



## **Opinion on a notification for prior checking received from the Data Protection Officer of the European Training Foundation concerning "ETF annual dialogue"**

Brussels, 4 May 2009 (Case 2009-168)

### **1. Proceedings**

On 26 February 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Training Foundation (ETF) a notification for prior checking concerning the annual dialogue system which aims at planning work and assessing individual performance.

The draft opinion was sent to the DPO for comments on 22 April 2009 and these were received on 30 April 2009.

### **2. Facts**

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 ETF (temporary and contractual agents, local agents and seconded national experts) as mentioned in ETF Internal Control Standard n° 4 (*"The ETF shall review the performance of its entire staff at least annually. All staff shall have the opportunity to discuss their individual performance with their reporting officer at least once a year. Where specific performance issues are identified these shall be addressed by managers as early as possible."*)

The present notification concerns the processing of personal data in the exercise of yearly evaluation of staff members of ETF as foreseen in Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants (CEOS) of the European Communities. ETF is dealing also with Seconded National Experts (see article 21 of Director's decision ETF/009DEC/001) and local agents [see article 7 of the new framework regulation for local agents adopted by the Commission on 30 September 2002 SEC(2002)1049].

The conditions for the establishment of yearly evaluation reports concerning the efficiency, competencies and conduct of staff members working for the ETF are laid down in the "ETF Annual Dialogue" guidelines implementing the articles above mentioned.

## Description of the data processing operations

**“Objective setting”** is the process that ensures that every staff member knows what role they have to play and what results they need to achieve to maximise their contribution to the ETF. It is also the basis for the assessment of performance.

After the meeting between the staff member and the line manager, the latter will:

- finalise the setting of objectives in the electronic form in ADele (Annual Dialogue ELEctronic);
- finalise the Personal Development Plan on paper;
- send everything to the staff member for approval.

Once the staff member has acknowledged that s/he has read the objectives, s/he sends the form to HR. The electronic form will be locked in ADele. The Personal Development Plan should then be forwarded to HR/Staff Development.

Once the HR Unit has launched the **assessing process**:

1. The **staff member** should provide a concise self-assessment for each objective set
2. The **line manager** should give concise feedback on efficiency, ability and conduct in the service in a text form and as an assessment descriptor (per objective).
3. Once the line manager has drafted his/her feedback on the staff member’s self-assessment, the **countersigning officer** should revise them and add additional comments on the overall performance, indicating any contribution the staff member has made and that s/he feels should be stressed. This review will be the basis of the consistency phase that will take place soon afterwards.
4. The key to a fair system is overall coherence and consistency throughout the organisation in the assessment of similar performance. To reinforce this coherence, **HR will lead a review** with relevant line managers and countersigning officers of any critical feedback and assessments.
5. Following the consistency check phase, the line manager shall give face to face **feedback to the staff member** on the performance results attained during the reporting period.
6. Following the above mentioned meeting, the **staff member is invited to sign off the feedback report** electronically in ADele. S/he may also submit written comments particularly if s/he wishes to provide specific information on noteworthy achievements that the line manager did not include, or other comments that s/he wants to include as part of the performance feedback document.
7. Once the staff member has acknowledged having read the detailed feedback s/he **sends the form to HR** thereby confirming that the line manager has discussed and reviewed the feedback with him/her. The electronic form (comprising objectives set and feedback) is locked in ADele.
8. Wherever possible, the staff member and the line manager should attempt to resolve any eventual disagreement about the performance feedback. A staff member must express his/her dissatisfaction and seek **clarification** with the line manager. This discussion should take place within seven calendar days of the staff member’s receipt of the form, and the line manager’s decision must be communicated to the staff member, either verbally or in writing, within seven calendar days of the discussion.
9. Within 10 working days of receipt of the final performance feedback form the staff member may **appeal** to the Head of HR Unit under specific circumstances. In any case, no appeal can be brought to the appeal board/joint evaluation committee if the above mentioned conditions have not been met. The appeal board shall reject such cases which do not fall under its mandate. In the case of an appeal, the performance

feedback form will be considered final and locked in ADele only once the appeal case has been closed.

The ADele system is a Lotus Notes database specifically designed to store and process data relevant to the annual objective setting and performance appraisal processes.

The data is channelled into an electronic workflow starting in the HR Unit. The individual electronic form is sent to each staff member; the form is edited by the staff member and then sent to the relevant Line Manager. The database is designed to allow a “loop” in the workflow between staff member, line manager (reporting officer) and countersigning officer, in order to ease dialogue and the drafting of the objectives to be set and performance feedback. The staff member is always the last one to be able to add any additional comments. The form is then signed electronically by pushing the workflow while inserting one’s Lotus Notes restricted and personal password to the HR Unit for archiving. The workflow mechanism is valid for both the objective setting and the performance appraisal processes, one being the natural consequence of the other.

### **Purpose of the processing**

The Annual Dialogue system applicable to ETF staff aims at planning work by setting annual individual objectives and assessing individual performance in the course of a given reporting period. Besides providing ongoing feedback, the system is designed to set goals, effectively plan work in advance and contribute to future career development.

### **Categories of data processed**

- Surname, Name
- Type of contract, category, grade
- Job description function
- Personal objectives (annual)
- Performance related feedback (annual)

### **Data retention**

According to the information provided in the notification, the retention period is of 10 years starting from the time the staff member definitely leaves the ETF.

Relating to storage for historical, statistical or scientific purposes ETF mentions that *"It happens frequently that even after end of service of a staff member, they contact HR to ask for reference letters, copies of documents from their personal file such as performance appraisal or else. Therefore unless staff member request destruction of their performance feedback, for their benefit, they are kept in archive"*.

### **Storage media of data**

When the process is over, the access under editable mode to the entire Lotus Notes database is frozen (to prevent any further modifications), while read only access is allowed for the staff mentioned in the previous section, and stored on the ETF servers. The printout of the individual objective setting/performance appraisal form is stored within the personal file, in accordance with the Conditions of Employment of Other Servants (CEOS).

### **Information provided to the data subjects**

According to the notification, the information provided is within the ETF annual dialogue guidelines, with annex 7 dedicated to Data protection, mentioning the

- the legal basis
- the purpose of the processing

- the personal data collected
- the controller/processor
- the recipients of the data
- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply
- the existence of the right of access to, and the right to rectify, the data concerning him or her
- the time-limits for storing the data

### **Rights of the data subjects**

The procedure set up the following rules:

- rights of access: any time
- to rectify: any time if a mistake (originated by a clerical error of input into the database) is noticed regarding the name, type of contract, category or grade
- to block: article 43 of the Staff Regulations does not allow for blocking performance appraisal.
- to erase: article 43 of the Staff Regulations does not allow for erasing performance appraisal. However upon end of service, one can ask erasure of the performance feedback forms or after an appeal for which it has been authorised to erase a feedback form.
- to object: via an appeal procedure through a Joint Evaluation Committee and within 10 days of received the feedback form

### **Data transfers**

The data processed within the career development exercise can be disclosed to the following recipients: Staff members (concerning their own data), Reporting Officers, Countersigning Officers, HR Unit, Joint Evaluation Committee, Promotion Board.

### **Proposed transfers of data to third countries or international organisations**

The notification mentions that there is no such transfer unless in case of successful participation in an interagency job market, where it is foreseen that a copy of the performance appraisals are sent to the recruiting institution.

### **Security measures**

[...]

## **3. Legal aspects**

### **3.1. Prior checking**

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). The data contained in ADele is processed wholly by automatic means (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

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

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.

The notification of the DPO was received on 26 February 2009. 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 8 days. Consequently, the present opinion must be delivered no later than 5 May 2009.

### **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*". Indeed, the staff's evaluation/assessment is necessary for the management and good functioning of the agency.

The lawfulness of the processing operation is therefore respected.

The legal base for the processing in question can be found in Articles 15 (2) and 87 (1) of the Conditions of Employment of Other Servants, in Article 21 of Director's decision ETF/009DEC/001 about Seconded National Experts and in Article 7 of the new framework regulation for local agents adopted by the Commission on 30 September 2002 SEC(2002)1049 as implemented in the ETF Guidelines for the Annual Dialogue and the ADele system.

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

### **3.3. Data Quality**

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, namely administrative data and evaluation related data are being processed within the framework of the evaluation exercise at the ETF. A priori, annual personal objectives and annual performance related feedback are adequate, relevant and non excessive. Persons involved in the exercise should be reminded that they may only include data relevant to the evaluation exercise. Therefore the EDPS recommends that all persons involved in the evaluation exercise are informed that they should only included data relevant to this exercise.

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 line manager 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 contributes to ensure that the data are accurate and up to date (cf. point 3.6).

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 is notably related to information provided to data subjects (cf. point 3.7)

### **3.4. 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"*.

According to the information provided in the notification, the retention period is of 10 years from the starting from the time the staff member definitely leaves the ETF. However in annex 7 of the annual dialogue guidelines on Data protection, it is mentioned that the data is kept with no time limit. Moreover, the notification underlines that relating to storage for historical, statistical or scientific purposes : *"It happens frequently that even after end of service of a staff member, they contact HR to ask for reference letters, copies of documents from their personal file such as performance appraisal or else. Therefore unless staff member request destruction of their performance feedback, for their benefit, they are kept in archive"*.

The EDPS considers that data retention ETF policy is not compliant with the provisions of Article 4.1.e of Regulation 45/2001 and asks ETF to reconsider the data retention period as:

- It could not be possible to keep the data with no time limit unless it has been anonymised and which does not met the given reason (*ask for reference letters, copies of documents from their personal file such as performance appraisal or else*)
- The EDPS in similar evaluation exercise prior checking opinions has recommended a data retention period between 5-7 years in order to meet the requirements of the budgetary discharge (Article 49 of financial Regulation). This retention period will also apply to electronic files.
- Relating to the paper files, the EDPS recommends that only relevant documents are kept in view, for example, of replying to those persons asking for reference letters,.

### **3.5. 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 communicated to Reporting Officer, Countersigning Officers, HR Unit, Joint Evaluation Committee, and Promotion Board which is in conformity with the Regulation. The EPDS underlines that staff members are not recipients as such as they are the data subjects.

In the notification form, the ETF mentions that there is no proposed transfers of data to third countries or international organisations, unless in case of successful participation in an interagency job market, where it is foreseen that a copy of the performance appraisals are sent to the recruiting institution. The EPDS underlines that those transfers remain transfers between institutions or bodies and as such to be considered under Article 7.1 of the Regulation and not as transfers to recipients other than Community institutions or bodies subject to Directive 95/46/EC (Article 8 of the Regulation) or not subject to Directive 95/46/EC (Article 9 of the Regulation). In that case this transfer is necessary for the legitimate performance of tasks covered by the competence of the receiving institution.

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.

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 ETF 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.

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

Article 13 of Regulation 45/2001 provides a right of access to personal data being processed. Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

The notification and the procedure set up the following rules:

- rights of access: any time
- to rectify: any time if a mistake (originated by a clerical error of input into the database) is noticed regarding the name, type of contract, category or grade
- to block: article 43 of the Staff Regulations does not allow for blocking performance appraisal.
- to erase: article 43 of the Staff Regulations does not allow for erasing performance appraisal. However upon end of service, one can ask erasure of the performance feedback forms or after an appeal for which it has been authorised to erase a feedback form.

- to object: via an appeal procedure through a Joint Evaluation Committee and within 10 days of received the feedback form

In addition, pursuant to Articles 15 (2) and 87 (1) of the CEOS the "Personal Development Plan" shall be communicated to the person concerned who shall be entitled to make any comments thereon he considers relevant. Finally, in terms of Articles 11 and 81 of the CEOS the officials have a right of access to all documents contained in their personal files even after leaving the service.

The EDPS is of the opinion that in the context of the ETF 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. Regarding the rights of access and rectification, the EDPS considers that Articles 13 and 14 of the Regulation are complied with.

As concerned the rights of blocking and erasure, the EDPS underlines that those rights have nothing to do with Article 43 of the Staff regulation but should be provided on the basis of Articles 15 and 16 of the Regulation 45/2001. The EDPS recommends that ETF set up rules about those rights in particular the right of blocking, also to be mentioned in the Annex 7 dedicated to Data protection.

### **3.7. 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 notification, the information provided is within the ETF annual dialogue guidelines, with annex 7 dedicated to Data protection

The EDPS recommends this notice to be revised with the following points:

1. There is a mistake in the mention of the controller (Article 11.1.a) and the processor. HR officers are not to be considered as processors. They are delegated by the Data Controller;
2. Regarding the recipients (Article 11.1.c), a sentence could be added mentioning that other Institutions which "need to know" might receive the data processed during the annual dialogue (for example, the Ombudsman in case of lodging a complaint). In the part dedicated to the security measures it has been said that the agency's Director (as Appointing Authority) or Legal Adviser can request access to individual personal files, upon authorisation of the agency's Data Protection Officer. The data subject should also be informed of this possibility.
3. the mention of whether replies to the questions are obligatory or voluntary (Article 11.1.d), as well as the possible consequences of failure to reply is missing and should be indicated in the Personal development form.
4. If the Annex 7 mentions the right of access (Article 11.1.e), the right of rectification is missing, even if foreseen in the guidelines. It should be added in the privacy notice. Moreover the right to object is only mentioned in the guidelines but should also be added there. See also 3.7 for the right of blocking and erasure;
5. it is mentioned that the data is kept with no time limit (Article 11.1.f.ii). Annex 7 should reflect the new data retention period when defined.

6. the mention of the right to have recourse at any time to the EDPS (Article 11.1.f.iii) is missing and should be added.

The EDPS welcomes that this annex is automatically inserted in the guidelines. The EDPS recommends that this notice be reviewed in the light of the above comments.

### **3.8. Security measures**

As indicated above, the relevant data are kept in the secured environment (both paper and electronic files) with access restricted to authorised staff.

The description of the process seems to be in compliance with the Regulation 45/2001. Nevertheless the EDPS reminds that, according to Article 22 of Regulation (EC) No 45/2001 relating to the security of processing, *"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"*.

### **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, ETF shall:

- inform all persons involved in the evaluation exercise that they should only include data relevant to this exercise.
- reconsider the data retention period in the light of the above point 3.4
- remind all ETF internal recipients of their obligation not to use the data received for any further purpose beyond the purposes stated in the guidelines for ETF annual dialogue;
- set up rules about those rights in particular the right of blocking, also to be mentioned in the Annex 7 dedicated to Data protection.
- revise the privacy statement (Annex 7) in the light of the above point 3.7.

Done at Brussels, 4 May 2009

(signed)

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