



Opinion on the updated notification concerning administrative inquiries and disciplinary proceedings within the Court of Justice of the EU (hereinafter '*the Court*')

Brussels, 12 September 2011 (Case 2011-0806)

1. The procedure

On 8 June 2006, the EDPS issued a prior-checking opinion concerning disciplinary proceedings within the Court. On 23 April 2010, the EDPS adopted the Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European institutions and bodies. On 15 June 2011, the Court's Data Protection Officer (hereinafter '*the DPO*') sent the EDPS an updated notification incorporating the section relating to administrative inquiries pursuant to Article 27(2) of Regulation No 45/2001 (hereinafter '*the Regulation*').

In his analysis, the EDPS has highlighted those practices which do not appear to conform with his Guidelines and has made relevant recommendations to the Court. The EDPS has also taken account of the recommendations made in his Opinion of 8 June 2006.

2. Lawfulness of the processing

In his Opinion of 8 June 2006, the EDPS emphasised that, in the light of the Staff Regulations, it is essential that the Court adopt procedures and measures relating to disciplinary proceedings. In the updated notification, which relates both to disciplinary proceedings and administrative inquiries, the Court only provided the EDPS with a preliminary draft of the general implementing provisions relating to administrative inquiries.

The EDPS wishes to emphasise that the first recommendation made in his Opinion of 8 June 2006 should be taken into account in the updated notification. Consequently, the EDPS takes the view that the Court's procedures may be considered as conforming with the principle of lawfulness as recommended in the Opinion of 8 June 2006 once the preliminary draft has been adopted. The Court should send the EDPS a copy of the part of the draft relating to disciplinary proceedings.

3. Processing of special categories of data

The Court makes no reference to information concerning exceptional grounds for authorising the processing in question set out in Article 10(2), (4) or (5) of the

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Regulation. The EDPS already made a recommendation concerning this in his Opinion of 8 June 2006 and has also emphasised it in his Guidelines.

The EDPS therefore recommends that the data controller should make sure, for example by means of a notice, that investigators conducting an administrative inquiry or disciplinary proceedings are aware that processing of any sensitive data may be authorised only in the exceptional cases described in Article 10(2),(4) or (5) of the Regulation.

4. Data quality

Adequacy, relevance and proportionality

As already emphasised in the Opinion of 8 June 2006, the Court should make explicit reference in its general provisions to Article 4(1)(c) of the Regulation. In accordance with the Guidelines, the Court should in particular add to the general provisions a statement that the principles of necessity and proportionality must be applied to reports concerning administrative inquiries and disciplinary proceedings and also to Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations).

Accuracy

Article 5(3) of the general provisions concerning administrative inquiries provides that the data subject shall receive a copy of the inquiry report and also, on request, a copy of all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties. Reference should also be made to this principle in relation to disciplinary proceedings since, by this means, data subjects will be in a position to check that data relating to them are accurate and kept up to date in accordance with Article 4(1)(d) of the Regulation (see also the right to rectification in Section 6 below).

5. Retention of data

The EDPS notes that the Court has adopted a maximum retention period of twenty years for files relating to administrative inquiries and disciplinary proceedings, commencing from the date of closure of the inquiry or that of the disciplinary decision. That retention period seems reasonable and necessary having regard to the purposes for which the data are collected pursuant to Article 4(1)(e) of the Regulation and also to the possibility of an appeal being lodged. It also conforms with recommendations made by the EDPS in other similar prior-checking opinions.

However, the Court has not introduced a retention period for cases where an inquiry is closed without any disciplinary action being taken. The EDPS therefore recommends that the Court adopt a proportionate retention period having regard to Article 4(1)(e) of the Regulation and that it include a reference to it in its information notice.

In the information notice, the Court refers to the application of Article 27 of Annex IX to the Staff Regulations, which provides that a data subject may submit a request for the deletion of the disciplinary decision from his personal file. However, the Court's DPO has informed the EDPS that, apart from under those circumstances, no time limit

has been set for requesting the deletion of a decision from a file, because files are currently processed manually and it is therefore not possible to monitor and update personal files on the basis of criteria connected with administrative inquiries and disciplinary proceedings. The EDPS has noted this difficulty and, in connection with this issue, recommends that the Court provide clear information for data subjects in the information notice concerning their right to request the deletion of such decisions from their personal file and also the rules and procedures for exercising that right. The EDPS also asks the Court to introduce a time limit for requesting the deletion of such decisions following the application of Article 27 of Annex IX to the Staff Regulations, once a computerised personal file management system is in place.

6. Transfer of data

Internal transfers of data within the Court and between the Court and other Community institutions or bodies (Article 7)

In order to ensure compliance with Article 7(3) of the Regulation, the EDPS recommends that the Court prepare an internal memorandum or a declaration to be signed by all internal recipients, within the meaning of Article 7, in connection with administrative inquiries and disciplinary proceedings, explicitly reminding them of their obligation not to use data received for purposes other than those for which they were transferred.

External transfers (Article 8)

In the case of transfers to national authorities, the EDPS recommends that the Court adopt specific guidelines and establish a substantiated and documented procedure based on the EDPS's Guidelines. In particular, where recipients are subject to Directive 95/46/EC, the necessity criterion must be taken into account pursuant to Article 8 of the Regulation:

- if the data are transferred at the request of a national authority, the latter must establish the 'necessity' of the transfer;
- if the data are transferred solely on the initiative of the Court, it is for the latter to establish the 'necessity' of the transfer in a reasoned opinion.

7. Rights of access and rectification

The EDPS notes that the information notice refers to Articles 13 and 14 of the Regulation. Simply referring to those rights is not sufficient, since it is necessary to provide an adequate explanation of the means whereby those rights are guaranteed and also of the restrictions on those rights which are applicable in connection with the processing in question.

Right of access

As emphasised in the Guidelines, in the course of an administrative inquiry or disciplinary proceedings, data subjects must have access without constraint to the documents contained in their disciplinary file and also to copies of final decisions

placed in their personal file. However, such access may be restricted if application of the restrictions defined in Article 20 of the Regulation is justified. The EDPS recommends that this principle be clearly set out in the general provisions and also in the information notice.

However, as emphasised in the Guidelines, particular attention should also be given to potential data subjects other than the person under investigation, that is to say other persons indirectly involved in an administrative inquiry or disciplinary proceedings, such as whistleblowers, informants or witnesses. In connection with this, the EDPS recommends that the Court indicate in the general provisions and in the information notice that any restriction on data subjects' right of access must be strictly applied in the light of the need for such restriction and must be balanced against the right of defence. In particular, the Court should add that:

- in the case of **whistleblowers, informants and witnesses**, any restriction of the right of access of those persons should be in line with Article 20 of the Regulation;
- the identity of whistleblowers should be kept confidential in as much as this would not contravene national rules regulating judicial procedures.

Right of rectification

In the information notice, the Court should indicate the various means whereby the right of rectification is guaranteed in the context of an administrative inquiry or disciplinary proceedings. For example, it should mention that data subjects may add their comments and may include decisions made during a recourse or appeal procedure in their file. Where appropriate, data subjects may also request that the decision be replaced or deleted from their file.

8. Information to be given to data subjects

The EDPS notes that the Court has incorporated the matters referred to in Articles 11 and 12 of the Regulation. Apart from the explanations concerning rights of access and rectification, the EDPS recommends that the Court also add that:

- the right to information may be restricted in certain cases if this proves necessary in the light of Article 20(1)(a) to (e), and
- the data controller must inform the data subject of the principal reasons on which the application of that restriction is based and of his or her right to have recourse to the EDPS pursuant to Article 20(3). Any decision for deferral to that provision should be taken strictly on a case-by-case basis.

9. Security

The Court's DPO has informed the EDPS that the data processing in question is only carried out manually, but that in the future a computerised file management system will be put in place.

In that case, the EDPS reminds the Court that all data processed in the course of an administrative inquiry or disciplinary proceedings must be properly managed and

protected in accordance with the technical and organisational measures referred to in Article 22 of the Regulation, The EDPS therefore recommends that the Court conduct an evaluation of the risks inherent in its existing general security policy as applied within the institution and, if necessary, adopt specific security measures, in particular as regards its policy on access control to be applied to the processing in question. The EDPS should be informed of these measures.

10. Traffic data and confidentiality of electronic communications

Traffic data

If in the future the Court considers that it is really necessary to process data relating to Internet connections and the use of e-mail or telephones in the course of an administrative inquiry or disciplinary proceedings, it would have to do so in accordance with Articles 20 and 37 of the Regulation. The Court should also adopt the following practice and include it in its general provisions: the DPO should be consulted before any traffic data are collected and the recommendations contained in the EDPS's Guidelines should be followed carefully.

Confidentiality of electronic communications

The Court has not addressed the problem of the confidentiality of electronic communications. If it proves necessary for the Court to have access to electronic communications in the course of an administrative inquiry or disciplinary proceedings, the principles contained in the Guidelines must be rigorously followed. The EDPS therefore recommends that all parties involved in an administrative inquiry or disciplinary proceedings should be familiar with these principles and recommends that the Court include them in its general provisions.

As mentioned in the Guidelines, the EDPS will be carrying out a further in-depth review of the legal basis for the interception of electronic communications. However, and before it takes any action, the Court should inform the EDPS whether the institution is authorised to intercept telephone calls or e-mails in the course of an administrative inquiry or disciplinary proceedings in order to obtain information necessary for the inquiry. If this is the case, the EDPS recommends that – in addition to providing advance information – the Court should mention this possibility in its general provisions and establish a procedure with particular emphasis on the legal basis for the recording of voice communications or e-mails and on the possibility of doing this without a judicial warrant or authorisation.

Conclusion

The proposed processing does not appear to involve breaches of the provisions of Regulation 45/2001, provided that the above observations are taken into account. This means, in particular, that the Court should:

- adopt and send to the EDPS a copy of a preliminary draft of the general implementing provisions relating to disciplinary proceedings;

- make it clear to the data controller that the processing of any sensitive data is authorised only in the exceptional cases described in Article 10(2), (4) or (5) of the Regulation;
- make an addition to the general provisions stating that the principles of necessity and proportionality must be applied to reports on administrative inquiries and disciplinary proceedings;
- indicate in the general provisions relating to disciplinary proceedings that the data subject has the right to receive a copy of the inquiry report and, on request, a copy of all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties;
- introduce a data retention period for cases where an inquiry is closed without any disciplinary action being taken;
- provide clear information for data subjects in the information notice concerning their right to request that the disciplinary decision be deleted from their personal file and also the rules and procedures for exercising that right. In addition, the EDPS asks the Court to introduce a time limit for requesting the deletion of the decision following the application of Article 27 of Annex IX to the Staff Regulations, once a computerised personal file management system is in place.
- explicitly remind all internal recipients of their obligation to use data received only for the purposes for which they were transferred;
- in the case of external transfers, adopt specific guidelines and establish a substantiated and documented procedure taking account of the necessity criterion pursuant to Article 8 of the Regulation;
- indicate in the general provisions and also in the information notice that the right of access to disciplinary and personal files may be restricted if the application of restrictions within the meaning of Article 20 of the Regulation is justified;
- state in the general provisions and the information notice that, in the case of other persons indirectly involved, such as whistleblowers, informants or witnesses, any restriction on data subjects' right of access must be strictly applied, having regard to the need for such a restriction, and should be balanced against the right of defence;
- indicate in the information notice the various means of guaranteeing the right of rectification within the context of administrative inquiries and disciplinary proceedings;
- add to the information notice the principles described in Section 8 of this Opinion;

- adopt security measures pursuant to Article 22 of the Regulation and inform the EDPS accordingly;
- if access to electronic communications should prove necessary during the course of an administrative inquiry or disciplinary proceedings, where appropriate adopt specific rules, having regard to the observations made in this Opinion, and inform the EDPS accordingly.

Done at Brussels, 12 September 2011

(signed)

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