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Brussels, 10 December 2015
C 2015-0915
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Subject: Prior checking Opinion on staff performance appraisal at the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice – Case 2015-0915

On 21 October 2015, the European Data Protection Supervisor ("**EDPS**") received a notification for prior checking under Article 27.2 of Regulation (EC) No 45/2001 (the "**Regulation**") relating to staff performance appraisal, from the Data Protection Officer of the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice ("**eu-LISA**").

As this is an ex-post prior check, the two-month deadline within which the EDPS must deliver his opinion does not apply. This case has been dealt with on a best effort basis.

Since the EDPS has already issued Guidelines concerning the processing of personal data in the area of staff evaluation¹, the present Opinion will focus on those aspects where the processing operation diverges from the Guidelines or otherwise needs improvement.

Legal analysis

¹ [Guidelines concerning the processing of personal data in the area of staff evaluation](#)

Controller

The Regulation in its Article 2(d) defines the controller as the "*the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data*". The notification and the privacy statement refer to the Head of Human Resources Training Unit as controller.

Clarification: The EDPS notes that eu-LISA as an organisation is the controller. While where necessary an official can be considered as the "controller in practice" or be indicated as a contact point; final accountability remains with the organisation as such and is not attributed *ad personam*.

Information to data subjects

According to the notification, the Annual Evaluation Report and the Self-Evaluation Report include a privacy notice, which contain the necessary information pursuant to Articles 11 and 12 of the Regulation. However, there are certain discrepancies between the notification and the privacy notice in the reports. Moreover, the Self-Evaluation Report contains two separate privacy notices², which are also to some extent contradictory (see below under "data retention").

Recommendation

There should be only one identical privacy notice in the Self-Evaluation Report and the Evaluation Report, and it should be made available on the appropriate webpage of eu-LISA's intranet. Furthermore, the privacy notice in the reports should not appear under the heading "Disclaimer", but rather under "Data Protection".

Rights of data subjects

The notification specifies that data subjects can rectify their data by submitting a written request to the controller, but that rectification is possible only for factual data and not for evaluation data, which are subjective.

This distinction between rectification of factual data and evaluation data is not made in the privacy notice, which states that "*data subjects can exercise their rights of access and rectification of the data at any time before the closing of the appraisal process*".

Recommendation

For the sake of clarity, the privacy notice should include the same distinction and both the notification and the privacy notice should specify that the revised reports (with comments by the data subject) should be added to the personal file.

Recipients - Transfers

² "Disclaimer" on page 1 and 3

Both the notification and the privacy notice list the recipients of data, including "*Institutions and bodies falling within the exemption provided by Article 20 of Regulation 45/2001 because acting for safeguard purposes (such as the Internal Audit Service, the EU Court of Auditors, EU Ombudsman, OLAF, the EU Court of Justice, the European Data Protection Supervisor)*".

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. This is an exception to the information obligation set out in Articles 11 and 12, but not to the rules on transfers in Articles 7 to 9. In practice, this means that authorities such as 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 must nevertheless always be respected. In any event, there is a misunderstanding of the meaning of Article 20 of the Regulation and the reference to this provision in this context is inappropriate.

Recommendation

For the sake of clarity, the entire sentence "*Institutions and bodies falling within the exemption provided by Article 20 of Regulation 45/2001 because acting for safeguard purposes (such as the Internal Audit Service, the EU Court of Auditors, EU Ombudsman, OLAF, the EU Court of Justice, the European Data Protection Supervisor)*" should be removed from the list of recipients in the notification and the privacy statement.

Data retention

The notification states that the final appraisal report is kept in the personal file for a period of five years after the termination of employment and that in "*in case of potential litigation, the retention period is kept frozen for non performance in three consecutive years*". The privacy notice in the Self Evaluation Report and the Evaluation Report³, on the other hand, states that the appraisal report is kept in personal files for ten years after the termination of employment and there is no mention of "freezing" the retention period in case of potential litigation. There is thus a discrepancy between the notification and the privacy notice in this regard.

The EDPS Guidelines clearly sets out that the necessity for such a lengthy conservation period, be it five or ten years after the termination of employment, is 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, the storage of evaluation reports for up to five years after the end of a particular evaluation procedure would be considered appropriate. While promotion decisions would in principle need to be kept during the career of the staff member, not all related documents should be kept after a certain period.

Additionally, the second privacy notice in the Self Evaluation Report⁴ provides that the "*data retention period is four years starting with the date of completion*". This retention period would thus be in line with the EDPS Guidelines.

³ "Disclaimer" on page 1 of the Self Evaluation Report and the Evaluation Report.

⁴ "Disclaimer" on page 3 of the Self Evaluation Report.

Recommendation

The retention period of appraisal reports should be aligned with the EDPS Guidelines, i.e. up to five years after the end of a particular appraisal procedure, and the same information should be included in the notification and in the privacy notice. Furthermore, eu-LISA should clarify what is meant by freezing the retention period in case of litigation.

Conclusion

The EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations and recommendations contained in this Opinion are fully taken into account.

eu-LISA should:

- Ensure that there is only one identical privacy notice in the Self-Evaluation Report and the Evaluation Report; make it available also on the appropriate webpage of their intranet; and change the heading of the privacy notice to "Data Protection";
- Clarify in the privacy notice the categories of data that can be rectified and ensure that the revised reports (with comments by the data subject) are added to the personal file;
- Remove the entire sentence "*Institutions and bodies falling within the exemption provided by Article 20 of Regulation 45/2001 because acting for safeguard purposes (such as the Internal Audit Service, the EU Court of Auditors, EU Ombudsman, OLAF, the EU Court of Justice, the European Data Protection Supervisor)*" from the list of recipients in the notification and the privacy statement;
- Align the retention period of appraisal reports with the EDPS Guidelines (i.e. up to five years after the end of a particular appraisal procedure); ensure that the same information is included in the notification and in the privacy notice; and clarify what is meant by freezing the retention period in case of litigation.

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

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: Data Protection Officer, eu-LISA