

Opinion on the notification for prior checking from the Data Protection Officer of the European Anti-Fraud Office (OLAF) regarding Interventions of the *Chambre d'écoute* in the Framework of the Reorganization of OLAF's Organigram

Brussels, 16 December 2011 (case 2011-1021)

1. Proceedings

On 5 October 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Anti-Fraud Office (OLAF or the 'Office') a request for consultation as to the need for prior checking under Article 27(3) of Regulation 45/2001, regarding 'Interventions in the *Chambre d'écoute* in the Framework of the Reorganization of OLAF Organigram'.

Together with the request for consultation, OLAF DPO also filed a notification for prior-checking, to be considered in case where, pursuant to the Article 27(3) consultation, the EDPS would conclude that a prior-checking would be necessary. The notification was accompanied by the following documents:

- Privacy Statement provided to the staff;
- Form for allocation of non-managerial staff (transmitted by the DPO on 10 October 2011).

By letter of 13 October 2011, the EDPS confirmed to the DPO that the notified processing should have been subject to prior checking, as it could be considered as a form of evaluation of personal aspects pursuant to Article 27(2) letter b) of Regulation 45/2001.¹ The EDPS emphasised that, as a rule, the Opinion of the EDPS should be requested and given prior to the start of the processing operations. Given that in this case the processing was already in place,² the EDPS already provided some recommendations in the letter. He stressed that these recommendations had to be fully complied with in the course of the implementation of the processing.

¹ In the notification it was argued that no evaluation of personal aspects and skills would take place. The controller accepted to modify the notification, where necessary (see letter of 16 November 2011).

² In the notification, it was specified that the collection of personal data had already begun as part of OLAF reorganisation since it was felt at the time by the controller, that a notification to the DPO pursuant to Article 25 of Regulation 45/2001 would have been sufficient.

On 7 November 2011, the DPO transmitted to the EDPS a draft Director's Note to the Staff concerning the creation of a *Chambre d'écoute* in the framework of OLAF reorganisation (the 'Note'). A slightly revised final Note was sent to the EDPS on 16 November 2011.

On 8 December 2011, the draft Opinion was sent to the DPO for comments which were provided on 14 December 2011.

2. Facts

This prior-check Opinion deals with the processing of personal data of OLAF staff for the purpose of managing and facilitating internal mobility of personnel in the framework of OLAF reorganisation. To run this process, the Director General of OLAF decided to set up a *Chambre d'écoute* (the 'Panel'), whose aim is to take note of the wishes of OLAF staff with a view to identifying possible reassignments within the new Office structure and submit an opinion thereon to the Director General.

The Panel is composed of 3 members appointed by the Director General, the Head of Unit 'Administration and Human Resources', the Assistant to the Director General and the Internal Auditor. The members are assisted by a secretariat (two secretaries from the Unit D5) and an official from the Unit D5 providing the necessary IT support.

In view of a possible re-assignment to other functions, staff members have been invited to fill the 'Form for allocation of non-managerial staff' (the 'Form') in order to express their wishes, and their updated CV. In light of the information submitted, the Panel may decide to invite the staff member concerned for an interview. An interview may also be requested by the staff.

Part of the information so collected is transferred into an Excel table containing the following data:

- Name, assignment, status (official, temporary agent, contractual agent, national expert);
- Function group (AD, AST);
- Desire to change job (Y/N);
- Preferred unit in case of a re-assignment (Unit X/Unit Y);
- Modification of the preference expressed following an interview with the Panel (Y/N);
- Opinion of the Panel (Unit X/Unit Y).

According to the notification no sensitive data pursuant to Article 10 of Regulation 45/2001 are processed.

The Panel will use the information collected exclusively in order to identify possible new assignment. The opinion submitted to the Director General will be limited to the identification of unit or units recommended for the possible re-assignment of the staff member (i.e. Unit X/Y) and will not include any further comments or observations. The recommended unit(s) will be identified by the Panel in light of a number of criteria, namely the interest of the service, staff member wishes, motivation and the information contained in the CV.

Data subjects will be able to access, modify, and delete the data they have provided at any time. Only the 3 members of the Panel, its secretariat, the IT official and the Director General can access these data (those contained in the Excel Table as well as those contained in the functional mailbox created for the exercise).

The data contained in the CVs and the forms submitted are retained until 1 February 2012 (date of publication of the new OLAF organigram). The data contained in the Excel Table are retained for 3 years after 1 February 2012, in order for the controller to be able to explain the reasons for the re-assignment. In the letter to the EDPS of 16 November 2011 and the attached revised Note, OLAF accepted to limit the retention period of the data to 1 year only.

Information to data subject has been provided by means of the enclosed Privacy Statement.

3. Legal aspects

3.1. Prior checking. Regulation 45/2001 applies to the processing of personal data by EU institutions wholly or partly by automatic means carried out in the exercise of activities which fall within the scope of EU law and are intended to form part of a filing system. The processing of personal data in terms of its Article 2(b) means any operation performed on personal data, such as collection, storage, retrieval, consultation, use, alignment or combination.

The processing of personal data carried out in the context of the Panel falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(b), which refers to processing operations intended to evaluate personal aspects relating to data subjects, including their ability, efficiency and conduct. The purpose of the processing is to identify possible new assignments within the new structure of the Office and submit a recommendation (an opinion) to the Director General in light of a number of criteria (interest of the service, staff member wishes, motivation, information contained in the CV). This will entail an evaluation of personal skills pursuant to Article 27(2)(b) of Regulation 45/2001, which is subject to prior checking by EDPS.³

According to Article 27(4) of Regulation 45/2001, the EDPS Opinion must be delivered within a period of two months. The two-month period should start running from the day on which the EDPS answered the request for consultation under Article 27(3), i.e. 13 October 2011. The procedure was suspended for 6 days to allow for provision of comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than 20 December 2011.

3.2. Lawfulness of the processing. The processing falls within the scope of Article 5(a) of Regulation 45/2001 (read in conjunction with Recital 27), as it is considered as necessary for the performance of a task carried out in the public interest (the management of human resources at OLAF) and there is a legal basis for the processing (Article 7.1 of the Staff Regulations and CEOS No 31/1962 and 11/1962).⁴

In addition, the notification refers to the Memorandum of the Vice-President Kallas to the Commission concerning the Commission Communication on organigrams of Commission's

³ This position has been constantly held by the EDPS in similar cases. See EDPS Opinion on a notification for prior checking received from the Acting Data Protection Officer of the European Commission on "SYSPER2- e-CV, the Commission's human capital database", 22 June 2006, Case 2005-406; EDPS Opinion on the notification for prior checking received from the Data Protection Officer of the Council of the European Union regarding the Skills Inventory, 4 April 2005, Case 2004-319; EDPS Opinion on the notification for prior checking received from the Data Protection Officer of the European Parliament regarding the Skills database, 13 June 2008, Case 2008-0192; EDPS letter in response to consultation from the Commission concerning "INFSO Staff Competencies and Aspirations Mapping Database, 23 September 2011, Case 2011-0469.

⁴ Article 7.1 of the Staff Regulation provides that '*The Appointing Authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his function group which corresponds to his grade*'.

DGs and services as well as to decisions of OLAF Director General on the reorganisation of the Office (e-mails to staff of 23 September 2011 and 4 October 2011).

Finally, on 16 November 2011, the controller transmitted to the EDPS the OLAF Director's Note to the Staff concerning the establishment of a *Chambre d'écoute* in the framework of OLAF reorganisation. In response to concerns raised by EDPS in his letter of 13 October 2011, the Note sets out in more detail the role of the Panel in the processing and the various steps of the procedure.

3.3. Data quality. Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate.

The lawfulness of the data processing has been already discussed (cf. point 3.2), whereas its fairness has to be assessed in the context of information provided to data subject (cf. point 3.7). The proportionality of the data processed seems to be ensured since they may be considered relevant for the purpose of managing the re-allocation of personnel and facilitating internal mobility in the framework of OLAF reorganisation.

Due to the fact that all data are provided by data subjects who can also modify or delete them at any time, the accuracy of the data processed seems to be also guaranteed.

3.4. Data retention. The retention periods submitted, which are, respectively, 1 February 2012 (entering into force of the new organigram) for forms and CVs submitted and 1 year (i.e. from 1 February 2012) for the Excel table, are in compliance with Article 4(1) (e) of Regulation 45/2001.

3.5. Transfer of data. As indicated above, only the 3 members of the Panel, its secretariat, the IT official and the Director General can access the processed data. The Note and the Privacy Statement specify that the data can only be processed within the framework of the reorganisation process and for the specific purposes for which the Panel has been created. The Privacy Statement also specifies that the confidentiality of the data transmitted will be guaranteed by a specific confidentiality note addressed to the persons processing the data and by the applicable IT security measures.

Given that these transfers are considered as necessary for the performance of the tasks of the Panel and the Director General and that the recipients have been specifically reminded of the purpose limitation and confidentiality obligations, as set out in the Note and the Privacy Statement, compliance with Article 7 of Regulation 45/2001 seems to be ensured.

3.6. Right of access and rectification. As indicated above, the data subjects will be able to access, modify and delete the data processed in the context of the processing under consideration. With regard to the access and rectification rights, the EDPS has the following observations.

First, as already highlighted in his letter of 13 November 2011, the EDPS emphasises that data subjects should have access not only to the data they submitted but also to any existing evaluation results regarding different stages of the procedure (e.g. the individual notes taken by the panel and/or interview notes if applicable), unless the exception of Article 20(1)(c) of the Regulation is applied.

The above exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the panel if such access would undermine the rights of others applicants or the freedom of members of the panel. Nevertheless, data subjects should be provided with aggregated results. Any restrictions to the right of access to such information on the basis of Article 20(1) (c) should therefore be applied restrictively, on a case by case basis.

Second, the general time limit of one month for dealing with requests for blocking and erasure on justified legitimate request from the data subject seems excessive. Requests for blocking and erasure (as well as requests for access and rectification) must be handled promptly. In this case, the EDPS advises the controller to reduce the time limit to 2 weeks at the latest, which could be prolonged in exceptional and justified cases for one additional week.

3.7. Information to the person concerned. The EDPS notes that almost all information requested in terms of Article 11 of Regulation 45/2001 has been provided in the Privacy Statement referred above. In order to ensure full compliance with the Regulation, information about the identity of the controller should be added to the existing Privacy Statement.

[...]

4. Conclusion

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. In particular, OLAF should:

- ensure data subjects' access not only to the data they submitted but also to any existing evaluation results regarding different stages of the procedure (e.g. the individual notes taken by the panel and/or interview notes if applicable), unless the exception of Article 20(1)(c) of the Regulation is applied;
- any restriction on access rights must not exceed what is necessary to achieve this purported objective. On the basis of Article 20 (3) of the Regulation, if a restriction provided for by Article 20(1) of the Regulation is imposed, the data subject should be informed of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the EDPS;
- reduce the time limit for blocking and erasure to 2 weeks at the latest, which can be prolonged in exceptional cases and on justified grounds (where the request raises complex issues) for one additional week;
- the existing Privacy Statement should be revised in order to provide for information about the identity of the controller;

[...]

Done at Brussels, 16 December 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor