LAWFULNESS, SENSITIVE DATA, DATA QUALITY

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Strategy
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LAWFULNESS

CRITERIA FOR MAKING THE PROCESSING LEGITIMATE

1) Art.5(a) Reg.45/2001
"*The processing must be necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instruments adopted on the basis of the Treaties …*"

- "**Legal instrument" = Regulations, Staff Regulations, Administrative Decisions**

- "**Necessity"of the processing and "public interest" to be analysed also in light of paragraph 27 of the preamble to the Reg** "Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary **for the *management and functioning of those institutions and bodies***".

LAWFULNESS

"…or in the legitimate exercise of official authority vested in the Community institution or body …"

- **Where there is no legal instrument but banning the processing would be excessive, the EDPS requires the institution to adopt a legal instrument asap** ("Analytical accounting and performance reports" by OHIM, EDPS Opinion 2/03/2011)

"…or in a third party to whom the data are disclosed"

- This can constitute a criteria to legitimise a transfer to a third party, namely **to a national court or police**

LAWFULNESS

2) Art.5(b) Reg.45/2001

or "processing is necessary for compliance with a legal obligation to which the controller is subject"

- **Safety at work**

- **"Safety Inspections at the JRC Ispra Site"**,EDPS Opinion 6/09/2010, case 2009-682

(Data processing for the "procedure for the case of an injury" was necessary for compliance with the European Commission's legal obligations in the area of safety at work set out in the Italian law

- **"Study on stress at work" by OHIM**, EDPS Opinion 2/05/2007, case 2006-0520

(Survey was carried out by OHIM in order to comply with an obligation resulting from Spanish law on Occupational Risks Prevention)

LAWFULNESS

3) Art.5(c) Reg.45/2001

or **"processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract"**

4) Art.5(d) Reg.45/2001

or **"the data subject has unambiguously given his or her consent"**

- Consent in the employment context is weak and cannot be in principle the sole justification for a processing, but a complementary ground
- Consent should be "freely given, specific and informed" (Art.2(h))

LAWFULNESS

Examples of Art.5(c) Reg.45/2001

- **"Who is Who project" CoR**, consultation 2010-0721
- The display of photos on intranet cannot be considered "necessary" under Art.5(a),
- Art.5(d) sole legal basis with an opt-in mechanism YES/NO
- **"Exit survey leaving the EACI",** consultation 2012-0361
- **"Survey on work life balance for women members of the EP"**, consultation 2012-0770
- **"Transfer of pre-recruitment medical data between institutions",** consultation 2012-0495
- Joint Opinion on **recruitment**, case 2010-346
- Joint Opinion on **harassment**, case 2011-151

LAWFULNESS

5) Art.5(e) Reg.45/2001

or **"processing is necessary in order to protect the vital interests of the data subject"**

- Processing operation on **nurseries and kindergartens**, case 2009-0088, but only to legitimise a specific part of the processing

- In rare cases, the protection of the vital interests of the data subject can be the grounds to process personal data in the context of **fight against harassment** (see Guidelines on harassment)

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Art.10(1): the processing of specific categories of data is prohibited …

This prohibition may be lifted under any of the five specific criteria listed in Art.10(2)

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Art.10(2)(a): the data subject gives express consent

(cases where the data subjects voluntarily reveal data about their political, religious or philosophical beliefs or health data

- in the context of the hearings of **Commissioners**

- when a candidate communicates his **photo**, he reveals his racial or ethnic origin

- when a data subject voluntarily accepts **further processing of his medical data**

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Art.10(2(b): the processing is necessary in the context of employment law authorised by Treaties (medical certificates for leave, allowances, invalidity procedure, pre-recruitment visits, annual medical visits under SF)

3 elements to be assessed

i)   Legal basis

ii)   Purpose of the processing

iii)   Necessity of the processing for the purpose described

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Art.10(2)(c): the processing is necessary to protect the vital interests of the data subject (collection of **blood type** of heads of delegations by the Council, case 2011-0933)

Or where the data subject is physically/legally incapable of giving his consent (in case of **nurseries**, **medical data of a child** provided by a parent or of a **handicapped person**)

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Art.10(2)(d):Processing related to data which are manifestly made public by the data subject (participation in a trade union, political, religious associations), **or necessary for the establishment, exercise, defence of legal claims** (transfer of medical data to a lawyer, national court, i.e in case of divorce)

Art.10(2)(e):Processing is carried out by a non-profit-seeking body (Council's Staff Committee sets out summer activities for the staff members' children, case 2011-0950)

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Due to the particularly sensitive nature of the data processed, all persons in charge, should sign **specific confidentiality declarations**, that they are subject to the specific obligation of secrecy equivalent to that of a health professional in terms of **Art.10(3) Reg.45/2001**

SPECIAL CATEGORIES OF PROCESSING –SENSITIVE DATA

Art.10(4):the processing of sensitive data in the context of **administrative inquiries and disciplinary proceedings** can also be based on reasons of "**substantial public interest**" (see Guidelines on this subject)

Art.10(5):the processing of **criminal records, good conduct and security clearance certificates** are justified under SF
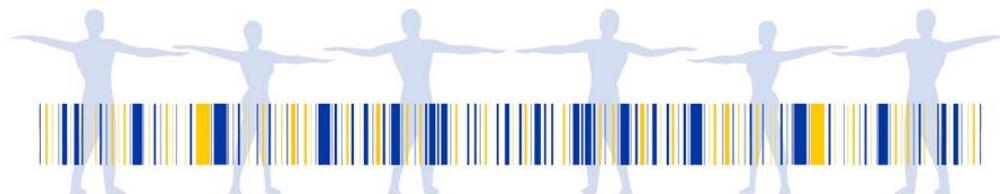
DATA QUALITY

<u>Adequacy, relevance, proportionality (Art.4(1)(c) Reg. 45/2001)</u>

1/ In the context of an application form,

« **Interests and skills not related to work, including social and sport activities** », « **reasons to leaving a previous post** » = excessive data to the prupose of recruitment and should be optional

DATA QUALITY

2/ processing of **administrative data in the context of appraisal** related to nationality, date of birth, details concerning previous education and career, contact details of previous reporting officers

= excessive to the purpose for which they are collected

DATA QUALITY

3/ the collection of **data related to health** is **unnecessary** for the purpose of an **appraisal/notation exercise**. However, *e**xtension of probation procedures** due to maternity, sick leave or accident: such data may be processed, as it is provided in Art.34(1) SR and justified in Art.10(2)(b) Reg. 45/2001*

Recommendations:
- such information should be provided in a separate note
- any actual diagnosis is prohibited

DATA QUALITY

4/ data revealing **trade union membership** may be collected: info spontaneously provided by the data subject in the report "additional duties"

It may be justified:

- express consent: Art. 10(2)(a) Reg. 45/2001 or
- necessary for complying with controller's specific rights and obligations: Art. 10(2)(b) or
- data already manifestly made public by the data subject: Art. 10(2)(d)
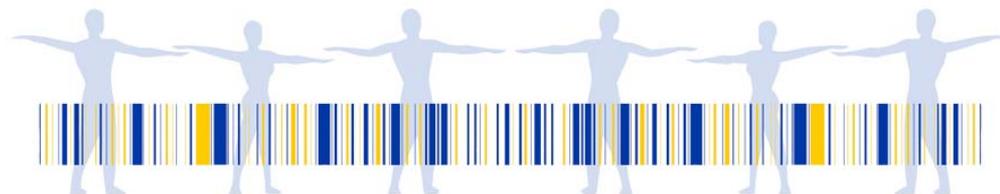
DATA QUALITY

5) Sick leave (Art. 59, 60 SR) = justified under Art. 10(2)(b) Reg. 45/2001; yet,

• data subjects should send medical certificates to the medical service/doctor of the agency

• HR should only receive the name and the duration of absence, not the reason of illness

6) Special leave for a competition

• only invitation to participate and attestation of presence should be sufficient

DATA QUALITY

7) Special leaves on illness/handicap of a child/spouse, parental/family leave, marriage leave: sensitive data are inevitably revealed in HR, but justified under Art. 10(2)(b) Reg. 45/2001 (yet, only the need-to-know data should be collected)

8) Flexitime system (voluntary basis): Only ID numbers of staff members, clock-in, clock-out time are relevant:

- for balancing professional and private life
- should not be further processed for detection of fraud

DATA QUALITY

Accuracy of data (Art. 4(1)(d) Reg. 45/2001

How to ensure accurate, complete, updated data?

- data subjects **provide data themselves** in reports/procedures
- **repetition of procedures** every x years
- data subjects should be given the possibility to **add their comments** directly on the reports, **different medical opinions**
- **appeal procedures** should be available
- **rights of access and rectification** should be guaranteed at any time
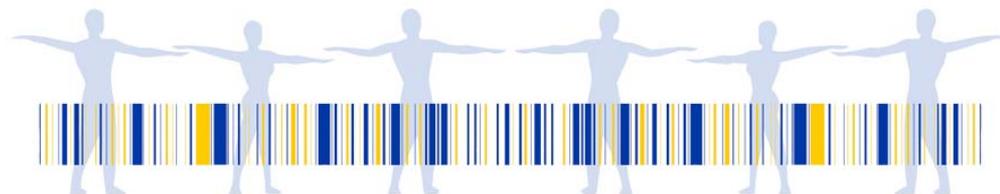
DATA RETENTION

Data retention (Art. 4(1)(e) Reg. 45/2001)

The controller should adopt a **reasonable, necessary and proportionate retention period** for all categories of data collected in light of

- the prupose of their collection

- The practical need of keeping them

- The Financial Regulation's requirements

- Other justified basis

CONCLUSION

For more examples, Guidelines, questions, doubts, you may consult www.edps.europa.eu

✓Prior-checking Opinions
✓Consultations
✓Thematic Guidelines
✓DPO Corner
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