

Opinion on the notification for prior checking from the Data Protection Officer of the European Centre for the Development of Vocational Training concerning Staff Appraisal

Brussels, 24 May 2011 (case 2010-0620)

1. Proceedings

On 20 August 2010, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Centre for the Development of Vocational Training (**CEDEFOP**) a notification for prior checking concerning Staff Appraisal. The notification was accompanied by the following documents:

- Note to the DPO on Processing of data in connection with Staff Appraisal (Career Development Review - **CDR**) of 5th August 2010;
- General Provisions for implementing Article 43 of the Staff Regulations (CEDEFOP/DGE/9/2010 - Corrigendum) of 1st June 2010;
- Decision of the Management Board of the CEDEFOP concerning treatment of complaints under Article 90 of the Staff Regulations of 4th February 2000;
- a template of the CEDEFOP CDR 2009¹;
- Privacy statement.

The draft opinion was sent to the DPO for comments on 6 October 2010 which were provided on 18 May 2011.

2. Facts

This prior checking opinion deals with the new online staff appraisal procedure at the CEDEFOP to be deployed in 2011. It involves the automation of the workflow within the CDR module in the Livelink software², whereby an agreement or refusal of one person automatically triggers transition to the next phase of the procedure. It is accompanied with automatically generated messages inviting the next person concerned to take the appropriate action/decision³.

The purpose of the data processing within staff appraisal is to evaluate individual performance in the course of the given reporting period and in particular, the jobholder's efficiency, competences and conduct in the service.

The controller is the CEDEFOP represented by the Head of the Human Resources Service.

¹ which will be used as a template for the development of the new CDR.

² collaborative document management system used at the Agency.

³ only the workflow is automated, not the content of the respective actions.

The data subjects are officials⁴, temporary agents and contract agents of CEDEFOP who have been in active employment/leave for a continuous period of at least one month.

The following data categories are being processed within the procedure in question:

- report details (staff number of the jobholder; name, staff number and function of the reporting and countersigning officers);
- personal details of the jobholder (name; current status, category and grade; location - area/service; career history; appraisal period);
- job description;
- data related to the initial dialogue with the reporting officer (agreed objectives, assessment criteria; personal development goals leading to the training map);
- assessment data (qualitative appraisal and its summary in terms of performance levels I - V);
- final approval (countersigning officer's assessment; signatures of reporting and countersigning officers, as well as the jobholder);
- further review (countersigning officer's further review and signature);
- appeal (opinion of the Joint Committee on Appraisal and Promotion; appeal assessor's decision and signature).

The Career Development Reviews are stored in the Livelink until the jobholder or his beneficiaries have exhausted all channels of appeal after termination of service⁵. Once finalised, the CDR is printed for inclusion in the personal file which in turn is kept for eight years after the extinction of all rights of the person concerned and any of dependants, in any case at least 120 years after the birth of the person concerned.

Storage of anonymous data for historical, statistic or scientific purposes is also envisaged (to enable tracking of the performance levels evolution etc.).

Personal data processed in this context may be transferred to the following recipients:

- jobholder's hierarchical superior (in his quality as reporting officer),
- reporting officer's hierarchical superior (in his quality as countersigning officer and/or internal reviewer),
- CEDEFOP Director (in his quality as appeals assessor),
- members of the Joint Committee on Appraisal and Promotion (**JCAP**);
- members of the Appeals Committee (four CEDEFOP staff members and one external member)⁶,
- staff members in the Human Resources service dealing with appraisal procedures,
- staff members responsible for examining appeals pursuant to Article 90 of Staff Regulations and cases brought before the EU Civil Service Tribunal (**CST**),
- staff members in charge of inquiries and disciplinary proceedings,
- auditing bodies (IAS, COA, OLAF),
- EDPS,
- external contractors based in the EU assisting CEDEFOP in handling the respective court cases,
- other EU institutions or agencies in case of the jobholder's transfer.

⁴ except the CEDEFOP Director and Deputy Director.

⁵ within the meaning of Article 47 of the Staff Regulations.

⁶ two staff members appointed by the CEDEFOP Director and the CEDEFOP Staff Committee respectively, the external person appointed by the Chairman of the CEDEFOP Management Board, all in terms of Article 2 of the Decision of the Management Board of the CEDEFOP concerning treatment of complaints under Article 90 of the Staff Regulations.

The specific Privacy statement that will be made directly accessible on the "staff appraisal - CDR" module home page contains the following information:

- identity of the controller,
- purpose of the processing,
- categories of data processed (factual identification data and evaluation data),
- data recipients,
- existence of rights of access and rectification (and its limitations),
- legal basis of the processing,
- some information related to the data retention period,
- right to have recourse to the EDPS.

Information about purpose of the processing, the CDR timetable and the process in Livelink will also be provided in the administrative notice published on the CEDEFOP Intranet.

All data subjects have access to their respective CDRs stored in the Livelink CDR module and in the respective personal file⁷. Rectification of factual identification data in the CDRs is possible upon an e-mail request to the controller (Human Resources service).

(...)

3. Legal aspects

3.1. Prior checking. The processing of personal data for the purpose of staff evaluation within the CDR module in Livelink by the European Centre falls within the scope of Regulation 45/2001.

It is subject to prior checking by the EDPS pursuant to its Article 27(2)(b) since it is clearly intended to evaluate ability, efficiency and conduct of the data subjects.

The notification of the DPO was received on 20 August 2010. 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 224 days to allow for provision of comments on the draft opinion. Therefore, the present opinion must be delivered no later than on 2nd June 2011.

3.2. Lawfulness of the processing. The legal basis for the staff appraisal procedure at CEDEFOP can be found in the following provisions:

- Article 43 of the Staff Regulations,
- Articles 15(2) and 87(1) of the Conditions of Employment of Other Servants (CEOS),
- CEDEFOP General Provisions for implementing Article 43 of the Staff Regulations of 1st June 2010 (Cedefop/DGE/9/2010 - Corrigendum),
- Decision of the Management Board of the CEDEFOP concerning treatment of complaints under Article 90 of the Staff Regulations of 4th February 2000.

The respective processing of personal data is also necessary for the performance of a public interest task in terms of legal instruments adopted on the basis of the Treaties. Thus, it is lawful in accordance with Article 5(a) of Regulation 45/2001 (read together with its recital 27).

3.3. Processing of special categories of data. In the context of the present procedure, data revealing trade union membership spontaneously provided in the self-assessment may be

⁷ pursuant to Article 26 of the Staff Regulations.

processed. Such processing could be justified in terms of Article 10(2)(a) of Regulation 45/2001 since it would be based on an express consent of the data subject.

3.4. Data quality. Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate.

As to the proportionality of the data processed, the EDPS notes that the factual identification data, as well as evaluation data referred above are considered necessary for the accomplishment of the evaluation procedure. Thus, Article 4(1) (c) of the Regulation is being complied with.

The accuracy of the data processed is partly ensured by the nature of the evaluation procedure itself. In addition, the invitation to make use of the rights of access, rectification and/or appeal helps to ensure that the processed data are accurate and kept up to date (cf. point 3.7 in detail).

Lawfulness of the data processing has been already discussed (cf. point 3.2), whereas fairness has to be assessed in the context of information provided to data subject (cf. point 3.8).

3.5. Data retention. According to Article 4(1)(e) of Regulation 45/2001, personal data may be kept in a form enabling the identification of data subjects for no longer than necessary for the purposes for which they were collected or further processed. Further storage of data for historical, statistical or scientific purpose is possible in anonymous form only.

As to the data retention policy applicable in the present case, the EDPS notes the following:

- the time limit for storage of personal data in Livelink has been established in relation to the possible appeal channels available to the data subjects or their beneficiaries (internal review and appeal, Article 90(2) complaint, as well as appeal to the CST);
- the time limit for storage of finalised CDRs' paper copies in personal files has been set in accordance with the Common Conservation List⁸;
- further storage of data for historical, statistical or scientific purposes can take place in anonymous form only.

Therefore, the EDPS is of the opinion that compliance with the Regulation is fully ensured in this respect.

3.6. Transfer of data. The internal and inter-institutional data transfers mentioned above are subject to Article 7 of Regulation 45/2001. They should be necessary for legitimate performance of the task covered by the competence of the particular recipient who could process the data only for the purposes for which they were transmitted.

The EDPS notes that the transfers to the jobholder's hierarchical superiors, other competent CEDEFOP staff members, as well as competent staff members of other EU institutions or agencies are considered necessary for accomplishment of the respective staff appraisal procedure, including possible review. The transfers to the respective auditing bodies, as well as EDPS are considered necessary for the execution of the particular supervisory task.

The compliance with Article 7(1) of the Regulation being ensured, the EDPS just recommends that all internal recipients are reminded of the purpose limitation set out in Article 7(3) of the Regulation.

⁸ addressed in the EDPS Comments on the CCL of 7 May 2007 - cf. Common Commission-Level Retention List for European Commission Files of 4 July 2007 - SEC(2007)970.

The transfers to the external contractors assisting CEDEFOP in handling the respective court cases, as well as to the external member of the Appeals Committee are subject to Article 8 of Regulation 45/2001.

The transfers to the external contractors are considered necessary for the efficient handling of court cases on behalf of CEDEFOP, thus in full compliance with Article 8(a) of the Regulation (cf. also point 3.9 below).

The transfers to the external member of the Appeals Committee are considered necessary for the accomplishment of the review phase of the staff appraisal procedure. Also, there is no reason to assume that the data transfers to the Appeal Committee may in any way prejudice the legitimate interests of the data subjects. They are therefore fully in line with Article 8(a) and (b) of the Regulation.

3.7. Right of access and rectification. Articles 13 and 14 of Regulation 45/2001 provide for data subject's rights of access and rectification with respect to their personal data processed.

As indicated above, all data subjects have access to their respective CDRs stored in the Livelink CDR module and in the respective personal files. Rectification of factual identification data in the CDRs is possible upon an e-mail request to the controller. Rectification of evaluation data is not possible, but data subjects can add "additional comments" at every stage of the CDR procedure and/or request a review⁹.

The EDPS acknowledges that the right of rectification has to be limited to the factual data given the subjective nature of evaluation data processed. He also welcomes the possibility given to data subjects to add comments about the evaluation data processed. Therefore, he is of the opinion that the Regulation is duly complied with.

3.8. Information to the person concerned. The EDPS acknowledges that all information required in terms of Article 11 and 12 of Regulation 45/2001 is already provided for in the Privacy statement as referred above. The compliance with the Regulation is fully ensured in this respect.

3.9. Processing on behalf of the controller. As indicated above, external contractors may be involved in processing of personal data in connection with staff appraisal at CEDEFOP, notably when providing legal assistance with handling of CDR related court cases. In fact, these contractors may be processing personal data on behalf of the CEDEFOP who would determine the purposes and means of the actual data processing (Article 2(d) and (e) of Regulation 45/2001).

Pursuant to Article 23 of the Regulation, the controller should choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 of the Regulation and that such processing should be governed by a contract or a legal act binding the processor to the controller stipulating, in particular that the processor has also to comply with the confidentiality and security obligations set out in the national law transposing Articles 16 and 17(3) of Directive 95/46.

According to Article 16 of Directive 95/46/EC, the processor shall not process personal data except on instructions from the controller, unless required to do so by law.

⁹ by requesting a second dialogue with the countersigning officer, lodging an appeal with the JCAP, seeking a decision by the appeal assessor.

Article 17(3) of Directive 95/46/EC specifies that appropriate technical and organisational measures must be adopted by the controller and the processor to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

The "contract for legal services" used at CEDEFOP has been drafted in line with the respective Commission template and provides for a confidentiality clause.

(...)

4. Conclusion

In order to ensure that there is no breach of the provisions of Regulation 45/2001, the above considerations have to be taken fully into account. In particular,

- all internal recipients should be reminded of the purpose limitation of data transfers in terms of Article 7(3) of the Regulation; (...)

Done at Brussels, 24 May 2011

(signed)

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Assistant European Data Protection Supervisor