

REGISTER NUMBER: 880 UPDATE

NOTIFICATION FOR PRIOR CHECKING

Date of submission: **08/08/2012**

Case number: **2012-0683**

Institution: **FRA**

Legal basis: article 27-5 of the regulation CE 45/2001⁽¹⁾

(1) OJ L 8, 12.01.2001

INFORMATION TO BE GIVEN⁽²⁾

(2) Please attach all necessary backup documents

1/ Name and address of the controller

Morten Kjaerum, Director of the European Union Agency for Fundamental Rights (FRA)
Schwarzenbergplatz 11
1040 Vienna
Austria

2/ Organisational parts of the institution or body entrusted with the processing of personal data

Director of the FRA
Members of the Investigation Panel
Members of the Disciplinary Board

3/ Name of the processing

DPN-2012-079 EB Decision on conduct of administrative inquiries and disciplinary procedures

4/ Purpose or purposes of the processing

To meet the needs of managing and dealing with administrative inquiries and disciplinary procedures, with regards:
- to ascertain facts in particular under Articles 12a, 22a, 24, 86 and 90 of the Staff Regulations;
- to determine whether there has been a failure to comply with the obligations incumbent on the FRA's staff members.

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5/ Description of the category or categories of data subjects

Data Subject concerned:

- Temporary agents, Contract agents, Seconded National Experts, Interns and Interim Staff, who may be subject to an investigation carried out in the frame of an administrative inquiry or disciplinary proceeding (e.g. victim or witness).

6/ Description of the data or categories of data (including, if applicable, special categories of data (article 10) and/or origin of data)

- Personal data of data subjects involved/concerned, such as: last name, first name, nationality, contract type, beginning and end of contract, department, etc.

- Administrative investigation files and disciplinary files are likely to contain data relating to offences, criminal convictions or security measures. Processing of such data is subject to authorisation in accordance with Article 10(5) of Regulation 45/2001. The decisions implementing Article 86 of the Staff Regulations and, by analogy, Article 49 to 51 and 119 and of the CEOS shall be regarded as an authorisation to process data. "Special categories of data" as defined under Article 10(2) of Regulation 45/2011, may also be processed. The Data Controller shall ensure that the Investigation Panel and the Disciplinary Board are made aware of the restrictive rules which apply to the processing of special categories of data (racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and data concerning health or sex life) and avoid the inclusion of these data unless of the circumstances foreseen in Article 10(2) of Regulation 45/2001 are present in the particular case under investigation.

- Traffic data relating to a communication by means of telecommunications network and terminal equipment.

7/ Information to be given to data subjects

The Director shall inform all staff members involved of the existence of an administrative or disciplinary inquiry, its opening and closing where appropriate, the hearing and its outcome.

Moreover, the Director shall provide all staff members involved with an information privacy policy note including general and specific information on the procedure of an administrative or disciplinary inquiry in compliance with Article 11 and 12 of Regulation 45/2011.

All staff members involved shall receive a copy of the conclusions of the investigation, and, on request, of all documents directly linked to the allegations made, subjects to the protection of the legitimate interests of third parties.

The record of the hearing shall be forwarded to the staff member concerned by registered letter with acknowledgement of receipt, for signature.

The staff member concerned in a disciplinary investigation shall have the right to obtain his/her complete disciplinary file and take copies of all documents relevant to the proceedings, including exonerating evidence.

8/ Procedures to grant rights of data subjects (rights of access, to rectify, to block, to erase, to object)

The data subjects can exert their right of access by contacting in writing either the data controller or Chairperson of the Disciplinary Board at their office email address.

To exercise the right of rectification, the data subject shall contact in writing the data controller at his office email address.

However in the course of a disciplinary procedure, the right of access of staff members involved may be restricted within limits of the possible exceptions set out in Article 20 Regulation 45/2001. These exceptions shall be strictly applied in the light of necessity and they shall be balanced in relation to the right of defence:

- In case of whistleblowers, informants or witnesses, any restriction to the right of access of these persons shall be in line with Article 20 of the Regulation 45/2001;
- The identity of the whistleblowers shall be kept confidential in as much as this would not contravene national rules regarding judicial proceedings.

The Director shall inform the staff members involved of the principle reasons on which the application of the restriction is based as well as of his/her right to have recourse to the EDPS under Article 20 (3) Regulation 45/2001. Any decision for any deferral to this provision shall be taken strictly on case by case basis.

Should a restriction to the right of access or rectification be imposed, the staff member shall be informed of the principle reasons for the application if the restriction and the right to have recourse for indirect access. In the context of an 'evaluation of conduct' it is difficult to establish whether data are accurate or not and this right can be lifted under the exemptions of Article 20 Regulation 45/2001. Nevertheless, some means of guaranteeing rectification shall be to allow staff members involved to add their comments and to include recourse or appeal decision in their files in order to ensure completeness of their disciplinary files.

9/ Automated / Manual processing operation

The processing operation is manual.

An administrative investigation is opened at the request of the Director.

The Director defines the purpose and scope of the inquiry and appoints the Investigation Panel which may consist of one to three members and designates a person of the Investigation Panel as responsible for the inquiry.

The involved parties are requested to sign the confidentiality declaration forms (see Annex II and Annex III).

As soon as an administrative inquiry suggests that a staff member may be subject to an Investigation, that person shall be kept informed provided that information does not hinder the inquiry. In any case, conclusions referring to a staff member by name may not be drawn at the end of the inquiry unless he/she has had the opportunity to express an opinion on all the facts which relate to him/her. The conclusions shall record that opinion.

The Investigation Panel establishes the facts, in particular under Articles 24 and 90 of the Staff Regulations. The Panel has the power to obtain documents, summon any person subject to the Staff Regulations to provide information and carry out on-the-spot investigations. The Investigation Panel collects only necessary, proportionate and relevant data to the purpose of the investigation and the reports shall only contain such necessary, proportionate and relevant data.

The Investigation Panel submits a report on the inquiry to the Director. This report sets out the facts and circumstances in question; it establishes whether the rules and procedures applicable to the situation have been

respected and determines any individual responsibility, having regard to aggravating or extenuating circumstances. Copies of all relevant documents and records of interviews will be attached to the report.

All staff members involved in an administrative inquiry shall be informed of the existence of the administrative inquiry, its opening and closing where appropriate as well as potential extensions unless the Director considers that disclosing this information would hinder the inquiry.

On the basis of the report the Director decides either to close the file without any disciplinary consequences or immediately open a disciplinary procedure.

The Director shall inform the staff member concerned of the conclusion of the inquiry together with the conclusions of the inquiry report and, on request, communicate all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties.

The Director is responsible for disciplinary proceedings and co-ordinate any preventative measure needed.

The Disciplinary Board is set up following the provisions laid down in Article 5 and Article 6 of Annex IX of the Staff Regulations, as well as Article 119 of the Conditions of employment of other servants of those Communities.

The Chairperson of the Disciplinary Board, its members and their alternates are appointed for a maximum period of three years, which may be renewed.

The Disciplinary Board only collects necessary and proportionate data to the purpose of the investigation and the reports shall only contain necessary and proportionate data.

A staff member heard pursuant to Article 3 of Annex IX to the Staff regulations shall receive a record of the hearing by registered letter with acknowledgement of receipt, for signature. She/he shall sign the record of the hearing or make comments and/or remarks within 15 calendar days from receipt of the record. Failure to do so within the period shall, except in cases of force majeure, result in the record being considered approved.

On the basis of the conclusion of a disciplinary proceeding the Director decides on appropriate disciplinary measures, which are communicated in writing to the staff concerned.

10/ Storage media of data

- Disciplinary files and administrative investigation files shall be kept in a locked filing cabinet of the Human Resources and Planning Department allowing to access solely to authorised individuals.
- Electronic personal folders are located on the hard drive or local storage media and on CT applications that store personal data.
- The final disciplinary decisions are kept in the personal file of the staff member concerned. In cases where the Director imposes no charges on the staff members' concerned there shall be no traces of its decision in the personal file unless the staff member requests so.

11/ Legal basis and lawfulness of the processing operation

Articles 49, 50 and 119 of the CEOS and Article 86 and Annex IX to the Staff regulations.

12/ The recipients or categories of recipient to whom the data might be disclosed

- Director
- Members of the Investigation Panel
- Members of the Disciplinary Board
- authorized ICT staff member

Data may also be communicated, where necessary, outside of the institution to other EU bodies such as OLAF, European Ombudsman, the Civil Service Tribunal, the Court of First Instance or the EDPS and in case of an infringement of national law, to the competent national authorities such as a national court.

13/ retention policy of (categories of) personal data

- Personal files: only copies of the disciplinary decisions will be kept in the personal file of the staff member concerned. The retention period of such decisions, other than removal from post and those with implications (financial or contractual) on the employment relationship, is 18 months, taking into account the provisions of Article 27 of Annex IX to the Staff Regulations concerning the request of deletion of such data. In the case of denial of deletion, the Appointing Authority (AA) has to motivate his decision.
- Administrative investigation files will be kept for 18 months. Should the case proceed into the court retention period shall be extended.
- Disciplinary files shall be retained for a period appropriate to the circumstances and the complexity of case as well as taking into account the time limit for appeal and the principle evoked in Article 4 (1) (e) of Regulation 45/2001. As a general rule, the retention period is 18 months. Should the case proceed into the court retention period shall be extended.

In all the above cases the retention period of 18 months is the minimum retention period and 20 years is the maximum.

- In Principle Traffic Data shall be erased or made anonymous upon termination of call or connection under Article 37 (1) Regulation 45/2001. However there can be 2 exceptions:
 - Traffic data can be stored if necessary during specific administrative investigation or specific disciplinary proceedings under a strict interpretation of Article 20 (1) (a) Regulation 45/2001 and
 - Where traffic data are processed for telecommunications budget and traffic management purposes (Article 37 (2) Regulation 45/2001), they can be kept for a maximum conservation period of 6 months or even a longer period, in the context of an administrative inquiry or disciplinary investigation.

13 a/ time limits for blocking and erasure of the different categories of data (on justified legitimate request from the data subject)
(Please, specify the time limits for every category, if applicable)

N/A

14/ Historical, statistical or scientific purposes

If you store data for longer periods than mentioned above, please specify, if applicable, why the data must be kept under a form which permits identification,

N/A

15/ Proposed transfers of data to third countries or international organisations

If data are transferred at the request of a national authority, it must establish the 'necessity' for the transfer. If, on the other hand, data are transferred on the sole initiative of the Agency it will be for the latter to establish the 'necessity' for the transfer in a reasoned decision.

With regard to those countries which have not implemented a comprehensive data protection framework for judicial activities, the application of Article 9 of Regulation 45/2011 should be considered.

16/ The processing operation presents specific risk which justifies prior checking (*please describe*):

Article 27.2.(b)

Processing operations intended to evaluate personal aspects relating to the data subject,

Article 27.2.(c)

Processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes,

Article 27.2.(d)

Processing operations for the purpose of excluding individuals from a right, benefit or contract,

Other (general concept in Article 27.1)

17/ Comments

List of annexes:

Annex I - Draft Executive Board Decision on conduct of administrative inquiries and disciplinary procedures

PLACE AND DATE: Vienna, 08/08/2012

DATA PROTECTION OFFICER: N. Fikatas

INSTITUTION OR BODY: FRA