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Guidelines concerning the processing of personal data during the selection of confidential counsellors and the informal procedures for cases of harassment in European institutions and bodies

INTRODUCTION

These guidelines (“**Guidelines**”) are issued by the European Data Protection Supervisor (“**EDPS**”) in the exercise of the powers conferred on him in Article 41 (2) of *Regulation (EC) No 45/2001 on the protection of personal data by European institutions and bodies*¹ (“**the Regulation**”).

Article 12 (a) of the **Staff Regulations** provides that *"Officials shall refrain from any form of psychological or sexual harassment"*². Institutions and bodies must set up procedures to prevent harassment and to guarantee a work environment free of any form of psychological or sexual harassment among their staff. In this respect, institutions and agencies set up informal anti-harassment procedures which involve the intervention of confidential counsellors. Any formal investigation on a harassment case dealt with in the frame of disciplinary procedures is not the object of the Guidelines. Indeed, the formal procedure falls into the field of "classic" administrative inquiries and Guidelines have already been issued by the EDPS on this theme³. The scope of these guidelines is therefore limited to **the informal procedure and to the selection of confidential counsellors**. To the extent that the European institutions and bodies may process personal data relating to identified or identifiable persons in anti-harassment procedures put in place, they are subject to the respect of the Regulation as an instrument of primary legislation.

The content of the Guidelines is based on the ten EDPS Opinions issued so far regarding the selection of confidential counsellors and the conducting of the informal procedure in cases of harassment (see annex). The objective is to present in a **clear and concise way the outcome of the EDPS positions and recommendations** regarding each fundamental principle of the Regulation and to underline particular issues.

¹ Regulation 45/2001 of 18 December 2000 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, OJ L 8, 12.01.2001, p. 1.

² Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ P 45, 14.6.1962, p. 1385).

³ Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European institutions and bodies, 23 April 2010

Processing operations involving personal data in informal anti-harassment procedures are subject to prior-checking in conformity with Article 27(2) (b) and possibly (a) of the Regulation, since they involve:

- for the *selection of confidential counsellors*, an evaluation of the applicants' ability to perform the function, and possibly processing operations related to health;
- for the *informal procedure*, an evaluation of the data subjects' conduct and possibly processing operations related to their health.

The Guidelines should serve as basis for notification for institutions and bodies which have not notified their procedure, and provide for guidance to those which have. Procedures may slightly vary from the one described below. If doubts arise as to the application of the data protection principles, this should be reflected in the cover letter attached to the notification.

The EDPS recommends to:

- **Use the Guidelines as a practical guidance when dealing with processing of personal data relating to harassment;**
- **When notifying anti-harassment processing operations, make "Article 27 notifications" clear, precise and as complete as possible in the light of the issues raised in the Guidelines and of the document providing instructions for completing the notification Article 27, available on the EDPS website⁴;**
- **Attach a cover letter to the notification describing the discrepancies in terms of data protection.**

The selection of confidential counsellors is not compulsory; certain institution do not develop a specific role of counsellor in their procedure.

The **data processing operations** which take place in the context of *selecting and appointing confidential counsellors* can be summarized as follows.

Further to the receipt of applications, the eligibility of the candidates is checked by the dedicated staff (usually from the HR Department). A selection panel/jury assesses then the eligible candidates during personal interviews. The appointing authority (usually the Director) finally accepts or rejects proposed appointments; a reserve list may be elaborated. Laureates may be asked to attend compulsory training modules. The final list of confidential counsellors is circulated to all staff and specifies information which may be of interests for the alleged victim's selection of a counsellor (gender, nationality, spoken languages, etc.).

The data processing operations which take place in the context of the *informal procedure* can be summarized as follows.

Individuals which consider themselves as a victim of psychological or sexual harassment may request for assistance by contacting a confidential counsellor of their choice, or the Human Resources who will recommend them to the network of confidential counsellors. The role of the counsellor is first dedicated to listen to the alleged victim. Secondly, if necessary and with the consent of the alleged victim, a mediation is launched so as to reach an informal agreement between the parties. In

⁴http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Priorchecks/11-02-08_Notification_form_EN.pdf

case of failure of conciliation, the alleged victim may engage in a formal procedure. The data are contained in the personal notes of the confidential counsellors (including all documents relevant for the case) and in possible opening and closure forms (including data such as reference numbers, date of first contact and further meetings, closing date, type of issue, contacts with other departments, reasons given for complaint or actions undertaken).

GUIDELINES

1. Lawfulness of the processing operation

Pursuant to the Regulation, any processing of data which relates to an identified or identifiable person must find a legal basis in Article 5 to be considered as lawful. As for the selection of confidential counsellors and the informal procedure, two specific legal bases could be considered as relevant, paragraph (a) and complementary paragraph (d).

*Article 5 (a)*⁵ stipulates two elements to be taken into account to determine whether the processing operations comply with the Regulation:

- 1) First, whether the fight against harassment is a task carried out in *the public interest on the basis of the Treaty or other legal instruments adopted on the basis thereof*;
- 2) And second, whether the processing operations are indeed *necessary for the performance of this task*.

1) As far as the **first** element is concerned, the specific legal basis for the selection of confidential counsellors and for them to conduct the informal procedure will usually be found in **Article 12 (a)**⁶ of the **Staff Regulations** and **Article 11**⁷ of the **Conditions of Employment of Other Servants** (hereinafter "**CEOS**"⁸). In addition, **Articles 1 and 31 (1) of the EU Charter of Fundamental Rights** complement the

⁵ Article 5(a) of the Regulation stipulates that personal data may be processed only if the "processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instrument adopted on the basis thereof, or in the legitimate exercise of official authority vested in the institutions or bodies." Recital 27 of the Regulation further specifies that this "includes the processing of personal data necessary for the management and functioning of those institutions and bodies".

⁶ Article 12(a) of the Staff Regulations stipulates:

(§1) "Officials shall refrain from any form of psychological or sexual harassment".

(§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."

⁷ Article 11 of the CEOS stipulates:

(§1) The provisions of Articles 11 to 26 of the Staff Regulations, concerning the rights and obligations of officials, shall apply by analogy.

⁸ The Civil Service Tribunal has interpreted "legal instrument" as any act of normative value (see *Vinci v. ECB*, F-130/07, §119).

legal basis. The Charter states that every worker has the right to working conditions which respect his or her dignity.

The two procedures under analysis are usually put in place to combat psychological and sexual harassment, a task obviously carried out in the public interest of every European institution or body. The processing operations put in place therefore contribute to their management of resources and functioning of the institution.

The Staff Regulations define psychological and sexual harassment and prohibits such behaviour. However, on this basis the procedure ensuring working conditions free from harassment needs to be developed by each institution or body.

The EDPS enjoins the institutions and bodies to:

- **Further detail the modalities of both procedures in more specific rules of normative value (policy, communication, decision), restrictively applicable to their internal staff.**

2) As far as the **second** element is concerned, the necessity of the processing of personal data has to be evaluated in the light of their purposes, on a case by case basis. As regard harassment, processing operations supporting the procedure for the protection of the dignity of the person and the prevention of psychological and sexual harassment can be regarded as necessary, for example, in order to create a good working environment.

Article 5(d) can be seen as complementary legal basis of the processing of harassment related data, according to which the processing must be based on the "*unambiguous consent*" of the data subject. In the terms of Article 2(h) of the Regulation, the data subject's consent is "*any freely given specific and informed [...] agreement*".

Finally, in rare circumstances the processing operations can be considered lawful if they are necessary to protect the vital interests of the data subject (article 5(e) of the Regulation).

2. Processing of special categories of data

The Regulation provides for specific rules for categories of data considered by their nature of infringing fundamental rights and freedoms. Article 10(1) of the Regulation establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*". The prohibition is lifted if justifying grounds can be found in Articles 10(2) or 10(3) of the Regulation.

In cases of harassment, the intention of the European institutions or bodies concerned is usually not the collection of special categories of data.

However, during the *selection of confidential counsellors*, the possibility that applicants provide for sensitive data in their application forms and/or any other

attached documents (especially CV or motivation letter) cannot be excluded, this possibly without any data having been requested.

Article 10(2)(a) of the Regulation permits the processing of special categories of data where "*the data subject has given his/her consent to the processing of such data*". In case of spontaneous communication of sensitive data, it should be therefore considered that candidates have given their express consent to the collection of these data and to their further processing.

Example

When motivating his/her application to the function of confidential counsellor, the candidate reveals for example that:

- *he/she has been himself/herself harassed because of his/her sexual orientation,*
- *he/she has been himself/herself harassed because of his/her handicap.*

Likewise, as regard the ***informal procedure***, processing of data concerning health or sex life of the data subjects for instance cannot be excluded during the collection of information by the confidential counsellor.

Article 10(2)(b) of the Regulation states that the processing of special categories of data may be justified if "*necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorized by the Treaties or other legal instruments adopted thereof*". The legal basis which is relevant in the case (Article 12(a) of the Staff Regulations) imposes an obligation on the European institutions and bodies to prevent harassment and to guarantee a work environment free of any form of psychological or sexual harassment among their staff. Therefore, the processing of special categories of data can be regarded as necessary for complying with this obligation, inasmuch as those data are relevant for the case.

Article 10(2)(a) of the Regulation detailed above may also be relevant when the alleged victim or harasser, or other witnesses and third parties, requesting assistance or providing information, possibly provide sensitive data without having been requested to. In this case, it should be considered that they have given their express consent to the processing of these data.

Article 10(2)(a) and (b) being exceptions to a more general prohibition, they must be interpreted strictly. Thus, the processing of sensitive data is permissible only in so far as it is relevant for the specific purposes described above. Second, as the data processing has to be necessary, there are additional constraints when applying Article 4(1)(c) of the Regulation, as will be explained in the point 3 on data quality below.

3. Data quality

Adequacy, relevance and proportionality. According to Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they have been collected and/or further processed*".

As regard the ***selection of confidential counsellors***, the immediate purpose of collecting data on candidates is to best evaluate their aptitude and competences,

regarding the specific tasks as confidential counsellors to conduct informal procedures in cases of harassment. The data collected must reflect the specific nature of their function.

The EDPS therefore recommends to

- **Adopt selection and eligibility criteria in order to guarantee the principle of data quality.**
- **Present these criteria explicitly in the call for interests.**

As regard the *informal procedure*, the EDPS first distinguishes between:

- Data qualified as "**hard**" or "objective", i.e. administrative and identification data, usually collected directly from the data subjects (possibly by means of opening and closing forms). The collection of "hard" data aims at the identification of the person, the management of historical records and most importantly at the identification of recurrent and multiple cases.

- Data qualified as "**soft**" or "subjective", i.e. allegation and declaration based upon the subjective perceptions of data subjects, usually collected by means of the personal notes of the counsellors.

The distinction between "soft" and "hard" data will also play a role in the exercise of the right of rectification of the data subject (see point 6 on rights of access and rectification below).

The selection of hard data the collected through the forms and communicated to the HR should therefore allow the identification of recurrent and multiple cases and should not be excessive in relation to that purpose.

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 counsellors 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 the counsellors.

As regard the collection of both data, the EDPS enjoins the institutions and agencies to:

- **Ensure that the "hard" data collected in the forms are adequate, relevant and not excessive in relation to the purpose of their collection (the management of historical records and most importantly at the identification of recurrent and multiple cases). This necessity test should be re-evaluate in a few years time in relation to the purpose.**
- **Guarantee the respect of the principle of data quality during their collection; the counsellors should conduct his/her analysis on a case by case basis.**

Lastly, with regard to the possible collection of data for statistical purposes (through a statistical report/form), the EDPS insists on the nature of the data collected; they should not allow the identification of the data subject. Indeed, the ability of identifying data subjects might arise for example by means of statistical inferences, especially within small European entities.

The EDPS recommends:

- **To prove the necessity of collecting each single data for statistical purposes in advance.**
- **In any events, to keep data collected for statistical or historical purposes in anonymous form only (see point 4 on conservation of data below).**

Accuracy and Update. According to Article 4(1)(d) of the Regulation, personal data must be “*accurate and where necessary kept up to date*”, while “*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.*”.

As to the ***selection of confidential counsellors***, the system itself ensures the accuracy and the update of the data. Data subjects supplying voluntarily most of the data during the selection process, it is to be assumed that the candidate considers that his/her data are accurate. However, other information is not provided directly by the individual but generated by the selection panel. In this regard, as further developed below, it is important for the data subjects to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data held about them is accurate.

As for the ***informal procedure***, the requirement of accuracy cannot appertain to the facts or subjective perception provided by data subjects (so called "soft" data), but to the fact that a statement has been made by the data subject and rightly annotated. In this regard, effective rights of access and rectification of the data subject enable individuals to control whether the data reflect the facts and perceptions they wanted to transmit and, in that sense, whether these are accurate and as complete as possible (see also point 6 on the right to access and rectification below).

4. Conservation of data

Pursuant to Article 4(1)(e) of the Regulation, 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*”.

The EDPS invites institutions and bodies to:

- **Settle a specific retention period in compliance with Article 4(1)(e) taking into account that: (i) a shorter time limit should be adopted for non selected counsellors (for instance a limited period of time during which it is possible to challenge the data or the decision taken on the basis of the data for the non-selected persons); (ii) any further data required for**

statistical purposes should be kept in an anonymous form in the light of Article 4(1)(e) of the Regulation.

As regard the *informal procedure*, data are usually stored by the HR Department as well as by the confidential counsellors.

The EDPS recommends to:

- **To set beforehand precisely the time they are allowed to keep the data, in particular after the closure of the harassment case.**
- **To ensure that data stored for a longer period (usually for statistical purposes) are kept in anonymous form only, following Article 4(1)(e) (see point 3 on data quality above).**

5. Data transfer

Articles 7, 8 and 9 of the Regulation set forth certain obligations which should apply when data controllers transfer personal data to third parties. Transfers of harassment related data might take place, first, within or between different EU institutions or bodies (internal transfers: Article 7); and second, between EU institutions or bodies and third recipients (external transfers: Article 8 and 9). In the latter case it has to be determined whether the recipient is subject to national law adopted pursuant to Directive 95/46/EC or not⁹.

5.1. Internal transfers

Internal transfers are in accordance with the Regulation if they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*" (Article 7(1) of the Regulation).

As to the *selection of confidential counsellors*, personal data may be transmitted to the services of internal audit, to the Court, to the European Ombudsman or to the EDPS.

The EDPS underlines that transfers of data should only be based on Articles 7 and 8 and not on the consent of the data subject. Therefore, the exception of Article 20(1)(c) does not apply to data transfers.

As far as **internal transfers** are concerned, *structural* (automatic), and *ad hoc* (case by case) transfers should be distinguished.

As regard specifically *the informal procedure*, with regard to cases of *structural transfers* the EDPS considers that the HR Department may also be the recipient of the data processed. Indeed, due to the sensitive nature of the informal procedure, the

⁹ For the applicable law see Article 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. See also the recent Art. 29 Opinion n. 8/2010 on applicable law, adopted on 16 December 2010 (WP 179, in http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp179_en.pdf).

counsellors' network is in charge of the core activity of the procedure whereas the HR Department plays a role of administrative support. The HR Department may therefore be considered as the recipient when receiving information from the confidential counsellors' network. These transfers to HR Department should be limited to the data necessary for the legitimate performance of their tasks (administrative support) as foreseen in Article 7(1). In this respect, only hard data should be transferred. In addition, the EDPS welcomes the involvement of a so called "contact person" or "coordinator" within the HR Department, usually in charge of the networks of the confidential counsellors and possibly of certain security facilities (keys, lock boards containing the files, list of passwords or USB sticks). Transfers of harassment related hard data to him/her are allowed under the same modalities as to the HR Department; and the same limitations apply as regard the processing of "soft" data.

The EDPS reminds institution and bodies that:

- **The HR should only provide for an administrative support to the core activity and network of the confidential counsellors as foreseen in Article 7(1) of the Regulation.**
- **In this regard, the HR might keep in its facilities the electronic or paper files containing "hard" and "soft" data, so as to safeguard best security and confidentiality of all data (see point 8 on Security).**
- **However, while processing of "hard" data by the HR is allowed so as to perform its administrative tasks, consultation and processing of "soft" data shall be excluded for reasons of confidentiality (in particular to the personal notes of the counsellors).**

Ad hoc transfers of harassment related data (be hard or soft data) may take place, for example, to the DPO, the appointing authority, the Directors (in the event of recurrent cases) or the internal audit of the European institution or body concerned. Data may also be transmitted to the Court of the European Union, the EDPS or the Ombudsman. Such transfers may be considered as legitimate if they are necessary for the legitimate execution of the tasks of those recipients. If the transfer follows a request from the recipient, then both the controller and the recipient shall bear the responsibility of the legitimacy of this transfer in accordance with Article 7 (2). The controller should verify the competence of the recipient and evaluate the necessity for the transfer of the data. If doubts arise as to the necessity, the controller shall seek further information from the recipient.

Recipients should process the data received only for the purposes for which they were transmitted (Article 7(3) of the Regulation), i.e. within the strict framework either of the selection procedure, or of the informal procedure.

The EDPS recommends that:

- **Transfer of "soft" data can not be structural (except for security and confidentiality purposes and only under the conditions explained above).**

- **In case of transfer of data, each paragraph of Article 7 must be taken into account.**
- **Compliance with Article 10 of the Regulation (see point 2 on the processing of special categories of data above) must be ensured.**
- **To take into account the principle of data accuracy (as exposed in point 3 on data quality above), as additional information might be necessary to enable the recipient to assess and/or understand the personal notes of the counsellors. Indeed, data are collected in a context where the data subject is expected absolute confidentiality. Statements of the alleged victim have to be considered as such and not as verified facts. When transferring the data this difference must be made clear to the recipient.**

5.2. External transfers

External transfers are in accordance with the Regulation if, according to Article 8, they are "*necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*" (paragraph a) or "*if the recipient established the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced*" in cases of recipients subject to national law adopted pursuant to Directive 95/46/EC (paragraph b).

As to the *informal procedure*, in exceptional circumstances, external transfers may take place, for example, when data are transferred to third actors who have to play a role in the harassment procedure (social advisors/psychologists) or to judicial national authorities. As reminded above, confidentiality plays a crucial role in the informal procedure. The necessity for transferring data must be carefully analysed beforehand, in compliance with Article 8.

The EDPS enjoins the institutions and bodies to:

- **Decide on a case by case basis the transfer of which documents (containing personal data) are relevant and necessary to the third party recipients in compliance with Article 8.**
- **Comply with Article 9 of the Directive 95/46/EC in case of transfers to recipient not subject to the same Directive.**

Example

In case the data subject needs the help of a psychologist, prefer a solution where the data subjects directly address the psychologist, rather than have a transfer of data from the European entities concerned.

6. Right of Access and Rectification

According to Article 13 of the Regulation, "*the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form*

of the data undergoing processing and of any available information as to their source" (paragraph c).

In addition, Article 14 of the Regulation provides the data subject with a *"right to obtain from the controller the rectification of inaccurate or incomplete personal data"*.

As to the *selection of confidential counsellors* specifically, the EDPS is aware that a limitation to the right of access of the data subject to the overall final assessment of the selection process is possible, in accordance with the principle of the secrecy of selection committee's proceedings¹⁰.

This principle should nevertheless be read in the light of Article 20(1)(c) of the Regulation, according to which *"The community institutions and bodies may restrict the application of [...] articles 13 to 17 [...] where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others"*.

As to the right of rectification of the data processed by the panel during its selection, it is obvious that only objective and factual data may be rectified, and not appreciations done by the members of the selection's panel as those are the result of a subjective appreciation inherent to the selection procedure.

Furthermore, Article 20(1)(c) may in certain cases also be applied to protect the right of other applicants. Indeed, in cases where comparative data is involved, the European institution or body may assess on a case by case basis whether full access to the data should be granted to the data subjects or whether certain restrictions should be applied in order to protect the rights and interests of others.

In addition, the EDPS notes that limitations to the right of rectification of candidate's data, after the deadline for the sending of documents regarding a given selection, may be necessary for different reasons, including those of a practical nature. In this regard, the EDPS considers that these limitations can be seen as necessary to ensure objective, certain and stable conditions for the selection, and as essential to the fairness of processing. Thus it can be recognized as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

The EDPS enjoins the European institutions and bodies:

- **To guarantee the right of access and rectification of the data subject;**
- **To provide the data subject with general information about the restrictions to the right of rectification (see point 7);**
- **To foresee the modalities of exercising a right to block and to erase data;**
- **To specify the duration needed for blocking or erasing personal data.**

As to the informal procedure The European institutions and bodies should distinguish objective ("hard") and subjective ("soft") data in granting the right of rectification. If

¹⁰ As set out in Article 6 of Annex III to the Staff Regulations: "The proceedings of the Selection Board shall be secret".

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.

Examples

- *The exercise of the rights of access and rectification may be ensured by the possibility given to individuals to make contact by means of a specific functional mailbox, allowing written requests and discretion.*

- *The data subject may request his/her file to be complete - i.e. he or she may request that further information such as additional evaluations (in the case of selection of confidential counsellors) or additional testimonies (in the case of the informal procedure) are added to his/her individual file.*

Article 20(1) (c) of the Regulation¹¹ provides for certain restrictions to this right, in particular where necessary to safeguard "*the rights and freedoms of an identified third party override the access of the data subject to the information*".

In this case, data subjects may have their right of access restricted.

Example

The alleged harassers may experience a limitation to his/her right of access pursuant to this provision, in order to protect the alleged victim.

Article 20.3 must also be taken into account: "*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 European Data Protection Supervisor*".

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*".

Information may be obtained directly by the data subject ("direct access") or, in other circumstances, by a public authority ("indirect access", usually exercised by an authority in charge of data protection, in the present cases by the EDPS).

¹¹ Article 20.1 (c) of the Regulation reads as follows: "*The Community institutions and bodies may restrict the application of Article 4(1), Article 11, Article 12(1), Articles 13 to 17 and Article 37(1) where such restriction constitutes a necessary measure to safeguard: (c) the protection of the data subject or of the rights and freedoms of others*".

Example

The right of indirect access will come into play, when, for instance, the data subject has been informed of the existence of the processing operations, or is aware of them, but has a restricted right of access under Article 20 of the Regulation.

Finally, Article 20.5 provides that: "*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*". It may be necessary to defer provision of information in order to protect the victim.

As a general rule to restrictions, the EDPS recommends to:

- **Examine any restriction on a case by case basis and in the light of the principle of proportionality, and if necessary after the consultation of the DPO.**

7. Information to the data subject

Articles 11 and 12 of the Regulation provide for "*certain information to be supplied to the data subjects*" in order to ensure the transparency and fairness of the processing of personal data. Article 11 is applicable if the data have been obtained from the data subject, while Article 12 foresees certain requirements in case the data have not been obtained directly from the data subject. These provisions list a series of mandatory and facultative items, for which the latter applies inasmuch as, considering the particular circumstances of the processing under analysis, they are necessary so as to ensure a fair data processing as regard the data subject.

The EDPS recommends, given the character of the data being processed, that the data controller uses adequate means to ensure the data subject receives the information.

Ideally, the information is provided in a general text (by means of general privacy statement available to all staff members, recalling the provisions of Articles 11 and 12); as well as in each specific case (to the alleged victim, and the alleged harasser if the alleged victim agrees to it).

It may be necessary in certain cases not to specifically inform the alleged harasser or to defer his/her information, in order not to prejudice the procedure (see Article 20(1)(c) of the Regulation discussed above in point 6). Article 20(5) must also applied in specific circumstances. In the case in point, an alleged harasser will usually be informed by the confidential counsellor, with the prior consent of the victim, of the existence of an informal procedure relating to him. In case the victim does give his/her consent, attention has to be given to this exception.

As regards both procedures, the EDPS recommends:

- **To provide for general information in an exhaustive privacy statement, specific to the European institution or body (including the restriction to**

the right of rectification in case of the selection of counsellors), at best published on the website or on the intranet of the entity.

- **To ensure the easy access to this statement.**
- **Provides specific information in case of a harassment procedure to the persons concerned when appropriate.**

Examples

A link to the specific privacy statement or declaration of confidentiality on the web referring to the processing of harassment related data would contribute to ensure its visibility and accessibility and to provide pro-active information. The EDPS considers such linking as a good practice.

*As for the **selection of confidential counsellors**, the link could accompany the publication of the call for interests or be joined to the application form at the disposal of the candidates.*

*As for the **informal procedure**, the link could appear on the web page informing on the network of confidential counsellors and their contact details. During the initial meeting with the confidential counsellor, the privacy statement could be given to the data subject.*

8. Security

According to Articles 22 and 23 of the Regulation, the controller and the processor must implement the appropriate technical or 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. Due to the sensitive nature of harassment related data, all processing operations therefore deserve careful consideration in the light of data protection principles. In this context the EDPS highlights the need to put in place appropriate security measures in order to effectively prevent data from being accessed by non-authorised persons. This is particularly true in cases where the confidential counsellors cannot store their personal notes in their office due to the absence of keys or lock boards. The procedure put in place should allow the confidential counsellors to store their documents in the HR Department while ensuring that the personal notes cannot be accessed by anyone else (see point 5 on transfers).

These measures should as a minimum include:

- **The verification of the security policy in place. It should cover the risks of the procedure, taking into account in particular:**
 - **the assets under protection (i.e. the paper and/or electronic files), in particular the data processing procedures related to them, and the security measures adopted;**
 - **the identification of risks and the list of the security measures adopted to mitigate these risks;**
 - **the roles and responsibilities, as well as respective access rights, of all persons involved in the processing as well as the management of the access right (the policy should also be documented).**

- **The use of codes of conduct or confidentiality declarations for all persons involved in the processing.**

Example

*The declaration of confidentiality within **the informal procedure** ideally includes:
- an emphasize on the delicate nature and sensibility of personal data the counsellors will have to deal with.*

- **The establishment of appropriate physical access control measures in all areas where paper files are processed.**

Example

*Within the **informal procedure**, all written exchanges shall be in hard copy in sealed envelopes marked "staff matters and confidential" and be delivered by hand. Paper files shall be conserved in locked cupboards, whose keys are only kept either by the confidential counsellors or the contact person/administrator in the HR Department.*

Annex: List EDPS prior checking opinions relating to the processing of harassment related data

- 1) Opinion of 29 July 2010 on a notification for Prior Checking received from the Data Protection Officer of the European Aviation Safety Agency (EASA) regarding "EASA policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment" (Case 2010-318).
- 2) Avis du 6 octobre 2010 sur la notification d'un contrôle préalable reçue du délégué à la protection des données du Comité des régions à propos du dossier "le harcèlement moral et sexuel au travail (procédure contre l'harcèlement)" (Dossier 2010-485).
- 3) Opinion of 10 February 2010 on a notification for Prior Checking received from the Data Protection Officer of the EU Agency for Fundamental Rights regarding the selection procedures for the selection of Confidential Counsellors (Case 2009-857).
- 4) Avis du 29 avril 2008 sur la notification d'un contrôle préalable reçue du délégué à la protection des données (DPD) de la Commission européenne à propos du dossier "Sélection des personnes de confiance dans le cadre de la lutte contre le harcèlement moral et le harcèlement sexuel à la Commission européenne" (Dossier 2008-060).
- 5) Opinion of 18 May 2009 on a notification for Prior Checking received from the Data Protection Officer of the European Parliament regarding "Prevention of harassment" (Case 2008-477).
- 6) Avis du 30 septembre 2008 sur la notification d'un contrôle préalable reçue du délégué à la protection des données de la Commission européenne à propos du dossier "Mise en œuvre par le service gestionnaire et le réseau des personnes de confiance de la procédure informelle de lutte contre le harcèlement moral et le harcèlement sexuel à la Commission européenne (procédure contre l'harcèlement)" (Dossier 2008-062).
- 7) Avis du 4 octobre 2007 sur la notification d'un contrôle préalable reçue du délégué à la protection des données de la Cour de justice des Communautés européennes à propos du dossier "procédure de harcèlement" (Dossier 2007-440).
- 8) Opinion of 28 July 2010 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" (Case 2010-321).
- 9) Opinion of 21 December 2010 on a notification for Prior Checking received from the Data Protection Officer of the European Union Agency for Fundamental Rights (FRA) regarding "FRA policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment" (Case 2010-722).
- 10) Opinion of 7 February 2011 on a notification for prior checking received from the DPO from EMA regarding the processing operation "listening points/informal procedure" (case 2010-598).