

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Economic and Social Committee regarding "The implementation of the informal procedure for treating case of psychological and sexual harassment in the Committee"

Brussels, 28 July 2010 (Case 2010-321)

1. Proceedings

On 4 May 2010, the European Data Protection Supervisor (EDPS) received by regular mail from the Data Protection Officer (DPO) of the European Economic and Social Committee (EESC) a notification for prior checking the data processing operations related to "The implementation of the informal procedure for treating case of psychological and sexual harassment in the Committee". The EESC has already submitted a notification for prior checking related to moral and sexual harassment (EPDS file 2008-478). The DPO has withdrawn it as the new draft decision will repeal and replace the procedures for handling cases of psychological and sexual harassment contained in Decision 398/02 A of 13 November 2002.

On 4 May 2010, the EDPS requested further information from the DPO. He received the responses on 19 May 2010. On 15 July 2010, the EDPS sent the draft opinion for comments to the controller. He received the comments on 28 July 2010.

2. The facts

The EESC has drafted a decision concerning the procedures for dealing with psychological and sexual harassment at work within the EESC Secretariat. The treatment consists in particular in listening to individuals who feel they are victims of harassment, the creation and storage of a file containing the contact information of the persons concerned (alleged victim and alleged harasser), the date on which the procedure was started and dates of subsequent meetings. This file can contain notes taken during meetings as well as e-mail messages or any other document related to the case in question submitted by the persons concerned.

This procedure is divided into an informal and a formal procedure. However, the opinion will not make the analysis of the formal procedure that falls into the scope of "administrative inquiry and disciplinary procedures" prior checking opinion which has already been issued¹.

Detailed description of the processing

The presumed victim of harassment may take the following steps:

- (i) informal procedure
 - consult one of the members of the harassment panel;

¹ Case 2008-569 - EDPS opinion issued on 9 November 2009 - see EDPS website.

- consult the harassment panel;
 - request the intervention of their hierarchical superiors;
 - ask the Administration to provide for mediation.
- (ii) formal procedure
- make a request to the Appointing Authority to investigate a case of harassment.
- Consulting the harassment panel or one of its members.

Persons who feel they are victims of psychological or sexual harassment may consult the harassment panel or one of its members. The panel is made up of three persons: one member appointed by the Administration, one member appointed by the Staff Committee, and one member appointed by the Administration and the Staff Committee by mutual agreement.

The role of the harassment panel consists in listening actively, and in complete confidentiality, to persons who feel they are victims of harassment, as well as to any other person involved in a conflict which appears to constitute harassment (alleged harasser, colleagues, witnesses). Members of the harassment panel could be contacted individually; however, the opinion of the panel as a college shall be needed to forward a case to other people concerned by the procedure. For those persons who feel that they are victims of sexual harassment, the panel shall provide an initial point of contact and support. They may direct the reported victim to the medical service or the Director of Human Resources and Internal Services in order to put an immediate stop to a situation.

Members of the harassment panel are authorised to keep a record of names of the people who have consulted them, as well as the dates of their visits. This data, after being rendered anonymous, shall be used for activity reports and statistical purposes. With the interlocutor's prior consent the panel is allowed to take notes during a consultation. The harassment panel members create and store a file containing the contact information of the persons concerned (alleged victim and alleged harasser), the date on which the procedure was started and dates of subsequent meetings. This file can contain notes taken during meetings as well as e-mail messages or any other document related to the case in question submitted by the persons concerned.

- Intervention of hierarchical superior

Persons who feel that they are victims of harassment can refer a case of alleged harassment to their hierarchical superior, requesting the latter's assistance in resolving the situation. If the alleged harasser happens to be the hierarchical superior him or herself, the presumed victim may directly address the immediate superior authority.

- Mediation

A case of harassment may be the subject of mediation, to which the parties involved have to give their consent. Mediation can be provided by:

- (i) the harassment panel, or;
- (ii) by an external psychological adviser, requested by the person concerned via the administration or by the harassment panel, when the complexity of the case justifies this and with prior consent of the alleged victim of harassment or by the alleged harasser.

The mediator's task must be performed with objectivity and neutrality, and the mediating party is bound by secrecy. The information provided to the mediator is considered as confidential. Such information may be divulged only with the explicit consent of the person

concerned, in particular the person who feels the victim of harassment or, where appropriate, the alleged harasser. The mediator may inform the Appointing Authority that there is a problem in a service, and shall draw the Appointing Authority's attention to cases deemed especially serious, as well as recurrent cases when different persons complain against the same individual.

- Request to the Appointing Authority

Anyone who feels he/she is the victim of psychological or sexual harassment is also free from the beginning to start a formal procedure by making a request to the Appointing Authority for assistance, under article 24 of the Staff Regulations. Passage to the formal procedure shall automatically mean closing any informal procedure underway. The Appointing Authority shall examine the request in accordance with the provisions of the Staff Regulations in force and decide on the appropriate measures to take, possibly by conducting an administrative investigation with a view to establish the facts related to the request for assistance.

- Measures in urgent situations

In urgent cases, the Appointing Authority, on its own initiative, at the suggestion of the harassment panel, the mediator or at the direct request of one of the parties concerned, may take any steps it feels necessary in the interest of the service and taking into consideration the interests of the parties involved. These measures may include a temporary reassignment of the presumed victim or alleged harasser within the Committee and may be undertaken at any point during the informal or formal procedures. They shall not in any way constitute recognition of an act of harassment, but shall serve as precautionary measures aimed at putting an end to a given situation.

Category of data subjects

Potentially concerned are all the persons working in the EESC: officials, temporary agents, contractual agents, special advisors, seconded national experts, trainees.

Concerning the informal procedure, it is important to note that this applies only to the personnel covered by the Staff Regulations or by the Conditions of employment of other servants of the European Communities as well as seconded national experts, special advisers, and trainees. Other persons not subject to the Staff Regulations or the Conditions of employment of other servants of the European Communities wishing to file a complaint of harassment against any member of the EESC staff may resort to national legislation. However, these persons can in parallel inform the EESC Appointing Authority about the fact pertaining to their complaint.

Category of data

All data relevant to the handling of a case of alleged harassment are likely to be subject to processing under this procedure. With the interlocutor's prior consent the panel is allowed to take notes during a consultation. The following is a non-exhaustive list of personal data of persons involved in a case of alleged harassment that can be processed: identification data; administrative data; data on the health status of persons concerned; claims, statements, information on cases treated coming from the alleged victim, the alleged harasser, witnesses or persons involved in other capacities; documents that the person consulting a member of the harassment panel wishes to submit, provided that the latter considers these documents to be necessary for the performance of his/her mandate; dates of consultations with a member of the harassment panel; stages of potential mediation efforts.

Information given the data subjects

Together with the adoption of the decision concerning the procedures dealing with psychological and sexual harassment at work within the EESC Secretariat mentioned in point 11 of the present notification, a separate Declaration on the protection of personal data within the framework of an informal procedure for handling cases of alleged psychological harassment (Privacy statement) will be published on the Intranet website dedicated to this topic. This statement clearly indicates the Controller of the data processing, the purposes of the processing, the description of the data processed, the procedures for accessing and rectifying data, the data recipients, as well as the retention periods of data in accordance with this notification.

Rights of data subjects

Data subjects can exercise their right to access the information or documents relating to them and to update or rectify factual mistakes at any given time at a simple request to the harassment panel or the data controller. All data subjects shall be able to access the documents they have themselves transmitted. Access to any other document will only be granted if this document does not contain personal data relating to other persons or confidential statements, or if there is no risk that its transmission may negatively affect one of the parties involved in the case, the smooth running of the procedure or future relations between the parties.

The alleged harassers are only directly informed of the rules for the processing and storage of the data if and when the alleged victim has given his/her prior consent. This exception is based on the need to guarantee the protection of the alleged victim (Article 20(1)(c) of Regulation 45/2001). However, if at the end of the intervention of the harassment panel, the alleged victim still refuses that the alleged harasser be informed of the informal procedure involving him/her, all data related to that person will be erased from the record and no element that could reveal the identity of this person will be kept by any member of the harassment panel.

Storage media of data

The data is stored in paper format in a binder. This binder is kept in a locked cabinet in the office of the respective harassment panel member.

Recipients to whom the data might be disclosed

In the informal procedure the data is only transmitted to the competent authorities in cases of harassment (members of the harassment panel, the harassment panel, external psychological adviser performing mediation, the hierarchical superior, the Appointing Authority) and with the consent of the person concerned. All information provided to the harassment panel or its members individually in the course of their work shall be considered as confidential, even after informal or formal procedures have been closed. Such information may be divulged only in the context of procedures relating to harassment, and with the explicit consent of the person concerned. The harassment panel shall, however, draw the Appointing Authority's attention to cases deemed especially serious, general problems existing in certain services, and to recurrent cases when different persons complain against the same individual.

As part of a formal and/or legal procedure, personal data may be transmitted to the Civil Service Tribunal, the European Court of Justice, and the Appointing Authority of another EU institution.

Retention period

Members of the harassment panel may keep a record for a period of 5 years. If at the date of the expiration of the initial 5 years there are ongoing legal or administrative proceedings, which may necessitate their consultation, records shall be kept until the rights for appeal expire. After being rendered anonymous, data can be used for activity reports and statistical purposes, as well as for monitoring and evaluating the implementation of the anti-harassment policy.

Security measures [...]

3. Legal analysis

3.1. Prior checking

Regulation (EC) No 45/2001 (hereinafter referred to as "the Regulation") applies to data processing activities by Community institutions and bodies. It applies to the data processing activities by the EESC in the context of procedures for treating psychological and sexual harassment. The processing of data 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 former "Community body" in the exercise of activities which fall within the scope of former "Community law".

The personal data collected undergo "manual processing" operations where personal data form part of a filing system, as stated under Article 3(2) of the Regulation. The notes taken by the members of the panel are collected during an "informal" procedure. This informal procedure is nevertheless institutionalised and personal data are structured and accessible following specific criteria and therefore also form part of a filing system. Therefore, Regulation No 45/2001 is applicable.

Article 27 (1) of the Regulation 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. This list includes Article 27 (2) (b): "processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct" and processing of data relating to health (Article 27(2)(a)). The procedure at stake falls under Article 27(2)(b) as it is designed to assess one's conduct under the procedure for dealing cases with harassment. 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.

The EESC has already submitted a notification for prior checking related to moral and sexual harassment (EPDS file 2008-478) which was withdrawn as the new draft decision will repeal and replace the procedures for handling cases of psychological and sexual harassment contained in Decision 398/02 A of 13 November 2002.

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. Any recommendations made by the EDPS must be fully taken into account prior to the collection and subsequent processing of personal data.

The notification of the DPO was received on 4 May 2010. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 5 July 2010. The prior checking procedure has been suspended for a period of 15 days + 13 days for comments. Thus, the Opinion should be rendered not later than 2 August 2010.

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 implementation of the informal procedure for handling cases of psychological and sexual harassment is established on the basis of Articles 1 and 31 of the Charter of Fundamental Rights of the EU and of Articles 12, 12a, 24 and 86 of the Staff Regulations and of Article 11 of Conditions of employment of other servants of the European Communities.

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

- it is mainly based on Article 12(a) of the Staff Regulations and the informal procedure implementing it, which are clearly *legal instruments adopted on the basis of the Treaty*.
- 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 as *necessary* for creating a good working environment, and

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

The legal basis and the lawfulness of the processing operation are therefore appropriate and clear. See point 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 EESC may involve in the informal procedure 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. The

possibility that persons provide sensitive data when requesting the assistance of the harassment panel members, the hierarchical superior or an external psychological adviser can not be excluded. If this occurs, it should be considered that candidates have given their express consent to the processing of that data, so that the condition of Article 10(2)(a) would be met.

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 EESC 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 EESC 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 presence of categories of personal data in the file depends on the particular case in question. That is why it is crucial that the persons involved in the procedure make in 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.

Concerning this informal procedure, the EDPS will first distinguish two types of data. Data qualified as "hard data" collected (contact information of the persons concerned, administrative data, dates of visits) and the data qualified as "soft data" collected through the personal note of the people in charged of the mediation. Hard data are considered as objective data whereas soft data must be considered as subjective data as they are based on "subjective" perception of individuals. This distinction will also play a role in the exercise of the right of rectification of the data subject (see point 3.7 below).

The collection of soft data does not follow systematic rules as to the type of data processed; it is not possible to determine a priori the type of data collected. This does not mean that the collection may be random. The data collected by the people involved in the procedure must be adequate, relevant and not excessive in relation to the fight against harassment. This analysis must be conducted on a case by case basis by those people involved.

Therefore, the EDPS recommends that the principle of Article 4.1.c is reminded to all persons involved in the procedure.

The EDPS welcomes that the data collected for statistical purpose are provided with appropriate safeguards and in particular that the data are kept in anonymous form only (see conservation of data below).

Article 4(1)(d) provides that personal data must be accurate and, where necessary, kept up to date. As for the informal procedure, the requirement of accuracy cannot appertain to the facts brought by the alleged victim (or alleged harasser) - part of the notes is based on the subjective perception of the data subject - but to the fact that these specific facts have been brought by the data subject. In this regard, the right of access and rectification of the data subject enable individuals to control whether the data held about them reflect the facts they wanted to transmit and, in that sense are accurate (see also point 3.7).

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).

Members of the harassment panel may keep a record for a period of 5 years. If at the date of the expiration of the initial 5 years there are ongoing legal or administrative proceedings, which may necessitate their consultation, records shall be kept until the rights for appeal expire. After being rendered anonymous, data can be used for activity reports and statistical purposes, as well as for monitoring and evaluating the implementation of the anti-harassment policy. Thus, it complies with Article 4.1.e.

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*".

In the light of Article 7(1) of the Regulation, the EDPS is satisfied that in the informal procedure the data is only transmitted to the competent authorities in cases of harassment and especially with the explicit consent of the person concerned. On the other hand, the EDPS stresses that in case it is decided to 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 the controller should carefully consider the requirements of Article 7 of Regulation 45/2001.

Personal data might be transferred to national authorities for investigation. Should it be the case, the EESC should comply with Article 8 of Regulation 45/2001.

EESC must also ensure that the recipients process the personal data only for the purposes for which they were transmitted, in compliance with Article 7(3) of the Regulation. This is particularly important due to the sensitive nature of the data part of which is soft data as explained in the point 3.4.

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. 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).

If the EESC seems to comply with Articles 13, 14 and 20 of the Regulation, the EDPS nevertheless recommends that the exception of Article 20 is interpreted restrictively and being is on a case by case basis, if necessary after the consultation of the DPO. The EESC must in any event take into account and comply with Article 20.3 which states that "if a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the EDPS".

Article 20.4 must also be taken into account: "If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made." The right of indirect access will come into play when, for instance, the data subject has been informed of the existence of the processing operation, or is aware of it, but has a restricted right of access under Article 20.

Moreover the EDPS recommends that the potential whistleblowers are taken into account in particular with respect to the confidentiality of their identity (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".

As to the right of rectification, the EESC should distinguish hard data and soft data in granting the right of rectification. If inaccurate hard data should be rectified following Article 14, the notion of inaccurate soft data, as explained above, refers to the fact that specific statements have been made by the data subject. In the case of soft data, the data subject may also ask to add his/her opinion to the file to ensure the completeness of the file in accordance with Article 14. The right of rectification should be granted as described above.

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 harassment panel members or the psychological adviser 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.

In order to comply with this obligation, the EESC has drafted a "Declaration on the protection of personal data within the framework of an informal procedure for dealing with psychological and sexual harassment at work" that will be published on the dedicated Intranet website and which includes all the information necessary to comply with Articles 11 and 12. The EDPS recommends that the reference to the right of verification is corrected by the right of rectification.

The EDPS also recommends that this note is also given to the data subject concerned when starting a case. The alleged harasser is informed when the mediation attempts to reach an amiable solution. The same information must be given to witnesses and others involved.

Article 20 of the Regulation, discussed above (see point 3.7), provides for certain restrictions to the right of information, in particular where necessary to safeguard "(...) (c) the protection of the data subject or of the rights and freedoms of others". It may be necessary in certain cases not to inform the data subject (alleged harasser) in order to not prejudice the operation of the procedure. As has been stated, in the case in point an alleged harasser is informed by the panel, with the prior consent of the victim, of the existence of an informal procedure relating to him (exception intended to protect the victim). In case the victim does give his/her consent, attention has to be given to the application of Article 20.1.c.

Article 20.5 must also be applied in specific circumstances: "Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect".

3.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor 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. On the basis of the available information, the EDPS does not have any indication suggesting that EESC would not have applied the security measures required in Article 22 of the Regulation.

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 harassment panel 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 of the following recommendations:

1. the principle of Article 4.1.c has to be reminded to all persons involved in the procedure.
2. the controller should carefully consider the requirements of Article 7 of Regulation 45/2001.
3. 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.
4. the data controller should comply with Article 8(a) of Regulation 45/2001 with regard to possible transfers data to national authorities

5. the exception of Article 20 has to be interpreted restrictively and to be applied on a case by case basis and if necessary after the consultation of the DPO
6. the confidentiality of whistleblower's identity should be guaranteed during the investigations and they should also benefit from the rights of access and rectification.
7. the mention of the right of verification in the privacy statement is to be corrected by the right of rectification.
8. the privacy statement should also be given to the data subject concerned when starting a case. The alleged harasser should be informed when the mediation attempts to reach an amiable solution. The same information must be given to witnesses and others involved.
9. all members of the harassment panel have to sign a specific confidentiality declaration and their attention has to be drawn to the delicate nature and sensitivity of personal data they will deal with.

Done at Brussels, 28 July 2010

(signed)

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