



## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Food Safety Authority regarding "Transfer in the interest of the services within EFSA"**

Brussels, 09 July 2014 (Case 2013-1396)

### **1. Proceedings**

On 17 December 2013, the European Data Protection Supervisor ("**EDPS**") received a notification for prior checking relating to a mobility policy from the Data Protection Officer ("**DPO**") of the European Food Safety Authority ("**EFSA**").

The draft Opinion was sent to the DPO for comments on 23 June 2014. The EDPS received a reply on 1 July 2014.

### **2. The Facts**

This Opinion concerns the processing of personal data in the context of internal staff transfers within EFSA, which involves the assessment of the CV, professional experience and other personal information in order to find the optimal fit between the needs of EFSA and the individual to ensure that in-house talent is used to its full potential.

The procedure has the **purpose** to meet the discretionary power of the Executive Director to reassign staff members to different posts within the organisation responding to organisational needs whilst considering the professional competencies, knowledge and ambition of the staff members concerned.

The **legal basis** of the processing is:

- The Staff Regulations<sup>1</sup> of Officials and the Conditions of Employment of Other Servants particular Article 7 of the Staff Regulations;
- The Decision of the Executive Director of EFSA concerning transfers in the interest of the service within EFSA;
- The relevant Standard Operating Procedure (SOP) on transfers in the interest of the service within EFSA.

The categories of **data processed** consist of information contained in a performance dialogue tool (information on career development plan of jobholders), career project forms and/or expressions of interest and related summary reports prepared by the Human Capital and

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<sup>1</sup> Staff regulation of officials of the European Communities and the Conditions of employment of other servants of the European Communities (CE, CECA, Euratom) No. 23/2005.

Knowledge Management Unit (HUCAP), reports on Talent Review Meetings prepared by HUCAP, related to career project; candidates assessment grids as well as reports with recommendations prepared by HUCAP and personalised decisions on internal staff transfers signed by the Executive Director.

Regarding the **recipients of the data** the data are disclosed to jobholder's line managers (reporting officer, delegated reporting officer, countersigning officer in the Carrier Development Appraisal Cycle (CDAC) workflow), heads of unit, EFSA management team (Directors/Heads of Division) and Executive Director, Head of HUCAP and HUCAP staff supporting the internal mobility process, the EFSA Internal Auditor, and institutions or bodies having a legitimate purpose of audit, of the exercise of supervisory tasks or in charge of judicial proceedings (the Internal Audit Service, the EU Court of Auditors, the EU Ombudsman, OLAF, the EU Court of Justice, the European Data Protection Supervisor).

The **data subjects are informed** through a specific Privacy Statement which is available for the data subjects as a part of the career project forms and on the EFSA Intranet Portal.

In the privacy statement the data subjects receive information about their **rights of access and rectification**.

Regarding the **retention period** final ED decisions on internal staff transfers are kept in the personal file of the staff members concerned and are kept for the entire career of the EFSA staff member and in an additional period of nine months. Other documents containing personal data such as career project forms, expressions of interest, assessment grids and HUCAP reports are kept for five years.

[...]

### **3. Legal analysis**

#### **3.1. Prior checking**

**Applicability of Regulation No 45/2001 ("the Regulation"):** The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by an EU institution: EFSA, in the exercise of activities which fall within the scope of EU law and the processing of the data is done by automatic means. Therefore, the Regulation is applicable.

**Grounds for prior checking:** Article 27(1) of the Regulation subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. Article 27(2)(b) of the Regulation refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". Given that the processing at hand is intended to assess staff members in order to select suitable staff when managers have to quickly fill a resource/competence gap, the processing operation at hand thus requires prior checking under Article 27(2)(b) of the Regulation.

**Ex-post prior checking:** Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operations have already been established. The recommendations made by the EDPS should be implemented or reasons for not implementing them should be provided without undue delay. It should be noted that in the case of ex-post prior checking, the deadline of Article 27(4) of the Regulation does not apply.

### **3.2. Lawfulness of the processing**

Personal data may only be processed if grounds can be found in Article 5 of the Regulation. Under Article 5 (a) of the Regulation, personal data may be processed inter alia if the "processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)". The processing of data with regard to transfer in the interest of the service within EFSA is based on the Staff Regulations, particular Article 7 and the Conditions of Employment of Other Servants. The EDPS would like to point out that **Article 10 of the Conditions of Employment of Other Servants should also be mentioned**. The processing is considered as necessary for the performance of a public interest task, namely the selection of staff within EFSA and of improving the career possibilities whilst optimising the use of EFSA's resources, through the internal mobility process. Thus, the processing appears to be lawful in accordance with Article 5(a) of the Regulation.

### **3.3. Data Quality**

**Adequacy, relevance and proportionality:** In accordance with Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". On the basis of the information available, the personal data processed seem adequate and non excessive for the purpose of transfers in the interest of the service within EFSA.

**Accuracy:** Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". The purpose of the processing itself helps ensuring that the data are accurate and kept up to date. Furthermore, the possibility to make use of the rights of access and rectification helps to ensure that the data are accurate and up to date (see Section 3.5 below - rights of access and rectification).

**Fairness and lawfulness:** Article 4(1)(a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see section 3.2) and fairness will be dealt with in relation to information provided to data subjects (see section 3.6).

### **3.4. Conservation of data/ Data retention**

Article 4(1)(e) of the Regulation states that personal data must 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*". The EDPS notes that the EFSA keep the final decisions on internal staff transfer for the entire career of the EFSA staff member and in an

additional period of nine months. Other documents containing personal data such as career project forms, expressions of interest, assessment grids and HUCAP reports are kept for five years. There is no reason to believe that this retention period exceeds what is necessary for the purpose of the processing at hand.

### **3.5. Rights of access and rectification**

Articles 13 to 19 of the Regulation establish a number of rights for data subjects. These notably include the right to access data upon request by the data subject and the rights to rectify, erase or block personal data.

The data subjects can exercise their rights of access and rectification to the data that is processed about them by contacting the Head of HUCAP Unit and this is also stated in the privacy statement.

### **3.6. Information to the data subject**

Articles 11 and 12 of the Regulation provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data has not been obtained from the data subject, the information must be given when the data is first recorded or disclosed, unless the data subject already has it (Article 12).

The EDPS notes that the EFSA's privacy statement contains all the information listed in Article 11 of the Regulation. However, the privacy statement does not appear to inform the data subjects of any time limits for requests and responses. It is good practice to include **information on in which time limit a reaction can be expected** (e.g. 3 months for access request, without delay for rectification, etc.). The EDPS would **recommend that this information is added** to the document for the sake of clarity.

The notification and the privacy statement both mention a number of possible recipients of personal data, such as the OLAF and the European Ombudsman. For your information, with regard to Article 2(g) of the Regulation, authorities which would only receive data in the context of specific targeted inquiries are not considered "recipients" and do not *need* to be mentioned in the privacy statement.<sup>2</sup>

### **3.7. Security measures**

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<sup>2</sup> This is an exception to the information obligations in Article 11 and 12, but not to the rules on transfers in Articles 7 to 9. In practice, this means that authorities such as the OLAF, the European Ombudsman or the EDPS do not need to be mentioned in the privacy statement (unless the processing operation in question involves transfers to these organisations as part of the procedure); however, the applicable rules on transfers will always need to be respected.

#### **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 provided the above considerations are fully taken into account. In particular, the EFSA should add to the privacy statement the missing information about Article 10 of the Conditions of Employment of Other Servants and time limits for requests and responses.

The EDPS expects that the EFSA implements the recommendations accordingly and will therefore close the case.

Done at Brussels, 09 July 2014

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor