for changes.
5. The changes are made.
6. The lists are sent electronically (in Excel format) to each assessor as well as to the administrative assistants.

For the record, administrative assistants do not have access to RAPNOT data. They are solely concerned by the official procedure (Persona Grata)¹ to ensure follow-up and compliance with the time limits in their department. These are two different programs. In some departments, no administrative assistant has been designated yet and a secretary or manager performs these duties.

7. The assessors and administrative assistants make their comments, underline errors, request changes.
8. The assessor/reportee data are entered in the application.
9. The login, passwords and instructions for use are sent to assessors by e-mail.
10. The data are recorded by the assessors. The reports are printed, completed, signed and initialled by the persons consulted, the second assessor and the reportee. The Persona

¹ See the EDPS opinion dated 13 November 2006 – Case 2006-359, on the EDPS website.

Grata application is used in the secretariats for the "reports follow-up" (Persona Grata procedure).

11. The report is subsequently delivered to the Archives Dept, DGA1 B and entered as delivered in an Excel file containing a list of reportees.
12. Statistics are requested by DGA1 B, to be sent to the Director-General of Administration and Personnel and the Promotions Boards. It is worth noting that a document containing statistics compiled according to category, grade and DG/larger departments is distributed to staff.

The procedure is partly automated.

Data storage medium: the automated data is stored on a server and backed up daily. For the moment, the final paper copy is stored in the secure personal file archives.

Data storage: at present data are stored in their current state (last three reporting exercises) in the database. Assessors are not allowed to keep a paper copy of the report. The final report is printed and kept in the official's personal file where it is stored for the duration of his/her career and, as things currently stand, for thirty years after the end of service. As statistics are drawn up at the end of each reporting exercise, there is no need to keep data for that purpose. Data on performance reports covered by the statistics and which are brought to the attention of staff by a Staff Note are totally anonymous. A broader overview of statistics is given to the Chairpersons of the Promotion Boards when considering comparative merits. That version contains a table of statistics broken down according to first assessor.

Blocking and erasure: technically, the automated section allows real-time blocking and erasure of data. Nevertheless, at present, where no automated procedures exist, that action must be taken by DGA5 specialised staff.

Security measures: [...]

3. Legal aspects

3.1. Prior checking

The notification received on 20 January 2009 constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a) of the Regulation). Processing of personal data includes collection, storage, consultation and erasure. The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)). The processing of files under scrutiny remains partly manual, but the processed data form part of a filing system. The data processing is partially automated. Article 3(2) is thus applicable in this case.

This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of the Regulation requires prior checking by the EDPS of 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) of the Regulation sets out a list of processing operations likely to present such risks, such as "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). Clearly, the reporting procedure involves the processing of personal data intended to evaluate personal

aspects relating to the data subject, including his or her ability, efficiency and conduct, and is therefore subject to prior checking by the EDPS.

In principle, checks by the EDPS should be carried out before processing. Otherwise the checking necessarily becomes ex post. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

Notification from the Council DPO was received by post on 20 January 2009. A number of questions were put to the DPO in an e-mail dated 11 February 2009. Answers were given on 19 February 2009. Additional questions were put on 6 March 2009 and the answers were given on 2 September. On 15 September 2009, the EDPS's draft opinion was sent to the DPO for his comments. In the absence of comments, the EDPS lifted the suspension on 9 December and will therefore deliver his opinion by 20 December (21 March + 273 days' suspension).

3.2. Lawfulness of the processing operation

The lawfulness of the processing operations must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides 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 in the legitimate exercise of official authority vested in the Community institution*".

All the personal data in staff reports are either generated via the ARPEGE application (surname, first name, personnel number, department to which the official is assigned, any period(s) of leave on personal grounds, length of service, date and place of birth, grade, date of seniority, incremental step) either provided by the reportee (for example, reportee's comments) or by the assessor or appeal assessor (assessments of the reportee's ability, output and conduct in the service, for example).

That information is processed solely in the context of the reporting procedure and the other career progression procedures (promotion, certification and attestation procedures) in accordance with each procedure's purposes and objectives.

Furthermore, it is stated in the preamble to the Regulation (recital 27) that this processing "*includes the processing of personal data necessary for the management and functioning of those institutions and bodies*". Since the reporting procedures involving the collection and processing of personal data relating to officials are necessary for the legitimate exercise of the Appointing Authority's activity, processing is lawful.

The main legal basis for data processing in the context of the reporting procedure comprises the following:

- Article 43 of the Staff Regulations;
- Articles 15(2) and 87 of the Conditions applicable to other servants of the EC;
- the General instructions on the preparation of staff reports (Staff Note No 99/89 dated 28 July 1989).

The legal basis thus supports the lawfulness of the processing.

3.3. Data quality

The data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (See 3.2 above). Fair processing means having the information forwarded to the data subjects (see 3.9 below).

Data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)(c) of the Regulation). The processed data described at the beginning of this opinion must be regarded as fulfilling these processing conditions. The data required are administrative in nature and are necessary to assess the work of officials/temporary staff/contract staff. The EDPS is satisfied that Article 4(1)(c) of the Regulation has been complied with in this respect.

Article 4(1)(d) of the Regulation stipulates that data must be "*accurate and, where necessary, kept up to date*". The Regulation further provides 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*".

The assessment carried out by the assessors is subjective by nature and it is therefore difficult to determine its accuracy. Nevertheless, the fact that staff have the opportunity to consult their personal files and are invited to exercise their right of access, rectification and appeal against the assessment does guarantee data accuracy and allow data to be updated. Those rights provide the second means of ensuring the quality of the data. For a discussion of these rights, see section 3.8 below.

3.4. Data storage

Under Article 4(1)(e) of the Regulation, 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*".

For the record, the data are stored in their current state (last three reporting exercises) in the database. Assessors are not allowed to keep a paper copy of the report. The final report is printed and put in the official's personal file where it is kept for the duration of his/her career and, as things currently stand, for thirty years after the end of service. As statistics are drawn up at the end of each reporting exercise, there is no need to keep data to that end.

Since the report forms are stored in staff members' personal files and are an integral part of the data subject's file, the rules on the storage of personal files are applicable. Once the data subject's service is terminated, the personal file is kept in the Personnel Unit archives until there are no longer any dependants (heirs of the deceased official, for example). That being the case, Article 26 of the Staff Regulations applies, especially: "*an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them*". This is therefore long-term storage which is necessary from the date on which the member of staff or his legal successors are entitled to claim pension rights or from the date of the last pension payment. However, the EDPS considered that in a number of similar cases it was reasonable to fix the duration of data storage at ten years to run from the date on which the staff member leaves the service or from the last pension payment. For that reason, the EDPS recommends that the storage period for report forms in personal files be reassessed.

Since the data are to be stored in the data subject's personal file over a long period, the appropriate guarantees must be provided. The data stored are personal. The fact that they are archived for long-term storage does not divest them of their personal nature. For that reason, data stored over a long period must be covered by appropriate storage measures, like any other personal data.

As regards the period for storing data in the database, data are kept for three years. The EDPS considers this period reasonable and that the system fulfils the conditions of Article 4(1)(e) of the Regulation.

The data are not used for historical, statistical or scientific purposes. In accordance with Article 4(1)(b) of the Regulation, these reports must be rendered anonymous. Article 4(1)(b) is therefore complied with.

3.5. Change of purpose/Compatible use

Article 4(1)(b) of the Regulation provides that *"personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes"*.

As stated above, the purpose of the processing is staff reporting. Data are retrieved from or entered in the staff databases. The processing under consideration does not involve any overall change in the stated purposes for which data are collected and processed, the reporting procedure being only one aspect. Accordingly, Article 6(1) of the Regulation is not applicable to the case in point and the requirements of Article 4(1)(b) are complied with.

3.6. Processing including the personnel or identifying number

Article 10(6) of the Regulation states that *"the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body."*

The personnel number of the official concerned may be collected in the framework of processing for the reporting exercises. The EDPS considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates correct follow-up. There is no reason to set other conditions in the case in question.

3.7. Transfer of data

Pursuant to Regulation No 45/2001, data transfers between or within Community institutions or bodies must meet the conditions set out in Article 7. Personal data may be transferred only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient. The recipient may process personal data only for the purposes for which they were transmitted.

The data are transferred to the assessors (first and second assessors). At the end of the reporting procedure, the forms are printed and stored in the reportee's personal file. The promotion boards can access the latest performance reports and in certain cases, some joint committees may also have access to the performance reports of certain staff (Mobility Committee, Reports Committee).

The administrative assistants are also data recipients but while they do not have access to the content of reports (RAPNOT) they monitor the formal procedure (Persona Grata). The comments made, errors highlighted and the requests for any revision of the report solely concern assessments of reportees by assessors, handling the report flow and compliance with the deadlines. Data may only be deleted if there are input errors at any stage of the report.

In addition, the European Ombudsman, the EDPS and the Council's internal auditor and DPO may also receive those data. Finally, the European Union Civil Service Tribunal and the Court of First Instance may receive these files in the context of legal proceedings². In this case the transfers are justified since they are necessary for the legitimate performance of the tasks within the competence of the recipient.

It should be noted that where an official or other servant is transferred to another institution [or agency] performance reports are transferred to the relevant departments in the other Community institution or agency. Where staff members are transferred between Community institutions or agencies, it is legitimate to transfer the performance reports stored in their personal files. The transfer of such reports is necessary for the legitimate performance of tasks covered by the competence of the recipient.

Finally, Article 7(3) of the Regulation provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". For that reason, the EDPS recommends that those receiving and processing data in the context of the reporting procedure be informed that they may not use them for other purposes. The EDPS would recommend that this information be added to the notification to accompany the next reporting exercise (see point 3.9 below).

3.8. Right of access and rectification

Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and of any available information as to their source. In connection with the performance report, Article 43 of the Staff Regulations of EC officials also provides that "*the report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant.*"

Article 14 of the Regulation provides that "*the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

The rights of access and rectification are guaranteed by means of Section 5 of the Council Decision of 13 September 2004: The staff reports instructions and the Staff Note explicitly refer to the rights of data subjects to contest each stage of the procedure. Any incorrect information may be corrected immediately, except if verification is required. The EDPS sees the options of accessing and contesting each stage of the procedure as well as the scope to appeal the report by submitting it to the Reports Committee as guarantees of compliance with Articles 13 and 14 of the Regulation.

The Staff Regulations also lay down a right of access for the data subject to documents in his or her personal file. The right of rectification is partly covered by Article 26 of the Staff Regulations which stipulates that *the personal file of an official shall contain any comments*

² Jurisdiction lies with the European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), instead of with the Court of First Instance, which is the appeal body.

by the official on such documents. In the reporting procedure, the reportee should be authorised not only to add comments but also to be certain that the report is complete. To ensure full compliance with Article 14 of Regulation No 45/2001, the Committee should ensure that the data subject has the right (for instance in the event of an appeal) to have incomplete reports in his or her personal file rectified by the controller.

It is difficult to verify the accuracy of the data since they are the result of a subjective evaluation of the data subject. Nevertheless, making sure that the report is complete is an additional way of ensuring compliance with Article 14 of the Regulation. The EDPS notes that the decision on the report makes provision for placing the report in the personal file. Provision should also be made for keeping in the personal file the decisions taken following an appeal before the Court of Justice and staff should be notified accordingly.

3.9. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items of information. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject. In the case in question, some of the data is collected directly from the person concerned (Article 11) and other data is collected from other persons, in particular the assessors and committee members (Article 12).

Council officials are notified of every reporting exercise mainly by a Staff Note. The Council has pointed out that the most recent Staff Note does not include all the information covered in Articles 11 and 12 of the Regulation and that any omissions will be corrected at the next exercise, a fact welcomed by the EDPS. That staff note should also include the changes mentioned in the above points (see data storage, right of access and data transfer).

3.10. Security

The security measures as described appear to comply with the Regulation. However, the EDPS would point out that, under Article 22 of Regulation (EC) No 45/2001 on 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*".

Conclusion

The proposed processing 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 means in particular that the Council should:

- reevaluate the data retention period;
- remind all those receiving and processing data in the context of the reporting procedure that they may not use them for other purposes and include this reminder in the information notice;

- put in place a procedure allowing inclusion in the personal file of decisions taken following appeals before the Court of Justice and communicate this fact;
- review the Staff Note as outlined under 3.9 above.

Done at Brussels, 15 December 2009

[Signed]

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