

**Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the Council of the European Union regarding the internal rules concerning psychological and sexual harassment at work within the General Secretariat of the Council (GSC)**

Brussels, 9 June 2006 (Case 2006-93)

**1. Procedure**

- 1.1. On 22 February 2006, the EDPS received postal notification regarding prior checking of data processing in the context of the future application of the internal rules concerning psychological and sexual harassment at work within the General Secretariat of the Council (draft Decision concerning the implementing rules for personal data processing in connection with procedures relating to harassment, hereinafter "draft data processing/harassment Decision", and the proposal for a Decision concerning psychological and sexual harassment at work within the General Secretariat of the Council, hereinafter "draft harassment Decision").
- 1.2. Additional questions were sent on 11 April and 11 May 2006. The replies were received on 11 May and 19 May 2006, respectively. In order to enable the DPO to provide the additional information and relevant comments, the deadline was suspended for a further ten days.

**2. Examination of the case**

**2.1. The facts**

The General Secretariat of the Council wishes to establish a policy to protect any person working at the Council against harassment. The arrangements for implementing this policy and the roles of those involved are set out in a specific decision. The personal data processing operations to be carried out in this connection are the subject of this prior check.

The purpose of the processing operations under examination is to adopt and implement procedures aimed at preventing and combating psychological and sexual harassment. The data subjects are officials, GSC staff covered by the CEOS, seconded national experts, persons employed under private law contracts and trainees.

The categories of data concerned are those relating to allegations by persons who feel they have been victims of harassment or other persons concerned (alleged harasser, colleagues, witnesses), processed in the context of procedures to combat psychological and sexual harassment, as set out in the draft Decision of the Deputy Secretary-General and the draft Decision of the Director-General of Personnel and Administration.

Persons who feel that they are victims of harassment should first communicate directly with the alleged harasser. If that does not resolve the problem, they may take the following steps:

- request the intervention of their hierarchical superiors <sup>1</sup>,
- consultation of a confidential counsellor,
- request mediation,
- make a request to the Appointing Authority relating to a case of harassment.

If direct communication and the involvement of hierarchical superiors have not been successful, or do not appear to be possible or sufficient to resolve a case of harassment, persons who feel they are victims of harassment may choose to consult a confidential counsellor.

Following a call for applicants, and on the basis of a proposal by a Selection Board chaired by the Director of Personnel and Administration, in which a member nominated by the Staff Committee will participate, the confidential counsellors will be appointed by the Appointing Authority from amongst GSC officials or servants in categories, taking into consideration their personality, motivation, competence and availability. Their two-year term of office is renewable.

The role of the confidential counsellors consists of listening actively, and in complete confidentiality, to persons who feel they are victims of harassment, as well as to any other person involved in a conflict which appears to constitute harassment (alleged harasser, colleagues, witnesses). They must take care to remain objective and neutral. They help individuals to understand and assess their situation, inform them of existing procedures, provide guidance, and may assist them in the steps they take with the aim of finding a solution together.

The information provided to confidential counsellors is regarded as confidential. The information may be divulged only in the context of procedures relating to harassment, and with the explicit consent of the person concerned.

The confidential counsellor is authorised to keep a record of the name of the persons who have consulted him, and the dates of their visits. With the agreement of his interlocutor, the confidential counsellor is authorised to take personal notes during a consultation and to receive documents which his interlocutor would like to submit, insofar as the counsellor considers this to be necessary for the performance of his duties. At the request of his interlocutor, the confidential counsellor must give access to the notes made during their meeting.

Mediation may be provided by a psychologist at the GSC. The request for mediation must be sent to the psychologist by the person who feels they are the victim of harassment or by the alleged harasser. If the psychologist has too heavy a workload, if there is a conflict of interests or for other well-defined reasons, the psychologist may propose to the Appointing Authority that this task should be entrusted to a member of the Welfare Office or a qualified external expert. The mediator's task must be performed in a neutral and objective manner. It consists of listening attentively to the persons who want a hearing to help them identify the

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<sup>1</sup> According to the information provided by the controller, no structured file would be created for any cases submitted, in computerised form or in any other form, even if several cases were submitted at the same time, since the creation of such a file is not necessary, and would not be useful in the light of the purpose of the hierarchy's involvement in the context of harassment. The involvement of hierarchical superiors has a precise objective which relates to oral communication. Article 6(2) of the harassment proposal states that specific training activities will be organised for managers on the nature of their involvement.

conflict and its parameters, seek its causes and find possible solutions. The psychologist is a specialised counsellor bound by professional secrecy. In performing his or her tasks, he or she will neither seek nor receive instructions from the Appointing Authority or any other person.

The information provided to the mediator shall be regarded as confidential. Such information may be divulged only with the explicit consent of the person concerned, in particular the person who feels they are the victim of harassment or, where appropriate, the alleged harasser. The mediator may inform the Appointing Authority that there is a problem in a department. In that case, he is not authorised to divulge the confidential information he has received without the explicit consent of the person concerned. Information on the existence of a problem in a department is therefore general information which is necessary for the smooth running of departments.

The mediator is authorised to take personal notes during mediation and to receive documents from the persons involved, directly or indirectly, in a case of harassment. The mediator is authorised to keep a record of the name of the persons who have consulted him, the dates of their visits and the documents concerning the outcome of the mediation.

Once adopted, the draft data processing/harassment Decision and the draft harassment Decision will be brought to the attention of GSC staff by a Staff Note. Under the two draft decisions, it is expressly pointed out to data subjects that the information given to the confidential counsellor and the mediator is regarded as confidential and may be divulged only in the context of procedures relating to harassment, and with the explicit consent of the person concerned. The attention of the persons concerned is also drawn to the fact that the mediator may advise the Appointing Authority of the existence of a problem in a department, without prejudice to the foregoing. Staff are informed that use in bad faith of the procedure may give rise to disciplinary penalties.

The recipients or categories of recipient to whom the data may be communicated are the following: Appointing Authority of the GSC, Directorate Advisers Unit (relevant department), mediator (psychologist/member of the Welfare Office providing mediation), and the confidential counsellor.

The proposed data retention policy is the following:

- The confidential counsellor

"The confidential counsellor shall not retain any personal data beyond the time necessary for the performance of his duties. In no case shall the counsellor retain personal data for more than three years after initial referral to him. At the end of that period, the personal data shall be destroyed or, if possible use in connection with procedures relating to harassment, shall be returned on request to the person who made them available to the confidential counsellor. These time-periods shall also apply to any person who might replace the confidential counsellor if he resigns, his term ends, or for any other reason." (Article 1(5), Draft data processing/harassment Decision)

- The mediator

"The mediator shall keep records relating to the result of mediation requested, even if the person concerned decides not to continue with the mediation. He shall retain personal data for the time necessary for any use in the context of procedures relating to harassment,

including to ensure that the mediation is properly followed up. At the end of his term, the mediator shall pass the documents he has received in the performance of his duties to his successor, or to the person at the Welfare Office responsible for mediation." (Article 2(5), Draft data processing/harassment Decision)

"The mediator shall not retain any personal data beyond the time necessary for the performance of his duties, including to ensure that the mediation is properly followed up. As a general rule, he shall retain personal data for five years from the date on which a case is initially referred to him, except if it may be of use in the context of procedures relating to harassment. In no case shall he retain personal data for more than 10 years after referral. If the personal data is not retained, it shall be destroyed. These time-periods shall also apply to the person who replaces the mediator if he resigns, his term ends, or for any other reason." (Article 2(6), Draft data processing/harassment Decision)

Data stored for statistical purposes are kept only after being made anonymous.

Security measures have been adopted.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The management of data concerning the application of the Decisions on psychological and sexual harassment within the General Secretariat of the Council programme constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a)). The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)), and is not automated but intended to form part of a filing system (Article 3(2)). Accordingly, it falls within the scope of Regulation (EC) No 45/2001.

The Regulation defines a personal data filing system as follows: "*any structured set of personal data which are accessible according to specific criteria*". The written notes and records kept by the confidential counsellor and by the mediator must be deemed to constitute processing of personal data since the data are filed in a structured way.

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of all "*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 contains a list of processing operations likely to present such risks.

The present case qualifies for prior checking since it involves "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). The data processed by the different participants in the process (confidential counsellor and/or mediator) are intended to evaluate aspects of the personalities of the data subjects, in particular their behaviour.

The present Opinion takes account of data processing operations carried out by the confidential counsellor and the mediator, and excludes any other persons who may intervene either beforehand or subsequently.

The DPO's notification was received on 22 February 2006. According to Article 27(4) the present opinion must be delivered within the following two months. The deadline was suspended for 49 days; the Supervisor therefore had to deliver his opinion by 12 June 2006.

### **2.2.2. Legal basis and lawfulness of the processing operation**

The legal basis for the data processing in question is Article 24 of the Staff Regulations of Officials of the European Community (the "Staff Regulations"), which concerns assistance to be provided by the Communities to officials subject to "*threats, insulting or defamatory acts or utterances*".

Moreover, Article 12a of the Staff Regulations provides that: "1. *Officials shall refrain from any form of psychological or sexual harassment.*

2. *An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution. An official who has given evidence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution, provided the official has acted honestly.*

3. *"Psychological harassment" means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.*

4. *"Sexual harassment" means conduct relating to sex which is unwanted by the person to whom it is directed and which has the purpose or effect of offending that person or creating an intimidating, hostile, offensive or disturbing environment. Sexual harassment shall be treated as discrimination based on gender."*

Article 86 of the Staff Regulations on disciplinary measures provides that "*any failure by an official (...) to comply with his obligations under these Staff Regulations (...) shall make him liable to disciplinary action*". The related rules and procedures are set out in Annex IX to the Staff Regulations. Article 90(2) of the Staff Regulations refers to the right of an official to submit to the appointing authority a complaint against an act adversely affecting him.

Lastly, the legal basis is supplemented by the draft Decision concerning the implementing rules for personal data processing in connection with procedures relating to harassment and the draft Decision concerning psychological and sexual harassment at work within the General Secretariat of the Council. These draft Decisions describe the types of data which will/can be processed in connection with procedures relating to harassment.

As well as the legal basis, the lawfulness of the processing operation must also be considered in relation to the Regulation. Article 5(a) provides that "*Personal data may be processed only if processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed (...)*".

In the present case, the procedures concerning harassment fall within the scope of a task carried out in the public interest, on the basis of Article 12a of the Staff Regulations and the other provisions mentioned above.

On the basis of those provisions taken together, the legal basis is therefore valid.

Moreover, data relating to sexual or psychological harassment could be classified within the scope of the data which Article 10 of the Regulation classes as "special categories of data", such as for example data concerning health or sex life.

### **2.2.3. Processing of special categories of data**

Article 10(1) states that "[t]he processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited."

Notwithstanding, in the case under examination, the exception provided for in Article 10(2)(b) could apply in certain cases: "*processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)*". Article 24 of the Staff Regulations fulfils these conditions. However, as an exception to a general rule, that provision should be interpreted restrictively, i.e. the confidential counsellor and the mediator must be aware (correctly informed) of the prohibition provided for in Article 10(1) and, consequently, must not include such data in their notes unless it is necessary to resolve the problem in question.

### **2.2.4. Data Quality**

"*Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)(c) of Regulation (EC) No 45/2001).

The data processed as part of the procedures under examination (described in section 2.1 of this Opinion) can be extensive, making it difficult to determine *a priori*, and without knowledge of the specific case, whether they are "adequate, relevant and not excessive". It is therefore important for the persons processing the data under the different procedures to be correctly informed of their obligation to respect the principle established by Article 4(1)(c), and that they take account of it in processing the data. In this respect, a recommendation could be drawn up to correctly inform such persons of their obligation.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in section 2.2.2 of this Opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see section 2.2.7 below);

Finally, the data must be "*accurate and, where necessary, kept up-to-date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*" (Article 4(1)(d) of the Regulation).

The system described in the draft Decisions helps to ensure the accuracy and updating of the data, given the possibility open to the data subject of providing documents. Moreover, this principle is related to the exercise by the data subject of the right of access to and the right to rectify data, with a view to ensuring that the file is as accurate and as comprehensive as possible. With regard to these two rights, see section 2.2.6 below.

### **2.2.5. Conservation of data**

Personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (...)*" (Article 4(1)(e) of the Regulation).

In the case under analysis, the data retention periods established were 3 years for the confidential counsellor and 5 years for the mediator. The data retention period for the mediator may be extended to 10 years in cases in which the data could be useful in connection with procedures relating to harassment. As a general rule therefore, the draft Decision on personal data/harassment establishes that the confidential counsellor or mediator may not retain the data beyond the time necessary for the performance of their duties. Given the nature of the case under examination, this general rule is not an obstacle to the fixing of specific periods, since it concerns a reasonable period during which the role of the confidential counsellor or mediator may become important again (e.g. in the event of a formal complaint addressed to the Appointing Authority in which they are required to act as witnesses – subject to the confidentiality obligation, and with the express consent of the data subject; new informal or formal procedure involving the persons who consider they have suffered harassment and the alleged harasser, etc.).

Accordingly, Article 4(1)(e) of the Regulation is duly complied with.

The data may, once rendered anonymous, be kept for statistical purposes (for activity reports), in accordance with Article 4(1)(b) of the Regulation.

### **2.2.6. Right of access and rectification**

Article 13 of the Regulation makes provision, and sets out the rules, for the right of access at the request of the data subjects (in the case under examination, and taking account of its specific nature, data subjects include persons who feel they have been the victim of harassment, the alleged harasser, colleagues, witnesses, etc.). Article 14 of the Regulation allows the data subject a right to rectification. In the present case, the right of access is granted in relation to the personal notes of the confidential counsellor. However, neither the right of access or the right to rectification are granted in relation to documents submitted by the interlocutor. Nevertheless, even if these documents are submitted by the interlocutor, it may become necessary to update, amend or replace them, etc. The rights of access and rectification should be extended accordingly. Furthermore, the draft Decision on personal data/harassment does not mention these rights in relation to the data handled by the mediator. The EDPS thus proposes including such a reference in a paragraph of Article 2.

### **2.2.7. Information to be given to the data subject**

The Regulation provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, the data are collected directly from the data subject and indirectly, for example, through the drawing up of notes.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) and Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also apply in this case.

As mentioned in section 2.1, the controller will bring the draft Decisions to the attention of staff once they have been adopted. However, the content of the information does not meet the requirements of Articles 11(1) and 12(1). The data subject must be notified of the information specified in Article 11(a) (identity of the controller), (b) (purposes of the processing operation), (c) (recipients or categories of recipients of the data), (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) and (e) (existence of a right of access to, and the right to rectify, the data concerning him or her). The same goes for point (f), which stipulates the following: *legal basis of the processing operation, time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*. It guarantees that processing is carried out completely fairly. The same reasoning applies in relation to Article 12 of the Regulation as regards data used in the drafting of personal notes.

The EDPS therefore recommends that all the information specified in Articles 11 and 12 be notified to the data subjects as part of the general information provided to staff by the controller. Furthermore, he considers that, at the first interview, the confidential counsellor and the mediator should also draw the provisions of Articles 11 and 12 of the Regulation to the attention of the persons who consult them. Lastly, the EDPS welcomes the fact that Article 3 of the Decision on personal data/harassment also provides guarantees for the alleged harasser, particularly as information on the allegations against him, subject to the provisions of Article 20 of the Regulation.

#### **2.2.8. Transfer of data**

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies "if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

Article 7(1) of the Regulation is complied with, since data is only transferred within the institution to persons with a role in investigations into harassment (the Appointing Authority of the GSC, Directorate Advisers Unit (relevant department), mediator (psychologist/member of the Welfare Office providing mediation), and the confidential counsellor).

#### **2.2.9. Security**

In accordance with Article 22 of Regulation (EC) No 45/2001 on security of processing, "the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected".

The EDPS considers that the security measures described in the notification are adequate in the light of Article 22 of the Regulation.

### **Conclusion**

The processing proposed does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This implies in particular that:

- the confidential counsellor and the mediator must be correctly informed of the prohibition provided for in Article 10(1) and, consequently, must not include such data in their notes unless it is necessary to resolve the problem in question.
- a recommendation should be drawn up to correctly inform the confidential counsellor and the mediator of their obligation to process the data in accordance with the principle of data quality.
- the right of access and the right of rectification should be extended in relation to documents submitted by the data subject, and documents processed by the mediator;
- the information specified in Articles 11 and 12 of the Regulation should be notified to the data subjects.

Done at Brussels, 9 June 2006

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