

Opinion on a notification for prior-checking received from the Data Protection Officer of the Committee of the Regions concerning the case ‘Establishment of probationers/Management of agents’ probationary reports’.

Brussels, 26 January 2012 (Case 2011-1118)

1. Proceedings

In an e-mail received on 21 October 2011, the Data Protection Officer (DPO) of the Committee of the Regions (CoR) sent a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (the Regulation) concerning the case ‘Establishment of probationers/Management of agents’ probationary reports’.

The case was suspended on 12 December 2011 following a request for additional information. The information was received on 12 January 2012. The Committee of the Regions also supplied the following documents:

- a privacy policy statement concerning the probationary procedure within the Committee of the Regions;
- an employment offer letter (template);
- a probationary report (template).

The draft opinion was sent to the controller for comments on 18 January 2012. Since the Committee of the Region had no comments to make on the draft opinion, the opinion has to be adopted by 30 January at the latest (2 months + 39 days suspension).

2. Legal aspects

The establishment of probationers and agents’ probationary reports are dealt with in the Guidelines concerning the processing of personal data in the area of staff evaluation within European Union institutions and agencies, published by the European Data Protection Supervisor (EDPS)¹.

Consequently, the EDPS will first of all highlight the practices which do not appear to comply with data protection requirements in the light of those Guidelines and will then confine his analysis of the legal aspects to those same practices. It is taken as given that the recommendations made in the Guidelines and which are relevant to the processing in question are applicable. In the case under examination, the letter from the Committee of the Regions states that its procedure does not differ in any significant way from the recommendations contained in the Guidelines.

The EDPS finds that data subjects are afforded the right of access and the right to obtain rectification pursuant to Articles 13 and 14 of Regulation No 45/2001 and that the information

¹ EDPS 2011-042, July 2011, Guidelines concerning the processing of personal data in the area of staff evaluation, <http://www.edps.europa.eu/EDPSWEB/edps/lang/en/Supervision/Guidelines>.

supplied to data subjects complies with Article 12. The security measures also appear to be satisfactory, having regard to Article 22. Lastly, the processing is lawful, in accordance with Article 5(a) of Regulation No 45/2001. Nevertheless, the Committee of the Regions should provide the EDPS with an updated version of its procedures once they have been revised.

However, the EDPS notes that the data quality, data retention and data transfers do not appear to be fully in compliance with the Regulation. The EDPS will therefore examine these matters in more detail below.

2.1. Data quality. Pursuant to Article 4(1)(a), (c) and (d) of the Regulation, personal data must be processed fairly and lawfully and must be adequate, relevant and not excessive in relation to the purposes for which they were collected and further processed, and must be accurate.

Regarding the question of proportionality, the administrative and appraisal data processed as part of establishment and officials' probationary report management procedures must be necessary for the performance of those procedures.

In this regard, the collection of the date of birth in probationary reports could be considered excessive for the purposes of staff appraisal. The EDPS would therefore ask the Committee of the Regions to reassess this point or to provide justification for the collection of such data.

He would also point out that the collection of medical data in connection with probationary reports is considered to be unnecessary for the purpose of performing the procedure in question and recommends that the reason for extending the probationary period (sickness, maternity leave or accident) be given in a separate note.

2.2. Data retention. In accordance with Article 4(1)(e) of Regulation No 45/2001, personal data may 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.

Although pursuant to Article 26 of the Staff Regulations (read in conjunction with Article 11(1) and Article 81 of the Conditions of Employment of Other Servants) end of probation reports may be retained in personal files for a period of up to ten years after the official has left the service, the need for such a long retention period should be viewed with caution, since it does not form part of the specific purposes for which the data were collected, namely the performance of the appraisal.

The EDPS considers that keeping end of probation reports for a maximum of five years after the appraisal procedure is completed is an appropriate period. This is particularly true in the case of end of probation reports, which do not necessarily remain relevant throughout the data subject's career. The EDPS would therefore ask the Committee of the Regions to reassess the retention period for data subjects' probationary reports.

In contrast, the same does not apply to decisions concerning establishment or confirmation of an agent's appointment, which may be stored for a period of up to ten years after the last pension payment.

2.3. Data transfers. Pursuant to Article 7 of the Regulation, personal data may be transferred within or between institutions or bodies. Such transfers must be necessary for the legitimate performance of tasks covered by the competence of the recipient, who may process the personal data only for the purposes for which they were transmitted to him.

The EDPS has noted the various potential recipients to whom data may be transferred. He considers that all those transfers are necessary for the legitimate performance of the tasks covered by the competence of the recipient. He also points out that personal data processed in such circumstances may be transferred to the OLAF, the Civil Service Tribunal, the EDPS and the European Ombudsman if they are considered necessary for the performance of a particular monitoring, consultative or judicial task. Where staff transfer from one institution or body to another, transfers to the HR Departments of the other institutions and bodies may also be necessary.

In order to ensure full conformity with Article 7(3) of Regulation No 45/2001, the EDPS recommends that all recipients be reminded of their obligation to use the data received only for the purposes for which they were transmitted.

3. Conclusion

The proposed processing does not appear to entail any infringement of the provisions of Regulation No 45/2001, provided that account is taken of the comments made above. In particular, this requires the Committee of the Regions:

- to re-evaluate the need to collect data subjects' dates of birth for probationary reports; to give the reason for extending the probationary period (sickness, maternity leave, accident) in a separate note;
- to re-evaluate the retention period for data subjects' probationary reports;
- to remind all recipients of data transfers of their obligation to use the data received only for the purposes for which they were transmitted.

The EDPS requests the Committee of the Regions to adopt the measures necessary to comply with Regulation No 45/2001. We should be grateful if you could provide the EDPS with all relevant documents within three months of the date of this opinion, to enable us to check that our recommendations have been implemented.

Done at Brussels, 26 January 2012

(signed)

Giovanni Buttarelli
Assistant European Data Protection Supervisor