

## **Opinion on the notification for prior checking from the Translation Centre's Data Protection Officer concerning the promotion and regrading procedure case**

Brussels, 18 May 2009 (Case 2009-018)

### **1. Procedure**

By e-mail received on 9 January 2009, a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was made by the Data Protection Officer of the Translation Centre (CdT) concerning the promotion and regrading procedure case.

The notification was accompanied by the following documents:

- eligibility criteria,
- details on the number of posts for promotion and regrading in 2008,
- anonymous list of officials eligible in 2008,
- CdT general implementing provisions relating to the career progression of temporary staff and their assignment to a post carrying a higher grade than that at which they were engaged,
- CdT general implementing provisions relating to the career progression and promotion of officials,
- presentation of the promotion/regrading procedure,
- Staff Note from the CdT's Director on the promotion/regrading exercise.

Questions were put to the data controller on 27 January 2009. The answers were received on 17 April 2009.

The draft opinion was sent for comments to the data controller on 6 May 2009. A reply was received on 14 May 2009.

### **2. The facts**

Promotion is defined in Article 45 of the Staff Regulations of officials of the European Communities (hereinafter "the Staff Regulations") and regrading in Article 10 of the Conditions of Employment of other Servants of the European Communities (CEOS). A promotions exercise is organised every year. It commences following the reporting exercise. On the basis of proposals from senior management (hereinafter "the management")<sup>1</sup> promotions are decided by the Appointing Authority in the case of officials and by the authority empowered to conclude contracts of employment (AECE) in the case of temporary staff. They are the result of a consideration of the comparative merits of the officials/temporary staff eligible for promotion, based in particular on the annual staff reports, on the use of languages in the execution of their

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<sup>1</sup> The management consists of the Director and the Heads of Department. It is chaired by the Director of the Centre.

duties other than the language for which they have produced evidence of thorough knowledge and, where appropriate, the level of responsibilities exercised by them. The purpose of the procedure examined in the present prior checking is to draw up a list of officials and temporary staff for promotion or regrading.

To be eligible for promotion, CdT officials must have at least two years' seniority in their grade unless they are above grade AD 13.

To be eligible for regrading, temporary staff must be employed in the long term on permanent duties and have at least two years' seniority in their grade unless they are above grade AD 13.

To be proposed for promotion/regrading, officials/temporary staff must have a number of promotion points which is equal to or higher than an indicative reference threshold. The hierarchical superior who draws up the annual staff report proposes awarding promotion points to each official/temporary staff member for the year under consideration. These points are awarded on the basis of the criteria established based on the function type of the data subjects (management posts, translators, AST staff and AD staff). The proposal is put to management. The management is responsible for drawing up the list of officials/temporary staff members to be proposed for promotion/regrading in each grade based on the lists of eligible officials/temporary staff members. The management puts forward a proposal to the Appointing Authority/AECE.

The human resources section uses the promotion form to inform the official/temporary staff member of the number of points which the management has proposed to award for the year under consideration as well as of their total number of aggregate points. The official/temporary staff member may lodge an appeal to the joint promotions body<sup>2</sup> within ten working days following this notification. The appeal must be in writing and be reasoned. The individual concerned may request that any documents which they deem useful for their appeal be included in their file. He may also ask the human resources section to amend the data appearing on the individual promotion form following verification (seniority in the grade, for example).

Once internal appeal channels have been exhausted, officials/temporary staff may lodge a complaint with the Appointing Authority under Article 90(2) of the Staff Regulations.

The Appointing Authority definitively decides the number of points awarded to each official/temporary staff member once it has noted the proposals of the management at the latest three months after officials/temporary staff members have been notified of their merit points. The definitive number of points awarded is notified to each official/temporary staff member individually. Based on the points awarded, the total for each official/temporary staff member is compared with the indicative promotion threshold for their grade and function group. A draft list of officials/temporary staff members is drawn up. The list is approved, signed by the Appointing Authority and is circulated to all staff by e-mail.

A promotion form is drawn up for every official/temporary staff member eligible for promotion/regrading. Each individual promotion form contains the following information:

- surname, forename, function group/grade, seniority in the grade, administrative status;
- staff number and department;
- information concerning the ability to work in a third language (in accordance with the general rules);

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<sup>2</sup> A joint promotions/regrading body is established with the same membership and arrangements as for the joint reports body.

- information on the indicative reference threshold (number of points);
- total number of points (aggregate points/reconstitution of career);
- the level of performance as proven by the most recent staff report (minimum number of points guaranteed for the promotion aggregate);
- number of points awarded per criterion (Head of Department and Appointing Authority points).

The individual promotion form is accessible to the following groups of users:

- officials and temporary staff members of the Translation Centre for their own personal data;
- the official's hierarchical superiors (as a general rule, the Head of Section/Group, Head of Department and Director);
- the members of the joint promotions body;
- the human resources managers responsible for the promotion file;
- the administrators of the staff file;
- where appropriate, the staff responsible for examining complaints under Article 90 and appeals to the Civil Service Tribunal;
- where appropriate, the staff in charge of inquiries and disciplinary proceedings;
- where appropriate, the auditors (IAS, Court of Auditors).

Rights of access for each user group are organised on a need-to-know basis. Access to the file is limited in time.

Promotion/regrading files are transferred to other Community institutions and agencies if officials/temporary staff are transferred, or apply for a transfer, to another institution/agency. They may also be sent to the Civil Service Tribunal, if it so requests, in the context of proceedings brought before it.

An administrative notice is published for the attention of staff at the beginning of the exercise. It states the purpose of the procedure, the implementation arrangements, the number of promotions available and the criteria. The administrative notice sent to all staff with the list of eligible officials/temporary staff members also notifies the purpose of the data collection, the data recipients (the document refers to the data recipients being mainly management and human resources), the right to access and correct personal data and the option of contacting the European Data Protection Supervisor.

General information on how personal data is processed upon taking up duties is permanently available on the intranet. The notice informs staff that their data might be consulted in the context of internal audits by the Court of Auditors or audits by the European Commission. It also mentions keeping data until the rights of the data subjects and their dependants and appeal possibilities have expired. The data storage time limit of ten years as from the last pension payment is not mentioned.

The promotion file consists of individual promotion/regrading forms, the list of the staff members eligible for promotion/regrading and the list of those promoted. Promotion files are kept until the official/temporary staff member (or their dependants) have exhausted all channels of appeal after termination of service within the meaning of Article 47 of the Staff Regulations and for no longer than ten years as from the last pension payment. Annual promotion statistics are kept in aggregate form by function group. This makes it impossible to identify individuals.

[...]

### **3. Legal aspects**

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

The prior checking relates to the processing of personal data ("any information relating to an identified or identifiable natural person", Article 2(a) of the Regulation) in the context of the Translation Centre's promotion and regrading procedure. The processing includes the collection, consultation and storage, etc. of data. It is carried out by a European institution in the exercise of activities part of which fall within the scope of Community law. The processing of personal data is partially automated (Article 3(2) of the Regulation), particularly for the publication of the promotion/regrading lists. This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of the Regulation subjects all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*" to prior checking by the EDPS. Article 27(2) of the Regulation contains a list of processing operations likely to present such risks. Under Article 27(2)(b), "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" are also subject to prior checking by the EDPS. In the case under examination, the data processing operation is clearly aimed at evaluating the data subjects with a view to drawing up the promotions/regrading list, which means that Article 27 applies.

The CdT's previous promotions procedure was submitted for prior checking in November 2005, with the EDPS issuing an opinion on 7 April 2006. Given that prior checking aims to examine in advance situations likely to present certain risks, the EDPS believes he should have been informed of the new procedure prior to definitive adoption of the general implementing provisions for the promotion of officials and the regrading of temporary staff members so that he could have issued his opinion before the processing began, as provided for in Article 27. In this case, however, the processing operation has already begun. The EDPS points out that it would have been preferable to consult him before final adoption of the text. The recommendations made by the EDPS should be adopted where appropriate.

The notification of the DPO was received on 9 January 2009. In accordance with Article 27(4), the present opinion must be delivered within a period of two months. The procedure was suspended for 80 days + 8 days for comments. The opinion will therefore be adopted no later than 5 June 2009.

#### **3.2. Legal basis and lawfulness of the processing operation**

Article 5(a) of Regulation (EC) No 45/2001 stipulates that processing of personal data can be carried out 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 other legal instruments adopted on the basis thereof".

The legal basis for the processing operation is contained in Article 45 of the Staff Regulations of Officials of the European Communities (Staff Regulations) and the third paragraph of Article 10 and Article 15(1) of the Conditions of Employment of other Servants of the European Communities (CEOS).

Article 45 of the Staff Regulations provides that: "1. Promotion shall be by decision of the Appointing Authority in the light of Article 6(2). It shall be effected by appointment of the

official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the Appointing Authority shall in particular take account of the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) and, where appropriate, the level of responsibilities exercised by them."

The third paragraph of Article 10 of the CEOS states that: "Assignment of temporary staff to a post carrying a higher grade than that at which they were engaged shall be recorded in an agreement supplementary to their contract of service."

The Articles of the Staff Regulations and the CEOS were transposed by general implementing decisions adopted by the Translation Centre on 7 February 2008.

The processing of personal data in the context of the promotion and regrading procedure is therefore considered to be necessary for the performance of a task carried out in the public interest based on the legal provisions set out above. The lawfulness of the processing operation is therefore justified.

### **3.3. Data quality**

According to Article 4(1)(c) of the Regulation, personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed".

The data must also 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)).

The EDPS considers the data collected in the promotion form to be adequate, relevant and not excessive in relation to the purpose insofar as they are exclusively identification and reporting data. As for the accuracy of the data, the possibility of appealing to a joint body and also the possibility of asking to have any document deemed useful to an appeal included in the file help ensure the accuracy of the data. The same applies to the rights of access and rectification (see 3.7 below).

Moreover, the data must be "processed fairly and lawfully" (Article 4(1)(a)). The lawfulness of the processing has already been discussed (see point 3.2 above). As for fairness, this relates in particular to the information which must be supplied to the data subject (see section 3.8 below).

### **3.4. Data storage**

The Regulation lays down that the 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". (Article 4(1)(e)).

As already stated in the facts, the promotion files (consisting of individual promotion/regrading forms, the list of staff members eligible for promotion/regrading and the list of officials promoted) are kept until the official/temporary staff members (or their dependants) have exhausted all channels of appeal after termination of service within the meaning of Article 47 of the Staff Regulations and for no longer than ten years as from the last pension payment. The EDPS has already deemed such a storage period to be adequate in similar cases in the European

Commission in particular<sup>3</sup>. The EDPS points out, however, to the Centre that only relevant data may be stored in the data subject's personal file. He therefore asks the CdT to examine the documents kept in the promotion file in order to determine which documents, in addition to the promotion/regrading decision, are relevant.

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

According to the facts established above, the data are transferred only within the institution itself or between Community institutions or bodies (for example, other institution or body if the data subject's data are transferred to the Civil Service Tribunal or Court of Auditors). Such transfers must therefore be examined in the light of Article 7(1) of the Regulation which states that: "Personal data shall only be transferred within or to 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 will be circulated among various people within the Translation Centre: the staff member's hierarchical superiors, where appropriate, the members of the joint promotions body, the human resources managers responsible for the promotion file, the administrators of the staff file, where appropriate, the staff responsible for examining complaints under Article 90 and appeals to the Civil Service Tribunal, and, where appropriate, the staff in charge of inquiries and disciplinary proceedings. Access is granted on a need-to-know basis. The EDPS believes that if such a transfer takes place it is compliant with the legitimate performance of tasks by the various parties.

The data on promotions might also be communicated to other institutions or agencies when personal files are transferred in the case of transfers to another institution. The EDPS regards such a transfer to be legitimate provided that only relevant documents are transferred to the new institution insofar as the transfer is necessary for the legitimate performance of tasks covered by the competence of the recipients as it enables the new employer to establish career equivalence based on its own rules on the matter.

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

The Translation Centre uses the staff number in the promotion file. The use of the staff number may have the consequence of allowing data processed in different contexts to be linked. The point here is not to establish the conditions under which the Translation Centre may process the personnel number (Article 10(6) of the Regulation), but rather to draw attention to that provision of the Regulation. In the case in point, the Translation Centre's use of the staff number is reasonable as it is used for the purposes of identifying the person and keeping track of the file. The EDPS considers that this number may be used in the context of the promotion/regrading procedure.

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

Under Articles 13 and 14 of Regulation (EC) No 45/2001, data subjects have a right of access to, and rectification of, personal data concerning them.

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<sup>3</sup> See EDPS opinion of 9 October 2007 on SYSPER 2: promotion at the European Commission (20047-192) and the opinion of 7 January 2008 on promotion of officials at the Committee of the Regions (2007-354)

As already mentioned, data subjects have a right of access to their personal data processed under the promotion/regrading procedure as well as the right to contact the human resources department to request that the data be corrected.

The EDPS notes that officials/temporary staff members are informed of the number of points which the management intends to award them for the year under consideration as well as their total aggregate points by the human resources section via the promotion form and that they may lodge an appeal to the joint promotions body. It is also noted that officials/temporary staff members may also request that the human resources section amend data on the individual promotion form following verification. Articles 13 and 14 of the Regulation are therefore complied with.

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

Under Articles 11 and 12 of the Regulation, whenever personal data are processed, data subjects must be sufficiently informed of the operation. This information should usually be given at the latest when the data are collected from the data subject, if the data subject has not already been informed.

The EDPS notes that general information on the administrative processing of data concerning staff at the Centre is supplied to staff members in a document given to them when they take up their duties and for which they must sign an acknowledgement of receipt. The same information appears on the Centre's intranet. Data processing information is also supplied as part of the promotion/regrading exercise when the list of temporary staff members and officials eligible for promotion/regrading is published. The EDPS is generally satisfied with the information supplied, but recommends that the specific information note include the general information headings. The data storage time limit of ten years as from the last pension payment should also be mentioned.

### **3.9. Security**

Article 22 of the Regulation lays down that technical and organisational measures must be taken to ensure a level of security appropriate to the risks represented by the processing and by the nature of the personal data to be protected.

Based on the information available, the EDPS has no reason to believe that the Translation Centre has not complied with the security measures required under Article 22 of the Regulation.

## **Conclusion**

The proposed processing 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:

- only relevant data should be stored in the data subject's personal file;
- only relevant data should be transferred to another institution in the event of the data subject's transfer there;

- the specific information note should include the general information headings. The data storage time limit of ten years as from the last pension payment should also be mentioned.

Done at Brussels, 18 May 2009.

(signed)

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