



**Prior Checking Opinion of the European Data Protection Supervisor concerning the internal whistleblowing procedure of the Committee of the Regions  
(Case 2015-0897)**

Brussels, 8 December 2015

**1. Proceedings**

On 15 October 2015, the European Data Protection Supervisor (“the EDPS”) received a notification for prior checking regarding the internal whistleblowing procedure of the European Union’s Committee of the Regions (the “Committee of the Regions”).

In accordance with Article 27(4) of Regulation (EC) No 45/2001 (“the Regulation”), this Opinion must be delivered within a period of two months, that is, no later than 15 December 2015, taking into account suspensions<sup>1</sup> due to requests for further information and suspensions to allow comments on the draft Opinion.

**2. Facts**

These proceedings **aim** to set out a framework for managing whistleblowing by members of staff of the Committee of the Regions<sup>2</sup> or by whistleblowers who are not members of staff of the institution<sup>3</sup> in order to report on suspected illegal activity, including fraud, corruption, theft or a serious breach of public procurement law, detrimental to the interests of the European Union, or conduct relating to the performance of professional duties which may constitute a serious failure by EU officials to comply with their obligations.

The processing of personal data carried out in that context is intended to:

- make it possible for the whistleblower to report directly to the European Anti-Fraud Office (OLAF) or to their superiors (possibly with the support of ethics counsellors<sup>4</sup> or those persons responsible for ethics and legal affairs within the Human Resources Directorate of the Committee of the Regions);

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<sup>1</sup> This period was suspended from 1 December 2015 to 4 December 2015 to enable the Committee of the Regions to submit its comments on the draft Opinion.

<sup>2</sup> Officials, seconded national experts, trainees, interim agents, local staff (cf. Article 1 of the Draft decision on the internal whistleblowing procedure).

<sup>3</sup> Contracting parties, subcontractors and their employees (cf. Article 1 of the Draft decision on the internal whistleblowing procedure).

<sup>4</sup> The draft decision attached to the notification and the notification both refer to confidential counsellors. The amended draft subsequently communicated to the EDPS refers to ethics counsellors.

- establish a case file making it possible for OLAF or the Committee of the Regions to carry out an investigation and to respond to requests for information as a result of the whistleblowing procedure.

The draft **decision** of the Committee of the Regions regarding internal rules concerning whistleblowing (“the Decision”)<sup>5</sup> was established on the basis of Article 5(a) of the Regulation, Articles 22a, 22b and 22c of the Staff Regulations, Articles 11 and 81 of the Rules applicable to other servants of the European Union and Decision No 26/2004 of the Committee of the Regions of 10 February 2014 relating to the conditions and procedures for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests.

The **data subjects** include officials, agents (temporary or contractual) of the Committee of the Regions, Committee of the Regions members, and all persons engaged by or providing services to the Committee of the Regions (seconded national experts, trainees, interim agents, local staff, external contractors, sub-contractors and their employees)<sup>6</sup>.

The **personal data processed** are included in the initial report submitted by the whistleblower and in all subsequent documents pursuant to that report.

According to the notification, the data processed include:

- identification data;
- administrative data (grade, department(s) assigned to, position and responsibilities, etc.); - data related to performance (record of attendance and leave, staff reports, written comments, etc.);
- disciplinary decisions (disciplinary actions, warnings, decisions not to take disciplinary measures or decisions that no case can be made against the data subject, etc.);
- documents produced at work (e-mails, notes, correspondence, etc.);
- data concerning personal privacy, in so far as the data are necessary to the investigation (bank statements in matters of suspected fraud, private e-mails and correspondence exchanged at work, etc.);
- testimonies.

In accordance with the notification, the data referred to in Article 10 of the Regulation shall, in principle, not be processed.

Whistleblowers may proceed anonymously but are encouraged to mention their identity. The whistleblower’s identity shall be kept confidential<sup>7</sup>.

The data are likely to be **disclosed to the following persons** on a *need to know* basis: immediate superiors (Head of Unit; Manager of the whistleblower or persons in an equivalent position; Secretary-General and assistants); appointed persons of trust and the person responsible for ethics and legal affairs within the Human Resources Directorate of the Committee of the Regions; the Data Protection Officer; the data subject of the whistleblowing

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<sup>5</sup> The first draft of the Decision was communicated to the EDPS with the notification. An amended draft was sent to the EDPS on 13 November 2015.

<sup>6</sup> Article 3 of the Decision.

<sup>7</sup> Article 9 of the Decision.

procedure and his advisers; Legal Service of the Committee of the Regions; staff responsible for whistleblowing procedures within OLAF<sup>8</sup>.

A **Specific Privacy Statement** is attached to the notification. The Committee of the Regions intends to publish the Specific Privacy Statement, together with the Decision, on its intranet (on a page dedicated to whistleblowing) and to communicate it in a timely manner to the data subjects of the whistleblowing procedure. The persons referred to in the reports and documents relating to the investigation procedure and, in particular, who are the subject of the suspicions and allegations, shall be informed in a timely manner by the controller responsible for dealing with the allegations made against them<sup>9</sup>. Informing the data subjects may be postponed where there is a substantial risk of jeopardising the investigation or the security of the evidence.

The maximum **time-limit for storing data** is 2 months upon closure of the proceedings by OLAF; the data shall then be destroyed. In the event that an administrative investigation and disciplinary proceedings are opened, the time-limit for storing the processed data shall be in line with the rules relating to administrative investigations and disciplinary proceedings.

[...]

### **3. Legal Analysis**

This Opinion concerns the processing of personal data carried out by the Committee of the Regions in the context of whistleblowing. This Opinion does not concern the processing of data carried out by the Committee of the Regions subsequently to the whistleblowing procedure (administrative investigations and disciplinary proceedings), as these are separate subsequent processes<sup>10</sup>.

The processing of personal data is carried out by a European Union agency and the processing is carried out, in part, by automatic means. Regulation (EC) No 45/2001 is therefore applicable.

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

All processing operations are to be prior checked by the EDPS because they present risks in relation to the processing of data on suspected offences and on the evaluation of the conduct of the suspected persons<sup>11</sup>.

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<sup>8</sup> The notification also sets out a series of potential recipients in the event that an internal administrative investigation and disciplinary proceedings are opened or where the disciplinary decision is contested. However, these are separate processes which are subsequent to the processing operations carried out in the context of the whistleblowing procedure.

<sup>9</sup> Article 13 of the Decision.

<sup>10</sup> The processing of data in the context of administrative investigations and disciplinary proceedings is the subject of a separate notification received by the EDPS (Case 2007-0382).

<sup>11</sup> Pursuant to Article 27 of the Regulation, the EDPS shall carry out a prior check on any 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 lists the areas likely to present such risks, in particular Article 27(2)(a) refers to the processing of data relating to suspected offences and Article 27(2)(b) refers to processing operations to evaluate certain aspects of the data subjects' personality, including their conduct.

### **3.2. Data quality and special categories of data**

Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed<sup>12</sup>.

The notification states that “*where the report submitted by the whistleblower or any document relating thereto contains personal data that are deemed to be irrelevant, the controller shall destroy it at the request of its author*”. It is of course permissible for the Committee of the Regions to assess the relevance of the information submitted by the author of that information. However, from the perspective of data protection, any potential omission of information from the case is not subject to the agreement of the author of that information. The selection of adequate, relevant and not excessive information in relation to the purposes of the internal whistleblowing procedure falls within the discretion of the controller of the Committee of the Regions alone.

#### **Recommendation**

1. Do not make the deletion of information deemed to be irrelevant subject to the agreement of its author; the notification should be clarified in that regard.

The processing of data relating to offences, criminal convictions or security measures may be carried out only if permitted by the Treaties or other legislative acts adopted on the basis of the Treaties<sup>13</sup>. Suspected offences and disciplinary actions are treated as belonging to those categories of data. There is a possibility that the Committee of the Regions may indirectly collect information relating to the offending conduct or past disciplinary record of the data subject which would be included in the whistleblower’s report. Such processing operations are permitted under Articles 22a, 22b, and 22c of the Staff Regulations. However, instead of referring to the data collected in the context of the whistleblowing procedure, the notification seems to refer, in that regard, to the results of the administrative investigation and disciplinary proceedings which may be launched subsequently to the whistleblowing procedure.

In addition, the notification states that the data processed includes data relating to performance (record of attendance and leave, staff reports, written comments, etc.). Again, instead of referring to the data collected in the context of the whistleblowing procedure, those elements seem to refer to the results of the administrative investigation and disciplinary proceedings which may be launched subsequently to the whistleblowing procedure.

#### **Recommendation**

2. Remove the references made to disciplinary decisions and to the processing of personal data in the context of administrative investigations and disciplinary proceedings in the notification and the Specific Privacy Statement; ensure that only the data processed in the context of the whistleblowing procedure is included in the categories of data referred to in the notification.

In general, there is a possibility that the Committee of the Regions collects, unwittingly in some circumstances, special categories of data within the meaning of Article 10(1) of the Regulation<sup>14</sup>. The processing of such data is possible only if those data are necessary to enable the Committee of the Regions to fulfil its obligations set out in Articles 22, 22a and

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<sup>12</sup> Article 4(1)(c) of the Regulation.

<sup>13</sup> Article 10(5) of the Regulation.

<sup>14</sup> Data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and data concerning health or sex life.

22b of the Staff Regulations. It is therefore necessary to carry out an initial assessment of the whistleblower's report as quickly as possible so as to rule out any data which do not meet the conditions set out in Article 4(1)(c).

**Reminder:** ensure that Committee of the Regions staff members involved in the whistleblowing procedure are informed of the principles relating to the quality of processed data, in particular with regard to special categories of data.

### **3.3. Information given to the data subjects**

#### a) Information note

In the interests of clarity, the EDPS recommends changing the title from "Specific Privacy Statement" to "Information note on the protection of personal data". So far as concerns the content of the statement, the controller cannot be a natural person, but must be an institution or organisational unit operating in the name of the institution.

#### b) Timing of the information to be provided

Information concerning the processing of data in the context of the whistleblowing procedure must be communicated to the data subjects on two separate occasions:

- the information note on the protection of personal data must be posted on the website of the Committee of the Regions, not merely on the intranet, in so far as the intranet is not accessible to all data subjects (for example contractors and sub-contractors of the Committee of the Regions and their employees);
- once a whistleblowing procedure has been launched, the Committee of the Regions must communicate, in a timely manner, the information note to the data subjects (whistleblower, person suspected, witnesses and any other person whose data may be processed in the context of the procedure), except where the exemptions and restrictions provided for under Article 20 of the Regulation allow for the provision of information to be deferred, for example where the information concerning the person suspected would be detrimental to the investigation or to the rights and freedoms of others (for example the rights of the whistleblower); recourse to Article 20 must be documented and the documentation made available to the EDPS.

#### **Recommendations**

3. Change the name from "Specific Privacy Statement" to "Information note on the protection of personal data".
4. Indicate in the information note that the controller is the Committee of the Regions, represented by the Secretariat-General of the Committee of the Regions.
5. Publish the information note on the website of the Committee of the Regions.
6. Communicate, without delay, the information note to the data subjects of the whistleblowing procedure, except as provided for in Article 20 of the Regulation.

#### **Reminder**

Recourse to the exceptions and restrictions provided for under Article 20 of the Regulation to defer the provision of information concerning the data subjects of a whistleblowing procedure must be duly documented and the documentation made available to the EDPS.

### **3.4. Rights of Access**

Rights of access and rectification provided for in Articles 13 and 14 of the Regulation may be restricted under the conditions set out in Article 20 of the Regulation. In particular, the Decision provides that the identity of the whistleblower must never be revealed, except in exceptional circumstances (permission from the whistleblower; if necessary in the context of criminal proceedings; if the whistleblower has acted in bad faith and made false allegations)<sup>15</sup>.

#### **Recommendation**

7. Specify in the information note that the right of access may be restricted under Article 20 of the Regulation.

### **3.5. Confidentiality**

The confidentiality of the information collected in the context of the whistleblowing procedure shall be protected with regard to the whistleblower and the person suspected in order to prevent the stigmatisation and victimisation of the data subject within the organisation to which he belongs. The person suspected will be exposed to such risks even before knowing that they have been implicated and even before an assessment is carried out to evaluate whether the alleged facts are well founded.

#### **Recommendation**

8. Insert a provision into the Decision guaranteeing the protection of both the person suspected and the whistleblower.

### **3.6. Data retention**

Following the opening of a whistleblowing procedure, the Committee of the Regions may, inter alia, decide not to forward the case to OLAF and to close the case.

The data retention period for cases which have not been forwarded to OLAF and have been closed without internal administrative investigation has not been set in the notification.

#### **Recommendation**

9. Clarify the data retention period with regard to cases which have not been forwarded to OLAF and with regard to which there has been no internal administrative investigation.

### **3.7. Security measures**

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The Committee of the Regions is requested to inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Brussels, 8 December 2015

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

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<sup>15</sup> Article 9 of the Decision.