

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Centre for the Development of Vocational Training on the data processing carried out in the framework of administrative enquiries and disciplinary proceedings**

Brussels, 13 February 2008 (Case 2007-582)

### **1. Proceedings**

On 24 September 2007, the European Data Protection Supervisor (hereinafter "EDPS") received from the Data Protection Officer of the European Centre for the Development of Vocational Training ("CEDEFOP") a notification for prior checking regarding the processing of personal data carried out in the context of conducting administrative enquiries and disciplinary proceedings ("the Notification").

The EDPS requested complementary information about the processing on 26 October 2007. The answers were received on 28 November 2007, following a conference call where various points related to the data processing were discussed. On 20 December 2007, the EDPS sent a draft Opinion to CEDEFOP for comments which were received on 11 February 2008.

### **2. Examination of the matter**

The Notification describes the procedures carried out within CEDEFOP in order to ascertain failure by an official<sup>1</sup> to comply with the obligations under the Staff Regulations of Officials of the European Communities and under the Conditions of Employment of Other Servants (respectively "Staff Regulations" and "CEOS") and, if appropriate, impose disciplinary sanctions. The main actors involved in such procedures include the Appointing Authority ("AA") and the Disciplinary Board ("DB").

The actions taken towards collecting information to investigate whether an official has failed to comply with his/her obligations are referred to as "administrative inquiry"<sup>2</sup>. The AA is competent to open an administrative inquiry. The findings of an inquiry are described in a report. On the basis of the report, the AA has several options, which include closing the case or initiating disciplinary proceedings with or without the intervention of the DB. At the end of the procedure the AA may impose disciplinary sanctions.

Below follows a description of the data processing operations carried out in the framework of administrative enquiries and disciplinary proceedings.

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<sup>1</sup> For the sake of brevity we will use the term "officials" or "EU officials" to refer to both EU officials and other EU servants.

<sup>2</sup> Administrative enquiries include all the actions carried out by the official to whom the Appointing Authority has assigned responsibility for establishing the facts and circumstances which will enable it to determine whether an official has failed to fulfil his/her obligations.

## 2.1. The Facts

The *purpose of the data processing* is to gather information about EU officials in order to enable the Appointing Authority ("AA") to assess whether the person/s concerned failed to fulfil their obligations under the Staff Regulations and CEOS and, where appropriate, impose a disciplinary penalty.

The *primary responsibility for the data processing* lies with the Area Resources, section Human Resources which reports to the of CEDEFOP Directorate. Responsibility also lies with the AA (hereinafter altogether "CEDEFOP").

As further described below, the *automated and manual data* processing operations are closely interrelated and can be described altogether as follows:

First stage -Following the AA's decision to open an administrative enquiry, it appoints an investigating official who will be in charge of collecting information regarding the alleged wrongdoing. In doing so, the investigator will have the power to obtain documents of any kind or in any format and to ask any present or former CEDEFOP employee for information. At the end of the inquiry the investigating official produces a written report.

Second stage - The AA assesses the information contained in the report and carries out a hearing with the person alleged to be engaged in wrongdoing. Afterwards, the AA decides whether to close the case (no further action) or initiate disciplinary proceedings. Disciplinary proceedings without the intervention of the DB consist of a written warning or reprimand. Otherwise, disciplinary proceedings take place with the intervention of the DB which will issue an opinion on the matter to be delivered to the AA. At the end of this procedure, the AA may impose disciplinary sanctions.

Third stage - The information and documents generated through the administrative inquiry and in the context of the above mentioned disciplinary procedures will be stored in paper form in a disciplinary file. The file will be structured by reference to individual inquiries. CEDFOP Area Resources, section Human Resources will keep the disciplinary file. An electronic version of the same file will be stored in LiveLink, which is a management software.

In addition, a copy of the decisions taken in the context of administrative inquiries will also be stored in the personal file of the official. This includes the copy of the decision to take no further action (unless the person concerned makes a request to the contrary) and the decision to issue a written warning or reprimand.

The data processing involves the following *types of data subjects*: (i) EU officials, former officials, as well as servants or former servants within the meaning of the CEOS who are the object of administrative inquiries (jointly referred to as "EU officials"). (ii) Individuals who participate in an inquiry and disciplinary proceedings in a role other than that of the accused official. This may include witness, whistleblowers, etc.

*Regarding the categories of personal data, the personal data collected from users of the system include*, surname, first name, personnel number, grade/step, data relating to status under the Staff Regulations and CEOS, data relating to the conduct, action or inaction of persons under investigation and/or subject to disciplinary proceedings, data relating to the legal definition of such action or inaction with regard to the Staff Regulations and CEOS and to other obligations by which the persons in question are bound, data relating to the individual

responsibility of the persons concerned, including financial liability, data relating to penalties imposed on the persons concerned, if required.

In the context of administrative enquiries and disciplinary proceedings, the *information* collected may be deemed *special* insofar as it reveals political or trade-union affiliation, religious or philosophical beliefs, data revealing racial or ethnic origin, or data concerning health or sex life. Such information will only be processed and stored if it is relevant in the context of the case and proportional to the intended purpose.

Regarding *conservation periods*, the following rules apply both to electronic and paper disciplinary files: (i) Files which have led to the opening of disciplinary procedure will be stored for a period of 20 years starting from the date of the AA's decision concluding the procedure; (ii) Files relating to an administrative inquiry without disciplinary follow-up will be stored for a period of 5 years starting from the date of the AA's decision not to pursue the matter; (iii) Files where the AA decides that no case can be made against the official or where a warning is issued will also be stored for a period of 5 years.

The above mentioned time limits are extended if an administrative or legal procedure is ongoing which might require consultation of the files (e.g. requests for damages, appeals to the European Civil Service Tribunal or the Court of Justice).

In addition to disciplinary files, some information will be placed in the personal file. In particular, a copy of the decision to take no further action and the decision to issue a written warning or reprimand will be stored in the personal file. This information may be deleted upon request by the data subject after three years in the case of a written warning or reprimand and six years in the case of another penalty. The decision to grant the request is taken at the discretion of the Appointing Authority. If the information is not deleted (because the individual does not request it or because the request is not allowed), the content of personal files is kept throughout the entire career of the official concerned and after the end of the career for an unlimited period.

At present, CEDEFOP does not intend to keep data beyond the above mentioned time limits for historical, scientific or statistical purposes. Should data be kept for such purposes, they will be duly anonymised.

Regarding *data transfers*, the EDPS notes that the following transfers may occur: (i) At the request of the member of staff concerned, the file or part of it may be translated. In this case the file will be seen by a member of CEDEFOP's Linguistic Support Service; (ii) if the official concerned contests the Appointing Authority's disciplinary decision, the dossier may be referred to the CEDEFOP Appeals Committee, the European Civil Service Tribunal or to the Court of Justice of the European Communities; (iii) to the European Ombudsman, if the official concerned addresses a complaint; (iv) to the European Data Protection Supervisor, if the official concerned addresses a complaint; (v) if appropriate, the decision is communicated to OLAF if OLAF has requested disciplinary follow-up; (vi) where the disciplinary decision has a financial impact, it is forwarded to the Human Resources Service for the adjustment of the salary. The HR service then requests the salary adjustment to the Paymaster's Office and the salaries are processed jointly by the Finance Service and the Human Resources Service of CEDEFOP.

Regarding the *data subjects' rights to information*, the EDPS notes that the AA informs individuals of the existence of the administrative inquiry and disciplinary procedure as such, in line with the Staff Regulations and CEOS. In this context, the AA informs individuals of

the opening and closing of an administrative enquiry as well as potential extensions unless it considers that disclosing this information would hinder the enquiry. Individuals are also informed about the hearing and its outcome. Furthermore, regarding the disciplinary proceedings, the AA informs officials of its decisions on the charges and choice of procedure.

Regarding the *right to access*, according to the Notification, individuals are informed of their right to access and automatically given various documents, including a copy of the conclusions of the investigation report; minutes of the hearing, decision of the AA on the charges and the choice of procedure, report by the AA to the disciplinary board; opinion of the disciplinary board and the final decision of the AA. The only limit to the right of access arises when information refers to other individuals in which case access may be limited to the information that relates uniquely to the alleged offender.

In addition to direct access, according to the Notification, individuals can request access and copies of all documents directly related to the allegations made against them, the only limit being when this may violate the privacy and data protection of third parties.

According to the Notification, individuals are afforded the *right to rectification*. This is done by allowing the data subject to add his or her comments but also to ensure completeness of his or her disciplinary file. Furthermore, in accordance with Article 27 of Annex IX to the Staff Regulations, after a certain period of time individuals can submit a request for the deletion from their personal file of all reference to disciplinary measure. However, there is no automaticity of erasure as the decision falls within the discretionary power of the Appointing Authority.

Regarding the *security measures*, (...)

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

**Scope of Notification.** The scope of the notified processing operation concerns the processing of personal data in connection with administrative inquiries and disciplinary proceedings. The purpose of this Opinion is to assess the extent to which the processing is in line with Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ("Regulation (EC) No 45/2001" or "Regulation"). The purpose is not to give an opinion on the administrative inquiries and disciplinary proceedings themselves.

**Application of Regulation (EC) No 45/2001.** Pursuant to its Article 3, the Regulation 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"* and to the processing *"by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law"*. For the reasons described below, all the elements that trigger the application of the Regulation exist in the processing at point:

Firstly, the processing entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described in the Notification, personal data of individuals alleged to be involved in wrongdoing will be collected. Secondly, as described in the Notification, the personal data collected undergoes manual as well as automatic processing operations, as defined under Article 2 (b) of the Regulation (EC)

No 45/2001. For example, the collection of the information is reflected in a report which is later transferred to the AA for its assessment. Finally, the EDPS confirms that the processing is carried out by a Community agency, in this case by the CEDEFOP, Centre for the Development of Vocational Training, in the framework of Community law.

**Grounds for Prior Checking under Article 27.** Article 27.1 of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*processing operations likely to present specific risks to the rights and freedoms of a data subject by virtue of their nature, their scope or their purposes*". Article 27.2 of the Regulation contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (a), the processing of data related to suspected offences, offences, criminal convictions or security measures. The data collected in connection with the performance of administrative enquiries constitutes suspected offences, and therefore, requires prior checking by the EDPS. Furthermore, the list of Article 27.2 also includes under paragraph (b) the processing operations that intend to evaluate personal aspects relating to the data subject. In this case, the processing intends to evaluate the individual/EU official in order to assess whether he/she is engaged in a wrongdoing. Therefore, also for this reason, the data processing requires prior checking by the EDPS. Thus, the data processing operations carried out in the framework of conducting administrative inquiries and disciplinary procedures qualify for prior checking on two different legal grounds.

**Notification and due date for the EDPS Opinion.** The Notification from CEDEFOP's Data Protection Officer was received on 24 September 2007. Pursuant to Article 27.4 of Regulation (EC) No 45/2001, due to information requests and to allow comments from the DPO on the EDPS Draft Opinion, the procedure was suspended for 86 days. The Opinion will therefore be adopted no later than 15 February 2008.

**True prior checking.** This is a true prior check, meaning that the data processing operations have not started yet. Since prior checking is designed to address situations that are likely to present risks, the opinion of the EDPS must be requested and given prior to the start of the processing operation as has been done in this case.

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

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, of the various grounds listed under Article 5 of Regulation (EC) No 45/2001, the processing operations notified for prior checking fall under Article 5 a), pursuant to which data may be processed if 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 institution or body*".

The legal basis for the processing is provided by Article 86 and Annex IX of the Staff Regulations of officials of the European Communities as well as by Articles 49, 50 and 119 of the Conditions of Employment of Other Servants. As conducting disciplinary procedures is necessary for the legitimate exercise of official authority vested in the CEDEFOP, the processing operation is lawful.

As foreseen under Paragraph 3 of Article 2 of Annex IX to the Staff Regulations, the institutions are to adopt implementing arrangements for that Article, in accordance with Article 110 of the Staff Regulations. Furthermore, Article 30 of Annex IX to the Staff

Regulations provides that each institution will, if it sees fit, adopt implementing arrangements. The EDPS considers that it would be appropriate to complement the measures set forth in the above legal instruments with more detailed rules. More detailed rules will enable staff members to have the necessary information to exercise their rights as data subjects.

### **2.2.3. Processing of Special Categories of Data**

Article 10.1 of Regulation 45/2001 establishes that "*the 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, is prohibited*". The prohibition is lifted if one of the hypotheses foreseen in Article 10.2 applies. Special categories of data include personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life.

In the course of conducting administrative inquiries and disciplinary proceedings, information which Article 10 of Regulation (EC) No 45/2001 classifies as "special categories of data" may be collected and further reflected in the report.

The EDPS considers that the processing fulfils the hypothesis of Article 10 (2) of Regulation (EC) No 45/2001 pursuant to which it should be "*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*".

CEDEFOP has an obligation to ensure that its staff members do not fail to comply with their professional obligations. Accordingly, if such data appear in the context of investigations, they must be relevant to the case and proportionate to the intended purpose. Investigators should be informed accordingly.

Administrative investigation files and disciplinary files are liable 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 (EC) No 45/2001. The decisions implementing Article 86 of the Staff Regulations and, by analogy, Articles 49 to 51 and 119 of the CEOS should be regarded as an authorisation to process these data.

### **2.2.4. Data Quality**

Article 4 of Regulation (EC) No 45/2001 lays down certain obligations as regards personal data quality. These data must be "*adequate, relevant and not excessive*" (Article 4(1)(c)) in relation to the purposes for which they are collected.

The EDPS acknowledges that it is difficult to identify from the outset which data are relevant for the purposes of conducting an administrative inquiry and disciplinary proceedings. There is no systematic rule regarding the nature of data which can be included in administrative investigation or disciplinary procedure files. The nature of the data to be kept in these files depends to a large extent on the case in point.

The Note to the Data Protection Officer regarding the CEDEFOP internal administrative enquiries and disciplinary proceedings explains that "the Appointing Authority's decision to open an administrative inquiry defines the subject and scope of the enquiry". This procedure is significant given the extent of the data collected and stored in the course of the procedure.

The EDPS considers that before investigators start the investigation they must be given instructions quoting Article 4(1)(c) of Regulation (EC) No 45/2001 with a view to encouraging greater caution with respect to collecting evidence or data in an investigation file. Staff called upon to conduct administrative inquiries and draft reports must be given these instructions and must follow them. The instructions applicable to reports on administrative inquiries should also be applicable to Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations).

Furthermore, the data must be processed fairly and lawfully (Article 4(1)(a) of Regulation (EC) No 45/2001). The matter of lawfulness has already been analysed (see section 2.2.2 above). Fairness is closely related to information to be given to the data subject (see section 2.2.7).

Lastly, 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 procedure itself must ensure that data are accurate. In particular, a copy of all decisions of the Appointing Authorities should be inserted in the disciplinary file. Any subsequent amendments or corrections should also compulsorily be inserted in the file. Data subjects' right of access to their data is a further means of ensuring that the data are accurate and up to date (see section 2.2.8)..

#### **2.2.5. Conservation of Data/ Data Retention**

Pursuant to Article 4 (1) e) of Regulation (EC) No 45/2001, personal data may be kept in a form which permits the identification of data subjects for "*no longer than is necessary for the purposes for which the data were collected and/or further processed*".

Personal data relating to disciplinary proceedings within the CEDEFOP are kept in different files: in the disciplinary file and in the personal file.

*Disciplinary files* are stored for a maximum period of 20 years starting from the date of the AA's decision concluding the procedure and a minimum of five years for administrative inquiries without disciplinary follow-up and cases where the AA decides that no case can be made against the official or where a warning is issued. The EDPS is satisfied with the retention period set by CEDEFOP for disciplinary files.

The EDPS is also satisfied by the fact that *personal files* do not contain a copy of all the disciplinary proceedings but only copies of the final decision. This is in line with the nature of personal files which should contain all documents concerning the administrative status of an official and reports regarding his ability, efficiency and conduct, and also any comments by the official on such documents. A copy of all the documents contained in a disciplinary file would go beyond the scope of the personal file.

The Staff Regulations do not contain any rule governing the time limit of the storage of personal files, however, according to Article 27 of Annex IX to the Staff Regulations certain information may be removed from the personal file. It is up to the AA to decide whether to grant the request for deletion or not. Thus, the data subject is not therefore granted an automatic removal of the data after a certain lapse of time. However, according to Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, the AA's denial of deletion has to be motivated and the EDPS calls upon the CEDEFOP to motivate denials of deletion. In addition, the EDPS would like the CEDEFOP to set up a maximum data retention

period of 20 years, i.e. the same length as the storage period for the disciplinary files or otherwise provide reasons why a longer period is necessary. If the period was longer, the conservation period for the disciplinary files would be pointless. Indeed, even if the information was deleted from the disciplinary file, they would still be available in the personal file. This is independent from the possibility to extend these time limits, both for personal and disciplinary files, if an ongoing administrative or legal procedure required consultation of the files<sup>3</sup>.

#### **2.2.6. Transfer of Data**

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made *ex Article 7* to Community institutions or bodies, *ex Article 8* to recipients subject to Directive 95/46 or to other types of recipients *ex Article 9*.

The data processing operation analysed involves data transfers within the CEDEFOP, where different units and persons (Finance and Human resources services, Linguistic Support Service, Appeals Committee) may receive personal data. It may also involve data transfers to other Community bodies, for example when a disciplinary decision is challenged before the European Union Civil Service Tribunal or upon appeal on a question of law before the Court of First Instance, or a complaint of maladministration in relation to a disciplinary proceedings is made to the European Ombudsman, or to OLAF in cases where the disciplinary procedure is related to fraud. Also to the EDPS, for example when the official addresses a complaint to him. Transfer of personal data is necessary for the legitimate performance of the task of those units and institutions and covered by their competence. Article 7 is therefore respected.

Article 2 (g) of the Regulation defines the recipient as a "*natural or legal person, public authority or any other body to whom data are disclosed, whether a third party or not; however authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients*".

The parties referred to above are not regarded as recipients within the meaning of Article 2 (g) as they are covered by the exemption provided for in that article, given that they are likely to receive data in the framework of a particular investigation or a disciplinary procedure. All transfer of data must be regarded as taking place "in the framework of an inquiry". But, taken in context, Article 2 (g) is to be understood as an exception to the right to information rather than as an exception to the application of Article 7.

EDPS points out that future implementing arrangements should state precisely who is entitled to receive disciplinary data.

#### **2.2.7. Information to the Data Subject**

Pursuant to Article 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals to whom the data refers of the fact that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

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<sup>3</sup> The EDPS has sent a letter to the President of the College of Chiefs of Administration summarising the EDPS views on this subject.



The AA informs individuals of the existence of the administrative inquiry and disciplinary procedure as such, in line with the Staff Regulations and CEOS. In this context, the AA informs individuals of the opening and closing of an administrative enquiry as well as potential extensions unless it considers that disclosing this information would hinder the enquiry. Individuals are also informed about the hearing and its outcome. Furthermore, regarding the disciplinary proceedings, the AA informs officials of its decisions on the charges and choice of procedure.

CEDEFOP informed the EDPS that in addition to the above information, it will also provide the information foreseen in Article 11 and 12 of Regulation (EC) No 45/2001. CEDEFOP has not yet prepared a draft notice but has agreed that it will work with the EDPS to draft a formulation to this effect.

In addition to assessing the content of the privacy policy, it is also necessary to examine the timing when the information must be provided. When the information is collected directly from the data subject, Article 11 of Regulation (EC) No 45/2001 provides that it must be provided at the time of the collection. If the data are not directly collected from the data subject, then it must be provided, according to Article 12, either at the time it is recorded or, if a disclosure to a third party is envisaged, no later than the time the data are first disclosed.

Personal data contained in the disciplinary files and previous administrative investigation may be collected from the data subject, but also from third parties. Information must therefore be given either at the time of collection of the data or, as the case may be, before it is first recorded or transmitted to a third party. CEDEFOP has informed the EDPS that it intends to provide the information required under Article 11 and 12 of Regulation (EC) No 45/2001 when an administrative inquiry is opened and the official is informed of it.

Article 20 of the Regulation (EC) No 45/2001 provides for certain restrictions to inform - notably where such restriction constitutes a measure necessary to safeguard: "a) the prevention, investigation, detection and prosecution of criminal offences; b) an important economic interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters; c) the protection of data subjects or the rights and freedoms of others". Regarding the restriction in point a) the EDPS notes that Article 20 of the Regulation does not apply *strictu sensu*. In some cases, however, it may be necessary not to inform the data subject so as not to harm the proper functioning of the investigation even though it is not a criminal investigation within the meaning of Article 20 of the Regulation.

The EDPS considers in line with his consistent application of Article 20 of the Regulation that account must be taken of the *ratio legis* of the provision and restrictions must be allowed on the obligation to provide information during investigations. This is backed up by the fact that Article 13 of the Directive (EC) 95/46 makes a provision for limiting the right to information of the data subject when such a restriction "constitutes a necessary measure to safeguard [...] d) the prevention, investigation, detection and prosecution of criminal offences, or breaches of ethics, for regulated professions". Article 13 (d) is therefore wide-ranging and extends from prevention, investigation, detection and prosecution of criminal offences to breaches of ethics of regulated professions. Even though this is not explicitly stated, there is no reason to believe that breaches of discipline by public servants are not also covered by the provision.

The Regulation must be read in the light of Directive (EC) 95/46. The twelfth recital of the Regulation encourages "*consistent and homogenous application of the rules for protection of individuals' fundamental rights and freedoms with regard to the processing of personal data*". Article 286 of the Treaty also provides "Community acts on the protection of individuals with

regard to the institutions and bodies set up by, or on the basis of, this Treaty." There is therefore no reason to believe that a restriction on the right to information may not be justified by the fact that a disciplinary procedure is underway.

Nothing would therefore appear to stand in the way of application of a similar restriction, if necessary, on the duty to inform and the corresponding right of access during the investigation.

In this aspect due account should be taken of the fact that the fair processing of personal data in an administrative investigation and subsequent disciplinary proceedings implies the exercise of the right of defence. In order to exercise that right, the official must normally be in a position to know when proceedings have been initiated against him. Any exceptions must therefore be strictly limited and adopted on a case-by-case basis.

### **2.2.8. Right of Access and Rectification**

According to Article 13 of the Regulation: "*The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller: (a) confirmation as to whether or not data related to him or her are being processed; (b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed; (c) communication in an intelligible form of the data undergoing processing and of the available information as to their source; (d) knowledge of the logic involved in any automated decision process concerning him or her.*" Article 14 provides: "*the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

In principle, the EDPS draws attention to the fact that access is essential not only for the rights under the Regulation, but also to the right of defence. Restrictions may be made, where restrictions constitute a necessary measure to safeguard the various interests envisaged in Article 20 of the Regulation.

The wording of the Article 13 (1) of Annex IX of the Staff Regulations deserves special attention. This paragraph provides for access to the *personal file*. The wording is misleading since it is beyond doubt that the purpose of this rule is to grant data subject with full access to documents which are, or may be of importance with regard to proper defence during a disciplinary procedure. These documents are included in the 'disciplinary file'. According to the correct interpretation of the paragraph in question the official concerned shall have the right to obtain his complete "personal" (i.e. on him/her) disciplinary file and take copies of all documents relevant to the proceedings, including exonerating evidence. Any other interpretation would lead to the redundancy of Article 26 (7) of the Staff Regulations. This article stipulates that "an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them". In this context, it is necessary to emphasise that a disciplinary procedure in progress does not affect the data subject's right of access to his or her personal file. In the course of a disciplinary procedure data subjects are granted full access to documents in their personal file without restriction.

By the same token the EDPS calls to the attention of the controller that in the context of an investigation and disciplinary procedure data related to data subjects other than the person under investigation may be present. The right of access of any person implied in the

disciplinary procedure should also be taken into account. Any restriction to the right of access of these persons should be in line with Article 20 of the Regulation.

To exercise the right of rectification, the data subject should contact the controller. The EDPS notes that in the context of a "conduct evaluation" it is difficult to determine whether personal data are "inaccurate" or not. A means of guaranteeing rectification should be to allow the data subject to add his or her comments but also to ensure completeness of his or her disciplinary file, as decisions made during the recourse or appeal procedure should be included in the disciplinary file, and the decision should possibly be placed in the personal file, or should be replaced or removed.

### **2.2.9. Security Measures**

(...)

### **3. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001, provided that the above considerations are fully taken into account. In particular, CEDEFOP must:

- ⇒ Consider complementing the legal measures set forth in the Staff Regulations and CEOS with more detailed rules. Such rules will enable staff members to have the necessary information to exercise their rights as data subjects;
- ⇒ Inform investigators that if special categories of data appear in the context of conducting administrative inquiries, they only must be kept if relevant to the case and proportionate to the intended purpose;
- ⇒ Ensure that before investigators start an administrative enquiry, they are given instructions quoting Article 4(1)(c) of Regulation (EC) No 45/2001 with a view to encouraging greater caution with respect to collecting evidence or data in an investigation file. Staff called upon to conduct administrative inquiries and prepare draft reports must follow the instructions;
- ⇒ Ensure that all decisions of the AA including subsequent amendments are inserted in the disciplinary file;
- ⇒ Motivate denials of deletion of information contained in the personal file;
- ⇒ Consider setting up a maximum data retention period of 20 years for disciplinary related information contained in the personal file;
- ⇒ Ensure that future implementing arrangements state precisely who is entitled to receive disciplinary data;
- ⇒ Work with the EDPS to formulate an information notice in accordance with Article 11 of Regulation (EC) No 45/2001;
- ⇒ Ensure the implementation of security measures as far as disciplinary files are concerned.

Done at Brussels, 13 February 2008

Peter HUSTINX  
European Data Protection Supervisor