

Prior checking opinion on the performance evaluation procedures of the European Medicines Agency (“EMA”) notified on 25 June 2007

Brussels, 18 December 2009 (Case 2007-0421)

1. Proceedings

On 25 June 2007, EMA notified the European Data Protection Supervisor (“**EDPS**”) of its performance evaluation procedures for "ex-post" prior checking. The EDPS requested additional information from EMA:

- on 19 July 2007 (EMA replied on 15 October 2007)
- on 7 November 2007 (EMA replied on 21 November 2007)
- on 23 November 2007 (EMA replied on 21 February 2008) and
- on 25 February 2008 (EMA replied on 1 December 2009).

On 7 December 2009, the EDPS sent EMA a copy of the draft Opinion, for comments. EMA commented on 17 December 2009.

2. The facts

2.1. Introduction. The scope of the prior checking procedure covers the data protection aspects of the performance evaluation of EMA's temporary staff. The evaluation is carried out on the basis of Article 15(2) of the Conditions of Employment of other servants of the European Communities (“**Conditions of Employment**”).

EMA has not adopted a formal internal decision on performance evaluation to put the procedure into effect. However, it has issued a "Guide to performance evaluation reports" ("**Guide**"). This document:

- describes the purpose of the performance evaluation
- defines the roles and responsibilities of staff members, assessors and reporting officers
- provides an overview of the process
- describes the work objectives and performance measures
- sets forth the provisions for appeal
- lists recommended questions to be asked during the evaluation
- provides guidance on how to manage performance problems.

2.2. Overview of the process, data collected and parties involved. The performance evaluation report at EMEA is used to:

- assess and comment on staff duties
- define work objectives
- identify responsibilities
- detail performance measures
- provide feedback
- identify development needs
- identify staff for promotion

The report covers the following matters:

- description of duties
- achievement of work objectives and performance measures
- changes in duties
- language competencies
- strengths and weaknesses
- general conduct
- relations with other staff
- training needs
- suggestions for work objectives and performance measures for the next period

Markings are either "unsatisfactory", "satisfactory", very good" or "excellent". A specific number of points are awarded for each rating for the purpose of using the performance evaluation reports in the promotion process.

Each Head of Unit is the assessor for the staff in his or her unit. The Executive Director is the assessor for the Heads of Unit and for the Directorate staff. The assessor may appoint a reporting officer to prepare the performance evaluation report. As a rule, the reporting officer is the person to whom the staff member directly reports. The reporting officer develops the work objectives and performance measures together with the staff member.

The reporting officer and the individual discuss the staff member's performance. Following this discussion, the reporting officer prepares a written appraisal of the employee's performance on each work objective and performance measure. The report is signed by both the reporting officer and the staff member and is submitted to the assessor for review and signature.

The final report is filed in the staff member's personal file. In addition to the staff member, the reporting officer and the assessor, the following persons have access to the evaluation reports:

- a limited number of staff in the Human Resources ("**HR**") unit who work specifically on the evaluation process
- the Executive Director for AD category staff
- the Head of Administration for AST staff

This is with the exception of the evaluation reports of the Heads of Units, to which the Head of Administration and staff in the HR unit have no access.

No other person will have access to the report without the staff member's written permission. Prospective employers will not be given access to the reports. Personal files, however, may

be checked by the Internal Auditing Services and by the Court of Auditors. The file may also be forwarded to the European Union Civil Service Tribunal if an action concerning the staff member is brought before the Court. Similar transfers to the European Ombudsman or to the EDPS may also occur where necessary. The Guide emphasises that performance evaluation reports must be treated in strict confidence at all times. Reports in transit must always be kept in envelopes marked confidential.

Working notes may be taken during the meeting by the staff member and by the reporting officer. These working notes remain the property of the party who prepared them and will not be part of the personal file.

2.3. Access rights. EMEA's implementing rules on data protection lay down specific rules on the rights of access, rectification, blocking, erasure and objection. Any of these rights may be exercised by the data subject or by a duly authorized representative free of charge. The request has to be addressed to the data controller and may be submitted by internal or external post, email or fax. An electronic form is available on the EMEA intranet. An acknowledgement of receipt is sent to the applicant within five working days.

In relation to requests for access, the controller has to respond within three months. The data subject may exercise his/her right of access on-site or the controller may draw up a certified copy or provide an electronic copy. Other options may also be available depending on the means available to the data controller and the configuration of the file. With regard to the right of rectification the document provides a more stringent deadline for the controller to act: inaccurate or incomplete data must be rectified "without delay". If a request for rectification is accepted, it shall be acted upon immediately and the data subject must be notified. Should a request for rectification be rejected, the data controller shall have 15 working days to inform the data subject of the grounds for rejection. Requests for blocking or deletion must either be implemented or rejected and the data subject must be informed within 15 working days in either case. The same 15 day time period applies for accommodating a request for objection.

EMEA also provided the EDPS with a copy of the access request form that the implementing rules refer to, and which is available on the EMEA internal website. The form is 4 pages long, including a page of explanatory notes and requires:

- the data subject's name, telephone and fax number and email address
- an indication as to whether the individual acts for themselves or has a representative (in which case proof must be submitted)
- details of the requested data
- details of what data is specifically excluded from the request
- details of whether the request concerns the right of access, rectification, blocking, deletion or objection
- the name and contact details of the requestor (if different from the data subject).

In addition, at the start of the prior checking procedure, the data subject's place and date of birth, nationality, home address and ID number were also required on the form. The form since then has been updated to no longer require this information.

Additionally, the form contains an acknowledgement of certain specific rules of the EMEA implementing rules regarding acknowledgement of receipt and remedies. At the start of the prior checking procedure the form also included a provision that the request for access may be refused if it is not made on the form. This provision since then has been removed.

2.4. Information provided to data subjects. Employees are informed about the evaluation procedure through the Guide to performance evaluation reports referred to in Section 2.1. The Guide is available to the employees on the EMEA intranet. New staff members are also briefed about the personal evaluation procedure during the training sessions for "newcomers".

At the beginning of their employment staff are also provided with a general data protection notice, which is applicable to all data processing activities at EMEA, although this does not specifically address the performance evaluations. All staff members sign an acknowledgement that they read the notice.

2.5. Retention period. Performance evaluations are carried out every two years. They are kept on file until the staff member's death, or, if dependents receive any pension payments, until such time as the pension payments to dependents end. This means that the files continue to be held by EMEA even when the staff members retire, change jobs, or otherwise cease to work for EMEA.

EMEA explained to the EDPS that the main reason for this is to facilitate reintegration in case the staff member subsequently returns to work for EMEA. When commenting on the draft Opinion, EMEA added that on at least one occasion, a former staff member requested EMEA to provide a copy of an evaluation report which was more than five years old, to assist him in connection with an "attestation procedure" at the Commission. EMEA also noted that occupational medical cases may also arise many years after an event has occurred and for these cases, the evaluation reports could also be relevant. Therefore, EMEA suggested, holding these records for longer periods of time are usually in the interest of the data subjects.

2.6. Storage and security. The performance evaluation reports are completed manually. They are then scanned and are held in both paper and electronic form. Electronic files are password-protected and access is limited as described in Section 2.2 above. Documents in paper form are kept in locked file cabinets. The Commission's general IT security measures also apply.

3. Legal aspects and Recommendations

3.1. Applicability of the Regulation. The notified performance evaluation falls under the scope of Regulation (EC) 45/2001 ("**Regulation**") pursuant to Articles 2 and 3.

With respect to the "working notes" described in Section 2.2, which may be taken during the meeting by the reporting officer, the EDPS considers that these are taken by the reporting officer in his official capacity, and therefore, fall under the applicability of the Regulation. It is not unlawful to take notes during the evaluation process. However, it is particularly important that these "personal notes" do not fall into a grey zone without adequate data protection safeguards. For practical recommendations in this regard, see Section 3.6.

3.2. Grounds for prior checking. The processing is subject to Article 27(2)(b) which requires prior checking by the EDPS of "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct".

3.3. Deadlines for notification and for issue of the EDPS opinion. The performance evaluation procedure was already in place at EMEA before the EDPS was notified. The opinion of the EDPS should, as a rule, be requested and given prior to the start of any processing of personal data. Nevertheless, taking into account that a large number of processing operations were already in place before the EDPS started to operate in 2004 and

some of the institutions and bodies have not yet fully cleared their backlog of notifications, these prior checking procedures are now carried out ex-post.

Pursuant to Article 27(4) of the Regulation, this Opinion must be delivered within two months, discounting any periods of suspension allowed for receipt of additional information requested by the EDPS. The procedure was suspended for 847 days. The Opinion must be provided no later than 21 December 2009.

3.4. Lawfulness of the processing (Article 5(a) and Recital 27). The performance evaluation of temporary agents is based on Article 15(2) of the Conditions of Employment. Thus, a specific legal instrument "adopted on the basis of the Treaties" allows and provides the basic conditions for the notified processing operations. The EDPS is also satisfied that the processing is necessary and proportionate for the management and functioning of EMEA. Therefore, the processing is lawful.

3.5. Data Quality (Articles 4(1)(a),(c) and (d)). With regard to the data collected on the data access request form as described in Section 2.3, the EDPS welcomes that the form for access requests has been revised according to the recommendations of the EDPS included in his 6 December 2007 prior checking opinion on public declaration of interests at EMEA (Case number 2007-0419). In particular, information on nationality, place or date of birth, home address and identification number has been removed. The form is amended to request only the following identification data:

- name and surname,
- telephone and/or fax number,
- email address.

The EDPS has no further recommendations on data quality (adequacy, relevance, proportionality, fairness, lawfulness, or accuracy). However, the EDPS emphasizes that compliance with these principles will always require analysis on a case by case basis.

3.6. Retention of data (Article (4)(1)(e)). EMEA should re-evaluate the necessity of keeping all performance evaluation reports for the entire duration of the staff member's employment, and even after the staff member changes jobs, retires or dies. EMEA must bear in mind that retention periods should closely match the periods for which access may be necessary for clearly specified purposes. Specifically, EMEA should assess how long it needs to keep the data:

- for the purposes of evaluation (including promotion, assessment of training needs and other related purposes)
- to allow for an appeal against evaluation
- to cater for the possibility of audit.

The storage period which extends to and even goes beyond the entire career of the staff member is clearly disproportionate. In similar cases, the EDPS accepted five years as proportionate but considered ten years disproportionate.¹ Shorter retention periods were recommended when the contract of a temporary agent was concluded for a shorter period.

¹ See, for example, the EDPS Prior Checking Opinion on the "Evaluation of the President and the Vice-President of the CPVO" of 28 July 2009 (Cases 2009-355 and 2009-356).

Each year, at the lapse of the retention period, the old reports should either be securely destroyed (both electronically and in the paper files) or returned to the individuals concerned.

The EDPS also encourages a flexible approach to accommodate employees who leave the service and request that their data be deleted earlier than the general timelines provided by EMEA. For example, if an employee leaves and specifically requests that his/her previous evaluations (in both paper and electronic form) are deleted or returned to him/her then EMEA should accommodate such a request, unless exceptional circumstances (e.g. an ongoing litigation) dictate otherwise.

With respect to the "working notes" described in Section 2.2, the EDPS recommends that the "personal notes" taken by the reporting officer (and the notes taken by the assessor, if any) should be destroyed as soon as the evaluation report is prepared. Otherwise a number of concerns would arise: the transparency of the evaluation procedure itself would be at stake and there would also be no guarantee that the data are kept secure.

3.7. Recipients and data transfers. The EDPS welcomes the fact that the scope of the recipients is limited to those identified in Section 2.

In addition, the EDPS reminds EMEA that if unforeseen data transfers are requested by any third party, EMEA should only allow such transfers subject to (i) either the unambiguous or explicit (with respect to sensitive data) and informed consent of the data subject, or (ii) as otherwise specifically allowed by the Regulation. In case of doubt, the EDPS recommends that the head of the HR unit consults the Data Protection Officer ("**DPO**") before making the requested transfer. The EDPS also emphasises that pursuant to Article 7(3) of the Regulation the controller should inform the recipients that they may only process personal data transferred for the purposes for which they were transmitted.

3.8. Right of access and rectification (Article 13). The EDPS welcomes the specific rules and procedures in place at EMEA to accommodate rights of access and rectification. The EDPS also welcomes that the form for access requests has been revised according to the recommendations of the EDPS included in his 6 December 2007. Prior checking opinion on public declaration of interests at EMEA (Case number 2007-0419). In particular, EMEA removed the text from the new version which stated that the access request may be refused where the form is not used.

To avoid any ambiguity and as a matter of good practice, the EDPS further recommends that both the form and the implementing rules state that use of the form, although recommended, is not mandatory.

3.9. Information to the data subject (Articles 11 and 12). Articles 11 and 12 of the Regulation require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data.

Although the Guide contains some of the items (in particular, the purpose of the processing, recipients, and identity of the controller); much of the information that should be provided is only available in the general data protection notice on the EMEA intranet.

First, the EDPS recommends that items not specified in either the general data protection notice or the Guide should be provided. Secondly, as noted in previous prior checking opinions, the content of the general data protection declaration should be amended as follows:

- There should be an introductory paragraph which states that this is a general data protection statement, and that further information on specific processing operations can be found in the links in an annex to this document.
- An annex should then be added to the document with links to a specific data protection notice on the evaluation procedures (which may form part of the Guide).

3.10. Security measures (Article 22). The EDPS has no specific recommendations on the technical and organisational measures taken by the controller to protect the data. Nevertheless, the EDPS highlights the fact that EMEA should ensure that data are not accessible by or disclosed to anyone other than those specified in Section 2.

Conclusion

The EDPS finds no reason to believe that there is a breach of the provisions of the Regulation provided that the recommendations in Section 3 are implemented, namely:

- **Retention of data**
 - EMEA should reconsider the retention period for the evaluation reports.
 - Personal notes taken by the reporting officer (and the assessor) during the interviews should be destroyed after drawing up the evaluation report.
- **Information to data subjects**

Notice should be provided with respect to all items under Article 11 and 12 of the Regulation and EMEA should provide a specific data protection notice on the evaluation procedures. This may be part of the Guide.

Done at Brussels, on 18 December 2009

(Signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor