

Opinion on the notification for prior checking received from the Data Protection Officer of the European Commission on the "Mediation Service of the European Commission".

Brussels, 18 May 2009 (Case 2009-010)

1. Procedure

On 6 January 2009 the European Data Protection Supervisor (EDPS) received a notification pursuant to Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the European Commission concerning the "Mediation Service of the European Commission".

Enclosed with the notification were:

- the note for the attention of the Commission members dated 4 March 2002 on the reinforced Mediation Service containing the draft Commission Decision on the reinforced Mediation Service;
- the specific confidentiality statement.

On 19 February 2009 additional information was requested, which the DPO supplied on 6 March 2009. The draft opinion was sent to the DPO for comment on 18 March 2009. His comments were received on 15 May 2009.

2. Facts

Purpose of the processing operation

The purpose of the processing is to help overcome, in individual cases, any difficulty that may arise in the context of working relations or concerning the rights and obligations of staff.

Description of the processing operation

The Mediation Service intervenes when a case is submitted to it by an individual or a Commission department.

It provides impartial advice to each official, servant or department that consults it. It may hear other persons involved in a particular case. It may also request information from any Commission department concerned.

The role of the Mediation Service is to reconcile the administration and staff. It makes recommendations and gives opinions, but has no decision-making powers.

Legal basis for the processing

Commission Decision C (2002) 601 of 4 March 2002 on the reinforced Mediation Service.

Data subjects

Potential data subjects are any person working at the European Commission regardless of their status or employment contract (that covers officials, temporary staff, auxiliary staff, contract staff, local staff, special advisers, trainees, seconded national experts, pensioners and persons working under a contract governed by national law).

The categories of data subjects are:

- persons who contact the Mediation Service (persons "in difficulty");
- persons they have complained about;
- witnesses or other persons somehow involved.

Data relating to data subjects

1) A brief record of the case being dealt with is drawn up on paper and may be replaced by entering a record of the case in the Service's database. A standard note does not exist. In general, it contains information on the:

- name, first name, age, gender;
- Directorate-General;
- grade;
- contact addresses, telephone, e-mail;
- the date on which the person contacted the Service;
- nature of the problem (statutory rights and obligations/relational conflict);
- type of intervention (advice, action, mediation);
- case history and transfers recorded in the database;
- the departments contacted;
- the solutions put forward and the results yielded by mediation.

2) Administrative files on cases may contain:

- messages, e-mails and all other paper or electronic documents on the case in question sent or received by the members of the Mediation Service.

Depending on the circumstances of the case, data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life may be processed.

The Mediation Service does not draw up notes or compile files on persons other than "persons in difficulty" who contact it. That does not, however, preclude the possible appearance, in certain situations, of other persons' data in the file of the "person in difficulty".

Information to be given to the data subject

The "person in difficulty" is briefed by means of a confidentiality statement when he/she makes initial contact with the Mediation Service.

The Service informs other persons whose names come up in the course of work on a particular case (e.g. colleagues involved in a workplace conflict, the data subject's superiors) only with the prior consent of the "person in difficulty".

The Service also plans to make the confidentiality statement available on the Mediation Service's page on the Commission Intranet site at the following address: http://www.cc.cec/mediation/i/index_fr.htm

The confidentiality statement provides information concerning:

- the identity of the controller;
- the purpose of the processing;
- the legal basis for the processing,
- the categories of data concerned;
- the existence of the right of access to and the right to rectify, personal data;
- the data storage period;
- the data recipients;
- the security measures taken to protect the data;
- the contact details of the DPC at DG ADMIN and the Commission's DPO.

Data storage medium

Documents are kept in electronic form in a specific database for the administration of files operated exclusively by the Mediation Service.

Paper files are also kept.

Paper files are in addition to the electronic files and do not always contain the same documents. The complete file is the sum total of the data held in the paper file and in the electronic file.

Recipients or categories of recipients to whom data may be transmitted

The Mediation Service may be required, under the mediation procedure, to transmit certain data to other bodies (the Commission departments responsible for dealing with the file or the complaint; or the persons about whom a complaint has been made).

The Service always asks the data subject for permission before transmitting data/information concerning them.

Only the parts of the file required to help solve the problem are transferred.

Personal data retention policy

Personal data (brief record of the case and administrative files) are kept by the Service for five years after the closure of a case.

[...]

3. The legal aspects

3.1. Prior checking

The notification describes the processing of personal data. The personal data of the "person in difficulty" and also those of any other persons involved are collected and processed within the meaning of Article 2(a) and (b) of Regulation (EC) No 45/2001. The processing in question is carried out by the Commission in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation). The processing operation is both manual and automated; the data will form part of a file, as defined in Article 2(c) of the Regulation: "*any structured set of personal data which are accessible according to specific criteria*". The processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS 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*".

Article 27(2) lists the processing operations likely to present such risks, such as "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*" (Article 27(2)(a)) and "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). The case in point concerns personal data processed for the purpose of assessing aspects of the personalities of the data subjects (in particular their behaviour) but also, in the case of alleged harassers, personal data processed in cases of suspected offences (Article 27(2)(a)), and also data relating to health, where the state of the data subject's mental health is an issue. This case therefore falls within the scope of the prior checking procedure on several counts.

In principle, checks by the EDPS should precede the setting-up of the processing operation. In this specific case, the check necessarily has to be performed *ex post facto*. This does not alter the fact that recommendations issued by the EDPS should be implemented.

The DPO's notification was received on 6 January 2009. Under Article 27(4) this opinion must be delivered within two months of that date. The time limit within which the EDPS must deliver his opinion was suspended for 15 + 58 days; the EDPS will therefore deliver his opinion by 19 May 2009 at the latest.

3.2. Lawfulness of processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that processing must be "*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 or in the legitimate exercise of official authority vested in the Community institution*".

This procedure is part of a policy based on prevention and on the reintegration and management of staff, which constitutes performance of a task carried out in the public interest on the basis of legislative acts adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of official authority vested in the Community institution. The condition of the lawfulness of the processing operation is therefore fulfilled.

As regards the legal basis for the processing, the EDPS notes that the Commission has adopted a specific Decision (C (2002) 601 of 4 March 2002) on the reinforced Mediation Service. The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

The processing of personal data by the Mediation Service may require the processing of special categories of data as provided for in Article 10 of Regulation (EC) No 45/2001, for example data concerning health and sex life. In principle, the processing of this type of data is prohibited.

However, processing in this case is justified because the "person in difficulty" concerned has given his/her express consent to such processing (Article 10(2)(a) of the Regulation). It is therefore essential that the data controller request and obtain that consent before processing sensitive data (see point 3.8 below).

In addition, given that the consent of everyone involved in the procedure is not obtained, the processing of sensitive data may be justified if it is proportional to the stated aim, by the need to comply with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by legislative acts based on the Treaties (Article 10(2)(b) of the Regulation).

3.4. Data quality

Personal data must be "*adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed*" (Article 4(1)(c)). This point is crucial as regards the data collected by the Mediation Service and kept during the procedure. Given that individual situations vary widely, there is no systematic rule regarding the types of data that may be kept in a file in a specific case. The EDPS recommends that officials who handle these files should be informed of the general rule of proportionality and necessity when data is collected and subsequently processed. It is essential that only data which are *adequate, relevant and not excessive* in relation to the purposes for which they are processed are entered in individual files (electronic and paper) and kept.

Data must also be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). Lawfulness has already been discussed in point 3.2 of this opinion. The issue of fairness is linked to the information which must be transmitted to the data subject (see point 3.8 below).

Personal data must also be "*accurate and where necessary kept up to date*". The Regulation also stipulates that "*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 system described should help to ensure that data are accurate and kept up to date, as

data subjects can approach the controller to request access to the data and make use of their right to rectify them. For a detailed discussion of these two rights see point 3.7 below.

3.5. Data storage

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle 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*".

As has been noted, the Mediation Service keeps the personal data (brief records of the case, paper files and data in the electronic database) for five years after the closure of a case. The EDPS considers that this practice complies with the Regulation. The period of storage corresponds to the purposes of the processing operation which are to ensure the monitoring of files, to find solutions in emerging cases by referring to similar precedents and to deal with appeals pursuant to Article 90 of the Staff Regulations and any referrals to the Court of Justice.

That period may be extended only in specific, exceptional cases, in particular if legal proceedings related to the case being dealt with are underway.

Article 4(1)(e) authorises unlimited storage of data for historical, statistical or scientific use provided that such data is kept in anonymous form. There is nothing to prevent the Mediation Service's secretariat from compiling anonymous statistics on the number of cases and their typology before destroying data. In this scenario, the Service must ensure that those statistics are anonymous; simply removing the name of the data subject may be insufficient to ensure anonymity, since other identifying factors (department, type of problem, etc.) can be used.

3.6. 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 Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

Data are communicated to other Commission departments competent to deal with the file or complaint, which is in keeping with the Regulation. The Service always asks for the data subject's prior consent before transmitting data/information concerning them.

If data needs to be transferred outside the Mediation Service, for instance to the data subject's superiors or to a person involved, such a transfer can be considered lawful only if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. It should also be noted that only relevant data must be transferred. The need to communicate data must be assessed on a case-by-case basis by the Mediation Service and the recipient of the data must be informed that he/she can process the data transmitted only for the purposes for which they were transmitted.

The EDPS and the Commission's DPO may also be sent data under Article 47(2) of Regulation (EC) No 45/2001 and point 4 of the Annex thereto. In the event of a dispute, the Ombudsman and the Community courts may be sent data .

3.7. Right of access and rectification

Article 13 of the Regulation establishes a right of access upon request by the data subject and lays down the arrangements for its exercise. Article 14 of the Regulation deals with the data subject's right of rectification. Those two rights are safeguarded in the processing operation under discussion. The confidentiality statement indicates that those rights may be exercised at the request of the Mediation Service.

The EDPS observes, however, that the data subject must have access to and, where applicable, request the rectification of all his/her personal data and not just the brief record of the case. However, those rights - of access and rectification - must also be guaranteed not only for the "person in difficulty" but for any other person involved in the processing, in particular persons complained about. In the event of such a request for access, the Service must take into account, on a case-by-case basis, the exceptions to this right laid down in Article 20(a) and (c) of the Regulation.

3.8. Information to be given to data subjects

Article 11 of Regulation (EC) No 45/2001 (information to be supplied where the data have been obtained from the data subject) on information to be given to the data subject applies in this case as does Article 12 (information to be supplied where the data have not been obtained from the data subject), as information may be collected from other sources, including the Commission departments concerned or other persons involved.

As has been noted, the "person in difficulty" is briefed orally at the first meeting with one of the members of the Service. A confidentiality statement is produced when that person makes initial contact. The EDPS recommends making the statement in question available on the Mediation Service page on the Commission Intranet site.

That statement does not contain all the information required by Articles 11 and 12 of the Regulation.

The EDPS also notes that, where the Service processes data relating to persons other than the "person in difficulty", those persons must, in principle, be informed of that processing. In deciding on whether or not those persons should be informed, the Service must take account, on a case-by-case basis, of Article 20(a) and (c) of the Regulation on exceptions and restrictions to the application of Articles 11 and 12 of the Regulation. While that examination must be based on the specific circumstances of the case and also take into account the opinion of the "person in difficulty", that opinion may not constitute the sole grounds for refusing to inform a third person whose data are processed, in accordance with Article 12 of the Regulation.

3.9. Security

Article 22 of Regulation (EC) No 45/2001 states that the controller must 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. Those security measures must, among other things, prevent any unauthorised disclosure or access.

In the case in point, information is kept under conditions of the strictest confidentiality and is disclosed only to the parties concerned.

In the light of the information available, the EDPS sees no reason to believe that the Commission has not put in place the security measures required by Article 22 of Regulation (EC) No 45/2001.

4. 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. That means, in particular, that the Commission must:

- for all data transfers outside the Service, check the appropriateness of the transfer on a case-by-case basis and ensure that only relevant data are transferred;
- remind data recipients that they can process the data transmitted only for the purposes for which they were sent;
- apply the right of access and rectification to anyone whose personal data are processed;
- make the specific confidentiality statement available on the Commission intranet site, and, if necessary, inform other persons whose data are being processed.

Done at Brussels, 18 May 2009.

(Signed)

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