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correspondence

Subject: Prior-checking notification regarding EEA's probationary period reports for temporary and contract agents (case 2013-0787)

Dear Ms Pedersen,

On 1 July 2013, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Environment Agency (EEA) a notification for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the EEA's probationary period reports for temporary and contract agents.

As the EDPS issued Guidelines on the evaluation of statutory staff in the context of annual appraisal, probation, promotion or regarding certification and attestation¹ (henceforth: "Guidelines"), the EDPS will highlight only those EEA practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines issued by the EDPS in July 2011 and will restrict his legal analysis to those practices. In the light of the accountability principle guiding his work, the EDPS would nonetheless want to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place in the frame of the probation procedure at the EEA.

As stated in the Introduction of the Guidelines, probation procedures are processing operations subject to prior checking on a basis of Article 27(2)(b) of Regulation 45/2001 since

¹ <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Guidelines>.

they are intended to evaluate personal aspects relating to the data subject; namely, the ability, efficiency and conduct of the respective staff members during their probation period.

1. Special categories of data: health data - Data quality/proportionality

According to the notification, "*In duly justified cases, data concerning health may be processed; for instance extension of probationary period due to sick leave*" (emphasis added).

As outlined in the Guidelines (p. 3), according to Article 10 of the Regulation, processing of certain sensitive data is prohibited unless in certain predefined circumstances. In the framework of the probation procedure, data concerning health may be processed, namely in case of its extension due to a maternity and/or sick leave as provided for in Article 34(1) of the Staff Regulations. The processing of such data may be justified in terms of Article 10(2)(b) of the Regulation as it is necessary to comply with the controller's obligations in the area of employment law as foreseen by the Staff Regulations.

However, as equally stated in the Guidelines (pp. 3/4), the collection of medical data within the respective probation reports is deemed unnecessary for the purpose of completion of the particular procedure. It is recommended that the reason for the extension of the probationary period (sickness, maternity or accident) is provided in a separate note and that no information about the actual diagnosis is processed within the probation procedure.

The EDPS therefore recommends that the EEA ensure that any medical reason for the extension of the probationary period (sickness, maternity or accident) is provided in a separate note and that no information about the actual diagnosis is processed within the probation procedure.

2. Information given to Data Subjects

According to the notification, a data protection clause (provided as annex 1) in accordance with Articles 11 and 12 of the Regulation is included in the probationary report.

The EDPS notes that the clause provided contains most of the information required under Articles 11 and 12 of the Regulation and that, insofar as recipients are not expressly listed in the clause itself, the rest of the form in which it is contained allows data subjects to conclude on the recipients of the data processed.

3. Retention period

According to the notification, probationary reports are kept in the personal file of the staff member concerned in line with Article 26 of the Staff Regulations for up to 10 years after the termination of employment or the last pension payment.

Article 4(1)(e) of the Regulation 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 no sufficient evidence was provided to demonstrate the necessity of the above mentioned conservation period extending to the whole career at the EEA.

Consequently, the EEA is invited to reconsider the existing retention period or to provide precise justifications in this respect. These will be taken into account in the upcoming discussions of the EDPS with the relevant stakeholders.

Conclusions

The EDPS recommends that the EEA adopts specific and concrete measures to implement the above recommendations regarding the EEA probationary period reports procedure. To facilitate our follow-up, please provide the EDPS with all relevant documents within three months of the date of this letter which prove that all recommendations have been implemented.

Kind regards,

(signed)

Giovanni BUTTARELLI

cc.: Mr Olivier CORNU, DPO EEA