

Analysis of the EDPS on the consultation received from the DPO of the European Commission

Case 2008-0427

1. Proceedings

On 8 July 2008 the EDPS received a consultation from the DPO of the European Commission, based on Article 46(d) of Regulation (EC) No. 45/2001 related to a request for access to public documents containing personal data. The note received mentioned the existence of a complaint submitted to the European Ombudsman (EO) based on the same subject matter. The EO had previously informed the EDPS about this complaint, and in this framework, the EDPS had sent a letter to the EO on 1 March 2008 with a preliminary approach to the issue under analysis (case 2007-0070).

On 30 July 2008 the EDPS sent a letter to the EO asking for a copy of the final decision adopted in the mentioned case.

On 3 September 2008 the EDPS received the answer from the EO mentioning that he had not adopted a final decision yet but a proposal for a friendly solution to the case. According to the EO internal rules, friendly solution proposals are treated in confidentiality.

On 28 August 2008 the DPO of the European Commission had sent a copy of the mentioned proposal to the EDPS.

2. Facts

In the framework of a pending case¹ before the Supreme Administrative Court of (...), one of the parties has requested the European Commission to provide him “*with the relevant documentation that shows the employment status of [Ms X] in the Organization of the E.C., specifically if she is a full time employee in the General Directorate (...) of the E.C. and the commencement date of her employment*”, as well as whether Ms X was employed by the Commission on four specific dates (between December 2005 and May 2006).

The Commission refused to give access to this information. The Commission invoked the application of Article 8 of Regulation (EC) No. 45/2001 (the recipient failed to justify the necessity of having the data transferred and it existed a risk of prejudice of the data subject, based on the fact that she refused to give her consent for the disclosure and her implication in the litigation).

As a consequence of such refusal the person who requested access to the documents submitted a complaint to the EO. The EO, as mentioned above, adopted a proposal for

¹ About the award of a public service contract in (...) to a partnership of engineers, in which Ms X was alleged to have played a role incompatible with her work for an EU institution.

a friendly solution to the case suggesting *“that the Commission could reconsider its contested refusal and provide the complainant with the documentation/information he requested unsuccessfully, unless it invokes valid and adequate grounds for not doing so”*.

In this context, the DPO of the European Commission submitted a consultation to the EDPS.

3. Current position of the European Commission in the present case

After receiving the proposal for a friendly solution from the EO, the Commission reconsidered its position in this case, and it envisages satisfying the EO proposal. This decision is based in the following points:

- *“L’identité de l’ensemble des fonctionnaires, leurs fonctions et service d’affectation sont disponibles sur Internet via le Guide des services ; même si le Guide des services est actualisé en permanence et ne contient pas d’historique de la carrière des fonctionnaires, l’information demandée dans le cas d’espèce, à part qu’elle se réfère à des moments dans le passé, n’est pas fondamentalement différente de l’information disponible aujourd’hui pour le même fonctionnaire”*.
- *“Dans la suite des réflexions qui ont amené la Commission à proposer la divulgation systématique des noms et les fonctions de tous les fonctionnaires des Communautés européennes dans sa proposition de modification du règlement 1049/2001, la Commission a reconsidéré sa position dans le cas d’espèce”*.
- *“Il ne s’agit pas de révéler l’historique complet de la carrière de l’intéressée, mais de confirmer simplement qu’elle était bien fonctionnaire aux dates indiquées par le plaignant ; enfin, la décision de divulgation envisagée se place dans le cadre d’un règlement amiable avec le Médiateur européen, et ne constitue donc pas un précédent de portée générale”*.

Nevertheless, the Commission mentions that the data subject in question has reiterated her refusal to give consent for a disclosure of her personal data, and for that reason they consult the EDPS. The Commission summarises the position of the data subject as follows:

- *"La procédure d'appel d'offres nationale qui a abouti à l'attribution du marché contesté au consortium duquel elle faisait à l'époque partie était parfaitement légale au regard du droit (...)"*.
- *"Au moment où l'offre a été soumise elle n'était pas au service de la Commission"*.
- *"La loi (...) autorise une personne à soumissionner même si celle-ci exerce des fonctions à l'étranger"*.
- *"Elle a démissionné du consortium lorsque le contrat a été signé"*.
- *"Les parties au litige devant les juridictions (...) sont le plaignant et l'administration (...) (pouvoir adjudicateur) et, par conséquent, elle n'est pas partie à ce litige"*.

- *"Le plaignant au travers de différentes actions et plaintes n'aurait pas cessé de mettre en cause son honorabilité et son éthique professionnelle".*

4. Legal analysis

4.1. Applicability of Regulation (EC) No. 45/2001

The request for access to the information described involves a processing of personal data by a Community institution in the exercise of an activity which falls within the scope of Community law (Article 3.1). Furthermore, this processing activity is done wholly or partly by automated means (Article 3.2). Therefore, Regulation (EC) No. 45/2001 is of application to the present case.

4.2. Applicability of Regulation (EC) No. 1049/2001

Article 2.3 of Regulation (EC) No. 1049/2001 stipulates, *"This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union"*. Furthermore, "document" is defined in Article 3(a) of Regulation (EC) No. 1049/2001 as follows: *"any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility"*.

In the present case, the information requested is related to the activities of the European Commission and therefore Regulation (EC) No. 1049/2001 is of application.

4.3. Simultaneous application of the Regulations

The document requested contains personal data, thus, it has to be assessed whether the exception contained in Article 4.1(b) of Regulation (EC) No. 1049/2001 prevents the access to it. This rule prescribes that: *"The institutions shall refuse access to a document where disclosure would undermine the protection of: (...) (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data"*. Such an assessment can only be conducted on a case-by-case basis, balancing the different interests at stake.

If the exception does not apply, this means that access should be provided under Regulation (EC) No. 1049/2001 and this processing is lawful under Article 5 (b) of Regulation (EC) No 45/2001 (*"necessary for compliance with a legal obligation to which the controller is subject"*).

4.4. Is the privacy and integrity of the data subject at stake?

Article 4.1(b) of Regulation (EC) No. 1049/2001 makes explicit reference to the "privacy" of the individual. As mentioned in the EDPS background paper "Public

access to documents and data protection”², “(...) *it has to be determined whether the interest of the data subject that is affected falls within the scope of the protection given by Article 8 ECHR. (...), Article 8 ECHR goes beyond the protection of private life and may not be interpreted restrictively, but it is not endless (...)*”.

The EDPS paper gives an indicative list that may serve as a guidance to identify in which situations the privacy of an individual may be affected (see page 39 of the paper). The present case cannot be identified with any of the examples mentioned therein (for instance, the data requested do not include sensitive data, they do not affect *per se* the honour and reputation of the person involved, they do not include embarrassing facts, they have not been given by the individual confidentially, etc.). Even if this is a non-limited list, the EDPS has not been provided with and does not see any other appropriate reason³ why the privacy and integrity of the data subject would be at stake, and in any case why the interest to have her data protected in the present case would not be overridden by the interest of access to public documents.

The need to safeguard transparency and accountability of democratic institutions plays a major role in the case under analysis. Indeed, the data requested is strictly limited to the confirmation or not of whether a person was working as a civil servant in certain given periods of time. This information is not of a private nature. Furthermore, it has already been in the public domain via the Commission Directory available on the Internet. Even if the Directory does not show the history of carriers at the institution it provides constantly updated information about its personnel by disclosing the names of its staff. This makes that the information requested could have been collected during the mentioned periods, without making a request for access, aspect that emphasizes the public nature of the data.

The privacy and integrity of the data subject is not at stake, and therefore, the exception stipulated in Article 4.1(b) of Regulation (EC) No. 1049/2001 cannot be applied.

5. Conclusion

Taking into account the factual information provided by the DPO of the European Commission, the exchange of letters with the EO, and the legal analysis above made, the EDPS is of the opinion that the request of access to public documents analysed herein would not undermine the protection of privacy and the integrity of the data subject, in particular in accordance with Community legislation regarding the protection of personal data.

As a consequence, there is no reason to deny such access in the light of Article 4.1(b) of Regulation (EC) No. 1049/2001.

² July 2005, available at www.edps.europa.eu. See in particular paragraph 4.3.

³ Other examples could be imagined, such as the risks of being threatened due to the fact of having worked in a politically sensitive area.