



WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

[***]
Director
European Agency for Health and
Safety at Work (EU-OSHA)
Santiago de Compostela 12
E-48003 BILBAO
Spain

Brussels, 28 July 2015
WW/BR/sn/D(2015)1278 C 2015-0467
Please use edps@edps.europa.eu for all
correspondence

Subject: Prior checking - Informal procedure for psychological and sexual harassment from EU- OSHA

Dear [***],

We refer to the notifications for prior checking submitted to us by the Data Protection Officer of EU-OSHA ("**OSHA**") in the framework of the EU- OSHA informal procedure for psychological and sexual harassment (notification received on 29 May 2015)¹.

The following draft documents were appended to the notification:

- Decision of the Governing Board on OSHA Policy on building and maintaining a working culture based on dignity and respect (the "**Dignity Policy**");
- Manual of procedures for confidential counselors (the "**Manual of procedures**")²;
- Privacy statement in relation to the informal procedure³.

The EDPS issued Guidelines concerning the processing of personal data during the informal procedures for cases of harassment in EU institutions and bodies (the "**Guidelines**")⁴. We will

¹ The draft Opinion was sent to the DPO for comments on 17 July 2015. The EDPS received a reply on 26 July 2015.

² As the Manual of procedures can also be useful for the members of the HR Section as far as the data protection rules are concerned, OSHA could change the title of the Manual of procedures so that it is not only intended for confidential counsellors.

³ A privacy statement in relation to the selection and appointment of confidential counsellors was also appended to the notification. It, however, relates to another set of processing operations, which were notified separately (case 2015-0562).

⁴ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-02-18_Harassment_Guidelines_EN.pdf

therefore only address the aspects of the processing which do not seem to be fully compliant with Regulation 45/2001⁵ ("**the Regulation**") as further outlined in the Guidelines.

1. Grounds for prior checking

The informal procedure may include the processing of data relating to health, it is therefore also subject to prior checking under Article 27(2)(a).

Recommendation: 1) include Article 27(2)(a) of the Regulation to the grounds for prior checking in the notification (Section 16).

2. Data Subjects

The notification does not mention the categories of data subjects.

Recommendation:

2) Add the data subjects (alleged victims of harassment, alleged harassers and witnesses) to the notification (Section 5).

3. Lawfulness and legal basis

The notification does not mention any specific legal basis for the informal procedure.

Moreover, the grounds for lawfulness mentioned in the notification are Article 5(a) (task necessary in the public interest), (d) (consent of the person concerned) and (e) (vital interest of the person concerned) of the Regulation. In the employment context, consent should not be used as a ground for lawfulness for the processing of personal data. In addition, it should be made clear in the notification that the main ground for lawfulness is Article 5(a), and that Article 5(e) of the Regulation can be referred to in exceptional circumstances.

Recommendations: edit the notification as follows:

3) Add the specific legal basis of the informal procedure, being Article 12(a) of the Staff Regulations, Article 11 of the Conditions of Employment of Other Servants ("**CEOS**"), Articles 1 and 31(1) of the EU Charter of Fundamental Rights, the Dignity Policy;

4) Remove Article 5(d) of the Regulation as ground for lawfulness of the processing and specify that Article 5(e) can be referred to in exceptional circumstances only; similar changes should also be made in the privacy statement.

4. Special categories of data

Although OSHA's intent is not primarily the collection of special categories of data, the informal procedure may involve the processing of sensitive data, such as data concerning health or sex life of the persons concerned⁶.

Recommendation: Adapt the notification as follows:

5) Indicate that special categories of data may be processed incidentally and indicate which ones (in Section 6 of the notification).

⁵ 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.

⁶ The Manual of procedures (p. 15) also mentions the processing of data relating to race, as well as political and religious beliefs.

5. Data quality

The notification indicates that there is no processing for statistical purposes, whereas:

- the Dignity Policy (Article 5.6) provides that relevant statistics will be collated from the confidential counsellors;
- the Manual of procedures (Article 2.2.12) provides that confidential counsellors must complete an anonymous statistical form for each case handled and must send the form to the HR section so that the latter can evaluate the collective workload of the counsellors and monitor trends in cases handled;
- a template of "anonymous statistical form" is appended to the Manual of procedures (Annex III).

The collection of data for statistical purposes should be kept either in anonymous form only or, if that is not possible, only with the identity of the persons involved encrypted⁷. The ability of identifying individuals may arise by means of statistical inferences, especially within small EU entities⁸. In the present case, the indication of the unit could allow the identification of the persons.

Recommendations:

6) Include the processing of anonymous data for statistical purposes in the notification (Section 14), as well as in the privacy statement;

7) Refrain from collecting any information on the indication of the unit of the alleged victim/harasser and adapt the "anonymous statistical form" appended to the Manual of procedures (Annex III) accordingly.

6. Conservation

The notification states notably that the documentation related to the informal procedure (opening and closing forms) will be stored in the HR section central archive for not more than five years unless there is a judicial or administrative procedure, in which case it can be stored for a further five year period.

Recommendation:

8) As far as the conservation period in HR archives is concerned, the extension of the five year conservation period in case of an administrative or judicial procedure should be limited to the duration of the said procedure (and not automatically five years); the notification (Section 13), the Manual of procedures (Article 6.8.) and the privacy statement should be adapted accordingly.

7. Transfers

According to the notification, the data can be transferred notably to "*external experts (psychologists, emergency services) where applicable*". In addition, the sharing of this information by the HR section and the confidential counsellors with other parties is subject to "*the consent of the alleged victim or, in exceptional cases, when it is necessary to protect the individual, as foreseen by Article 20(1)(c) of the Regulation*"⁹.

Such transfers, which are subject to Article 8 of the Regulation (or Article 9 if the recipient is not subject to Directive 95/46), should only occur in exceptional circumstances and one

⁷ Article 4(1)(e) of the Regulation.

⁸ See p. 7 of the Guidelines.

⁹ Article 6.3 of the Manual of procedures.

should decide on a case by case basis the documents the transfer of which is relevant and necessary to the third party recipient.

If the person concerned needs the help of a psychologist, OSHA should prefer a solution where the person directly addresses the psychologist, rather than have a transfer of data from OSHA with the person's consent¹⁰. The other cases (emergency cases) are very exceptional. In this framework, Article 20(1)(c) of the Regulation (referred to in the data transmission section of the Manual of procedures¹¹) does not relate to and cannot legitimate the transfer (it only limits the right of access of Article 13 of the Regulation under certain circumstances).

In addition to Article 8 (or 9), the requirements of Article 5 (lawfulness) and Article 10 (special categories of data) of the Regulation¹² should be met.

Recommendation:

9) Avoid transferring personal data to third parties, except in exceptional and emergency cases; adapt the notification (Section 12), the privacy statement and the Manual of procedures (p. 16) accordingly;

10) Remove the reference to Article 20(1)(c) from the section of the Manual of procedures entitled "processing of data and data transmission" (p. 16).

8. Information to the data subject

Except for what is mentioned in recommendations 4, 7, 9 and 10, the privacy statement complies with Articles 11 and 12 of the Regulation.

Section 7 of the notification (Information to be given to data subjects) does not refer to the privacy statement. Moreover, neither the Manual of procedures, nor the notification mentions how the privacy statement is made available to OSHA staff members in general and in each specific procedure¹³. In addition, the explanations on the restrictions to the data subject's rights, currently inserted in Section 7 of the notification (information to data subjects) should be moved to Section 8 (procedures to grant rights to data subjects).

Recommendations:

11) Adapt the privacy statement in accordance with recommendations 4, 6, 7, 9 and 10;

12) Make a reference in the notification (Section 7) to the privacy statement; move the current text of Section 7 of the notification to Section 8 (Procedures to grant rights to data subjects);

13) Mention in the Manual of procedures (p. 18) and in the notification (Section 7) how the privacy statement is made available to the persons concerned, in general and in each specific procedure.

9. Security

[***]

* *
*

¹⁰ See p. 10 of the Guidelines.

¹¹ See p. 16 of the Manual of procedures.

¹² See above Sections 3 and 4.

¹³ See pp. 13-14 of the Guidelines (the privacy statement should (i) be made available on the intranet page referring to the informal procedure and (ii) for each specific case communicated by the counsellor to the person concerned during the initial meeting).

In conclusion, there is no reason to believe that there is a breach of the provisions of the Regulation provided that the above-mentioned recommendations are fully taken into account.

The EDPS expects that OSHA implements the recommendations accordingly and will therefore **close** the case.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: [***], Data Protection Officer