



Prior Checking Opinion

**"Whistleblowing Procedure at the Fusion for Energy"
Case 2016-0087**

Whistleblowing procedures provide safe channels for staff or other informants to report fraud, corruption or serious wrongdoings in organisations. In the course of such a procedure, processing of personal information will take place, for example in relation to those suspected of wrongdoing as well as to informants and/or other third parties such as witnesses.

Brussels, 31 March 2016

1. Proceedings

On 26 January 2016, the European Data Protection Supervisor ("EDPS") received a notification for prior checking from the Data Protection Officer ("DPO") of Fusion for Energy (F4E) regarding the whistleblowing procedure at F4E.

According to Article 27(4) of Regulation 45/2001 (the "Regulation") this Opinion must be delivered within a period of two months, not counting suspensions for requests for further information¹.

2. The facts

The **purpose** of this procedure is to enable the reporting of "serious irregularities", i.e. illegal activities including fraud, corruption and serious professional misconduct or wrong doings within F4E. This requires establishing reporting channels for whistleblowers, managing and following-up reports and ensuring protection and adequate remedies for whistleblowers. Also covered by this notification is the processing of data within F4E, in case OLAF contacts F4E requesting information (because the whistleblowing about an irregularity within F4E was made directly to OLAF),

The **personal information processed** is contained in the report submitted by the whistleblower and any subsequent document drawn up in response to the initial report. These documents may in particular contain names, contact details and other personal data. If the report contains personal information that is clearly not relevant for examining the issues raised in the report, the information will be erased as soon as possible, after consulting the whistleblower to the extent that this is possible without the substantive examination being unduly delayed.

Information will be provided through a **privacy notice** published on F4E's intranet. Furthermore, the privacy notice will also be provided to any staff member involved in a particular whistleblowing procedure as soon as practically possible. However, where there is a substantial risk that a notification would jeopardise the ability of F4E to effectively investigate the allegations or gather the necessary evidence, notification may be deferred as long as such risk exists.

The notification states that personal information will be **disclosed** on a strict need-to-know basis. This depends on whether it is necessary for F4E to examine the particular case and the respective reporting channel chosen by the whistleblower as well as whether he/she seeks prior guidance.

The **conservation period** for files which do not lead to the opening of an administrative inquiry or disciplinary procedure, i.e. which relates to alerts found to be unsubstantiated by F4E or OLAF should be deleted without delay from the date on which F4E decides to close the file without follow-up and at the latest two months after such decision. Files on the basis of which an administrative inquiry or disciplinary procedure are opened are kept in line with the retention periods foreseen for those files in the respective procedure.

Regarding the **security measures**

[...]

¹ The case was suspended for comments of the DPO from 18 March 2016 to 23 March 2016. The EDPS shall thus render its Opinion no later than the 31 March 2016.

3. Legal analysis

3.1. Prior checking

The processing of personal data is performed by an agency of the European Union. Furthermore, the processing is partly done through automatic means. Therefore, the Regulation is applicable.

This processing activity is subject to prior checking since it presents specific risks. Indeed F4E will process information on suspected offences related to potential fraud and carry out an evaluation of the alleged wrongdoer's conduct.²

3.2. Data quality and special categories of data

According to Article 4(1)(c) of the Regulation, personal information must be adequate, relevant and non-excessive in relation to the purposes for which they are collected and/or further processed. They must also be accurate and where necessary, kept up to date (Article 4(1)(d)).

There is a possibility that F4E, perhaps involuntarily, receives information that is of no interest/relevance to the investigation, also concerning special categories of data³. Personal data and in particular special categories of data that clearly is not relevant for the purposes of investigating fraud or other serious wrongdoings through the whistleblowing procedure, should not be further processed.

The EDPS welcomes the fact that F4E will remove from the report personal information without relevance as soon as possible. A **good practice** is to implement a general recommendation, for example in the internal rules of procedure, to the persons handling the files **reminding them of the rules of data quality and recommend them to ensure the respect of the rules.**

3.3. Information to individuals

Articles 11 and 12 of the Regulation provide a minimum list of information about the processing of personal data that need to be provided to individuals involved in a case.

With regard to the procedures for data subjects notably to exercise their rights (access, rectification and others), it is good practice to include information regarding within which time limit a reaction can be expected (e.g. 3 months for access request, without delay for rectification, etc.).

The EDPS highlights that in cases where F4E decides to apply a restriction of information, access, rectification etc. under Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4)⁴, such decision should be taken strictly on a case by case basis. In all

² Article 27 of the Regulation subjects to prior checking by the EDPS processing activities 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 including under point (a) the processing of data related to suspected offences and under point (b) processing intended to evaluate personal aspects relating to the data subject, including his or her conduct.

³ Article 10 of the Regulation.

⁴ Under Article 20(5) of the Regulation.

circumstances, F4E should be able to provide evidence demonstrating detailed reasons for taking such decision (i.e. motivated decision). These reasons should prove, for instance, that there is a high risk that giving access would hamper the procedure or undermine the rights and freedoms of the others and they should be documented before the decision to apply any restriction or deferral is taken. F4E should ensure that the documented reasons are made available to the EDPS if requested in the context of a supervision and enforcement action.

3.4. Security measures

[...]

4. Conclusion

In order to comply with the Regulation, F4E should:

- Ensure that staff members that handling whistleblowing reports are aware of the data quality requirements (point 3.2.);
- [...]

Please inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Done at Brussels, 31 March 2016

(signed)

Wojciech Rafał WIEWIÓROWSKI