



## **Opinion on the notification for prior checking received from the Data Protection Officer of the European Commission regarding a self-perception questionnaire "PERFORMANSE" organised by the European Administrative School**

Brussels, 15 March 2013 (Case 2012-0590)

### **1. Proceedings**

On 10 July 2012, the European Data Protection Supervisor ("EDPS") received from the Commission's Data Protection Officer ("DPO") a notification regarding "PERFORMANSE", a self-perception questionnaire, established by the European Administrative School ("EUSA"), body of the European Commission ("the Commission"), in the framework of its various training courses.

On 27 July 2012, the EDPS sent to the Commission's DPO questions for further information. Replies were received on 7 September 2012. On 22 December a summary of facts along with remaining questions were sent to the DPO and the Commission replied on 24 January 2013.

The EDPS sent to the Commission's DPO a draft Opinion for comments on 11 February 2013. The Commission replied on 6 March 2013.

### **2. The facts**

#### **Data subjects**

The data subjects of the processing operation are all staff members (officials and agents) of all the E.U. institutions, bodies and agencies who are voluntarily participating in the self-perception questionnaire which forms part of a course organised by the EUSA.

#### **Purpose**

The purpose of the processing operation is to allow participants to obtain feedback in the form of two feedback reports and, upon request, a feedback session by telephone showing their behavioural tendencies and main motivation levels in their working environment. They receive information about their natural managerial skills. The data will not be used in any form of evaluation process of any of the data subjects.

#### **Legal base**

- 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, last amended by Council Regulation (EU) No 1240/2010 of 20 December 2010";

- Decision n° 2002/620/CE of the European Parliament, the Council, the European Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 culminating in the creation of the European Personal Selection Office;

- Decision n° 2005/118/CE of the European Parliament, the Council, the European Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 26 January 2005 culminating in the setting up of the European Administrative School;

- Decision n° 2005/119/CE of the Secretaries General of the European Parliament, the Council, the European Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 26 January 2005 concerning the organisation and running of the European Administrative School;

### **Outsourcing**

EUSA outsourced the processing operation PERFORMANSE to a private company (the contractor) established in an EU Member State. This company subcontracted the organisation of PERFORMANSE procedure to another private company, also established in an EU Member State, called Performanse S.A.S (the sub-contractor).

In its contract with the external contractor, EUSA included a specific data protection clause, that the contractor may act only on instruction from the controller with regard to in particular the purposes of the processing, the categories of data processed, the recipients of data and the means by which data subjects may exercise their rights. Furthermore, the contract explicitly mentions that the EUSA must be consulted by the external contractor in advance in order to verify if the direct or indirect subcontractor(s) satisfy the requirements of the legislation on data protection. The contract also makes reference to Article 23(2)(b) of the Regulation and that the contractor binds himself to adopt or to have adopted by its direct or indirect sub-contractors technical and organisational measures.

"PERFORMANSE" is a web-based tool. EUSA sends an e-mail to the data subjects in order to inform them about the content of the tool and its purpose. In this e-mail, they are asked if they wish to participate and if they agree that their e-mail address is communicated to the EUSA's sub-contractor. If the data subjects consent to this, EUSA sends their contact details to the sub-contractor which then sends an invitation to each participant. The invitation contains a link, upon which the participant is invited to create a personal password. After 3 days of training, the participant has the possibility to fill in a questionnaire. The participant is free to fill it or not.

### **Nature of the data to be processed**

This questionnaire takes the form of a self-assessment and the participants may answer to 70 pairs of propositions associated with the professional sphere, behavioural tendencies and motivation levels. The data processed are the following:

- Data of a personal nature allowing the identification of the staff member concerned (name, given name, electronic address);

- Information provided by the course participant in areas such as:
  - change management (managing complexity, developing a vision, implementing change),
  - organisational management (determining parameters, implementation, following through),
  - team management (team deployment, effective communication, rewarding and disciplining),
  - personal resources (staying power, tolerance, consistency).

Once the data subject provides input to the above questions, the data collected take the form of numerical data only, which are automatically amalgamated into two reports, namely PERF ECHO and PERF MANAGER. These reports are not anonymous. The reports are generated and then made available to each participant through their password.

According to further information received, those participants who wish to discuss their results during a telephone feedback, they may do so, but only within 15 calendar days after they have completed the questionnaire.

Moreover, on the fourth day of the training which is generally scheduled four months after the third day of the training, participants may have time to discuss and interpret their results, how those tie in with the task-team-results model examined during the first three days of the course, and what priority development needs they have for the future.

### **Information of the data subjects**

When EUSA sends an e-mail to the data subjects informing them about PERFORMANSE, the e-mail contains a link to the privacy statement. The EDPS received a copy of the privacy statement.

### **Recipients of the data**

- The sub-contractor of the EUSA receives the numerical data and its IT officers who may intervene in case of technical problems. The latter do not have access to the questionnaires and the data subjects' replies,
- the relevant EU institution, body or agency receives also a presence list signed by the participants.

### **Access and rectification**

Staff members concerned may send a request to EUSA and indicate any changes to their personal data. Following a written request with a copy of a proof of identity, they may obtain a copy of their personal data as registered by the contractor of the EUSA. Following a written request with a copy of a proof of identity, participants may obtain a written copy of all the information which they provided in the form of feedback to allow them to check that the information they supplied was accurately recorded or to indicate any changes. Requests can be sent to a functional email. EUSA submits access and rectification requests to its sub-contractor who will execute them within 24 hours.

## Data retention period

Participants to the course may or may not choose to fill in the questionnaire on the third day of the training.

For those who have chosen to fill it in on the third day of the training, their data, both identification and numerical data are kept for 90 days from the date of the completion of the questionnaire and then deleted.

## Data storage and security

All data collected are stored in a fixed hard drive on a secure web server computer in the sub-contractor's premises in Paris. In the contract between the EUSA and the contractor, there is a specific data protection clause and information on Articles 23(2)(a) and 23(2)(b) of the Regulation and Articles 16 and 17(3) second indent of Directive 95/46/EC. The EDPS received also a document produced by the sub-contractor regarding the security and confidentiality of the architecture of "PERFORMANSE".

## 3. Legal aspects

### 3.1 Prior checking

**Applicability of Regulation 45/2001 ("the Regulation"):** The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*"-Article 2 (a) of the Regulation). The data processing is performed by a body of the European Commission, the EUSA, in the exercise of activities which fall within the scope of EU law<sup>1</sup>. The processing of the data is automatic, since "PERFORMANSE" is a web-based tool and data subjects have individual access.

**Grounds for prior checking:** Article 27 (1) of the Regulation subjects to prior checking 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*" by the EDPS. Article 27(2) contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (b), "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The purpose of the notified processing operation intends to evaluate the potential managerial abilities and conduct (motivation and behaviour at work) of data subjects, since the participants are provided by the sub-contractor with feedback in the form of two feedback reports and upon request, with a feedback session by telephone. The notification therefore should be subject to prior-checking by the EDPS under Article 27(2)(b) of the Regulation.

**Ex-post prior checking:** Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, the EDPS regrets that the processing operation has already been established prior to his prior-checking Opinion. However, the EDPS underlines that all his recommendations given in the present Opinion should be duly implemented before the next "PERFORMANSE" questionnaire is carried out by EUSA.

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

**Notification and due date for the EDPS Opinion:** The notification of the DPO was received on 10 July 2012. According to Article 27 (4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for a total of 72 days for further information from the controller and 23 days for comments. Consequently, the present Opinion must be delivered no later than on 18 March 2013.

### 3.2. Lawfulness of the processing

According to Article 5 of the Regulation, data may be processed only on one of the grounds specified.

Of the five grounds listed in Article 5, the processing under analysis satisfies the conditions set out in Article 5(a) of the Regulation, to the effect that data may be processed if the "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities (...)*".

In the present case, **the legal basis** for the processing can be found in the legal provisions indicated in the facts.

As to **the necessity** of the processing, paragraph 27 of the preamble to the Regulation should be considered, which states that "*Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies*". The processing of personal data in the present case falls within the framework of the training policy of the institution concerned. It can be considered as necessary, since staff members have the possibility to receive feedback about their behavioural tendencies and main motivation levels at their working environment. The processing therefore forms part of the training policy of the institution and constitutes a tool, aiming to train and evaluate the staff members who take part in the questionnaire. In this respect, it can be considered as an instrument which intends to ensure the sound management and functioning of the institution, body or agency where the data subject works.

### 3.3. Data Quality

**Adequacy, relevance and proportionality:** According to Article 4 (1) (c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*".

The EDPS notes that the data as described in the facts seem to satisfy these conditions regarding the purpose of the processing explained above.

**Accuracy:** Article (4)(1)(d) of the Regulation provides that data must be "*accurate and, where necessary, kept up to date*". According to this Article, "*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*".

Accuracy may have different meanings in the context of the present processing operation. First, it is closely related to the issues of the adequacy and relevance of the questions asked when requesting information from the participants. The more they are adequate and relevant, the more likely it is that participants will be able to respond in a way which is meaningful so that they can be provided a useful feedback by the sub-contractor.

Second, accuracy depends on the subjective judgment of the participants who provide information, as well as the effort they put into answering the questions. Considering the optional character of the procedure, that staff members can participate on a voluntary basis and that, if they wish, they may receive an individual telephone feedback, it seems that the system itself gives a reasonable guarantee of data quality.

Furthermore, the rights of access and rectification are available to the data subjects, in order to make the information they provided as comprehensive as possible. These rights constitute the second means of ensuring that data concerning the data subjects are accurate and updated (see section 3.7 on "the right of access").

**Fairness and Lawfulness:** Article (4)(1)(a) of the Regulation provides that personal data must be '*processed fairly and lawfully*'. The lawfulness of the processing has already been discussed in section 3.2 of this Opinion. As to fairness, this is linked to the information that must be provided to the data subject (see section 3.7 on "the right to information").

### 3.4. Conservation of data

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

On the basis of the information available, the EDPS considers the 90 days retention period necessary and proportionate in light of Article 4(1)(e) of the Regulation.

### 3.5. Transfer of data

Articles 7, 8 and 9 of the Regulation set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made (i) to or within EU institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

The EDPS welcomes the fact that access to the data (questions, information provided and feedback) is strictly limited to the participants and serves only for their own benefit. The EDPS particularly welcomes that it is clearly stated that, neither the EUSA nor any other EU institution, body or agency has access to the data related to the questionnaire.

The external contractor, which is involved in the outsourced task of organising the "PERFORMANSE" and providing feedback to the participants, is subject to an E.U Member States' legislation and it is thus subject to Directive 95/46/EC. The transfer of data in question to the contractor can be justified under Article 8(a) of the Regulation if "*the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". The transfer in question is indeed considered necessary for the performance of a task carried out in the public interest based on national legislation (see point 3.8 about confidentiality and security measures on "processing on behalf of the controller").

### **3.6. Rights of access and rectification**

Article 13 of the Regulation provides for the principle of the right of access to the data – and the procedures thereof – at the request of the data subject. Article 14 of the Regulation provides for the data subject's right of rectification.

The privacy statement makes reference to the rights of access and rectification and provides information about the way data subjects may exercise their rights. The EDPS therefore considers that the EUSA is in compliance with Articles 13 and 14 of the Regulation.

### **3.7. Information to the data subject**

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items of information. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operations, they are required to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subject and other from other persons, which is the case with regard to the data contained in the feedback reports.

In the present case, the EDPS notes that the privacy statement contains almost all necessary information in conformity with Articles 11 and 12 of the Regulation.

Nevertheless, the EDPS considers that the privacy statement does not inform the data subjects that those wishing to discuss their results during a telephone feedback with the sub-contractor may do so, but only within 15 calendar days after they have completed the questionnaire. As it was analysed in point 3.1, the fact the participants may receive feedback, hence evaluation by the sub-contractor, it is the reason for which the processing operation under analysis has been prior-checked by the EDPS. Such information, including the time-limit within which they can obtain feedback, should therefore be mentioned in the privacy statement.

Furthermore, the EDPS notes that four months after the third day of the training, participants may interpret their results. This information is not indicated in the privacy statement either. Considering that the data processed are erased 90 days after a data subject has completed the questionnaire, the EDPS recommends that the EUSA adds in the privacy statement the possibility of discussion four months after the training and completion of the questionnaire. In this way EUSA guarantees a fair and transparent processing in respect of the data subjects.

### **3.8. Processing on behalf of the controller**

Article 2 (e) of the Regulation 45/2001 states that "*processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller*". Article 23 of the Regulation stipulates on one hand, the role of the processor and on the other hand, the obligations of the controller in ensuring sufficient guarantees in respect of the technical and organisational security measures and ensuring compliance with those measures.

The EDPS welcomes that the EUSA, in its contract, has included all necessary clauses and rules, as described in the facts, which are in conformity with Article 23(1) and (2) of the Regulation.

## **Conclusion**

There is no reason to believe that there is a breach of the provisions of the Regulation, provided that the additional information, as recommended by the EDPS in point 3.7, is indicated in the privacy statement.

Done at Brussels, 15 March 2013

**(signed)**

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