

## **Opinion on a notification for prior checking received from the Data Protection Officer of the Economic and Social Committee on the attestation procedure.**

Brussels, 25 November 2008 (Case 2008-476)

### **1. Procedure**

A notification under Article 27(3) of Regulation (EC) No 45/2001 was received from the Data Protection Officer (DPO) of the Economic and Social Committee by e-mail on 30 July 2008, concerning the attestation procedure.

Some questions were put to the DPO on 16 September 2008, and answers were received on 2 October 2008. On 11 November 2008 the draft opinion of the European Data Protection Supervisor (EDPS) was sent to the DPO for comments. The DPO replied on 21 November 2008.

### **2. The facts**

#### *Description of the procedure*

On 1 May 2004 officials serving in categories C and D were assigned to two separate career streams allowing for promotions to grades AST 7 and AST 5 respectively. The attestation procedure based on the evaluation of staff records enables officials who fulfil the conditions set out in the internal rules to continue their career up to grade AST 11 without restriction. The procedure does not apply to staff members recruited as officials in categories C\* and D\* after 30 April 2004. They automatically become members of the AST function group without career restriction.

The Economic and Social Committee organises a selection procedure for officials authorised to follow the attestation procedure (Article 10(3) of Annex XIII to the Staff Regulations). The Economic and Social Committee adopted a new Decision on the arrangements for implementing the attestation procedure on 28 November 2007<sup>1</sup>. Until then, the procedure had been established by the Economic and Social Committee Decision of 24 January 2006 (Decision No 011/06) and the attestation exercise had been launched annually since 1 January 2006. The reason for adopting a new Decision was that the existing arrangements needed to be adapted in the light of the experience of the first attestation procedure.

The officials eligible to apply for attestation are those referred to in Article 1(1) appointed to a permanent post in the Committee in accordance with Article 1a of the Staff Regulations and

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<sup>1</sup> Decision No 643/07A on the arrangements for implementing the attestation procedure.

who, at the date of publication of the call for applications, are on secondment in the interests of the service or are in one of the following situations referred to in Article 35 of the Staff Regulations: in active employment, on parental leave or on family leave.

Not eligible, however, are those officials referred to in paragraph 1 who, during the year concerned, will be automatically retired under Article 52 of the Staff Regulations, those in respect of whom the Committee has adopted a Decision definitively terminating their service under Article 47 of the Staff Regulations, and those to whom the Committee has, under Article 78 of the Staff Regulations, granted an invalidity allowance which takes effect during that same year.

The new procedure established by the Decision of 28 November 2007 is no longer comparative, as it was before: it consists only of an eligibility phase (all applicants who fulfil a set of criteria will be recognised as eligible without ranking the applicants in order to select only those applicants who best fulfil the criteria).

The attestation procedure comprises three stages: publication of a call for applications; establishment of a list of applicants admitted to the attestation procedure; attestation on posts recognised as being of "Qualified Assistant" level.

The officials who apply are admitted to the attestation procedure, after an opinion has been delivered by the joint attestation committee, if they fulfil all of the following four criteria:

- the level of training: have a level of training at least equal to that required in Article 5(3)(a) of the Staff Regulations for appointment as an official in the assistants' function group;
- seniority: have at least five years' seniority in career streams C or D. If periods of active employment in career streams C or D are taken into account as regards fulfilment of the criterion of level of training, the minimum seniority required is increased by the number of months making up those periods of active employment;
- ability: be able to prove the ability to perform duties at "Administrative Assistant" level;
- merit: have received sustained recognition as performing at a level that is fully in keeping with service and institutional requirements. Moreover, the official must have obtained a certain number of performance points in the last four reporting exercises.

For the attestation exercise, the Appointing Authority draws up the draft list of officials admitted. The draft list is submitted for an opinion to the joint attestation committee, for the attestation procedure, which issues an opinion within 20 working days. The final list of applicants admitted to the procedure is adopted and published by the Appointing Authority on the Committee's intranet site.

An individual Decision on the arrangements for attestation of the person concerned is adopted by the Appointing Authority at the end of the attestation exercise. The original Decision is sent to the person concerned and a copy, signed by them, is kept in their personal file.

### *Categories of data*

The forms which applicants must complete contain the following personal data:

- surname and first name;
- personnel number;
- office address and telephone number;
- directorate and unit;

- grade;
- name of reporting officer (in principle the applicant's head of unit);
- information on education (general level of education and details of the highest qualification obtained);
- the applicant's professional experience and seniority (detailed description of the career);
- statement by the reporting officer concerning that person's potential to carry out certain duties.

All statements made by applicants in their application are checked against the supporting documents accompanying the application or contained in the data subject's personal file.

The statement by the reporting officer on the applicant's potential to take on certain duties may either be based on the tasks they have actually carried out, or certify that given their performance, skills and/or conduct in the service, the person would have the potential to take on the duties of an Administrative Assistant if the opportunity were to be offered, with arguments in support of this assessment.

#### *Data subjects*

Any official serving in grades D or C on 30 April 2004 who applies for the attestation procedure (about 50 for the last exercise).

#### *Automated/manual procedures*

Data processing under the attestation procedure is manual (paper files). An Excel table is created to manage the applications.

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

The call for applicants for the attestation procedure contains a description of the procedure and the forms to be completed by the applicant and reporting officer.

The following specific privacy statement is attached to the call for applicants for the attestation procedure:

*"Personal data processed under the attestation procedure are processed in accordance 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".*

The application form is available on the Committee's intranet site. A presentation was also given on 22 April 2008.

#### *Right of access and rectification*

The data are in principle communicated to the administration by the applicant, including the statement made by the applicant's reporting officer.

Changes are envisaged only if an error is made or information needs to be added, which can be done only before the draft list is finalised by the Appointing Authority and forwarded to the joint committee. Blocking and erasure are carried out at once on receipt of a reasoned request.

There is no specific procedure for seeking access to and/or the rectification of data. Similarly, there is no specific procedure for contesting the Appointing Authority's final decision. In any

case, if they dispute the outcome data subjects may appeal as laid down in Article 90 of the Staff Regulations.

#### *Data recipients*

The data processed during the attestation procedure are divulged only to the following:

- members of the department responsible for this processing operation, namely the Recruitment, Careers and Training Unit of the Directorate for Human and Financial Resources, which administers the attestation procedure;
- members of the joint attestation committee, which delivers a consultative opinion on the draft list of individuals selected;
- the Appointing Authority (which draws up the list of officials eligible for attestation).

In certain individual cases the data may be transferred to:

- the Legal Service in the event of a dispute or appeal under Article 90 of the Staff Regulations;
- the internal audit service in the event of an audit;
- the Civil Service Tribunal in the event of a dispute;
- the European Ombudsman, in the event of a complaint or investigation;
- the EDPS, in the event of a complaint or investigation.

The only data made public, in the form of staff notes on the Committee's intranet site, are contained in the definitive list of individuals admitted to the attestation procedure. This list contains only the surnames and first names of the data subjects.

#### *Data storage policy*

The attestation procedure is recent and was organised for the first time in 2006. The data for that exercise were kept both on paper and electronically. The attestation procedure for 2007-2008 no longer applies a quota, and allows applicants admitted in 2006 to be admitted again if they fill in a simplified application form. This justified the retention of the data provided on paper in 2006. Another reason to keep these data is the fact that the procedure consists of two phases and that not all the admitted officials have yet been attested (i.e. they are not yet occupying posts at "Qualified Assistant" level). As there is no time-limit to the validity of the first phase, namely admissibility, these data need to be retained until those concerned are no longer able to benefit from the procedure, i.e. at retirement age.

It is intended that, one year after the closure of the attestation exercise for 2007-2008, the supporting documents attached to the applications (forms, statements by the reporting officer etc) will be destroyed. This period is justified by the data subject's opportunity to make an appeal in accordance with Article 90 of the Staff Regulations.

As an integral part of the data subject's personal file, a copy of attestation decisions is kept there by the Personnel Unit throughout the data subject's career at the Committee.

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

#### *Security measures*

[...]

### **3. Legal analysis**

#### **3.1. Prior checking**

The notification received on 30 July 2008 relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a) of Regulation (EC) No 45/2001). The data processing in question is carried out by a Community body in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing for the attestation procedure is essentially manual, but individual records for the attestation procedure are stored in a filing system. Article 3(2) is thus applicable in this case.

Regulation (EC) No 45/2001 therefore applies to this processing operation.

Under Article 27 of Regulation (EC) No 45/2001, processing operations that present specific risks to the rights and freedoms of data subjects are subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to present such risks "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The attestation procedure for officials of the Economic and Social Committee is a personal data processing operation with evaluation as its objective and is therefore covered by Article 27(2)(b) and subject to prior checking by the European Data Protection Supervisor.

In principle, since the checking carried out by the European Data Protection Supervisor is meant to prevent situations likely to present certain risks, the EDPS' opinion should be delivered before the processing begins. In this case, the attestation procedure follows the adoption of a Decision in 2005 and the first attestation procedure covers the year 2006. The EDPS should therefore have been notified at that time. The processing operation had, however, already taken place. The checking thus becomes *ex post*. The EDPS also regrets that when the new procedure was put in place, the Economic and Social Committee did not notify him beforehand. This does not alter the obligation to implement the recommendations presented by the European Data Protection Supervisor for future attestation exercises.

The DPO's notification was received on 30 July 2008. Article 27(4) of the Regulation states that the European Data Protection Supervisor should deliver his opinion within two months. Because of the 26 days of suspension, plus the month of August, the European Data Protection Supervisor had to deliver his opinion by 27 November 2008 at the latest.

#### **3.2. Lawfulness of the processing**

The lawfulness of the operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides that personal data may be processed only if "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution*". Recital 27 of the Regulation states that "*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 attestation procedure, which involves the collection and processing of personal data concerning staff members of the Committee, comes within the legitimate exercise of official authority vested in the institution.

The legal basis for the processing operation in question is to be found in Article 10(3) of Annex XIII to the Staff Regulations (attestation procedure) and in Decision No 643/07A of 27 November 2007 on the arrangements for implementing the attestation procedure. The legal basis is sufficient and supports the lawfulness of the processing.

### **3.3. 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). Having examined the application forms, the EDPS considers that the data collected in connection with this processing operation are adequate, relevant and not excessive in relation to the purposes for which they were collected.

Under Article 4(1)(d) of the Regulation, personal data must be *"accurate and, where necessary, kept up to date"*, and *"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 procedure in place gives sufficient cause to believe that the data are accurate and kept up to date. In fact the data are, in principle, provided by the data subjects who are able to check the accuracy of the factual data concerning them.

Consultation of the joint attestation committee also makes it possible, to some extent, to ensure that the data are accurate.

Finally, the right of access to the factual content of the files and the right of rectification may be exercised by the data subject (see point 3.8).

If the decision made during the attestation procedure is based on inaccurate information or a false conclusion drawn from the data available, the official is in any case able to appeal. Lastly, the data must also be processed *"fairly and lawfully"* (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been examined (see point 2 above). As regards fairness, this relates to the information given to the data subjects. On this see point 3.8 below.

### **3.4. Data storage**

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"*.

It should be remembered that, given that the attestation procedure was introduced as part of the transitional provisions of Annex XIII to the Staff Regulations, the institution will cease to organise attestation exercises once they have lost their transitional utility (i.e. when there is no longer anyone concerned by the transitional attestation procedure).

The data storage periods are also influenced by the fact that admission to the attestation procedure does not automatically guarantee that applicants will occupy a "Qualified Assistant" post. The validity of the list of persons admitted does not have a time-limit.

The EDPS therefore considers that the *list of officials admitted* for attestation may be kept for a long time, until the last of the individuals concerned is either attested or leaves the institution.

On the other hand, the *supporting documents attached to the applications* (copy of the most recent staff reports, qualifications etc) must be destroyed at the end of the time-limits laid down for appeals.

As an integral part of the data subject's personal file, a copy of *attestation decisions* is kept there by the Personnel Unit for the duration of the data subject's career at the Committee. In similar cases<sup>2</sup>, the EDPS has found it reasonable to set the data storage period for that decision at 10 years, starting from the time when the staff member leaves or the last pension payment. More specifically, this means the storage of attestation data in the individual file for ten years starting from the date on which the official or his legal successors may claim pension rights for an official selected for attestation, or storage until all channels for appeal have been exhausted, including the deadlines for appeals before the Court of Justice in the case of candidates deemed unsuitable for attestation.

### **3.5. Transfer of data**

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The data collected during the attestation procedure are only transmitted outside the department which administers the procedure to the members of the joint attestation committee and the Committee's Appointing Authority. In this case, transfer to the members of the joint committee to enable them to issue a consultative opinion on the draft list of persons selected, and transfer to the Appointing Authority which is responsible for drawing up the list of officials admitted for attestation, are compatible with the legitimate performance of their tasks. The EDPS considers that the transfers carried out are in accordance with Article 7(1) since the data in question are necessary for the tasks entrusted to the recipients.

The transfer of the lists of attested officials to all the Committee's staff enables the attestation procedure to be conducted in a fully transparent manner and complies with the Regulation.

As regards the transfers in exceptional circumstances to others such as the audit service, the Legal Service, the Civil Service Tribunal, the European Ombudsman or the EDPS, the EDPS considers that they comply with Article 7 of the Regulation since they are, in principle, necessary for the legitimate performance of tasks within the competence of the recipient. However, the European Data Protection Supervisor would like particular attention to be paid to the fact that personal data must be transferred only if such transfer is strictly necessary for the legitimate performance of the tasks covered by the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

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<sup>2</sup> Case 2007-110: European Parliament attestation procedure and Case 2006-422: Court of Auditors attestation procedure.

### **3.6. Processing including the personal or identifying number**

The staff number of the data subject is given in the application file. In this case the use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the data controller. That said, such use may have important repercussions, which is why the European legislator decided to regulate the use of such identifiers or personal numbers under Article 10(6) of the Regulation. Here, it is not a case of establishing the conditions under which the Committee may process the staff number but rather of drawing attention to this point in the Regulation. In this instance, the Committee's use of the staff number is reasonable because it provides a better means of monitoring the attestation procedure.

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

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to their source.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. Just as the data subject has a right of access, he or she may also directly change personal data or have them changed, if necessary.

Data considered during the attestation procedure are in principle submitted by the applicants themselves, including the statement made by the applicant's reporting officer. In practice this limits the scope of the rights of access and rectification.

Data subjects may contact the data controller to correct errors or add information, but may do so only before the draft list is finalised by the Appointing Authority and forwarded to the joint committee. Blocking and erasure are carried out at once, on receipt of a reasoned request. There is no specific procedure for seeking access to and/or the rectification of data. The EDPS recommends that a procedure should be established, to be followed in the event of a request for access or rectification, and to inform data subjects of their rights and how to exercise them, for example by providing the e-mail address to which any requests should be sent.

Similarly, there is no specific procedure for contesting the Appointing Authority's final decision. In any case, if they dispute the outcome data subjects may appeal as laid down in Article 90 of the Staff Regulations.

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

Articles 11 and 12 of Regulation (EC) No 45/2001 provide that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided.

These provisions apply in this case, since the data is collected from the data subject and verified using documents in the data subject's personal file.

The EDPS notes that the information given to data subjects is particularly unsatisfactory. A general statement that the processing operation complies with Regulation (EC) No 45/2001, attached to the call for applications, is manifestly insufficient to satisfy the requirements of the Regulation.



The EDPS recommends that a privacy statement should systematically be added to every application form. This statement must state the identity of the controller; the purpose and stages of the procedure; the categories of data processed; the recipients of the data; the existence of the rights of access and rectification, and information on how to exercise them; the legal basis of the processing operation; the data storage period and the possibility of recourse to the EDPS. In the EDPS' view this statement should also be displayed on the Committee's intranet site, on the page concerning the attestation procedure. This would ensure a maximum of transparency vis-à-vis data subjects.

### **3.9. Security**

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

Organisational and technical measures are being taken to ensure an appropriate level of security for the processing operation.

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 involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means in particular that the Economic and Social Committee should:

- set a time limit for storage of data related to the attestation procedure, in accordance with point 3.4 of this opinion;
- establish a procedure to be followed in the event of a request for access to or the rectification of data;
- provide information to data subjects in accordance with point 3.8 of this opinion.

Done at Brussels, 25 November 2008

(Signed)

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor