



Opinion on a notification for prior checking received from the Data Protection Officer of the European Food Safety Authority concerning "Career Development and Appraisal Cycle"

Brussels, 25 January 2008 (Case 2007-585)

1. Proceedings

On 27 September 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Food Safety Authority (EFSA) a notification for prior checking concerning annual career development and appraisal exercise.

The notification was accompanied by:

- Career Development and Appraisal Cycle (CDAC) Policy;
- Template of the Career Development and Appraisal Cycle (CDAC) Form;
- EFSA Draft Implementing Rules implementing Article 43 of the Staff Regulations, Articles 15(2) and 87(1) of the Conditions of Employment of Other Servants of 18 September 2007;
- Controller notification of the personal data processing operation to the DPO.

The EDPS requested further information on 16 November 2007. The DPO answered on 19 December 2007. The draft opinion was sent to the DPO for comments on 20 December 2007 and these were received on 18 January 2008.

2. Facts

The present notification concerns the evaluation of staff members of EFSA as foreseen in Article 43 of the Staff Regulations of Officials and Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants of the European Communities.

The conditions for the establishment of yearly evaluation reports concerning the efficiency, competencies and conduct of officials, temporary and contractual agents working for the EFSA are laid down in the "EFSA Draft Implementing Rules implementing Article 43 of the Staff Regulations, Articles 15(2) and 87(1) of the Conditions of Employment of Other Servants" of 18 September 2007.

Every year, an annual report covering the *reference period* from 1 January to 31 December of the preceding year is drawn up for every staff member of EFSA (officials, temporary and contract staff) engaged for a period of not less than one year.

2.1. Description of the data processing operations

The appraisal is conducted by the *reporting officer*.

The *countersigning officer* shall ensure that the appraisal standards are consistently applied to all the *appraisals* for which he/she is responsible and may comment on the appraisal.

The *Career Development and Training staff in the HR Unit* provide administrative support in the process. Have access to the data : HR Head of Unit, Senior Career Development Officer, Training and Personal Development Officer, Senior Career Development Assistant.

The Career development and appraisal cycle consists of two parts:

1. The *development plan* which is a written agreement on key objectives, performance indicators and development needs for the reference period. It is prepared *before* the start of the reference period. It constitutes the outcome of a dialogue between the jobholder and the reporting officer. The dialogue covers two areas: tasks and objectives on the one hand, and development of competencies, skills and knowledge on the other hand.

If there are significant changes in the jobholder's objectives or if the reporting officer changes during the year, a new career development dialogue should be planned and the current development plan should be reassessed.

Both parties must sign the agreed development plan. The original is forwarded to the Human Resources unit where it is to be placed in the personal file, together with the final appraisal. A copy is kept by the jobholder and the reporting officer for quick reference during the period.

2. The *final appraisal exercise* to be conducted at the end of the reference period.

The annual appraisal exercise starts with the request to the jobholder to fill in the self-assessment questionnaire indicating to what extent the development plan is considered to have been fulfilled.

The reporting officer, at the end of the cycle, will draw up a first draft version of the final appraisal in which he/she will state to what extent the key objectives contained in the development plan were reached. This appraisal might ultimately also involve some colleagues with whom the jobholder works closely.

Once a self-assessment and a first draft version of the appraisal have been produced, the assessment dialogue can take place. During the assessment dialogue jobholder and reporting officer will discuss the self-assessment and the draft version of the appraisal, and in particular how the tasks and objectives contained in the development plan were met.

Following the assessment dialogue, the reporting officer will draw up a final appraisal for the reference period, sign it and transmit it to the countersigning officer.

The countersigning officer may comment on the appraisal. Once signed, this is then transmitted to the jobholder for further comments and an approval. The final appraisal signed and approved by the jobholder is then forwarded to Human Resources unit.

Appraisals should be finalised during the three months following the end of the reference period. They will form the basis of the annual reclassification/promotion exercise.

If the jobholder was unable to resolve problems which arose during the appraisal dialogue and is dissatisfied with the final appraisal, she or he has the opportunity to request a dialogue with

the countersigning officer explaining the reasons for such a request. Within 10 working days, the countersigning officer shall organise a meeting designed to reach an agreement between the reporting officer and the jobholder. The countersigning officer should then either amend the report or confirm it and transmit it once more to the jobholder for approval.

If the jobholder is dissatisfied with the countersigning officer's decision, she or he may appeal to the Appointing Authority who will request the setting up of a Joint Evaluation and Promotion Committee¹. The decision of the Joint Evaluation Committee in consultation with the Appointing Authority, which is to keep or amend the appraisal, is final. At this point should the jobholder continue to refuse to accept the appraisal, she or he can submit a complaint under Article 90 of the Staff Regulations.

2.2. Purpose of the processing

The purpose of the data processing in question is to:

- take stock of the jobholder's working area and performance;
- establish the manager's and staff member's mutual expectations;
- clarify possible development areas for the staff member, seen in the light of existing as well as future tasks;
- identify possible problems;
- discuss routines and workflows that matter for the day-to-day work;
- establish a development plan for the jobholder in both short and long-term perspective;
- provide a proper background for assessing the jobholder;
- serve as element of background and documentation for possible promotion of the jobholder.

2.3. Categories of data processed

The "Career Development and Appraisal Cycle Form" contains the following information:

- period of appraisal (from - to);
- jobholder's details: surname, first name(s), personnel number, status, job title, unit/department, function group and grade;
- reporting officer's details: surname, first name(s), unit/department;
- countersigning officer's details: surname, first name(s), unit/department;
- content of the "career development dialogue": planning of the objectives for the period of appraisal, performance indicators and assessment criteria, personal development goals and training needs;
- jobholder's self-assessment report containing achievement of objectives, description of the performance environment, description of competencies, skills and knowledge, description of contribution to other activities and perspectives for the next reference period;
- reporting officer's assessment containing assessment of efficiency, abilities, competencies, conduct in service, contribution to other activities or additional duties, overall summary, assessment of the potential as well as his signature;
- countersigning officer's assessment and signature;
- jobholder's eventual comments and signature;
- countersigning officer's further review and signature (if applicable);

¹

The Joint Evaluation and Promotion Committee is currently in the process of being established. Besides a representative of the Staff Committee, the members are not known yet.

- opinion of the Joint Evaluation Committee and of the Executive Director (if applicable);
- Executive Director's decision (if applicable).

2.4. Data retention

According to the information provided in the notification, the electronic files are kept during the procedure and suppressed from the document management system once the appraisal cycle of the jobholder in question is completed.

At the end of the process, the completed "Career Development and Appraisal Cycle Form" is kept in the personal file of the respective employee in line with Article 26 of the Staff Regulations. The annual development plan, the self-assessment and the final appraisal shall be kept in the staff member's personal file in a sealed envelope for a period of five years after which they will be destroyed and a confirmation note will replace the file. The destruction of these documents shall also apply in the cases of termination of service of a staff member.

Storage for historical, statistical or scientific purposes is not being envisaged.

2.5. Information provided to the data subjects

According to the information provided in the notification, the whole process is detailed in the main policy document (CDAC policy document). This policy document was adopted internally in EFSA as a result of an in-depth decision and consultation process, including a consultation with the European Commission (DG ADMIN), the EFSA staff committee and the DPO. The CDAC was presented during the meeting with all staff on 16 March 2007. Training on objective setting and on job descriptions has been organised for reporting officers. The presentations for jobholders were also organised between 14 and 28 March 2007. The CDAC policy document is available to all EFSA staff on the Intranet.

The CDAC policy document clarifies:

- purpose of the CDAC;
- contradictory character of the CDAC appraisal procedure, enabling the jobholder to exercise his right to access and to rectify his personal data ;
- retention period and the time limits of storing of personal data contained in the CDAC policy.
- identity of the controller of the data processing operation and the identity and details of contact persons;
- recipients of personal data related to the CDAC.

Finally, jobholders are informed on the fact that they have, at any time, the right of recourse to the European Data Protection Supervisor (EDPS) with regard to the processing of his or her personal information in the context of the CDAC.

2.6. Rights of the data subjects

The contradictory character of the CDAC appraisal procedure enables the jobholder to exercise his right to access and rectify his personal data during the procedure. As already indicated above, each jobholder receives a final copy of his "Career Development and Appraisal Cycle Form" and write his or her comments directly on the form.

In addition, in line with Article 26 of the Staff Regulations, the staff members have right of access to all the documents contained in their personal files even after leaving the service.

2.7. Data transfers

The data processed within the carrier development exercise can be disclosed to the following recipients:

- as long as the CDAC process is ongoing (i.e. throughout the different stages of the CDA Cycle):
 - the jobholder,
 - the reporting officer,
 - the countersigning officer,
 - the HR staff (HR Head of Unit, Senior Career Development Officer, Training and Personal Development Officer, Senior Career Development Assistant),
 - in case of appeal, the Executive Director, the Joint Evaluation Committee.
- once the CDAC cycle is completed, the following controlling bodies can have access to the CDAC file:
 - Court of Auditors,
 - Internal Audit,
 - OLAF,
 - European Ombudsman,
 - EDPS.

2.8. Security measures

[...]

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The evaluation of the staff members constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a Community body in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation)². The processing of the data contained in the respective "Career Development and Appraisal Cycle Form" is manual, but the data form part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (b): "*processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct*". The evaluation of the staff members clearly

² Cf. Regulation N° 178/2002/EC of the European Parliament and the Council of 28th January 2002 laying down the general principles of food law, establishing the European Food Safety Authority and laying down procedures in relation to food safety, as amended by Regulation (EC) No 1642/2003.

represents as such a processing operation and is therefore subject to prior checking by the EDPS.

Ex-post prior checking: Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should have been given prior to the start of the processing operation. In this case however the processing operation has already been established. This is not a serious problem here in that any recommendations made by the EDPS may still be adopted accordingly.

Deadlines: The notification of the DPO was received on 27 September 2007. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 62 days. Consequently, the present opinion must be delivered no later than 29 January 2008.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5 (a) is that the *"processing is necessary for 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 institutions or body"*.

In addition, in line with recital 27 of the Regulation *"processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*.

The legal base for the processing in question can be found in Article 43 of the Staff Regulations of Officials and Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants, as implemented in the EFSA Draft Implementing Rules of 18 November 2007.

The evaluation procedures, that imply collection and processing of personal data concerning the officials and other statutory agents, fall within the scope of the legitimate exercise of public authority vested in the EFSA. The legal bases quoted above confirm the lawfulness of the processing in question.

3.3. Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data revealing trade-union membership is prohibited, unless grounds can be found in the second paragraph of this Article.

As stated previously, in the present case, the jobholder shall provide information about the participation of the staff member concerned in "other activities"³. This information can reveal the trade-union membership of the staff member concerned.

³ *"To which other activities of the Unit or the Authority, which were not part of your key objectives, did you contribute?"*

In the present case, the exception laid down in Article 10 (2) (a) of the Regulation is applicable, according to which the prohibition to process trade-union related data can be lifted in case "*the data subject has given his or her express consent to the processing*". The EDPS considers that the processing of the trade-union related data is justified.

3.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*".

As stated previously, the following data categories are being processed within the framework of the evaluation exercise at the EFSA:

- administrative data
- evaluation related data

This data can be considered as complying with the data quality related requirements outlined above and necessary for the evaluation of the statutory personnel.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*".

The staff members' evaluation carried out by the reporting officer and the countersigning officer is subjective by nature. It is therefore difficult to assess the accuracy of such data. In any case, the invitation to make use of the rights of access, rectification and appeal allows ensuring that the data are accurate and up to date (cf. point 3.8).

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.9)

3.5. Data retention

Article 4 (1)(e) of the Regulation states that 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*".

As indicated above, the "Career Development and Appraisal Cycle Form" are kept in the personal file of the respective employee in a sealed envelope for a period of five years after which they will be destroyed.

The electronic files are suppressed from the document management system once the appraisal cycle of the jobholder in question is completed.

Storage for historical, statistical or scientific purposes is not being envisaged.

The EDPS is satisfied that the five years storage period and the retention policy are compliant with the provisions of Article 4 (1)(e) of Regulation 45/2001.

3.6. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1). The recipient can process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

As mentioned above, the data are transferred to the hierarchical superiors of the staff member concerned, as well as to certain members of the Human Resources Unit. In case of appeal the members of the Joint Evaluation Committee.

In addition, in case of disputes, the personal file containing the evaluation reports may be transferred to the Civil Service Tribunal. The data contained in the evaluation report can also be subjected to an audit by the Court of Auditors or an internal auditor. Finally, the data can be transferred to the OLAF, to the European Ombudsman or to the EDPS.

These transfers have a legitimate purpose because they are necessary for the human resources management, disciplinary procedure, judicial proceedings, internal audit or the exercise of supervisory tasks.

In case of an inter-institutional transfer of the staff member concerned, his evaluation reports stored in the personal files are transmitted to the respective institution. This transfer is necessary for the legitimate performance of tasks covered by the competence of the receiving institution.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. Therefore, Article 7 (1) of the Regulation is being complied with.

In order to ensure the full compliance with Article 7 (3) of the Regulation, the EDPS recommends that all EFSA internal recipients are reminded of their obligation not to use the data received for any further purposes than the one for which they were transmitted.

3.7. Processing including the personnel or identifying number

Article 10 (6) of the Regulation provides that *"the European Data Protection Supervisor determines the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body"*.

The "Career Development and Appraisal Cycle Form" contains the personal number of the staff member concerned. The EDPS considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates the follow-up in an appropriate way. There is no reason to determine any further conditions in this case.

3.8. Right of access and rectification

Right of access: Article 13 of Regulation 45/2001 provides a right of access to personal data being processed.

In addition, pursuant to Article 43 (3) of the Staff Regulations the "Career development report form" shall be communicated to the person concerned who shall be entitled to make any comments thereon he considers relevant.

Finally, in terms of Article 26 of the Staff Regulations, the officials have a right of access to all documents contained in their personal files even after leaving the service.

As indicated above, each staff member receives a copy of her or his completed "Career Development and Appraisal Cycle Form" and, upon a request, can obtain access to his personal file even after leaving the service.

Right of rectification: Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

As already mentioned above, staff members are being asked to add their comments directly on the "Career Development and Appraisal Cycle Form" so that these comments are clearly visible to all recipients of the report.

Moreover, in order to rectify the data, the staff member in question can refuse the evaluation report and have the matter automatically referred to the Joint Evaluation Committee.

The EDPS is of the opinion that in the context of the EFSA staff evaluation procedure, the concerned agent is able to correct his factual data, as well as to add comments related to his (by nature subjective) evaluation data provided by his hierarchical superior in an appropriate way. In view of the above, the EDPS considers that Articles 13 and 14 of the Regulation are fully complied with.

3.9. Information to the person concerned

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject.

According to the information provided, all EFSA staff received a detailed main policy document (CDAC policy document). The CDAC was also presented in a presentation to all staff on 16 March 2007. The CDAC policy document is available to all EFSA staff on the Intranet (cf. point. 2.5).

The EDPS notes that all necessary information is provided via the CDAC policy document to the data subjects and that Articles 11 and 12 of the Regulation are respected. The EDPS recommends attaching the CDAC policy document to each "Career Development and Appraisal Cycle Form".

3.10. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented 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 or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

[...]

The EDPS considers that these measures are adequate in the light of Article 22 of Regulation 45/2001.

In order to ensure full compliance with Article 22 of the Regulation, the EDPS recommends that all data are transferred in sealed envelopes marked "confidential".

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations in this opinion are fully taken into account. In particular, EFSA shall:

- remind all EFSA internal recipients of their obligation not to use the data received for any further purpose beyond the purposes stated in the CDAC policy document;
- provide appropriate information to the data subjects by attaching the CDAC policy document to each "Career Development and Appraisal Cycle Form".
- ensure the security of data during transfers.

Done at Brussels, 25 January 2008

Peter HUSTINX
European Data Protection Supervisor