

Opinion on the notification for prior checking from the Data Protection Officer of the European Economic and Social Committee regarding the "*promotion's procedure for officials and agents*"

Brussels, 19 July 2010 (Case 2008-474)

1. Proceedings

On 30 July 2008, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data for the purpose of a promotion exercise from the Data Protection Officer (**DPO**) of the European Economic and Social Committee (**EESC**).

Questions were raised 2 October 2008 and replies were sent on 10 June 2010. The draft opinion was sent to the DPO for comments on 7 July 2010. The EDPS received a reply on 15 July 2010.

2. Facts

The promotion exercise within the EESC is carried out by the Recruitment, Careers and Training Unit of the Human Resources and Internal Services Directorate.

Data subjects

The data subjects are officials and some contractual agents who have two years of seniority in their grade.

Purpose

The purpose of the processing operation is to draw up different lists in order to establish the final list of the data subjects who are to be promoted.

Legal basis

The legal basis of the processing is Article 43 and 45 of the Staff Regulations. The procedure is carried out in the light of the Decision 251/10A and Decision 068/08A (of 12 February 2008) regarding the establishment and operation of the Joint Promotions Committee; furthermore, Decision Decision 410/04A (of 12 October 2004) concerning the general implementing provisions on periodical staff reports.

Procedure and data processed

The processing operation is manual¹.

¹ Processing via the Centurio database is currently being discussed.

Within the framework of the exercise of promotion, the data subject's performance report is sent by confidential e-mail to his/her assessor by the Directorate of Human Resources (DHR). The assessor fills it out and sends it back to the DRH (after an interview with and signature of the data subject). This is done personally or in a sealed envelope marked confidential. The data included in the data subject's performance report are the following:

- name;
- service;
- category;
- grade;
- knowledge of languages including whether a new language has been acquired during the reference period;
- an assessment of the data subject's ability, efficiency and conduct;
- description of duties; objectives of the next reporting period; and
- the mark awarded during the current appraisal exercise.

The person in charge at the DHR completes an Excel table with all the points as well as the total of points that the data subject received since his/her last promotion. Paper copies of performance reports are prepared for all promotable data subjects.

A Joint Promotions Committee is appointed jointly by the Secretary-General and the Staff Committee (decision 251/10 A).

The responsible persons at the DHR place the following 5 documents at the disposal of the Committee:

- a list of data subjects having the necessary seniority for promotion,
- a list of data subjects in each grade, together with the necessary information on the performance of these data subjects since they were last promoted, particularly their total number of points,
- a list of the data subjects considered by the Appointing Authority as being worthy of promotion,
- a copy of the latest performance report of the officials having the necessary seniority for promotion and
- a table summarising the possibilities of promotion in each category.

It is important to note that the DPO of the EESC was asked by the Head of the DHR about the possibility of publishing the list of promotable staff with the points that each one obtained from the assessor. This was a request of the Staff Committee in the interest of transparency and also on the basis that the Commission has adopted this policy. The DPO highlighted the fact that the EESC is much smaller than the Commission and therefore it was entirely possible that there was only one administrator or assistant in some units. Thus, according to the DPO, it would be easy for the staff members to be able to know the points obtained by a particular assessor. The DPO submitted a consultation regarding this issue to the EDPS under Article 46(d) of the Regulation. The EDPS position was sent to the DPO on 28 January 2010 (see below point 3.3).

The Joint Promotion Committee makes a comparative appraisal of the merits of all data subjects eligible for promotion in each grade on 31 December of the current year taking into account the promotion points accumulated by each of these data subjects since their last promotion and checking their consistency with the comments in the performance reports.

As part of its work, the Committee may consult the assessors of those who are eligible for promotion for the purpose of obtaining further information on the performance report. It may also interview the data subjects concerned, their immediate superiors or any other person it sees fit.

When the Promotion Committee completes its deliberations it gives its opinion on the list of the data subjects proposed for promotion in each grade. The Committee's opinions contain the name of the data subjects and their grade, and if they were adopted by unanimity or by majority of the votes of the full members present. The Committee forwards its opinion together with an explanatory report (procedural comments and observations) to the Secretary-General. Each member of the Committee is entitled to make any comments that he or she deem appropriate in this report.

The Appointing Authority (AA) decides and awards the promotions after having taken into account the opinions of the Committee.

The DHR publishes the list of persons promoted with the dates on which the promotion takes effect.

Recipients

The recipients involved in the processing operation are the following:

- ❖ the assessors who see the staff report or the appeal report where relevant. Once the assessment exercise is completed, the assessors are not involved in the promotions exercise, unless they are members of the Joint Promotions Committee;
- ❖ the Joint Promotions Committee deals with promotions (it reviews each case, votes, issues an opinion and proposes those whom it considers should be promoted);
- ❖ the Appointing Authority (AA; President for grades AD 11 – AD 14, Secretary General for all other grades) receives the Committee's final opinion on the data subjects to be promoted as well as its explanatory report and a note from the PER Unit with an annexed table which contains the following information:
 - the names of those that are promotable,
 - the date they would be promoted (as per the votes of Promotions Committee),
 - whether each person concerned has reached the threshold or not,
 - if the person was considered by the AA as worthy of a promotion,
 - if the person was proposed by the Promotions committee for a promotion (unanimous or majority vote).

This table also shows which individuals the DHR suggests should be promoted. This is then considered and signed by the AA before being returned to the PER Unit for publication of the final list of those promoted.

- ❖ the European Union Civil Service Tribunal in case of litigation.

Right of access and rectification

Data subjects may consult their personal file at any time by contacting the Archives service. Any incorrect or incomplete data contained therein may be rectified upon request. Requests for blocking and erasure are executed 2 weeks after the request.

Right of information

A privacy statement is communicated to the staff in January of each year when the assessment exercise is launched.

The privacy statement indicates the identity of the controller, the purpose of the operation, the recipients, the existence of the right of access and rectification and the right to have recourse at any time to the EDPS. The retention period is indicated as follows: "*the retention period of the data being processed by the controller is limited to 10 years following the appraisal*".

Retention policy

All the individual documents, decisions, appraisal reports etc are kept in the personal files of each staff member of the EESC.. The personal files are kept during a period of 10 years after the end of the period during which a staff member is in active employment or the last pension payment.

The promotion file with the Excel table contains all the background information regarding promotion data for all the officials and contract agents of the EESC; for instance, information such as minutes taken by the Secretariat and signed by the president of the Promotion Committee, the voting bulletins which show how the Committee has voted in each case, the lists and the decision of the AA. The promotion file is kept for about 10 years, as it is possible that a court case comes up several years after the promotions exercise.

Statistics are drawn up each year in an anonymous form following the promotions exercise.

Security measures

Copies of the performance reports of each data subject are scanned and stored on a CD which is kept in a locked cupboard in the PER Unit. The paper copies of the performance reports transferred to the Promotions Committee are destroyed after the procedure has ended.

The lists are stored on a secured drive in the PER Unit and the paper version kept in the promotion files is located in a locked cupboard in the PER Unit.

The Excel table with all the points of the data subjects is protected by a password. Only 3 responsible persons in the PER unit have access to this table.

3. Legal aspects

3.1. Prior checking

Applicability of Regulation 45/2001 ("the Regulation"): The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a European institution, the EESC, in the exercise of activities which fall within the scope of EU law². The processing of the data forms part of a filing system. Therefore, Regulation 45/2001 is applicable.

Grounds for prior checking: Article 27 (1) of Regulation 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 Regulation 45/2001 contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subjects*" (Article 27 (2) (b) of Regulation 45/2001).

² The concepts of "Community institutions and bodies" and "Community law" can not be any longer used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in light of the Lisbon Treaty.

The processing in question concerns the evaluation of the ability, efficiency and conduct of officials, and some contract agents in view of their promotion. It should therefore be subject to a prior checking analysis on the basis of Article 27(2)(b) of Regulation 45/2001.

Ex-post prior checking: 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 this case, however, the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

Notification and due date for the EDPS Opinion: The notification of the DPO was received on 30 July 2008. According to Article 27 (4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 587 days for further information from the controller and 8 days for comments. Consequently, the present opinion must be delivered no later than on 19 July 2010.

3.2. Lawfulness of the processing

The lawfulness of the processing operations has to be examined in light of Article 5 of Regulation 45/2001. Pursuant to Article 5 (a) of Regulation 45/2001, the processing is lawful 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 or in the legitimate exercise of official authority vested in the Community institutions or body*". 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*" (recital 27).

It follows that the first issue under Article 5 (a) is to determine whether there is a specific legal basis for the processing and the second issue is to verify whether the processing in question is necessary for the performance of a task carried out in the public interest.

The promotion procedures involving collection and processing of personal data are part of the legitimate exercise of the official authority vested in EESC. The legal basis confirming the lawfulness of the processing can be found in the following provisions: i) Article 43 and 45 of the Staff Regulations iii) the two Decisions concerning a Joint Promotions Committee.

As concerns the condition of necessity under Article 5(a), the EESC processes data in order to establish a final list of the data subjects who are to be promoted every year. Such processing is necessary for the performance of the EESC's mission in the public interest according to Article 5 (a) of the Regulation.

In light of the above, the lawfulness of the processing operation is therefore justified.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The administrative and evaluation data described seem to be, in principle, relevant and not excessive to the purpose for which they are collected and processed, namely for the examination of merits of the data subjects who are to be promoted. Article 4 (1) (c) of Regulation 45/2001 is therefore respected.

With regard to the publication of promotion points, which was the issue raised by the DPO in the context of a consultation to the EDPS on the basis of Article 46(d) of the Regulation, the EDPS found such practice excessive under Article 4(1)(c) of the Regulation. The EDPS highlighted that systematic publication of EESC staff with the promotion points, is irrelevant and unnecessary for the purpose of a promotion exercise. In general, a complaint or appeal under Article 90 of the Staff Regulations cannot be justified on the basis of the other candidates' promotion points, although this cannot be excluded in some exceptional cases where it might be necessary to obtain the other candidates' promotion points. Consequently, the EDPS underlined that the argument related to transparency cannot be considered as relevant in order to justify the publication or communication of the promotion points in a systematic way, without of course excluding a case by case analysis where it is necessary.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*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.*" According to the notification, documents related to the promotion exercise are kept in the personal file of each data subject and the promotion file. In this way, the EESC seems to ensure that the data processed are accurate, complete and up to date under Article 4(1)(d) of the Regulation. Furthermore, the EDPS recommends that all relevant documents following a court litigation in the context of a promotion exercise should be kept in the personal file of the data subject concerned, so that the file is complete and up to date in conformity with Article 4(1)(d) of the Regulation.

Moreover, the possibility to make use of the rights of access and rectification is another mechanism to ensure the quality of data (see point 3.6).

Fairness and Lawfulness: Article 4 (1) (a) of Regulation 45/2001 provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 3.2.) and fairness will be dealt with in relation to information provided to data subjects (see point 3.7).

3.4. Conservation of data

Article 4 (1) (e) of Regulation 45/2001 states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

As the EDPS has highlighted in previous opinions³, it is necessary to keep both personal and promotion files until the 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 the personal file for no longer than ten years from the last pension payment. According to the controller, this specific policy is adopted by the EESC. However, it seems that this information related to data retention is not clearly indicated in the notification and in the privacy statement. The EDPS recommends therefore that the EESC modifies both documents accordingly (see point 3.9 below).

³ See EDPS opinion of 9 October 2007 on SYSPER 2: promotion at the European Commission (2007-192); opinion of 7 January 2008 on promotion of officials at the Committee of the Regions (2007-354); opinion of 18 May 2009 on "*procédure de promotion et de reclassement* (2009-0018).

In addition, the EDPS questions the proportionality of keeping the minutes and voting bulletins used during the promotion exercise in the promotion files for a period of 10 years. The EDPS calls upon the EESC to examine the documents kept in the promotion files in order to determine which documents, in addition to the promotion decision, are actually relevant and necessary. Moreover, the EDPS invites the EESC to re-evaluate the conservation period for this type of information and propose shorter conservation periods in light of Article 4(1)(e) of the Regulation⁴.

3.5. Transfer of data

The processing operation should also be examined in light of Article 7 (1) of Regulation 45/2001. The processing covered by this Article is the transfer of personal data 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 are circulated among various persons within the EESC: the staff member's assessors, the Joint Promotion Committee, the AA, the PER Unit, the Joint Reports Committee and the European Union Civil Service Tribunal where appropriate. Access is granted on a need-to-know basis. The EDPS considers that in each of these cases the transfers are necessary and 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 and insofar as the transfer is necessary for the legitimate performance of tasks covered by the competence of the recipients, enabling the new employer to establish career equivalence based on its own rules on the matter.

The EDPS notes that in principle, communications and transfers of data within the above recipients are labelled as confidential. In this respect, and in accordance with Article 7(3), the EESC should also raise awareness amongst each of the recipients that they shall process the personal data they receive during the promotions exercise only for those purposes for which they were transmitted.

3.6. Right of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following a request from the staff member concerned. Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

According to the EESC notification, data subjects may consult their personal file at any time by contacting the Archives service. Any incorrect or incomplete data contained therein may be rectified upon request.

Articles 13 and 14 seem to be therefore respected.

⁴ See EDPS Opinion on *"internal promotion of officials and reclassification of temporary agents by EMCDDA"* on 22 April 2010 (case 2009-0839) and EDPS Opinion on *"procédure promotion et de reclassement de la Commission"* on 15 April 2009 (case 2009-0018).

Furthermore, the EDPS underlines that the right of access to individuals' own data may include access to the minutes or voting bulletins of the Joint Promotions Committee, for instance in the context of a court litigation. In such cases, the EESC should grant access to the above data, unless one of the exceptions of Article 20 of Regulation 45/2001 applies. If for example, the exception of Article 20.1(c) regarding "*the protection of the data subject or the rights and freedoms of others*" applies, the EESC could consider of giving partial or limited access to the data requested⁵.

3.7. Information to the data subject

Articles 11 and 12 of the Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

In the present case, Article 12 of the Regulation applies since the Recruitment, Careers and Training Unit (DRH) collects and processes data provided by the different parties involved in the promotion exercise.

The EDPS notes that the EESC prepares a privacy statement which according to the notification is communicated to staff in January of each year when the assessment exercise is launched.

The privacy statement includes all elements listed in Article 12 of the Regulation. However the EDPS finds the information regarding data retention misleading and not in compliance with the EDPS recommendations in point 3.4. The EDPS therefore recommends that the EESC amends and completes the information about the data retention principle, as explained in point 3.4.

3.8. Security Measures

According to Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, "*the controller shall implement 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*".

The security measures adopted by the EESC appear to comply with Article 22 of the Regulation.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the following recommendations are taken into account. In particular the EESC should:

- not publish or communicate the promotion points in a systematic way within the EESC, except on a case by case basis where necessary

⁵ See EDPS Opinion on "*internal promotion of officials and reclassification of temporary agents by EMCDDA*" on 22 April 2010 (case 2009-0839)

- keep all relevant documents following a court litigation in the personal file of the data subject concerned, so that the file is complete and up to date in conformity with Article 4(1)(d) of the Regulation
- keep both personal and promotion files until the 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 the personal file for no longer than ten years from the last pension payment.
- examine the documents kept in the promotion files in order to determine which documents, in addition to the promotion decision, are actually relevant and necessary. Moreover, the EDPS invites the EESC to re-evaluate the conservation period for such types of information and propose shorter conservation periods in light of Article 4(1)(e) of the Regulation
- raise awareness amongst each of the recipients that they shall process the personal data they receive during the promotions exercise only for those purposes for which they are transmitted
- grant access to data, such as minutes or voting bulletins of the Joint Promotions Committee, for instance in the context of a court litigation, unless one of the exceptions of Article 20 of the Regulation applies
- amend and complete the information about the data retention principle in the privacy statement and notification, as explained in point 3.4.

Done at Brussels, 19 July 2010

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor