



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Claus REUNIS
European Food Safety Authority
Data Protection Officer
Via Carlo Magno 1A,
I-43126 Parma
ITALY

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Subject: Prior checking notification of the processing operations concerning badge use as an informative tool to staff on office presence in the context of time tracking (2013-0171)

Dear Mr Reunis,

I am contacting you with regards to your *ex-ante* notification on the processing operations relating to "badge use as an informative tool to staff on office presence in the context of time tracking" (Case 2013-0171) at the European Food Safety Authority (EFSA), notification which was received on 11 February 2013.

You submitted the case for prior-checking considering that the processing falls within the remits of the general provision of Article 27(1) and Article 27.2(b). More specifically, EFSA states that it considers the processing operation subject to prior checking for the following reasons:

- with reference to Article 27(1) of the Regulation, the EDPS Guidelines suggests that badges use and RFID technology present a specific risk to the rights and freedoms of data subjects;
- with reference to what is mentioned in the EDPS guidelines on the application of Article 27(2)(b) of the Regulation, the objective characteristics of the informative tool may imply the existence of an implicit purpose of evaluating a person in case there is a suspicion of misconduct.

The notification and cover letter were accompanied by the following annexes:

1. Draft Decision of the Executive Director concerning staff access to EFSA's premises;
2. Draft Staff information notice;
3. Notification of the controller to the DPO.

The Guidelines concerning the processing of personal data in the area of leave and flexitime ("The Guidelines")¹ were adopted on 20 December 2012, which allows the EDPS to focus on the practices that do not seem to be fully compliant with Regulation 45/2001. The DPO stated in the cover letter to this notification that the controller has taken due account of the Guidelines before submitting this notification. The Opinion should be delivered before 12 April 2013.

After examining the data processing operations described in the prior checking notification and attached documents, we have reached the conclusion that, for the reasons described below, **the processing covering the badge use as an informative tool to staff on office presence in the context of time tracking is not subject to prior checking.**

1. Background

The EDPS would like to recall the background of the notification under analysis:

- In 2008, the EDPS was consulted on the need for prior-checking of the EFSA Time Tracking/Flexitime system (C 2008-0413). The EDPS concluded that the processing operation itself did not fall within the remits of Article 27 of Regulation (EC) N° 45/2001 and was therefore not subject to prior-checking notification. In the system submitted, time was inserted by staff members directly into the Time Tracking application in use at EFSA. It was also established that there were no links between time tracking reports and annual evaluation at EFSA (called CDAC).
- In 2009, the EDPS was notified by the DPO of EFSA on the leave management processing operation (C 2009-0455). There it was described that the Time Tracking/Flexitime at EFSA was in part a sub-processing of the overall EFSA Leave Management. The EDPS confirmed that in itself, the flexitime data processing was not subject to prior-check, while the general leave management processing operation was as it notably included data related to health.

2 Description of the processing operation

According to the cover letter and notification, the badging machines installed in EFSA premises serve the primary purpose of physical security and building access control.

The change that is foreseen with the processing operation submitted for prior checking is that jobholders will get access to the time that they enter EFSA premises through the time stamps (called clocking data by EFSA) recorded through the access control system. Regarding the purpose of the processing operations, it is stated that the access by the jobholder's to his/her own clocking data is aimed as an additional and separate informative tool for the jobholder to monitor his/her office presence, which may be useful as a reference when the jobholder completes his/her monthly Time Tracking timesheets. It is further described in the notification that access to the clocking data in the IT tool is provided to jobholders/data subjects by means of a password authentication. Each jobholder can only access his/her individual clocking data

¹ Guidelines concerning the processing of personal data in the area of leave and flexitime adopted on 20 December 2012 (C 2012-0158).

and the data are not transferred to any other recipients such as line managers, with the exception of the EFSA Service Desk for the sole purpose of providing user support. It is underlined that the clocking data cannot be assimilated with effective working time as e.g. specific work situations or equivalent activities (e.g. training) may be performed outside the EFSA building

EFSA describes the functioning of the system as follows.

Information made available by mean of the IT tool concerns the records of the badge readers installed at the main entrance doors to the EFSA building. Information of badge readers installed at other places in the EFSA building is not made available in the system². More specifically, the following information is made available by mean of the IT tool:

- for each working day, the precise time when the staff member first enters the EFSA building using his/her badge, together with the badge ID code from which the user is identifiable;
- the precise time of the staff member for the last time leaving the EFSA building on the same day. Temporary absences during the working day registered in intermediate in/out clocking is not made available in the system.

The EDPS notes that the notification foresees the following recipients:

- the individual jobholder (Official, TA, CA, END) related to his/her own clocking data by means of the IT tool requiring username & password authentication;
- the Service Desk of EFSA, for the sole purpose of providing technical support to users related to the IT tool;
- In the exceptional situation that an administrative inquiry or disciplinary proceeding is opened against a staff member on which fact the person shall be notified in advance, clocking data may be made available to the investigation panel or disciplinary board in case these are relevant for the investigation or disciplinary proceeding in question.

As to retention of the data, it is stated that clocking data are stored in the system and will be accessible to the jobholder via the EFSA Intranet Portal for a period of two months. This retention period matches the time frame during which the line manager may grant flexi leave compensation if the jobholder has approved Time Tracking timesheets of extra working time accumulated during the previous month. The retention period of the clocking data may be prolonged in the context of an administrative inquiry or a disciplinary proceeding.

3 Legal analysis

According to the information received, the legal basis of the processing is to be found on the working conditions of officials and other servants of the European Union, as defined in Title IV of the Staff Regulations. Furthermore, the processing operation is covered by a (draft) Decision of the EFSA Executive Director.

Before analysing whether the conditions that could justify prior-checking are met, the EDPS would like to share with EFSA the following elements of his analysis.

² As confirmed by the DPO, access to the EFSA building is possible only through the main building entrance. It is not possible to enter the building using other doors, except in case of an emergency triggered by the alarm system. When entering the EFSA building, any person has to pass through the main entrance doors. This applies also for the car park users.

The EDPS notes that EFSA specifically requested in the notification further clarification and confirmation from the EDPS as concerns the **compatibility** of use of the badging information (from the access control system) as an informative tool for the jobholders related to their proper time tracking.

As regards a change of purpose of data which are collected for a specific purpose (clocking data at entrance) and use for another purpose (helping staff to fill out their flexitime), the EDPS wants to stress, as stated in a recent opinion by the Article 29 Working Party³, that the concept of purpose limitation is an essential first step in applying data protection laws since it constitutes a pre-requisite for other data quality requirements including the adequacy, relevance, proportionality, necessity and accuracy of the data collected, along with the rules surrounding data retention periods. It contributes to transparency, legal certainty and predictability and aims to protect the data subjects by setting limits on how controllers are able to use their data. At the same time, it is also designed to offer some degree of flexibility for the controller.

The principle of purpose limitation -which includes the notion of compatible use- requires that in each situation where further use is considered, a distinction be made between additional uses that are 'compatible', and other uses, which should remain 'incompatible'. The principle of purpose limitation is designed to offer a balanced approach: an approach that aims to reconcile the need for predictability and legal certainty regarding the purposes of the processing on one hand, and the pragmatic need for some flexibility on the other.

In this aspect of compatibility, reference must also be made to the Guidelines in the area of leave and Flexitime (Chapter 7 on compatible use), where examples of incompatible uses have been given. For instance, the EDPS does not consider the possibility to link an access control database with a flexitime database as acceptable. The verification of flexitime clocking operations with respect to data on physical access checks might be justified as necessary only in those specific cases in which there are grounds to suspect that a member of staff is infringing the flexitime rules. Such verification should then be carried out within the framework of an administrative investigation.

In the case at stake, the EDPS notes that there is not such direct or automated verification of flexitime data using the badging information into the flexitime application, as the tool is not aimed at the verification of time worked but as a tool for helping staff complete their timesheets.

Therefore, it could be considered that in the context of use of the clocking data for a further purpose that is limited to providing help to staff members, the change of purpose could be considered as compatible in view of helping jobholder to fill in their timesheet as, under the current conditions of use, it would remain informative to the jobholders. It remains an indicative and non binding type of information as it only covers the records of the badge readers installed at the main entrance doors to the EFSA building and temporary absences during the working day registered in intermediate in/out clocking is not made available in the system. On the contrary, if EFSA were to decide to use the data from the badging system for verification of flexitime or to link the data from the two systems, such further use would be considered incompatible.

However, the EDPS would like to express some doubts as to the **necessity** of the system itself. Under Article 5(a) of Regulation (EC) No 45/2001, the data processing operation must be

³ Opinion 03/2013 on purpose limitation http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf

"necessary for the performance of a task". The necessity of a processing operation also has to be analysed in the light of the purpose that is foreseen. Indeed, if the main goal of the modification is to help jobholders to ensure that their timesheet is complete, the EDPS considers that other means not requiring the use of records from the access control system could be implemented.

The EDPS therefore invites EFSA to reconsider its decision to implement such system and to analyse whether other solutions would not be more appropriate for the purpose of helping its jobholders to fill in the time tracking system.

Taking into account the above comments, the EDPS also checked whether such processing operation would be subject to prior-check. The EDPS reached the following conclusions.

-With regard to Article 27(1), EFSA mentions that "*the EDPS guidelines suggests that badges use and RFID technology present a specific risk to the rights and freedoms of data subjects*".

This statement is not correct. The Guidelines state that the processing operations that are subject to prior checking cover the implementation of a flexitime application making use of RFID technology⁴. In the context of EFSA, the RFID technology is not meant as such to be used in the context of the flexitime application but is used in the context of the access control application. This is confirmed by the information which can be found in the notification and in the draft Decision of the EFSA Executive Director (Article 4.4), which says that: "The Time Tracking is based on self declaration. When filling in the Time Tracking, the recorded badging data will be available via an electronic system that is not linked directly to the Time Tracking application but allows the jobholder to check precise time he spent in EFSA's premises".

Therefore, the records made through the RFID badge are not integrated into the Flexitime application in use at EFSA and can not be considered, as such, as correct calculation of working time. In this context, and based on the EDPS approach towards Flexitime notification, Article 27(1) is not applicable in this context.

- With regard to Article 27(2), EFSA mentions that "*As referred to in the EDPS guidelines concerning the processing of personal data in the area of leave and flexileave and with reference to Article 27(2)(b) of the Regulation, the objective characteristics of the informative tool may lead to confirming the existence of an implicit purpose of evaluating a person in case there is a suspicion of misconduct*"⁵. It was further clarified in the notification that: "*in the exceptional situation that an administrative inquiry or disciplinary proceeding is opened against a staff member on which fact the individual shall be notified in advance, clocking data may be made available to the investigation panel or disciplinary board in case these are relevant for the investigation or disciplinary proceeding in question*".

⁴ See for instance for a specific case of prior-checking case 2007-0218: Flexitime specific to DG INFSO, available on the EDPS website.

⁵ In the Guidelines, the EDPS stressed that in some cases of Flexitime, "*personal data processed by the flexitime system can fall under the scope of Article 27 (2) (b) when attendance in the workplace is used to assess the conduct of the official. This is especially true when the processing of data concerning working hours and absences by the flexitime system is meant to make possible the evaluation of the conduct of the staff members, including its use in the annual evaluation and/or promotion procedure or if it is anticipated that the data gathered may also be used for purpose of evaluating a person in case there is suspicion of misconduct of the staff member. The EDPS stresses that this should apply whether the purpose of evaluating staff is explicit or implicit (the existence of an implicit purpose can be deduced from the objective characteristics of the system, e.g. existence of individual reports, conservation periods etc.)*".

The EDPS deducts from the wording of the cover letter and of the notification that the use of the data in the context of possible evaluation foreseen by EFSA would be processed solely in cases of an open investigation or enquiry on misconduct and not processed as a way to use the data in the context of the annual appraisal/evaluation of staff members. Therefore the evaluation is limited to specific and limited cases of internal inquiries opened against staff members. Furthermore, the evaluation purpose mentioned in this notification relates to the access to the records data of the access control system and not to the flexitime data.

In the case at stake, from the analysis of the rules governing Administrative inquiries and disciplinary proceedings at EFSA⁶, these rules can be considered as allowing the use of any relevant types of data in the context of disciplinary investigations. In the context of administrative inquiries at EFSA, the data from the access control (entrance and departure of the building) may be analysed with the purpose of establishing misconduct. Such processing operation would be covered within the remits of Case 2011-063 and not based on the notified case.

Furthermore, if the EDPS considers that these data may be used in the frame of an administrative inquiry, they should not be used per se to initiate an administrative inquiry. This has been acknowledged by the EFSA when stating that "clocking data may be made available [...] in case these are *relevant* for the investigation or disciplinary proceeding in question".

In this context, the EDPS notes that EFSA submitted a draft decision of the Executive director of EFSA concerning staff access to EFSA's premises. This decision contains a reference to administrative inquiry in its Article 4 covering the use and retention of data resulting from badging, where it states that "*the retention period can be prolonged in the context of an administrative inquiry or a disciplinary proceeding*".

The EDPS considers that such Decision would comply with Article 6(1)(a) but the EDPS advises EFSA to make more explicit the possible use for administrative inquiries in its draft Decision. In this regard, the EDPS notes the specific reference made in another document provided by EFSA, the (draft) staff information note. In this note, reference is made to Article 86 and Annex IX of the Staff Regulations and Articles 49, 50 and 119 of the CEOS on the availability of clocking data to the investigation panel or disciplinary board in the context of investigation or disciplinary proceeding. The EDPS advises that a similar wording should be reflected in the Decision.

Finally, contrary to the information provided in the notification, the EDPS considers that the jobholder should not be considered as a recipient of the data. The jobholder is the data subject and therefore benefits of all the rights of a data subject (information, access, correction, blocking). Therefore, EFSA should modify this part of the notification and connected documents.

⁶ See the Opinion of the EDPS in case 2011-0163 Administrative inquiries and disciplinary proceedings at EFSA, adopted on 22 June 2011.

4. Conclusion

In view of the above, the EDPS recommends that EFSA:

- analyse whether a more appropriate solution could not be implemented for the purpose declared;
- amend its proposed procedure as to make more explicit the possible use for administrative inquiries in its Decision;
- revise the list of recipients in the light of the comment above.

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

(signed)

Giovanni BUTTARELLI