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EEAS 02/053

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GB/OL/sn/D(2014)1897 C 2013-0957
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Dear Ms Allegra,

On 14 August 2013, the Data Protection Officer of the EEAS submitted a notification for prior checking pursuant to Article 27 of Regulation (EC) 45/2001 (the Regulation), on activity of the network of the confidential counsellors and the selection of the confidential counsellors at the EEAS to the European Data Protection Supervisor (EDPS).

On 30 August 2013, the EDPS asked several questions relating to the processing operation, which were discussed in a meeting on 25 February 2014; further documentation was submitted on 26 June 2014. As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

As the EDPS has already issued Guidelines on anti-harassment procedures and confidential counsellors¹, this Opinion will only discuss those aspects of the notified processing operation that either diverge from these Guidelines or otherwise merit attention.

The Facts

For the selection of confidential counsellors, candidates may rectify their personal data up to 10 days after closure of the call for applications. Files on non-selected candidates are kept for one year after the end of the panel's deliberations.

The legal basis for the activities of the network of confidential counsellors indicated in the notification also mentions Articles 86 and 90 of the Staff Regulations. Lawfulness is indicated as being based on Articles 5(a), (b), (d) and (e) of the Regulation.

The EEAS operates both a network of confidential counsellors and a dedicated mediation service. Persons in difficulty are free to choose either possibility.² The mediator of the EEAS

¹ Available on the EDPS website:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-02-18_Harassment_Guidelines_EN.pdf.

acts as "lead department" for the network. She ensures secure storage of files, evaluates the policy and heads the network of confidential counsellors.

Counsellors may approach the mediator for advice on cases, but she is not systematically involved in all cases. In case a procedure is transferred from a confidential counsellor to the mediator, the whole file up to that point in time is transferred. Within the informal procedure, ad-hoc transfers to other departments in the EEAS may occur, restricted to the amount that these departments need to fulfil their tasks. The notification also states that in case a formal procedure is launched, "some" information could be given to the relevant services. The same would apply for courts or other judicial authorities.

According to the notification form, data subjects "*could be provided*" with a paper copy of the privacy statement "*if and when deemed appropriate*", data subjects other than the alleged victim will also be referred to the privacy statement available on the EEAS intranet. The notification form justifies this with reference to Article 20(1)(a) and (c) of the Regulation.

The notification form states that in the course of the anti-harassment procedure, it may happen that sensitive data under Article 10 may be revealed to confidential counsellors. According to the form, further processing of such data would then be based on Article 10(2)(a) (consent of the data subject).

At the end of the informal procedure, according to the notification form, documents provided by the alleged victim are either returned to him/her or stored with his/her consent for a period of five years. The EEAS later clarified that only a "fiche" collecting certain information about the case will be kept after the end of the procedure. The content of this form is not defined yet. After the end of the conservation period, the EEAS may store anonymised data for statistical purposes for a longer period. The anonymisation measures have not yet been defined.

Legal Analysis

Legal basis, lawfulness and special categories of data

The notified processing is part of a policy aiming at preventing conflicts at work, based partly on Article 12a of the Staff Regulations (prohibition of harassment), Article 11 of the Conditions of employment for other servants, Article 1d (prohibition of discrimination) and Article 24 (protection of staff). The notification also refers to Articles 86 (disciplinary measures) and 90 (appeals) of the Staff Regulations. The EDPS would like to point out that the latter two Articles refer to well-established distinct formal procedures; the confidential counsellors' tasks are decidedly different from these formal procedures. The lawfulness of the processing is in the first place based on Article 5(a); for the selection of confidential counsellor, Article 5(d) can be a supplemental ground for lawfulness; for the counselling itself, Articles 5(d) and (e) may also be supplemental grounds for lawfulness. **The notification and other documentation should be adapted accordingly as concerns legal bases and lawfulness.**

As concerns the possible processing of special categories of data, the notification form mentions that this would be possible in line with Article 10(2)(a) of the Regulation. This provision allows the processing of such data based on the explicit consent of the data subject. One example would be an alleged victim providing such information about him/herself on his/her own accord. However, this provision cannot be used if a person involved in the procedure provides such information about a different person involved, which could very well be the case here. In any case, 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*

² The activities of the mediation service are the subject of the EPDS prior check Opinion in case 2013-0518. Persons in difficulty always have the option of going straight to more formal procedures as well.

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". **This should be reflected in the notification form.** The legal basis which is relevant in the case (Article 12a of the Staff Regulations) imposes an obligation on the European Union 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 specific case. In any case, processing of such data should be limited to the amount necessary for dealing with the case.

Data subject rights

Everyone whose personal data are processed in the procedure should be informed about this, in line with Articles 11 and 12 of the Regulation (as applicable). Data subjects also have several additional rights, such as that to access personal data stored about them (Article 13). In some cases (e.g. concerning alleged harassers), Article 20(1)(c) may allow for a restriction, to be applied on a case-by-case basis.

According to the privacy statement, restrictions under Article 20(1) (a) and (c) may apply. The exceptions in **Article 20 should only be used on a case-by-case basis following an evaluation of the individual situation.** Article 20(1)(c) (rights and freedom of the data subject or third parties) is the most relevant provision here. This concerns especially requests of alleged harassers to gain access to the allegations as submitted by the alleged victim. This limitation should only be applied when strictly necessary to protect the rights and freedoms of others, and in order to secure the good administration of cases or the future relations of the parties.³ In any case, the **privacy statement should be provided to everyone involved in the procedure** (including witnesses and alleged harassers) **at the latest when they are contacted by a confidential counsellor.**

Candidates applying as confidential counsellors can rectify their personal data submitted up to 10 days after the call for applications' closure. Normally, the EDPS recommends that changing data relating to the eligibility and selection criteria should not be possible after the closure in order to safeguard the fairness of the selection procedure. **As concerns purely administrative data (e.g. contact details), rectification should be possible after closure of the call, independent of the time passed since closure.**

Transfers

Transfers of personal data related to the informal procedure should only occur when they are necessary for the legitimate execution of the tasks of the recipient. If a transfer to a different department of the EEAS 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) of the Regulation. **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 within the EU institutions should process the data received only for the purposes for which they were transmitted (Article 7(3) of the Regulation).

Conservation and statistics

Concerning the form to be stored after closure of a case, the EDPS draws attention to the principle that personal data are only to be stored for as long as they are necessary for the accomplishment of the purpose of the processing. This means that the **content of the form should be restricted to what is necessary for the purposes following case closure** (e.g. policy evaluation, statistics). The EEAS should **design the form accordingly and provide it**

³ See also EDPS Guidelines on Data Subject Rights, available on the EDPS website, p. 33.

to the EDPS. Notably, exchanges with the parties and notes of the counsellors should not be stored. Asking the alleged victim's consent for further storage -as the EEAS plans to do- would on its own not provide a proper basis for lawfulness of this further conservation. The reason is that Article 5(d) declares lawful processing to which the *data subject* has unambiguously consented. The term data subject refers to every person about whom personal data are stored. In the case at hand, this could also include alleged harassers, witnesses and other persons mentioned in the file; the consent of the alleged victim will thus not be enough for lawful continued storage of data also relating to other persons. For this reason, the EDPS advises against storing full documentation based on the alleged victim's consent; instead of full documentation, a closure form should be stored following closure of the case, as recommended above.

The EEAS should also **ensure that data further stored for statistical purposes** following the conservation period **are properly anonymised.**

Conclusions

There is no reason to assume that there is a breach of the Regulation, provided that the recommendations indicated in bold in this Opinion are implemented.

Please inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Yours sincerely,

Giovanni BUTTARELLI

(signed)

Cc: Ms Carine CLAEYS, Data Protection Officer, EEAS