



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Jari AHOLA
Head of Unit Services and Finance
European Institute of Innovation and
Technology
Neumann János utca 1/E Infopark
H-1117 Budapest
HUNGARY

Brussels, 16 December 2013
GB/UK/sn/D(2013)0637 C **2013-0813**
Please use edps@edps.europa.eu for all
correspondence

Subject: Prior-checking notification regarding EIT's staff evaluation for the probationary period (case 2013-0813)

Dear Mr Ahola,

On 1 July 2013, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Institute of Innovation and Technology (EIT) a notification for prior checking under Article 27 (3) of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the EIT's staff evaluation for the probationary period of temporary and contract agents, seconded national experts (SNEs) and managers. In the light of somewhat overlapping background material, the EDPS wishes to highlight that this Opinion is not dealing with matters related to staff recruitment, which will be dealt with in a separate Opinion.

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:

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

"Guidelines"), the EDPS will highlight only those EIT 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 EIT.

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 the Regulation since they are intended² 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 / proportionality: health data

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 EIT 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

The "Privacy Statement for Procedures relating to Data for the Probation Period" provided on 8 August 2013 is not actually specific to the processing of personal data in the context of staff evaluation for the probation period but refers to pre-recruitment examinations, annual medical check-ups and medical check-ups during an absence due to sickness or accident.

In order to fulfil the obligation to inform data subjects under Articles 11 and 12 of the Regulation, the EDPS therefore invites the EIT to produce a privacy statement specific to the processing operation at hand.

3. Recipients

According to the notification, recipients of the data include the Court of Auditors, the Court of Justice of the European Union, lawyers (internal and external), the Internal Audit Service of the EC, the Internal Auditor of the EIT, the EIT Governing Board members, DG EAC and

² Given that the notification additionally mentions Article 27(2)(d), it should be noted that the exclusion of individuals from a right, benefit or contract can be the result of the staff evaluation for the probationary period, it cannot be considered the *purpose* of the exercise.

other EC staff members as reporting officer / countersigning officer as well as the Director of the EIT.

a) As regards the reference to external lawyers in the notification, under Article 8(a) of the Regulation, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority.

The EDPS understands that these external lawyers are natural or legal persons processes personal data on behalf of the EIT as controller and thus 'processors' in the sense of Article 2(e) of the Regulation in the context of the processing operation at hand. The EDPS would like to note that any respective contract needs to meet the standards laid out in Article 23 of the Regulation.

In that light, the EDPS notes that the transfer of personal data to external lawyers working for the EIT does not cause concern, as it can be considered necessary for the performance of a task carried out in the public interest.

The EDPS invites the EIT to include external lawyers when listing recipients as required under Articles 11 and 12 of the Regulation (see above point 2) and as is currently the case in the "Privacy Statement for Procedures relating to Data for the Probation Period" provided on 8 August 2013).

b) In line with Article 7 of the Regulation, personal data can be transferred within or to other institutions or bodies *"if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1). The recipient shall process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

The EDPS invites the EIT to additionally and explicitly remind all recipients that they can only process the data for the purposes for which they were transmitted (Article 7(3) of the Regulation).

4. Retention period

According to the notification, probationary reports are kept by the EIT for 10 years after the end of the period during which a staff member is in active employment.

As stated in the Guidelines (p.5), the necessity for such a lengthy conservation period may be questionable as it does not correspond to the specific purposes for which the data were collected and/or further processed, i.e. the accomplishment of the respective evaluation exercise. In this respect, in certain cases, the storage of evaluation reports for up to five years after the end of a particular evaluation procedure would be considered appropriate.

The EDPS consequently invites the EIT to reconsider the retention period applicable to the probationary reports.

Conclusions

The EDPS recommends that the EIT adopts specific and concrete measures to implement the above recommendations regarding the EIT procedure for staff evaluation for the probationary period. 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.: Data Protection Officer EIT, eit-dpo@eit.europa.eu