



## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament regarding "Prevention of harassment"**

Brussels, 19 May 2009 (Case 2008-477)

### **1. Proceedings**

On 31 July 2008, the European Data Protection Supervisor received by regular mail from the Data Protection Officer (DPO) of the European Parliament a notification for prior checking the already existing data processing operations related to the "prevention of harassment".

The notification included a note to the EDPS from the DPO (dated 30 July 2008); the Annual Report 2007 of the Advisory Committee on harassment and its prevention at the workplace (11 March 2008); decision of 23 January 2008 concerning the composition of the advisory committee for 2008; the Internal Rules for the Advisory Committee on harassment and its prevention at the workplace (21 February 2006) and the text of notification of personal data processing to the DPO (No152 of 30 July 2008).

On 26 September 2008, the EDPS requested further information from the controller. He received the responses on 11 November 2008.

On 8 December 2008, the EDPS sent the draft opinion for comments to the controller. He received the comments on 12 May 2009.

### **2. The facts**

An Advisory Committee on **Harassment and its Prevention** at the Workplace ("ACPH" or "Committee") functions in the European Parliament with the multiple **purpose** of promoting a peaceful and productive working environment, preventing and/or stopping harassment of staff (officials and other servants) of the European Parliament (EP), playing a role of conciliation and mediation, training and information and playing an active role within the EP's existing health promotion network. The ACPH combats **psychological and sexual harassment on the basis of complaints**.

The ACPH carries out its functions **on the basis** of Article 12a of the Staff Regulations and on the EP's Internal Rules for the Advisory Committee on harassment and its prevention at the workplace of 21 February 2006 (hereinafter referred to as: "Internal Rules") (see below in part 3.2. on legal basis).

The Committee **consists of six members**: one of them the chairman, two members must be appointed by the Staff Committee, one appointed by the Medical Service, at least one should have expertise in equal opportunities. The Committee is assisted by a secretary. It collaborates with two psychologists one in Brussels and one in Luxembourg. These psychologists are

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recruited on a contractual basis; they are not part of the administration of the European Parliament and are not allowed to assist EP agents in their private practice.

**The procedure of the ACPH** can be summarised in the following: A member of staff, who believes himself/herself to be the victim of harassment or observing acts of harassment against a colleague, contacts one of the committee members directly. Usually, as a first step, the person concerned is invited to **an informal meeting** to explain the problem and to talk with members of the committee.

If after this meeting the person decides to **lodge a complaint**, the **committee starts its investigation**. The purpose of the investigation is to gather as much information and evidence as possible. It normally interviews both parties and also witnesses, all those who in the committee's opinion may help to give a clear picture of the case. The interviews take place in Strasbourg, Brussels or Luxembourg, as appropriate, and in the presence of at least three members of the ACPH. All members of the ACPH who are present take notes during these interviews. The accuracy of the content is ensured when preparing the final report.

According to Article 10 of the Internal Rules, the Committee should ensure that **the staff member against whom a complaint of harassment has been made is heard and has an opportunity to put his/her case. Exceptions may be made** to this rule if the Committee considers it justified in the interests of one party or the other. The ACPH confirmed to the EDPS that no such cases have taken place, to date. The provision remains a theoretical possibility if for instance the person against whom the complaint is made could not be contacted having left the service.

Where appropriate, the Committee can contact the various level of hierarchy to advice them of the existence of a problem (Article 10 of the Internal Rules for the ACPH). Under this provision, the Committee either **contacts the immediate superior** (in strictest confidence) of the complainant or the **other party by phone**, or **can invite them to attend a meeting** of the Committee.

The collaboration with the **psychologist** in Luxembourg is limited to refer the person concerned to the psychologist. The ACPH will not dispose of the findings of the psychologist.

When an investigation is complete, the committee sends a **report to the Secretary-General**, stating the reasons behind its conclusions and, where appropriate, putting forward proposals concerning measures to be taken. The Secretary-General should notify the ACPH in writing of the measures he intends to take. The Committee should inform the parties accordingly. In the case of an investigation regarding persistent problems, the Secretary-General should notify the parties concerned directly (Articles 16 and 14 of the Internal Rules).

According to Article 12 of the Internal Rules, the ACPH may, if it deems advisable, **make recommendations to the staff management** with a view to resolving the problem. This report normally contains specific recommendation and the names of the complainant and the other party. The ACPH should notify all the interested parties of these recommendations.

If **the problem persists**, the ACPH should forward a confidential report to the Secretary-General containing proposals on the actions to be taken and, where appropriate, asking him for instructions to conduct detailed investigations (Article 14 of Internal Rules).

If it is instructed to carry out such **an investigation**, the ACPH should forward its findings and any recommendations to the Secretary-General (Article 15 of Internal Rules).

**Follow up:** the ACPH is an advisory body; it has no powers to adopt administrative or disciplinary measures. Any follow-up action is taken on the instruction of the Secretary-General after consideration of the Committee's reports. That action may include administrative or even disciplinary procedure.

The Committee is informed of any follow-up action taken by the Secretary-General.

In the frame of its activities the ACPH processes **various categories of personal data:** identification, administrative and career data, data about the conduct of individuals, health related data and any personal data which appear during the procedure related to the case.

Staff members of the EP may become **data subjects** either as **complainants** or as persons **against whom** the complaint is lodged.

The controller referred to several documents **providing the information to data subjects:** There is a *generic privacy statement* on the EP's internet site under "legal notices" ([http://www.europarl.europa.eu/news/public/default\\_en.htm](http://www.europarl.europa.eu/news/public/default_en.htm)). Staff have been informed about the purpose, the legal basis and of the data controller of this specific processing operation in the "*Internal Rules*" and in the *decision of 23 January 2008 concerning the composition of the advisory committee for 2008* (hereinafter referred to as: the Decision"). The *notification in the register of the DPO* kept under Article 25 of Regulation (EC) No 45/2001 states the retention period. The Committee's Intranet site contains the decision appointing the members of the Committee, the internal rules and the annual report.

If an investigation is launched, the Secretary- General should notify the parties concerned. **Exceptions may be made to this obligation to inform all the parties concerned** if the ACPH or the Secretary-General considers that confidentiality is essential to protect one of the party or the other (Article 16 of Internal Rules).

Further, Article 13 of the Internal Rules requires that the ACPH remains in contact with the concerned staff member to ensure follow up. The controller noted that this obligation implies to give information about the progress of the case.

Data subjects can **exercise their rights** according to Articles 8-13 of the Implementing rules related to Regulation (EC) No 45/2001.<sup>1</sup> The Implementing Rules lay down the general procedures<sup>2</sup> within the European Parliament on making a request to access<sup>3</sup>, rectify<sup>4</sup>, block<sup>5</sup> and erase<sup>6</sup> one's own personal data, and the right to object to the processing of one's own personal data.

Personal data **can be transferred** at various instances. The Committee may report in confidence to the Secretary-General. Recommendations may be made to the line management.

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<sup>1</sup> Decision of 22 June 2005 by the Bureau regard the Implementing Rules Relating to the European Parliament and Council 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

<sup>2</sup> Article 8 describes the common procedures

<sup>3</sup> Article 9 of Implementing Rules

<sup>4</sup> Article 10 of Implementing Rules

<sup>5</sup> Article 11 of Implementing Rules

<sup>6</sup> Article 12 of Implementing Rules

To ensure follow up, the ACPH should remain in contact, if necessary, with the superior of the person concerned (Article 13 of the Internal Rules).

The Committee should not, unless its members unanimously decide otherwise, forward any documents, or provide any information, to third parties concerning cases with which it is dealing.<sup>7</sup>

The processing operation is **mainly manual** and the storage media is mainly paper [...]

The **notes taken during the informal meeting** (when the person concerned is invited to explain the problem and to talk with members of the committee) **are kept**, even in those cases where the person does not lodge a complaint. These notes are kept as a general rule for three years as a problem could return.

In the case where after the informal meeting, the **person concerned lodges a formal complaint**, the ACPH **adds the notes** taken during the informal meeting **to the files**.

**Records are retained** for as long as the data subject can still be potentially active as a staff member, practically meaning until the sixty seventh birthday of the staff members. It is justified by the possibility that in some cases, a complaint can be lodged after a person has left the institution therefore a trace is needed in order to treat such complaints.

**No** documents of the Committee are annexed to the **personal file** of the person concerned.

The Committee should work with complete **confidentiality**. **Its deliberations are secret**.

**Security measures** are put in place regarding both the paper files and electronic information. [...]

The ACPH declares to carry out its work in the strictest confidence and with utmost respect for human and professional dignity.

### **3. Legal analysis**

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

Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 (hereinafter referred to as "the Regulation") applies to data processing activities by Community institutions and bodies. The Regulation applies to the data processing activities by the European Parliament in the context of harassment prevention for the reasons enumerated below.

**Personal data are defined** as any information relating to an identified or identifiable natural person. An identifiable person is the one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. In the frame of the activities of the ACPH, as explained in the facts part above, various personal data related to a particular individual are processed. Article 2(a) of the Regulation thus applies.

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<sup>7</sup> Article 7 of Internal Rules

The processing of applicants' personal data is carried out by the European Parliament in its activity which clearly falls under Community law. Article 3(1) of the Regulation therefore applies.

**The processing operation is mainly manual** and the storage media is mainly paper. Paper files are intended to form part of a filing system, a structured set of data is processed which is accessible according to given criteria. The processing operation falls under Article 3(2) of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 **subjects 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) of the Regulation contains a list of processing operations that are likely to present such risks, among those processing operations intended to evaluate personal aspects relating to the data subject, including his/her ability, efficiency and conduct (Article 27(2)(b)) and processing of data relating to health (Article 27(2)(a) of the Regulation). The procedure of the ACPH falls under **Article 27(2)(b) as it is designed to assess one's conduct** under the Internal Rules on harassment and Article 12(a) of the Staff Regulations. Moreover, in the case of psychological harassment, **data related to health could be provided by the complainant**, therefore the processing operation falls **under Article 27(2)(a) of the Regulation**.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In the present case nevertheless, the data processing operations are already established. The EDPS consider that his recommendations should in any case still be implemented.

The notification of the DPO was received on 31 July 2008. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 1 November 2008. The prior checking procedure has been suspended for a period of 46 days+ 155 days for comments and for the month of August 2008. Thus, the Opinion should be rendered not later than 19 May 2009.

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

Personal data may only be processed if it can be **justified under Article 5 of the Regulation**. Article 5(a) of the Regulation allows the processing if it 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". In this respect recital 27 of the Regulation specifies that the "processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies".

The Internal Rules for the Advisory Committee on Harassment and its Prevention at Workplace is established on the basis of Article 12(a) of the Staff Regulations and

Article 12(a) of the Staff Regulations stipulates that:

*"1. Officials shall refrain from any form of psychological or sexual harassment.*

2. *An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution. An official who has given evidence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution, provided the official has acted honestly.*

3. *“Psychological harassment” means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.*

4. *“Sexual harassment” means conduct relating to sex which is unwanted by the person to whom it is directed and which has the purpose or effect of offending that person or creating an intimidating, hostile, offensive or disturbing environment. Sexual harassment shall be treated as discrimination based on gender.”*

**The requirements in Article 5(a) of the Regulation are met in the present case, as:**

- processing personal data for the purposes of preventing harassment in a European institution constitutes part of good management of resources and contributes to the good functioning of the institution (*public purpose*),
- a procedure on harassment can be regarded *necessary* for creating a good working environment, and
- it is based on Article 12(a) of the Staff Regulations and the Internal Rules implementing it, which are clearly *legal instruments adopted on the basis of the Treaty*.

In addition, the harassment investigation can be seen as a legitimate exercise of official authority vested in the European Parliament regarding its staff (Article 5(a) of the Regulation).

Further, the formal phase of a procedure on harassment, namely the investigation by the ACPH, is launched on the basis of a complaint initiated by the person concerned. It can therefore be regarded that **the person lodging the complaint with the ACPH gave his/her consent unambiguously** to the processing of his/her personal data in the frame of the harassment investigation (**Article 5(d) of the Regulation**).

The legal basis and the lawfulness of the processing operation are therefore appropriate and clear. See, 3.3. below regarding the legal basis for processing special categories of data.

### **3.3. Processing of special categories of data**

Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited (Article 10(1) of the Regulation). Any exceptions in Article 10(2) and (3) should be narrowly tailored.

The procedure by the ACPH may involve both in the informal and in the formal phase the processing of personal data related to sex life or health.

**Article 10(2)(a) of the Regulation** permits the processing of health and sex life related data, where the data subject has **given his/her consent** to the processing of those data. As said in part 3.2., it is the case of investigations by the ACPH when it was launched after the person concerned lodged a complaint, regarding this person's data.

**Article 10(2)(b) permits** the processing of such data if it is necessary for the purposes of complying with specific rights and obligations of the controller **in the field of employment law**. The legal basis above implements the obligation of the European Parliament as an employer to ensure that the working environment is free of all forms of psychological and/or sexual harassment. Therefore, on a more abstract level, the processing of sex life or health related data in principle can be regarded necessary for complying with the obligation of the Parliament to ensure the appropriate working environment, inasmuch as those data are relevant for the case.

### **3.4. Data Quality**

**Data must be adequate, relevant and non excessive in relation to the purposes** for which they are collected and/or further processed (Article 4(1)(c) of the Regulation). The appearance of categories of personal data in the file depends on the particular case in question. That is why it is crucial that members of the committee make at each and every case a careful decision on which personal information are necessary to be entered into the file, which will be kept after that, and which data would be already inadequate or excessive for the need of the procedure.

The EDPS particularly welcomes the point that the ACPH will not dispose of any findings of the psychologist in Luxembourg or Brussels and that the processing of health related data is minimized within the framework of the ACPH (the processing stops at referring the person concerned to a psychologist).

Personal data must be **accurate and where necessary kept up to date** (Article 4(1)(d) of the Regulation).

The accuracy of the minutes taken during the interviews is ensured by the fact that all present members of the Committee take notes and those are edited when they prepare the final report.

In the present context, the ACPH could ensure the accuracy of data and keeping them up to date if it makes sure that the complainant and also the person against whom the complaint is lodged can have the possibility to share new information with members of the committee or correct inaccurate or incomplete data already existing in the file.

On a general level, it can be concluded that the system could ensure the quality of data as both complainants and people subjected to investigation can exercise their rights to access and rectify their own data according to the European Parliament Implementing Rules related to Regulation 45/2001. (For more details, see part 3.7 below)

Article 4(1)(a) of the Regulation requires that personal data are processed **fairly and lawfully**. The lawfulness has already been explained in parts 3.2 and 3.3 and fairness relates to the information provided to data subjects (see point 3.8 below).

### **3.5. Conservation of data**

Personal data can be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected and/or further processed. (Article (4)(1)(e) of the Regulation).

The processing operation is **mainly manual** and the storage media is mainly paper. Reports are kept both in paper and electronic versions.

**No documents** of the Committee are annexed to the **personal file** of the person concerned. **Records are retained** for as long as the data subject can still be potentially active as a staff member (meaning until the sixty seventh birthday).

The EDPS notes the fact that no records of the ACPH are added to the personal file, as in case there are further administrative or disciplinary proceedings it is more appropriate to follow the data conservation rules in the framework of those procedures.

The EDPS finds nevertheless excessive the data retention period for the records of the Committee until the sixty seventh birthday of the concerned staff member. In the case where, after the informal meeting, the person concerned lodges a formal complaint, the ACPH adds the notes taken during the informal meeting to the files. The EDPS does not consider well founded the justification for such long data retention, namely that in some cases a complaint can be lodged after a person has left the institution and therefore a trace is needed in order to treat such complaints.

First, as to the *computation of the start* of the data conservation period: it should not be linked to the birthday of the staff member concerned but rather to the *date of reporting* a harassment act (if no further action were taken either because the person concerned did not lodge a formal complaint or because the Committee did not launch the procedure) or the *date of closing the file*, regarding cases where a procedure for investigating harassment was conducted.

Second, as to the *term of conserving data*: it is excessive to keep personal data compiled in a harassment procedure until the sixty seventh birthday of the concerned person. Even if there may be *repetitive cases of harassment*, the EDPS is not convinced that it is lawful and fair to keep the personal data related to the harassment actions of a person or allegations against a person until the end of his/her career. For much more severely penalised acts and/or behaviour in the context of criminal law, the legal systems allows the opportunity of a clean criminal record after certain elapse of time. This is certainly a consideration to be taken into regard in setting the data retention period in the context of the activities of the ACPH.

Had it been the case that a harassment procedure is launched against a person who left the service for retirement reason at the age of sixty seventh the currently defined rules would block the Committee its investigation, due to the data conservation period defined currently until the sixty seventh birthday.

The EDPS believes that the conservation period should not be related to the term of the concerned staff member in the service but rather to the starting or ending activities of the investigation by the ACPH.

The follow up actions can also be taken into regard in defining the retention period.

**As to conclusions:** in the case when a harassment investigation results in launching administrative or disciplinary proceedings<sup>8</sup>, the rules on conserving personal data in those procedures should always be followed. In order to avoid duplication of files related to the same facts giving raise first to the harassment procedure and then to the administrative investigation, it seems to be reasonable not to keep the records in an identifiable form after

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<sup>8</sup> The EDPS already prior checked and issued his Opinion of 21 March 2005 on the notification for prior checking relating to data processing in the context of disciplinary files (Case 2004-198).

certain short period of time elapsed. The EDPS requests the controller to reconsider the storage period of personal data (records of the committee and the file itself) and consult the EDPS about that.

The **notes taken during the informal meeting** (when the person concerned is invited to explain the problem and to talk with members of the committee) **are kept**, even in those cases where the person does not lodge a complaint. These notes are kept as a general rule for three years as a problem could return. The EDPS does not see any reason to object to such a storage period.

In addition, the EDPS stresses that **certain exceptions** from the generally defined retention period may be necessary. For example, in the case of an ongoing legal proceeding (before the Civil Service Tribunal or the European Ombudsman) it may be necessary to keep records in an identifiable form containing the personal data related to the (alleged) conduct of the staff member concerned.

Any further data needed **for statistical purposes** (Article 4(1)(e) of the Regulation) must be extracted and the **remaining personal data should be destroyed**.

### **3.6. Transfer of data**

Article 7(1) of Regulation 45/2001 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"*.

Article 7 of the Internal Rules leaves open a possibility with the unanimous decision of the members of the Committee unanimously to forward any documents, or provide any information, to third parties concerning cases with which it is dealing.

The immediate superior of either the complainant or the other party may be contacted in strict confidence by phone or he/she may be invited to attend a meeting of the Committee. The phone call or on an interview during a meeting may include indeed the transfer of personal data, as the parties involved and their conduct would be mentioned by members of the Committee.

The Committee may report confidentially to the Secretary-General, who may decide to open an administrative or disciplinary procedure and recommendations may be made to the line manager. These measures also contain the particularities of the case, including the name of the complainant and the other party whose conduct was under examination.

Individuals involved in the investigation procedure would only be referred to consult a psychologist. It is always the person concerned who contacts the psychologist but never the Members of the Committee. Thus, in this case no data transfers from the Committee to the psychologist takes place.

Globally, in the light of Article 7(1) of the Regulation, the EDPS is satisfied that only those individuals whose competence seems to make it necessary can be recipients of personal data. On the other hand, the EDPS stresses that in case the members of the ACPH decide to apply the above provision in Article 7 of the Internal Rules and communicate any documents or personal information to third parties, it should always be examined whether the transfer of personal data is *necessary for the legitimate performance of tasks covered by the competence*

*of the recipient.* In any case, only relevant data should be transferred. Thus, on a case by case basis, members of the Committee should agree the transfer of which documents (containing personal data such as names and description and analysis of one's conduct) is relevant and necessary to the third party recipients.

These third party recipients in theory may be within the European Parliament (in the case of opening an administrative or disciplinary procedure) and outside of the European Parliament. Therefore, the controller should carefully consider the requirements of Article 7 of Regulation 45/2001.

Article 7(3) of the Regulation requires that the recipients shall process the personal data only for the purposes for which they were transmitted. In order to ensure this principle, the EDPS suggest that in the case of transferring personal information related to the investigation activities of the ACPH, a sentence (a note) is included in the document stating that the personal data transferred can be used only for the purposes of the specific harassment investigation procedure.

According to the facts, taking into regard its advisory role, it is never the ACPH which makes decision on further action after an investigation but the Secretary- General. In principle, it can be the case that personal data are transferred to national authorities for investigation. Should that be the case, the European Parliament should comply with Article 8 of Regulation 45/2001.

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

Article 13 of the Regulation provides for the right of access to one's own personal data being processed. Article 14 of the Regulation grants the right to rectification of inaccurate or incomplete personal data without delay.

Data subjects can **exercise their rights** according to Articles 8-13 of the European Parliament Implementing rules related to Regulation (EC) No 45/2001 ("DP IR"). As said in the facts, the Implementing Rules lay down the general procedures within the European Parliament on making a request to access, rectify, block and erase one's own personal data, and the right to object to the processing of one's own personal data. These general rules apply also to the requests of the data subject to exercise their right of access to their own data in the document and/or report kept with the Secretary -General of the European Parliament.

Article 9(1) of the DP IR requires, in light of Article 13 of Regulation 45/2001, that the data subjects within three month after receipt of the request can access their own personal data. The EDPS would like to highlight that in the context of investigating a harassment case accessing the documents containing one's own personal data is a legitimate interest and would need prompt action from the controller.

The EDPS would like to draw the attention of the controller to the fact that there may be various forms of exercising the right to rectify one's own personal data, for example providing documents as evidences to the file.

Article 20 of Regulation 45/2001 permits restricting the right of access and rectification of one's own personal data, in the case where such a restriction constitutes a *necessary* measure to *safeguard* the prevention, investigation, detection or prosecution of criminal offences or to safeguard the protection of the data subject or of the rights and freedoms of others (Article 20(1)(a) and (c) of Regulation 45/2001). In his practice the EDPS interpreted the interest of

the prevention, investigation, detection or prosecution of criminal offences covering investigations as part of the formal procedure, followed by disciplinary proceedings.<sup>9</sup>

The right of access involves the right of the data subject to be informed about the data referring to him or her. However, this right can be restricted to safeguard "the protection of the (...) rights and freedoms of others". This has to be taken into account in case a whistleblower would be involved in the investigation (for example a witness staff member would report about an act of harassment). The Article 29 Working Party has made the following statement: "[u]nder no circumstances can the person accused in a whistleblower's report obtain information about the identity of the whistleblower from the scheme on the basis of the accused person's right of access, except where the whistleblower maliciously makes a false statement. Otherwise, the whistleblower's confidentiality should always be guaranteed."<sup>10</sup> The EDPS therefore recommends the respect of the confidentiality of the identity of whistleblowers during the ACPH investigations and in the subsequent stages (if, for instance, disciplinary and judicial authorities request for this identification) in as much as this would not contravene national rules regulating judicial procedures.

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

Article 11 of the Regulation provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 provides for certain information to be given to data subjects when personal information has not been obtained from the person concerned.

In the procedure under examination, information is collected from the data subject himself/herself and from third parties as the Committee may hear witnesses or other parties (like the immediate superior), thus all items required in Articles 11 and 12 should be supplied to the data subjects.

The generic privacy statement on the EP's internet site under "legal notices" ([http://www.europarl.europa.eu/news/public/default\\_en.htm](http://www.europarl.europa.eu/news/public/default_en.htm)) refers to the specific policy on personal data protection related to the information on the EP website. This can not be regarded as providing the items required in Articles 11 and 12 of the Regulation in relation to the particular procedure on harassment and its prevention.

The Committee's Intranet site contains the decision appointing the members of the Committee, the internal rules and the annual report.

Much of the items required in Articles 11 and 12 can be obtained from the documents specified by the controller: the "Internal Rules" and the decision of 23 January 2008 concerning the composition of the advisory committee for 2008 contains information about the purpose, the legal basis and the identity of the controller and the notification to DPO register specifies the purposes, the legal basis, the basis for lawfulness, identifies the controller, the categories of personal data, main points of data processing ( collection of data,

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<sup>9</sup> See for example, part 2.2.10 of Opinion of 20 July 2005 on the notification for prior checking on the issue of harassment (Case 2005-145). Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

<sup>10</sup> For similar position in the context of OLAF internal investigations, see Opinion of 23 June 2006 on a notification for prior checking on OLAF internal investigations (Case 2005-418)

automated/manual processing), the retention period, security of processing and information on confidentiality.

Although much of the required items can be found in the above mentioned instruments, these items can only be recovered in a rather fragmented form. In addition, a few items required by Articles 11 and 12 are not mentioned in the above documents, namely:

- The information on data transfers (recipients of personal data) are not mentioned in the DPO register exhaustively.
- whether replies to the questions of the Committee are voluntary and the consequences of failure to reply
- the ways data subjects can exercise their rights.

It makes the processing fair towards the potential data subjects, if all items of Articles 11 and 12 are provided in a comprehensible form in one document. For example as a privacy statement on the Intranet site of the Committee. In addition, the EDPS recommends displaying the privacy statement in a clearly visible way in the premises of the Committee (for example distributing it in the meeting room) where usually its meetings are held with the persons involved.

As the investigation of the ACPH may have further and rather serious consequences, such as administrative or disciplinary procedure, providing the information in Articles 11 and 12 of the Regulation in a personalised form to the persons concerned is essential. Therefore, the EDPS recommends that a privacy notice specific to the harassment prevention procedure is included in the first communication (letter/email) sent to the persons concerned by the procedure. In this way, the persons concerned will receive all items required in a concise way.

*Specific information:* if an investigation is launched, the Secretary- General should notify the parties concerned. **Exceptions may be made to this obligation to inform all the parties concerned** if the ACPH or the Secretary-General considers that confidentiality is essential to protect one of the party or the other (Article 16 of Internal Rules). In such a case Article 20(1)(c) of Regulation 45/2001 could be invoked as justifying the deferral of information, provided that all conditions are met.

Further, Article 13 of the Internal Rules requires that the ACPH remains in contact with the concerned staff member to ensure follow up. The controller noted that this obligation implies to give information about the progress of the case, which the EDPS certainly welcomes having in mind the important interests at stake.

The controller should update its notification:

- retention period (after reconsidering it and after consultation with the EDPS)
- recipients: recommendations to the line managers include transfers of personal data.

### **3.9. Security measures**

According to Article 22 of the Regulation, the controller must implement the 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

The EDPS noted that confidentiality considerations are taken into regard in the procedure:

- Article 16 of the Internal Rules: where one of the party is not informed of the measures of the Secretary -General if confidentiality would so require in the interest of another party
- Article 14 of Internal Rules: the report forwarded to the Secretary-General on the proposed actions is confidential
- Article 7 of Internal Rules: Committee should work with complete confidentiality, its deliberations are secret. Committee should not forward any documents or information to third parties unless otherwise decided unanimously.

The EDPS emphasizes the need for confidential treatment of all personal data included in the documents the Committee deals with, as it may contain sensitive information as to one's sexual orientation and/or psychological state. A further way to ensure confidentiality is to request that all members of the Committee and the secretary assisting the work of the Committee sign a specific confidentiality declaration and their attention is drawn to the delicate nature and sensitivity of personal data they will deal with.

### **Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing that the above considerations are fully taken into account, in particular:

1. members of the committee should make at each and every case carefully a decision what personal information is necessary to be entered into the file which will be kept after that, and what data would be already inadequate or excessive for the need of the procedure.
2. the ACPH should ensure that the complainant and the other party can have the possibility to share new information with members of the committee or correct already existing inaccurate or incomplete data in the file,
3. the controller should reconsider the retention period for storing the records of the ACPH and the file itself in the light of the above expounded guidance
4. after the elapse of the pre-defined storage period any further data needed for statistical purposes must be extracted and the remaining data should be destroyed
5. members of the Committee should agree that the transfer of which documents (containing personal data such as names, description and analysis of one's conduct) is relevant and necessary to the third party recipients when transfers take place under Article 7(1) of the Regulation
6. in order to comply with Article 7(3) of the Regulation, the controller draws the attention of the recipients that the transferred personal data can only be used for the purposes of the specific investigation procedure.
7. had that been the case that the data controller the transfers data to national authorities, the data controller should comply with Article 8(a) of Regulation 45/2001
8. in the context of investigating a harassment case accessing the documents containing one's own personal data is a legitimate interest and would need prompt action from the controller
9. the confidentiality of whistleblower's identity should be guaranteed during the ACPH investigations and at later stage in as much as this would not contravene national rules regulating judicial procedures.
10. draft a privacy statement including all items of Articles 11 and 12 of the Regulation and should be put on the website of the data controller and should be disseminated in the meeting room
11. provide personalised information about the processing operation to the persons concerned in the first letter or email communication with them
12. the controller should update the notification to the DPO in the light of this opinion
13. the confidentiality of handling personal data is maintained during the procedure

14. all members of the Committee and the secretary assisting the work of the Committee sign a confidentiality declaration and their attention is drawn to the delicate nature and sensitivity of personal data they will deal with.

Done at Brussels, 19 May 2009

(signed)

**Giovanni BUTTARELLI**  
Assistant European Data Protection Supervisor