



## **The European Data Protection Supervisor's opinion on a notification for Prior Checking regarding the European Ombudsman's Whistleblowing Procedure (Case 2014-0828)**

Brussels, 04 December 2014

### **1. Proceedings**

On 28 August 2014, the European Data Protection Supervisor ("**EDPS**") received a notification for prior checking from the Data Protection Officer ("**DPO**") of the European Ombudsman ("**EO**") regarding the draft whistleblowing procedures to be established at the EO.

According to Article 27(4) the present Opinion must be delivered within a period of two months, not counting suspensions for requests for further information. The case was suspended for information from 10 September 2014 to 3 October 2014, from 9 October 2014 to 4 November, and for comments of the DPO from 2 December 2014 to 3 December 2014. The EDPS shall thus render its Opinion before 17 December 2014.

### **2. The facts**

#### **2.1. Description of the processing**

The purpose of the processing operation is to enable the reporting of fraud, corruption or other serious professional wrongdoing within the EO's Office<sup>1</sup>. This requires establishing reporting channels for whistleblowers, managing and following-up reports, and ensuring protection and adequate remedies for whistleblowers. Article 22 of the Staff Regulations, as well as the Conditions of Employment of Other Servants of the European Union provide for the rules on whistleblowing.

The EO has drafted internal rules concerning whistleblowing<sup>2</sup> by members of her staff (hereinafter internal rules). The rules aim to safeguard the rights and interests of whistleblowers and provide adequate remedies if they are not treated correctly and fairly in relation to their whistleblowing.

According to Article 5 of the internal rules, a whistleblower who reports to a manager or to the Ombudsman has the following information rights:

- (i) to be provided with an acknowledgement as rapidly as possible and, in any event, within five working days;
- (ii) to be told which staff member is responsible for dealing with the matter;
- (iii) to be told, as soon as possible and, in any event, no later than 60 days following receipt of the report, of the time it will take the EO's Office to take appropriate action;
- (iv) to be informed of any major steps taken in the course of any internal investigation based on the whistleblower's report, including the result of this investigation and any referral to OLAF.

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<sup>1</sup> The processing operation does not concern the Ombudsman's handling of disclosures made to her in accordance with Article 22b of the Staff Regulations by whistleblowing staff of other institutions.

<sup>2</sup> Draft Decision of the European Ombudsman on internal rules concerning whistleblowing.

The internal rules state that the identity of a whistleblower and the confidentiality of the report received shall be protected to the greatest extent possible by the EO. The name of the whistleblower is not disclosed to any person potentially implicated in the reported misconduct or to any other person, except where absolutely necessary, for example, where procedural fairness requires identification of the source of the information. Where a manager or the Ombudsman refers the matter to OLAF, the identity of the whistleblower shall not normally be disclosed to OLAF.

## **2.2. Individuals potentially affected by the whistleblowing procedure**

All staff members of the EO's office (including seconded national official and trainees) and third parties (for instance, contractors, sub-contractors and their employees) can blow the whistle. All these persons can also be affected because they might be witnesses, accused persons or third parties mentioned in a whistleblowing report.

## **2.3. Personal data collected and assessed during the procedure**

The personal data processed are contained in the report submitted by the whistleblower and any subsequent document drawn up in response to that initial report. These documents may contain names, contact details, and other personal data. In principle, special categories of data (Article 10) should not be included.

## **2.4. Information given to whistleblowers and other parties**

Individuals who make a report will receive the Decision on internal rules concerning whistleblowing as well as a privacy statement. The privacy statement is also available on the EO's intranet.

Furthermore, the internal rules mention that staff members implicated in reports of serious misconduct shall be informed in good time of the allegations made against them. Where there is a substantial risk that such notification would jeopardise the ability of the EO to effectively investigate the allegations or gather the necessary evidence, notification may be deferred as long as such a risk exists. Upon termination of any internal investigation, the staff members concerned shall be informed as rapidly as possible of the results of the investigation.

## **2.5. Categories of recipients to whom data might be disclosed**

The notification states that access may be granted on a strict need to know basis. The categories of recipients<sup>3</sup> mentioned in the notification are the Head of Unit concerned, the Head of the Personnel, Administration and Budget (PAB) Unit, individual members of staff designated by the Staff Committee or the EO, the Directors, the Secretary-General, the EO, Disciplinary Board members, the Internal Auditor, the European Court of Auditors, the Civil Service Tribunal (other EU Courts), the EDPS, OLAF and national judicial authorities.

## **2.6. Data retention**

The conservation periods for files which do not lead to the opening of an inquiry ('non-case') will be kept for a period of 2 years from the date on which the EO decides to close the file without follow up. Files which lead to an administrative enquiry or disciplinary procedure are kept in line with the retention periods foreseen for those files.<sup>4</sup>

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<sup>3</sup> In the answer of 3 October 2014, the EO's Office explained that the assistant(s) in charge of handling the files are not identified as recipients in the notification and privacy statement.

<sup>4</sup> See EDPS opinion of 17 October 2007 on the notification for prior checking from the European Ombudsman's Data Protection Officer regarding the "disciplinary proceedings and administrative investigations", case 2007-0413.

## **2.7 Rights of access and rectification**

As mentioned in the privacy statement, in line with the internal rules concerning whistleblowing, whistleblowers have the rights to access and to rectify their personal data by contacting the Head of the PAB Unit. The right to rectify data can normally only apply to factual data that the EO processes.

## **2.8 Security measures**

[...]

## **3. Legal analysis**

### **3.1. Prior checking**

The processing of personal data is performed by a Union institution. Furthermore, the processing is partly done through automatic means. Therefore, Regulation (EC) No 45/2001 (the "**Regulation**") is applicable.

Article 27 of the Regulation subjects to prior checking by the EDPS processing activities likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks including under point (a) the processing of data related to suspected offences and under point (b) processing intended to evaluate personal aspects relating to the data subject, including his or her conduct.

As the EO will process data related to (suspected) offences and carry out an evaluation of the accused persons' conduct, the processing activity is subject to prior checking under Article 27(2)(a) and (b).

### **3.2. Lawfulness of the processing**

Personal data may only be processed if grounds can be found in Article 5 of the Regulation. According to Article 5(a), processing that is "necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instrument adopted in the basis thereof" is lawful.

The processing of data with regard to whistleblowing procedures is an obligation in accordance with Articles 22a, 22b and 22c of the Staff Regulations (including the Conditions of Employment of Other Servants or "CEOS"). Article 22 (a) sets out the obligation for staff to report, in writing, suspicions of serious misconduct either within their own institution or to OLAF. Article 22 (b) provides for the additional possibility to report to the EO, or to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, if certain conditions are met. Article 22 (c) describes the obligation for an institution to put in place a procedure for the handling of complaints made by officials concerning the way in which they were treated after or in consequence of the fulfilment by them of their obligations under Article 22 a or b.

The processing is necessary for the performance of a public interest task, namely the whistleblowing procedure at EO. Thus, the processing appears to be lawful in accordance with Article 5 (a) of the Regulation.

### 3.1. Data quality and special categories of data

According to Article 4(1)(c) of the Regulation, data must be adequate, relevant and non-excessive in relation to the purposes for which collected and/or further processed. They must also be accurate and where necessary kept up to date (Article 4(1)(d)).

There is a possibility that the EO, perhaps involuntarily, receives information that is of no interest/relevance to the investigation, also concerning special categories of data (see Article 10(1) of the Regulation). In this regard, the EDPS recalls the data must be necessary to comply with the performance obligations set out in Article 22 of the Staff Regulations (see Article 10(2)(b)).

Pursuant to these principles, data and in particular special categories of data that clearly are not relevant for the purposes of investigating fraud or other serious wrongdoings through the whistleblowing procedure, should not be further processed and should be erased. This requires doing a first check of the reports as soon as possible. Investigators handling the files should be aware of this. In order to achieve this, the EO should **update the internal rules so it reflects the above requirements.**

### 3.2. Data retention

As a general principle personal data must not be kept in a form which permits identification of data subjects for longer than is necessary for which the data are collected and/or further processed (Article 4(1)(e)).

The conservation period is 2 years following closure of the files which do not lead to the opening of an inquiry. In that regard, the Opinion of WP Article 29<sup>5</sup> mentions that personal data processed by a whistleblowing scheme should be deleted, promptly, and usually within two months of completion of the investigation of the facts alleged in the report. Therefore, the EDPS recommends the EO **to re-evaluate the data retention period or provide more justification about the necessity to retain data for two years.**

### 3.3. Information to the data subject

Articles 11 and 12 of the Regulation impose certain information obligations on controllers. These differ depending on whether the data have been collected directly from the data subject (Article 11) or from another source (Article 12).

The internal rules describe in Article 5 the whistleblowers' information rights (see 2.1, third paragraph). The EDPS considers the information to be provided to the whistleblower under point (iv) excessive and would like to emphasize that there is no obligation under data protection law to provide this information since it is not the whistleblower's personal data. This information could be detrimental to the rights of others. **Therefore, the internal rules and privacy statement should be adapted accordingly.**

With regard to the procedures for data subjects to exercise their rights of access, rectification and others, **it is good practice to include information regarding which time limit a reaction can be expected within** (e.g. 3 months for access request, without delay for

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<sup>5</sup> See Article 29 Working Party Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting controls, auditing matters, fight against bribery, banking and financial crime, WP 117, page 12, recommending two months from the closure of the investigation; available here:

[http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf).

rectification, etc.). Furthermore, **it is good practice to identify all the recipients, included the assistants in charge of handling the files.**

**All individuals affected by a particular whistleblowing procedure should also be directly provided with the privacy statement as soon as practically possible.** Affected individuals will usually include whistleblowers, witnesses, members of staff and the accused person(s). In most cases, informing the accused person at an early stage may be detrimental to the investigation and specific information might need to be deferred (see Article 20 of the Regulation). Deferral of information should be decided on a case by case basis. **The reasons for any restriction should be documented and added to the internal rules under Article 17.**

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

Under Article 13 and 14 of the Regulation, data subjects have the right to access their personal data and to have inaccurate data rectified. These rights may be restricted under the conditions set out in Article 20 of the Regulation. **The reasons for any restriction should be documented and added to the internal rules under Article 17.**

The EDPS welcomes the guarantees foreseen in the internal rules concerning confidentiality of whistleblowers. In this regard, the EDPS stresses that preserving the confidentiality of whistleblowers, the accused persons and the third parties are of the outmost importance.

a) The identity of the whistleblower should never be revealed apart from in certain exceptional circumstances:

- if the whistleblower authorizes such a disclosure;
- if this is required by any subsequent criminal law proceedings or;
- if the whistleblower maliciously makes a false statement.

b) The accused person shall be protected in the same manner as the whistleblower. The reason is that there is a risk of stigmatisation and victimisation of that person within the organisation to which he/she belongs. The person will be exposed to such risks even before he/she is aware that he/she has been incriminated and the alleged facts have been investigated to determine whether or not they are substantiated. In this regards, the EO should **add information about the protection of the accused person under Article 7 of the internal rules.**

When replying to data subjects' access request, the EO should bear in mind that personal data does not only relate to information about an individual's private life in a strict sense, but also to information regarding an individual's activities, such as his or her working relations and economic or social behaviour. Information can relate to an individual because of its content, the purpose of its use and the result of its use.

When considering access rights, the EO should also consider the status of the requester and current stage of the investigation.

EO's internal rules describe an example of the exceptional circumstances for disclosure of the whistleblower's identity as "*...where procedural fairness requires identification of the source of the information*". The wording "procedural fairness" does not seem explicit as regard the exceptional circumstances described above. **Therefore, the EDPS recommends amending Article 7 to clarify in which exceptional circumstances the identity of the whistleblower might be revealed.**

### **3.5. Security measures**

[...]

### **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of the Regulation providing the recommendations contained in this Opinion are fully taken into account. The EO should:

- implement a general recommendation on how to deal with excessive personal data (including special categories of data);
- re-evaluate the data retention period or provide more justification about the necessity to retain data for two years;
- adjust the internal rules (Article 5, point (iv)) and the privacy statement to make sure that the whistleblower's right do not undermine the rights of others;
- provide all affected individuals with the privacy statement as soon as practically possible;
- document the reasons for any restrictions to data subject's rights (by adopting a motivated decision for example) and update the internal rules in that regard;
- make clear in Article 7 of the internal rules that the identity of the accused person should also be protected and under which exceptional circumstances the identity of the whistleblower might be revealed;
- [...]
- [...]

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

Done at Brussels, 04 December 2014

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