

Opinion on the notification of a prior check received from the Data Protection Officer of the Council of the European Union concerning the file ‘Procedure for dealing with cases of incompetence at the General Secretariat of the Council’

Brussels, 4 June 2010 (File 2010-237)

1. Procedure

By letter received on 25 March 2010, a notification within the definition of Article 27(3) of Regulation No 45/2001 (‘the Regulation’) was sent by the Data Protection Officer (DPO) of the Council of the European Union (‘the Council’) to the European Data Protection Supervisor (EDPS), concerning the procedure for dealing with professional incompetence.

The draft opinion of the EDPS was sent to the DPO on 18 May 2010 for comments, the latter having been received on 3 June 2010.

2. The facts

The Council plans to adopt a decision on the procedure for identifying, dealing with and remedying cases of professional incompetence. This decision is aimed at helping officials under appraisal to reattain a satisfactory level of work. The purpose of the processing relates to the implementation of the procedures provided for in Article 51(1) of the Staff Regulations to identify, deal with and remedy cases of incompetence.

The procedure takes the following course:

1. Staff report recording incompetence.
2. Information from the Appointing Authority on the finding, indicating the inadequacies at the root of the incompetence, the possible causes and the necessary remedial measures (copy to the official).
3. The official concerned is given a hearing and puts forward his comments on the proposed measures.
4. Draft remedial plan is drawn up (assessors and relevant department).
5. The draft remedial plan is sent to the Appointing Authority and states the duration of the measures identified.
6. Decision of the Appointing Authority notified to the official.
7. Regular discussions between official, assessors and relevant department.
8. Mid-term review.
9. Discussion at the end of the remedial plan.
10. Conclusions drawn up, setting out the measures implemented and the results obtained.
11. Notification of conclusions to the Appointing Authority and the official concerned.
12. Possible extension of the plan for up to six months.
13. Final staff report drawn up after the conclusions on the remedial plan.

14. If there is another finding of incompetence, the Appointing Authority may submit to the Joint Advisory Committee for Professional Incompetence (CPI) a reasoned proposal to dismiss, downgrade or classify in a lower function group (as provided for in Article 51(2) of the Staff Regulations).
15. Continuation of the procedure in accordance with Article 51(3) et seq. of the Staff Regulations.

The data subjects of this processing operation are officials of the Council.

The data concerned are administrative data enabling the identification of the official concerned and data relating to his career and the appraisal of his performance and skills which are necessary for drawing up the remedial plan, the conclusions on that plan and the follow-up to it. Also concerned are data set out in notes drawn up during the course of the procedure.

Information is provided in the following manner: the official is informed of the processing of data by means of standard wording included in the remedial plan. The official may also consult the GSC's (General Secretariat of the Council) data protection register. There is also provision for a communication to staff.

The rights of data subjects are guaranteed by the Council Decision of 13 September 2004 (Section 5) adopting implementing rules concerning Regulation (EC) No 45/2001. The draft decision of the Council on the procedure to identify, deal with and remedy cases of professional incompetence provides for the remedial plan and the conclusions on the remedial plan to be countersigned by the official concerned. The official may also put forward his point of view during a number of discussions to take place when the remedial plan is implemented. The draft decision also stipulates that the official must receive copies of the notes sent at different stages of the procedure, and that he is entitled to submit his comments on the remedial plan.

The processing operation is partially automated. In accordance with Article 51(1) of the Staff Regulations, the Council must define procedures to identify, deal with and remedy cases of incompetence by adopting the relevant internal regulations. These procedures involve the processing of personal data, which requires prior checking under Article 27 of Regulation No 45/2001. The processing operation concerns personal data which are generated during the procedures in question. These data are included in the remedial file drawn up in the context of such procedures. They may be notified to the individuals referred to in point 5. The data in the remedial file are stored in electronic files and/or in paper files, with access limited to authorised persons. The remedial plan, the conclusions and the notes drawn up during the procedure are printed out and placed in the personal file of the official concerned.

The storage media are as follows: storage in electronic format and paper form.

The recipients of the data are: assessors of the official concerned – members of the Joint Advisory Committee for Professional Incompetence – members of the Report Committee – Appointing Authority – head and members of the relevant department in charge of the file – administrative advisers in charge of the file – members of the Legal Service in charge of the file.

The data is retained as follows: retention of the remedial file in the archives on electronic media or on paper for five years following the Appointing Authority's decision. In the event of litigation, the remedial file is retained for three years following the conclusion of that

litigation. The original copies of the remedial plan, the conclusions and the notes must be kept in the personal file.

The data is blocked and erased the month following acceptance by the controller.

The security measures are as follows: the data from the remedial file are stored in a space on the server and/or in specific folders locked in a secure cupboard and may be accessed only by authorised individuals. Technical administration of the space on the server is confined to a very restricted group in order to ensure the confidentiality of the processed data.

3. Legal aspects

3.1. Prior checking

The notification received by letter on 25 March 2010 concerning procedures for dealing with incompetence entails the processing of personal data ('any information relating to an identified or identifiable natural person' – Article 2(a) of the Regulation). The data processing referred to is effected by a European Union – formerly 'Community' – institution and is carried out in the exercise of activities all or part of which fall within the scope of what was formerly known as 'Community' law (Article 3(1) of the Regulation). The processing of data in the procedure for dealing with professional incompetence is partially automated. Article 3(2) is therefore applicable to this case. That being so, this processing falls within the scope of Regulation No 45/2001.

Article 27(1) of Regulation No 45/2001 makes subject to prior checking by the EDPS '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'. The processing of data in the present case is also caught by Article 27(2)(b): 'The following processing operations are likely to present such risks (...) processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct'.

The notification from the DPO of the Council was received on 25 March 2010. On 18 May 2010, the draft opinion of the EDPS was sent to the DPO for comments. Those comments were received on 3 June 2010. The EDPS must therefore give his opinion no later than 11 June 2010.

3.2. Lawfulness of processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation No 45/2001, which provides that '[Personal data may be processed only if ...] *processing is 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*'.

The procedure to identify, deal with and remedy cases of incompetence involving Council staff, which entails the collection and processing of personal data relating to officials, comes within the scope of the legitimate exercise of official authority vested in the institutions. The proposed processing operation is therefore lawful.

The legal basis for the processing of data is Article 51 of the Staff Regulations, concerning procedures for dealing with incompetence, Article 9(6) of the Staff Regulations, concerning the Joint Advisory Committee for Professional Incompetence, and Article 12 of Annex II to

the Regulations. Reference should also be made to Article 43 of the Staff Regulations, concerning appraisals.

The legal basis provided by the Staff Regulations of Officials of the European Communities supports the lawfulness of the processing. However, the EDPS recommends that the preamble to the draft decision should also refer to Article 43 of the Staff Regulations.

3.3. Data quality

Article 4 of Regulation No 45/2001 lays down a number of obligations concerning the quality of personal data. Data must be *'adequate, relevant and not excessive'* (Article 4(1)(c)). The processed data described at the beginning of this opinion must be deemed to satisfy those conditions in connection with the processing. The data required are of an administrative nature and are necessary to allow the proper conduct of the different stages of the procedure for dealing with incompetence. The EDPS is of the opinion that there is compliance with Article 4(1)(c) of Regulation No 45/2001 in that regard.

In addition, the data must be processed *'fairly and lawfully'* (Article 4(1)(a) of Regulation No 45/2001). The lawfulness of the processing has already been analysed (see point 3.2 above). With regard to fairness, this relates to the information given to data subjects. On that question, see point 3.9 below.

Lastly, the 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).

It may reasonably be concluded from the description of the system that the data is accurate and kept up to date, since the data controller has an obligation to check that the data is accurate and to keep it up to date. Data subjects have the rights of access and rectification for the purposes of making the file as complete as possible. They represent the second opportunity to ensure the quality of the data. On the two rights of access and rectification, see point 3.8 below.

3.4. Keeping of data

Article 4(1)(e) of Regulation No 45/2001 lays down the principle that 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 remedial file must be kept in the archives on electronic media or in paper form for five years following the Appointing Authority's decision. In the event of litigation, the remedial file is retained for three years following the conclusion of that litigation. The original copies of the remedial plan, the conclusions and the notes must be kept in the personal file.

The EDPS is of the view that there is compliance with Article 4(1)(e) of Regulation No 45/2001.

3.5. Change of purpose / compatible usage

Most of the data are extracted from staff databases (administrative data). The processing operation under scrutiny does not entail a general change of the purpose intended for staff

databases and nor is it incompatible with that purpose. This means that Article 6(1) of Regulation No 45/2001 is not applicable in this case and that Article 4(1)(b) of the Regulation is met.

3.6. Transfer of data

The processing must be examined in the light of Article 7(1) of Regulation No 45/2001. Article 7(1) concerns the transfer of personal data within or between Community institutions or bodies ‘*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*’.

The present case involves the transfer of data within the same institution: assessors of the official concerned – members of the Joint Advisory Committee for Professional Incompetence – members of the Report Committee – Appointing Authority – head and members of the relevant department in charge of the file – administrative advisers in charge of the file – members of the Legal Service in charge of the file.

This case also involves the transfer of data between institutions, in so far as the official concerned may also bring the decision before the Court of Justice (Article 91 of the Staff Regulations) in addition to having the right to appeal to the EDPS (Article 90b of the Staff Regulations).

It is therefore necessary to ensure that the conditions laid down in Article 7(1) are satisfied, which is the case since the data collected are required to carry out the processing and, furthermore, the data are ‘*necessary for the legitimate performance of tasks covered by the competence of the recipient*’. In the circumstances, this task comes within the competence of the institution itself or the institutions concerned, and Article 7(1) is therefore fulfilled.

Furthermore, Article 7(3) of Regulation No 45/2001 provides that ‘the recipient shall process the personal data only for the purposes for which they were transmitted.’ It must be expressly guaranteed that no one receiving and processing data in the context of the procedure for dealing with professional incompetence is able to use that data for other purposes. In this particular case, the EDPS recommends that staff responsible for processing the data receive an information note to that effect.

3.7. Processing including staff number or identification number

In the present case, the Council uses staff numbers. The use of an identifier is, in itself, simply a means – a lawful one in this case – of simplifying the work of the controller of personal data; such use may, however, have important consequences. This is also what prompted the European Union legislature to regulate the use of identification numbers by means of Article 10(6) of the Regulation, which provides for the European Data Protection Supervisor to intervene. It is not a question here of establishing the conditions in which the Council may process personal numbers but rather of highlighting the attention which must be paid to this aspect of the Regulation. In the present case, the use of personal numbers by the Council is reasonable since it is a means of simplifying the processing task.

3.8. Right of access and rectification

Article 13 of Regulation No 45/2001 governs the right of access – and the detailed rules applicable to that right – at the request of the data subject. Article 14 of Regulation No 45/2001 governs the right of the data subject to obtain rectification.

The procedures for guaranteeing the rights of data subjects (right of access, right to obtain rectification, right to obtain blocking, right to obtain erasure, right to object) are set out in Section 5 of Council Decision 2004/644/EC of 13 September 2004 (OJ 2004 L 296, p. 20). Moreover, on a number of occasions during the procedure data subjects are given the opportunity to put forward their point of view. Taken together, these provisions satisfy the conditions laid down in Articles 13 and 14 of the Regulation, which are therefore fulfilled.

Nevertheless, the EDPS recommends to the Council that it mentions in the information text the fact that data subjects may exercise their rights (see the point below).

3.9. Information for data subjects

Certain personal data are provided directly by the data subject or are provided by the other participants in the appraisal process. That is why the provisions of Article 11 (Information to be supplied where the data have been obtained from the data subject) on giving information to data subjects are applicable in this case. The same is true of Article 12 (Information to be supplied where the data have not been obtained from the data subject).

Information will be supplied to data subjects by means of a communication to staff. In addition, the official concerned is informed of the processing of his data through standard wording included in the remedial plan.

While the EDPS is of the view that there is compliance with Articles 11 and 12, he would like the communication to staff to include all the compulsory information set out in Articles 11 and 12 of the Regulation.

3.10. Security

Article 22 of Regulation No 45/2001, on security of processing, provides that *'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'*.

Having regard to the security measures adopted, the EDPS is of the view that these may be deemed appropriate within the meaning of Article 22 of the Regulation.

Conclusion

In the terms in which it has been described, the proposed processing does not appear to entail any infringements of the provisions of Regulation No 45/2001, provided that account is taken of the observations set out above. That means, in particular, that the Council must:

- Include in the preamble to the draft decision a reference to Article 43 of the Staff Regulations.
- Remind staff responsible for processing personal data that it may be used only for the purposes for which it was transmitted.
- Include all the compulsory information set out in Articles 11 and 12 of the Regulation in the communication to be sent to staff.

Done at Brussels, 4 June 2010

(signed)

Giovanni Buttarelli
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