



WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Mr Carlo des DORIDES
Executive Director
European Global Navigation Satellite
Systems Agency (GSA)
Janovskeho 438/2
170 00 Prague 7
Holesovice, CZECH REPUBLIC

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Please use edps@edps.europa.eu for all
correspondence

Object: EDPS prior-check Opinion on *"the selection of confidential counsellors and of the informal procedure for cases of alleged harassment"* at the European Global Navigation Satellite Systems Agency (case 2016-0263).

Dear Mr Dorides,

We have analysed your notification sent on 9 March 2016 for prior-checking under Articles 27(2)(a) and 27(2)(b) of Regulation 45/2001 (the Regulation) in the context of the selection of confidential counsellors and of the informal procedure for cases of alleged harassment at the European Global Navigation Satellite Systems Agency (GSA).

Under Article 27(4) of the Regulation, the deadline of two months, not counting suspensions¹, for the EDPS to issue his Opinion applies. The EDPS should therefore issue his Opinion no later than the 14 June 2016.

On 18 February 2011, the EDPS issued Guidelines on the selection of confidential counsellors and the informal procedures for cases of harassment in EU institutions and bodies (the EDPS Guidelines)². On this basis, the EDPS will identify and examine the agency's practices which

¹ The procedure was suspended under Article 27(4) of the Regulation on 10 March 2016 for further information. GSA replied on 6 April 2016. The draft was sent for comments to the DPO on 2nd June 2016 and the reply was sent on 10 June 2016.

² https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-02-18_Harassment_Guidelines_EN.pdf

do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing GSA with relevant recommendations.

1) Lawfulness

The lawfulness of a processing must be justified on the basis of one of the five legal grounds under Article 5 of the Regulation.

The processing operations under analysis are considered to be lawful under Article 5(a) of the Regulation.

Article 5(a) of the Regulation requires two elements: the processing must be based on the Treaties or on an EU legal instrument and it must be necessary for the performance of GSA tasks carried out in the public interest based on the Treaties. As to the element of necessity, the two processing operations related to the selection of confidential counsellors and to the informal procedure on alleged harassment are obviously carried out in the public interest, contributing to the management of resources and sound functioning of the agency³. As to the legal basis, Article 12a of the Staff Regulations define the psychological and sexual harassment and prohibit such behavior; in addition, Article 31 of the EU Charter of Fundamental Rights states that every worker has the right to working conditions which respect their dignity.

Nevertheless, neither the Staff Regulations nor the Charter provides details and specific rules about the processing operations of both procedures. GSA should therefore further detail the modalities of the processing operations of both procedures in a specific legal instrument (policy, manual, internal rules), applicable to the agency's staff. Specific rules will set out the process in both procedures with legal certainty, safeguards and clarity in the interest of GSA. They should also give those implicated in the procedures the necessary information about their rights and how to exercise them.

Following the comments provided by the agency's DPO, the Commission is planning to adopt implementing rules on management of harassment. GSA would like to wait until the adoption of these rules and apply them by analogy in light of Article 110(2) of the Staff Regulations⁴.

Recommendation:

GSA should adopt the Commission's implementing rules by analogy as soon as they are adopted.

In the meantime, in case GSA needs to launch an informal procedure on alleged harassment, the EDPS should be consulted before any personal data are processed for the specific case.

Recommendation:

GSA should adopt a specific legal instrument, to set out specific rules about about the processing operations in both procedures.

³ See also recital 27 of the Regulation.

⁴ "Implementing rules adopted by the Commission to give effect to these Staff Regulations...shall apply by analogy to the agencies".

2) Information to be given to the affected individuals

In light of Articles 11 and 12 of the Regulation, GSA provided the EDPS with one privacy notice which makes a clear distinction of the applicable principles in each procedure.

In order to guarantee fairness and transparency about the information processed regarding a selection of confidential counsellors and an informal procedure of an alleged harassment, GSA should also inform all affected individuals about the specific processing of their personal data and their specific rights and other information about the processing in accordance with Articles 11 and 12 of the Regulation.

Content of the general and specific privacy notice:

In light of Articles 11(1)(e) and 12(1)(e) of the Regulation, GSA should provide some explanations in the privacy notice as to the meaning of the right of rectification regarding both procedures:

In the case of a *selection of confidential counsellors*, applicants may rectify their contact and identification data at any time of the procedure, even after the deadline of application. They may also add additional evaluations which could strengthen their application to the position of a confidential counsellor until the deadline for applications.

The right of rectification in the case of an *informal procedure* means that affected individuals (alleged harasser and alleged victim) may request that further information is added to their file, such additional testimonies and relevant documents to the procedure.

Recommendation:

GSA should inform all potentially affected individuals, via the privacy notice, about the meaning of the right of rectification in each of the procedures under analysis.

Reminder:

GSA should inform all affected individuals about the specific processing of their personal data before a specific procedure is launched in light of Articles 11 and 12 of the Regulation.

3) Possible limitations to the rights of information, access and rectification of the affected individuals:

When GSA informs all affected individuals about the specific processing of their personal data, it should also inform them about any possible limitations to their rights of information, access and rectification.

For example, in the case of a specific *selection of confidential counsellors*, a limitation of the **right of access** of the applicant to the overall final assessment of the selection process is possible in accordance with the principle of the secrecy of selection committee's proceedings⁵ and the protection of the rights and freedoms of the others⁶. The applicant might also be restricted to exercise their **right of rectification**, after the deadline of the application, to

⁵ Article 6 of Annex III of the Staff Regulations: "The proceedings of the Selection Board shall be secret".

⁶ Article 20(1)(c) of the Regulation.

documents which relate to the selection process⁷, to ensure objective and fair conditions for the selection.

In the case of an *informal procedure*, **informing** the person under investigation about the allegations at an early stage may be detrimental to the procedure. The person under investigation may experience a limitation to their **right of access** in order to protect the alleged victim. Another example of **access limitation** would be to restrict any information about the identity of the witness to the person under investigation, in order to protect the witness' rights and freedoms.

GSA should take note of the above examples of right limitations and make reference in the respective privacy notices to the possible application of Articles 20(3) and 20(5) of the Regulation in the case of a selection of confidential counsellors and of an informal procedure. The EDPS highlights that in cases where GSA 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)⁸, such decisions should be taken strictly on a case by case basis. In all circumstances, GSA should be able to provide evidence demonstrating detailed reasons for taking such decision (i.e. a motivated decision). These reasons should prove that providing information/access/etc. would cause actual harm to the informal procedure or undermine the rights and freedoms of the others and they should be documented when the decision to apply any restriction or deferral is taken⁹.

Recommendation:

GSA should make reference to the privacy notice, about the possible application of Article 20 of the Regulation in both procedures under analysis.

Reminder:

GSA should ensure that, in case of a restriction of a right, the decision to restrict such right is appropriately documented.

The EDPS expects GSA to provide information on what is planned regarding the implementing rules as a legal basis on the management of harassment and to receive an updated version of the notification and of the privacy notice **within a period of three months**, to demonstrate that GSA has implemented the above recommendations in this aspect.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: Mr Olivier LAMBINET, Head of Administration.
Ms Triinu VOLMER, Data Protection Officer.

⁷ For example, it should still be possible to correct contact information (which does not affect the selection process), while it would not be possible to add further information on the merits of the application.

⁸ under Article 20(5) of the Regulation.

⁹ This is the kind of documentation the EDPS requests when investigating complaints relating to the application of Article 20.