

Joint Opinion on the notifications for prior checking from the Data Protection Officer of the European Centre for Disease Prevention and Control regarding staff evaluation procedures

Brussels, 11 January 2013 (cases 2012-881, 2012-883 and 2012-884)

1. Proceedings

On 11 October 2012, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Centre for Disease Prevention and Control (**ECDC**) three notifications for prior checking concerning staff evaluation procedures:

1. "**Staff Development Dialogue (SDD)**" (Case 2012-0881) together with the following annexes:
 - SDD 2012: Appraisal Dialogue (Annex Ia)
 - SDD 2012: Development Dialogue (Annex Ib)
 - Specific Privacy Statement (Annex II)
 - Implementing rules n°20 on Appraisals (Annex III)
 - Director's Decision 35/2009 on the Rules applicable to National Experts on the secondment to European Centre for Disease Prevention and Control (Annex IV).
2. "**Probationary Period Report**" (Case 2012-0883) together with the following annexes:
 - Probationary Period Report Template (Annex I)
 - Specific Privacy Statement (Annex II).
3. "**Reclassification of Contract and Temporary Agents**" (Case 2012-0884) together with the following annexes:
 - Specific Privacy Statement (Annex I)
 - Implementing Rule n°21 on Reclassification of Temporary Agents (Annex II)
 - Director's Decision 23-2012 on the 2012 Reclassification of Contract Staff (Annex III).

The procedure was suspended between 20 November 2012 and 26 November 2012 for additional information and between 19 December 2012 and 10 January 2013 for DPO comments on the draft Opinion.

2. Legal aspects

This Opinion deals with three already existing staff evaluation procedures at the ECDC. It is based on the Staff Evaluation Guidelines¹, which allows the EDPS to mainly focus on the

¹ http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-07-15_Evaluation_Guidelines_EN.pdf.

ECDC practices that do not seem to be fully compliant with the Data Protection Regulation 45/2001 (the **Regulation**)².

The EDPS notes that for the three processing operations at hand (SDD, Probationary Period Report and reclassification) the administrative and evaluation data are processed in compliance with data quality principles set out in Article 4(1)(a), (c) and (d); transferred in compliance with Article 7; the right of access is granted to the data subject in accordance with Articles 13; and the data subjects are informed in line with the requirements of Articles 11 and 12 of the Regulation for SDD and reclassification (through Specific Privacy Statements on the ECDC intranet).

The EDPS, however, notes that the existing data conservation policy, the lawfulness of processing concerning seconded national experts, the rights of erasure and rectification and the extent of information to be provided to the data subjects for Probationary Period Reports do not seem to be in full compliance with the Regulation and therefore addresses these issues in more detail below.

2.1. Lawfulness:

The **SDD** exercise recommended by ECDC for seconded national experts (**SNEs**) can neither be based on the Staff Regulations/CEOS³ nor directly on other implementing rules provided in the notification. In this respect the EDPS doubts that Article 6(4) of Decision 35/2009 is a sufficiently clear legal basis for including SNEs in the SDD exercise.⁴ Therefore the EDPS recommends that a legal provision (e.g. modification of existing decision on SNEs or implementing rules) is adopted to provide a proper legal basis for including SNEs in the SDD exercise.

Furthermore with regard to the publication of lists of Contract Agents to all ECDC staff in the **reclassification** procedure the notification submits that lists are published of (i) eligible candidates, (ii) proposed candidates, and (iii) of reclassified staff. However, Decision 23/2012 only seems to provide a legal basis of the publication of the list of staff proposed for reclassification in its Article 3. The EDPS thus recommends that the necessity of publishing three different lists is reviewed in view of the legal basis.

Finally, concerning the **SDD** procedure for the sake of clarity Article 1 of the Implementing rule n°20 on Appraisals could state more directly that only contract agents fulfilling the conditions of pursuant to Article 87(1) CEOS (i.e. contract agents engaged for period not less than one year) shall be subject to SDD.

2.2. Transfers

The data transfers within ECDC, as well as to other EU institutions can be considered as necessary for the accomplishment of the respective task in the different procedures notified and thus in compliance with Article 7(1) of Regulation 45/2001.

² Regulation (EC) No 45/2001 of the European Parliament and of the Council 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.

³ Conditions of Employment of Other Servants of the European Community.

⁴ Article 6(4) states that "*ECDC shall remain solely responsible for approving the results of any tasks performed by an SNE and for signing any official documents arising from them*".

In this context, in order to ensure full compliance with Regulation 45/2001, the EDPS recommends that all internal recipients are reminded, at the time of the transfer (e.g. by e-mail), of the purpose limitation obligation in terms of Article 7(3) of the Regulation.

2.3. Data conservation

Article 4(1)(e) of the Regulation states that personal data should be kept in a form permitting identification of data subjects for no longer than necessary for the purpose for which they were collected or further processed.

According to the information provided, the following data conservation periods are applicable to personal data processed within SDD, reclassification and probationary period reporting procedures:

- reports of **SDD** and **reclassification** procedures are kept 10 years after the closure of the respective evaluation exercise in the data subjects' personnel files or five years after the termination of the contract;
- reports on **Probationary Periods** are kept five years after the termination of the employment

The EDPS reminds that for decisions on reclassification it could be justified to keep such decisions during the career of the member of staff, but not all the related documents should be kept after a certain period.⁵

The ECDC sets out that the 10 year conservation period of personal data contained in SDD and reclassification reports can be necessary due to the existing possibility of contract renewal and conversion into an indefinite contract after 10 years. For such renewal or conversion the ECDC argues it is required to have an overview of the entire employment period of the staff member. The EDPS notes that the ten year retention period can be considered as necessary in this respect. At the same time there seems to be no sufficient evidence that the 10 year conservation period is necessary for contracts where there is no possibility of renewal/conversion into an indefinite contract or after the end of a contract (where the shorter five year conservation period should be applied as described below).

The ECDC argues that the five year retention period for SDD and reclassification reports (in case of the end of the contract) as well as for probationary reports after the termination of employment is necessary in view of the right to lodge a complaint under Article 90(1) of the Staff Regulations, as well as corresponding to the time limit for lodging an action for damages against an EU institution. Therefore the ECDC wishes to store the entire file within the time limits prescribed above, in light of the need to have a complete file, in case of complaints and/or legal claims. The EDPS takes note of this. However, according to the available information, there seems to be no sufficient evidence that the existing retention period is necessary in view of the specific purposes for which it was collected or further processed. Therefore it needs to be reconsidered if the starting point for the relevant conservation period for probationary period reports as well as for SDD and reclassification (after the end of the contract) should not rather be as from the relevant evaluation exercise than from the end of the contract. Whereas it is evident that the personal file and the relevant reports need to be kept for the duration of ongoing proceedings pursuant to Article 90(1) of the Staff Regulations or court proceedings, there does not seem to be sufficient evidence that a

⁵ Guidelines concerning the processing of personal data in the area of staff evaluation of July 2011, p. 5.

conservation period of five years after the end of the contract would be necessary in all other cases.

2.4. Information to be provided to the data subject

The EDPS welcomes the Specific Privacy Statement to be provided to data subject for **SDD**, but suggests that for ease of reference a link to the Specific Privacy Statement could also be provided in the forms for appraisal and development which the data subject fills in for his/her self assessment.

For **Probation Period Reports**, the list of personal data processed in the Specific Privacy Statement should also mention data on the evaluation of the job holder's performance.

Furthermore, for **reclassification**, the EDPS suggest that the fact that lists of data subjects (i) which are eligible for reclassification (Contract Agents), (ii) which were proposed for reclassification (Contract Agents) or (iii) which were finally reclassified (Temporary Agents and Contract Agents) are published to all ECDC staff could be made clearer (see also above under 2.1 with regard to lawfulness of the publication of these lists).

2.5. Rights of erasure and rectification

Based on the additional information the ECDC provided to the notifications on **SDD**, **Probationary Period Reports** and **reclassification**, it rectifies or erases personal data within a 3-month period. The EDPS recommends that the existing period should be reconsidered in view of Article 14 of Regulation 45/2001 which states that rectification should be made "without delay".

2.6. Security measures

The applicable security measures seem to be adequate in terms of Article 22 of the Regulation. [...]

3. Conclusion

In view of the above, the EDPS recommends that the following measures are taken in order to ensure full compliance with Regulation 45/2001:

- the legal basis for the participation of SNEs in the SDD exercise should be clarified;
- the necessity of the publication of 3 different lists during the reclassification exercise for contract agents should be reviewed in view of the legal basis;
- all data recipients should be reminded of the purpose limitation principles;
- the existing conservation periods for SDD, Probationary Period Reports and reclassification should be reconsidered;
- data on the evaluation of the job holders' performance should be added to the list of categories of personal data processed in the Specific Privacy Statement for Probationary Period Reports;
- the period for rectification and erasure should be reconsidered.

He would like to invite the ECDC to inform him about the implementation of these recommendations within three months after receipt of this joint Opinion.

Done at Brussels, 11 January 2013

(signed)

Giovanni BUTTARELLI
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