

## **Opinion on the notification for prior checking received from the Data Protection Officer of the European Parliament (EP) regarding the "Independence risk assessment" dossier**

Brussels, 25 September 2006 (Case 2006-343)

### **1. Procedure**

- 1.1. On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to the Data Protection Officers (DPOs) asking them to prepare an inventory of data processing operations that might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001 (hereinafter referred to as "the Regulation"). The EDPS requested notification of all processing operations subject to prior checking, including those that commenced before the Supervisor was appointed and for which checking could never be regarded as prior, but which would be subject to "ex post" checking.
- 1.2. On 4 July 2006, the EDPS received the notification for prior checking of data processing in the context of the EP's "Independence risk assessment" dossier.
- 1.3. On 17 July 2006, the DPO of the EP was asked for further information. The DPO replied on 8 August 2006.
- 1.4. On 19 and 20 September 2006, the DPO asked the EDPS to provide him with proposals regarding the information to be provided to data subjects and the security measures to be taken when transmitting data. The information set out in footnote 1 was also specified.

### **2. Examination of the case**

#### **2.1. The facts**

Pursuant to the Financial Regulation and the detailed rules for its implementation, the Regulations and Rules applicable to officials of the European Communities and the Charter of Authorising Officers, the EP intends to carry out a data processing operation referred to as "*independence risk assessment*". The processing operation will be carried out by means of assessment questionnaires<sup>1</sup> with a view to detecting conflict-of-interests risks in connection

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<sup>1</sup> The controller wrote to the authorising officers by sub-delegation and operational initiators of the DG for the Presidency on 17 May 2006 to describe the project and circulate the forms, requesting the QI form to be returned by 19 June 2006. The second note to ask for the other forms to be returned will be circulated shortly.

with sensitive duties carried out by financial actors within the EP which could be damaging to the institution's financial interests.

The data subjects are the financial actors, i.e. EP officials and other staff members with financial responsibilities. They must fill in three questionnaires.

The first questionnaire (hereinafter referred to as "QI"), entitled "1a Sensitivity risk assessment of post for 2006", is a self-assessment questionnaire to be completed by the official or other staff member regarding exposure to possible risks in connection with sensitive duties.

The second questionnaire (hereinafter referred to as "QII"), entitled "1b Sensitivity risk assessment of post for 2006", is an analysis by the Supervisor and an assessment of possible risks in connection with sensitive duties.

The third questionnaire (hereinafter referred to as "QIII"), entitled "Independence risk assessment for 2006", is a self-assessment questionnaire to be completed by the official or other staff member in order to detect conflict-of-interest risks in connection with sensitive duties.

The data requested in QI are as follows: the official's post, name, post number and personnel number, and any additional function together with the relevant post number. The official or other staff member must reply to a number of questions. In particular:

- (i) whether the official or other staff member is involved in decision-making in financial and/or contractual matters related to contractors (i.e. whether he makes technical decisions on small contracts, whether he is able to choose the contractor, etc.);
- (ii) whether he works with staff belonging to the institution's contractors (e.g. on regular operations within the institution, on specific projects in cooperation with external staff, etc.);
- (iii) whether he is in contact with contractors' staff, with an indication of the type and frequency of such contacts;
- (iv) to what extent contacts with contractors' staff are important for the proper performance of the official's duties; and
- (v) the official's overall assessment of the risks inherent in exposure to contact with contractors in the course of his duties.

The data requested in QII are as follows: the Supervisor's post, name, post number and personnel number, and any additional function together with the relevant post number. The Supervisor is also asked to:

- (i) draw conclusions as to the risk of influences damaging to the financial interests of the institution for the specific post, on the basis of the risk assessment completed by the official or other staff member concerned;
- (ii) specify the function's level of specialisation in terms of the technical competence it requires;
- (iii) specify how damaging to the continuity of operations and sound financial management replacement of the official currently responsible for those duties would be, if the function is considered to be specialised;
- (iv) perform an overall sensitivity assessment of the post.

As for QIII, the official or other staff member must provide his name, post, personnel number and post number. The questions cover:

- (i) the circumstances and relevant facts that could affect or pose a threat to the respondent's independence and objectivity in performing his duties within the

institution. In particular, the official or other staff member must specify whether he has received gratuities or unjustified direct or indirect advantages, decorations, favours or payments (under "*personal interest*"), whether he has failed to apply laws or regulations correctly or engaged in an activity or relationship that could impair his unbiased assessment of a budgetary operation (under "*partiality*"), whether he has had a conflict of interest arising from family or emotional ties (under "*connections, relations*"), whether he received threats from his superiors (under "*intimidation*") and whether he was corrupted (under "*accountability*");

- (ii) the safeguards applied to pre-empt threats to independence and objectivity; and
- (iii) an assurance on the part of the official or other staff member that the list of contractors he has been in contact with for business purposes during the previous financial year is correct.

According to the notification sent to the EDPS, the information provided with the three questionnaires intended for data subjects included only the identity of the controller and, very briefly, the purpose of the processing operation. The legal basis for the processing was mentioned only in QIII. The DPO subsequently submitted a new document containing all the information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001. It has also been suggested that for the 2006 exercise, that information should be given to data subjects via a second note which will be circulated shortly.

All data subjects who have completed the forms have access, rectification, erasure and objection rights.

The questionnaires will be assessed by the Adviser to the Deputy Secretary-General. In very rare cases, the Authorising Officer by delegation for the Directorate-General for the Presidency may forward the data to OLAF so as to start an investigation.

As for the retention period, where no risk has been identified, the questionnaires are kept until discharge has been given in respect of the budget for the year in question – usually two years after budget implementation, so as to be able to keep any information that might be requested by the Committee on Budgetary Control. Where a serious risk is identified, appropriate measures are taken in accordance with its nature (e.g. start of an investigation).

The data are not stored for historical, statistical or scientific purposes.

Once the questionnaires have been collected, they are sorted by number and added to the files. They are kept under lock and key in the controller's office.

By e-mail sent on 20 September 2006, the DPO informed the EDPS that the controller would ask for the questionnaires to be returned in sealed envelopes marked "*Independence risk assessment for 2006*". These envelopes will be opened only by the person responsible for the exercise.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

Regulation (EC) No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as that processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)). In the case in point,

the EP's data processing is part of activities carried out under the first pillar and therefore falls within the scope of Community law.

Regulation (EC) No 45/2001 applies to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In the case in point, processing is manual within a structured system of data which are accessible via specific criteria. As soon as the questionnaires have been collected, they are sorted by number and added to the files. Accordingly, this processing operation falls within the scope of Regulation (EC) No 45/2001 since it involves processing personal data which form part of a filing system or are intended to form part of a filing system (Article 3(2) of the Regulation).

Article 27(1) of Regulation (EC) No 45/2001 makes "*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*" subject to prior checking by the European Data Protection Supervisor.

Article 27(2) contains a list of processing operations likely to present such risks, such as "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*" (Article 27(2)(a)) and "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). In the case in point, the personal data is processed in order to evaluate personal aspects relating to the data subjects (in particular their conduct) and includes data relating to suspected offences and possibly criminal convictions (Article 27(2)(a)). This dossier therefore falls within the scope of the prior checking procedure.

The Data Protection Officer's notification was received on 4 July 2006. Questions were put by e-mail on 17 July 2006. Pursuant to Article 27(4) of Regulation (EC) No 45/2001, the two-month period within which the European Data Protection Supervisor has to deliver his opinion was suspended to allow time for replies to be provided to these questions. Replies were sent by e-mail on 8 August 2006, resulting in a suspension of 22 days. The European Data Protection Supervisor therefore had to submit his opinion by 27 September 2006 (5 September plus a 22-day suspension period).

### **2.2.2. Lawfulness of processing**

The lawfulness of processing must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing must be "*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*".

The procedure for assessing the questionnaires completed by officials or other staff members holding sensitive posts involves collecting and processing personal data relating to the actions and conduct of the data subjects in fulfilling their duties and their responsibilities with respect to financial management of the institution. That procedure falls within the framework of legitimate exercise of official authority vested in the institution. The processing operation is therefore lawful.

The legal basis for the processing includes Article 52 of the Financial Regulation and Article 34 of the detailed rules for its implementation, together with Articles 11, 11a, 12, 12b, 13, 17, 22a, 22b and 24 (Title II – Rights and obligations of officials) of the Regulations and Rules applicable to officials and other servants of the European Communities (Staff

Regulations). The legal basis for the processing also includes the Code of Conduct (Guide to the obligations of officials and other servants of the European Parliament) and the Charter of Authorising Officers of 17 December 2002 (section on fraud and liability under criminal law).

In particular, under Article 52(1) of the Financial Regulation, "*all financial actors shall be prohibited from taking any measures of budgetary implementation which may bring their own interests into conflict with those of the Communities.*". Under Article 34 of the detailed rules for the implementation of the Financial Regulation, "*acts likely to be vitiated by a conflict of interests within the meaning of Article 52(2) of the Financial Regulation may, inter alia, take one of the following forms:*

- (a) *granting oneself or others unjustified direct or indirect advantages;*
- (b) *refusing to grant a beneficiary the rights or advantages to which that beneficiary is entitled;*
- (c) *committing undue or wrongful acts or failing to carry out acts that are mandatory.*".

Likewise, Article 11a of the Staff Regulations provides that "*an official shall not, in the performance of his duties (...), deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests.*"

Furthermore, Article 6(2) of the Charter of Authorising Officers stipulates that "*any measures of budget implementation which may give rise to a conflict of interest between the authorising officer by delegation or staff for whom he is responsible and a third party supplying revenue for the budget or receiving expenditure shall be prohibited. Should such a case occur, the authorising officer by delegation must refrain from such measures and refer the matter to his superior.*" In accordance with Article 11a of the Staff Regulations, the authorising officer by delegation must immediately inform the Appointing Authority, which shall take any appropriate measure and may in particular relieve the official from responsibility in the matter. The legal basis is valid and supports the lawfulness of the processing.

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

Article 10(5) of Regulation (EC) No 45/2001 provides that processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof.

The case in point concerns processing of personal data relating to suspected offences and criminal convictions, since the questionnaires completed by the officials or other staff members may reveal the conduct of financial actors and therefore their possible liability under criminal law (in particular if the data subject has, while fulfilling sensitive duties, been implicated in cases of fraud or corruption which could have had damaging consequences for the sound financial management of the institution).

As was pointed out above in the section on the legal basis, the data processing is justified under Article 52(1) of the Financial Regulation, Article 11 of the Staff Regulations and Article 6(2) of the Charter of Authorising Officers. Accordingly, Article 10(5) of Regulation (EC) No 45/2001 – which provides that processing of data relating to offences, criminal convictions or security measures "*may be carried out (...) if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*" – is duly complied with.

#### **2.2.4. Data quality**

The 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 processed data described at the beginning of this opinion must be regarded as fulfilling these conditions in relation to the processing operation. The data required are necessary to assess the sensitive nature of the financial actors' posts. The EDPS is satisfied that Article 4(1)(c) of Regulation (EC) No 45/2001 is duly complied with in this respect.

Furthermore, the data must be processed "*fairly and lawfully*" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see section 2 above). The issue of fairness is linked to the information which must be given to the data subject. That point is dealt with in section 2.2.9 below.

Article 4(1)(d) of the Regulation stipulates that "*data must be (...) accurate and, where necessary, kept up to date*". Furthermore, under that Article, "*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*". The system itself ensures that data are accurate and kept up to date. Furthermore, data subjects are made aware of their right of access to and right to rectify data in order to ensure that their file remains as comprehensive as possible. These rights are a means of ensuring that data are accurate and kept up to date. They are discussed in section 2.2.8 below.

#### **2.2.5. Data retention**

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that 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*".

As has been pointed out above, where no risk has been identified, the questionnaires are kept until discharge has been given in respect of the budget for the year in question – usually two years after budget implementation, so as to be able to keep information that might be requested by the Committee on Budgetary Control. Where a serious risk is identified, appropriate measures are taken in accordance with its nature (e.g. launch of an investigation).

The EDPS can accept the proposed data retention period, i.e. up to discharge of the budget. In the event of an investigation by OLAF, the data processing shall be subject to the rules governing the investigation <sup>2</sup>.

#### **2.2.6. Transfer of data**

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. Article 7(1) covers 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*".

In the case in point, data is transferred within the institution. The questionnaires are assessed by the Adviser to the Deputy Secretary-General of the EP's DG for the Presidency. It follows that the conditions of Article 7(1) are fulfilled since the data collected are necessary for

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<sup>2</sup> See the EDPS's opinion on data processing by the EP in the context of disciplinary files (Case 2004-198).

carrying out the processing and, furthermore, are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The case in point also concerns transfers to other Community bodies, since the data may be transferred to OLAF for the purposes of possible investigations. Under Article 2(g) of Regulation (EC) No 45/2001, "*authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients*". However, in the case in point, that article is considered to be an exception to the right to information rather than to the applicability of Article 7. In this case, OLAF receives data and is empowered to conduct investigations.

Moreover, Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". It must therefore be explicitly guaranteed that any person receiving and processing data for the purposes of assessing possible conflict-of-interest risks in connection with sensitive duties carried out by financial actors may not use those data for any other purpose.

### **2.2.7. Processing including the personnel or identifying number**

Under Article 10(6), the European Data Protection Supervisor "shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body".

This decision does not aim to establish the general conditions for using the identifying personnel number, but only its use in the context of the "*Independence risk assessment*" processing operation. In the case in point, use of the personnel number for the purpose of filing data in the personal file is reasonable insofar as this number is used to identify the person in the processing procedure and contributes to the processing operation.

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

Right of access and the related arrangements are governed by Article 13 of Regulation (EC) No 45/2001. In the case in point, the data subject has right of access. The right of rectification of data subjects is laid down in Article 14 of Regulation (EC) No 45/2001. In addition to being given access to their personal data, data subjects may also have factual personal data amended if necessary.

In this case, the data are collected both by the data subjects and by the Supervisor. The rights of access and rectification are both explicitly granted for all data. The EDPS therefore considers that Articles 13 and 14 of Regulation (EC) No 45/2001 are duly complied with.

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

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. Article 11 provides that when the data are obtained from the data subject, information must be given at the time of collection. When the data are not obtained from the data subject, the information must be given when the data are first recorded or disclosed, unless the data subject already has the information (Article 12).

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply in the case of

financial actors (officials or other staff members) who have sensitive duties and who complete the questionnaires.

The provisions of 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 because information are obtained from the Supervisor, who fills in QII on the basis of the risk assessment provided by the official or other staff member.

As has been mentioned above, according to the notification sent to the EDPS, the information provided with the three questionnaires intended for data subjects included only the identity of the controller and, very briefly, the purpose of the processing operation. The legal basis for the processing was mentioned only in QIII. The DPO subsequently submitted a new document containing all the information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001.

Accordingly, the EDPS is satisfied that the data subjects will receive all the information provided for in Articles 11(1) ((a) to (f)) and 12(1) ((a) to (f)) of Regulation (EC) No 45/2001 in the second note which will be circulated shortly.

#### **2.2.10. Security**

In accordance with Articles 22 and 23 of the Regulation, the controller and the processor are required to implement the 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction, accidental loss or alteration, and prevent all other forms of unlawful processing.

As has been pointed out above, the questionnaires are kept under lock and key in the controller's office. The DPO informed the EDPS that the controller would ask for the questionnaires to be returned in sealed envelopes marked "*Independence risk assessment for 2006*". These envelopes will be opened only by the person responsible for the exercise.

Having examined all of these measures, the EDPS considers that they are appropriate for the purposes of Article 22 of Regulation (EC) No 45/2001.

#### **Conclusion**

The proposed processing operation does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This implies in particular that:

- the EP must explicitly guarantee that any person receiving and processing data for the purposes of assessing possible conflict-of-interest risks in connection with sensitive duties carried out by financial actors may not use it for any other purpose;
- data subjects must receive all the information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001;



- questionnaires must be returned in sealed envelopes marked "*Independence risk assessment for 2006*" in order to ensure that the envelopes are opened by the person responsible for the exercise.

Done at Brussels, 25 September 2006.

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