



Opinion on the notification for prior checking from the Data Protection Officer of the European Chemicals Agency concerning Annual Performance Appraisal, Probationary Period Reporting and Promotion (Reclassification)

Brussels, 15 December 2011 (Case 2011-0945)

1. Proceedings

On 24 October 2011 the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Chemicals Agency (**ECHA**) a notification for prior checking concerning annual performance appraisal, probationary period reporting and promotion (reclassification) accompanied by the following documents:

- Specific Privacy Statement regarding the processing of personal data related to Staff Evaluation,
- ECHA Decision on performance appraisal of temporary and contract staff, implementing Article 43 of the Staff Regulations (MB/25/2009 final),
- template for Staff appraisal report,
- Performance Appraisal Guidelines for Jobholders,
- Performance Appraisal Guidelines for Managers,
- Guidelines for probationers and their managers,
- template for Probationary period report,
- template for Management trial period report,
- ECHA Decision on the policy and procedure for the reclassification of temporary agents, implementing Article 10 of the Conditions of Employment of Other Servants (MB/74/2010/D final),
- ECHA Executive Director Decision on the composition and powers of the Joint Committee for Appraisal and Reclassification

2. Legal aspects

This Opinion deals with the already existing annual performance appraisal and probationary period reporting for temporary and contract agents as well as with promotion (reclassification) procedure at the ECHA. It is based on the Staff Evaluation Guidelines¹ which allows the EDPS to focus on the practices that do not seem to be fully compliant with the Data Protection Regulation (EC) 45/2001 (hereinafter 'Regulation 45/2001').

The EDPS notes that the administrative and evaluation data are processed in compliance with data quality principles set out in Article 4(1)(a), (c) and (d). The right of access and rectification can be granted to the data subject in accordance with its Articles 13 and 14, as well as that the applicable security measure can be considered as adequate in terms of its Article 22.

¹ Guidelines concerning the processing of personal data in the area of staff evaluation adopted on 15 July 2011 (EDPS 2011-042).

However, the EDPS observes that the processing of special categories of data, data retention and data transfers, as well as information policy appear not to be in full compliance with the Regulation 45/2001. Therefore, he addresses these issues in more detail below.

2.1 Processing of special Categories of Data

In the framework of the annual appraisal procedure and the probation procedure data concerning health may be processed, namely if this information is necessary to define a possible extension of the work period. The EDPS considers the processing of such data as justified in terms of Article 10 (2)(b) of Regulation 45/2001 as it is necessary to comply with the controller's obligations in the area of employment law as foreseen by the Staff Regulations.

However, the collection of medical data within the respective probation and appraisal reports is deemed unnecessary for the purpose of the completion of the particular procedure. Therefore, it is recommended that the reason for the extension of the probationary and appraisal period (sickness, maternity or accident) is provided in a separate note and that no information about the actual diagnosis is processed within the probation and appraisal procedure.

2.2. Data retention. Final reports and decisions with regard to all three procedures are stored in the individual personal files for a maximum period of 10 years after the end of the employment contract, provided there are no pending claims. This long retention period is motivated by the obligations set in Article 26 of the Staff Regulations, where it is defined that the personal file of a staff member needs to contain all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct. Promotion decisions containing personal data are removed from ECHA's intranet pages after a maximum of 5 years.

Article 4(1)(e) of the Regulation 45/2001 states that personal data can be kept in a form permitting identification of data subjects for no longer than necessary for the purpose for which they were collected or further processed.

The EDPS notes that the storage period which extends to all the carrier of the jobholder in the ECHA plus ten years is not necessary in light of the purpose for which the data are processed which is to assess the efficiency, the competencies and the aspect of conduct in the service of the jobholder. In similar cases, storage of appraisal and probation reports for maximum five years period after the end of a particular exercise, as well as storage of promotion and reclassification decisions until the termination of employment was considered in conformity with the Regulation 45/2001². A pending legal action may be the only exception from this rule. After the end of the retention period the data shall be destroyed or made anonymous.

Thus, the ECHA is requested to reconsider the retention period and establish a shorter retention period for all paper and electronic files with regard to all three procedures.

2.3. Data transfers. Whereas all data transfers within ECHA, as well as to other EU institutions can be considered as in full compliance with Article 7(1) of Regulation 45/2001, it

² cf. EDPS Opinions on annual appraisal and probationary period of CPVO President and Vice-President of 28 July 2009 (EDPS 2009-355 and 2009-356).

seems that not all recipients are aware of their obligation to process the data received only for purposes for which they were transmitted.

Therefore, the EDPS recommends that all recipients are made aware of the purpose limitation set out in Article 7(3) of Regulation 45/2001.

2.4. Information to data subjects. The EDPS notes that all information listed in Article 11 and 12 of the Regulation 45/2011 are provided in the existing Specific Privacy Statement and in the Performance Appraisal Guidelines for Jobholders and Managers, as well as in the Guidelines for probationers and their managers available on the ECHA Intranet.

Nevertheless, he suggests that the Specific Privacy Statement may be attached to the respective forms and/or mentioned in the Office Notices launching the particular procedure.

3. Conclusion

In view of the above, the EDPS recommends that the following measures are taken in order to ensure full compliance with Regulation 45/2001:

- health data necessary to define a possible extension to the work period is processed separately from the respective reports in a separate note;
- reconsider the retention period and establish a shorter retention period for all paper and electronic files;
- remind all recipients of data of their obligation not to use the data received for any further purpose beyond the purposes for which the data were transmitted;
- provide information to the data subjects in line with section 2.4 of the present Opinion.

He would like to invite the ECHA to inform him about the implementation of these recommendations within three months after receipt of this letter.

Done at Brussels, 15 December 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor