



Prior Checking Opinion

"Individual performance indicators for the annual evaluation of staff members"

Community Plant Variety Office (CPVO)
Case 2016-0417

Personal data collected during an employer's core business activities are sometimes further used to produce productivity reports of employees to feed the evaluation process. This further use of personal data is a **change of the initial purpose (linked to the core business)** and should therefore be based on specific and explicit internal rules. Employees must be made aware of the change of purpose to ensure fair processing of their personal information. In addition, this information can only be used as a support tool for the annual evaluation of employees and not as the only source to feed the evaluation process.

Brussels, 04 July 2016

The European Data Protection Supervisor's prior checking Opinion concerning the individual performance indicators for the annual evaluation of staff members at the Community Plant Variety Office (Case 2016-0417)

Brussels, 04 July 2016

1. Proceedings

On 29 April 2016, the European Data Protection Supervisor ("EDPS") received a notification for prior checking from the Data Protection Officer ("DPO") of the Community Plant Variety Office ("CPVO") regarding the further use of data from the central CPVO database to produce (i) operational and productivity reports using aggregated data and (ii) reports with individual staff information from which individual performance indicators may be derived and used for staff evaluation. This EDPS opinion covers only the part of the procedure that is prior checkable: the establishment and use of individual performance indicators for the annual evaluation of staff members.

According to Article 27(4) of Regulation (EC) No 45/2001 (the "Regulation") this Opinion must be delivered within a period of two months, not counting suspensions for requests for further information¹, i.e. by 4 July 2016.

2. The facts

The **purpose** of the procedure to use data available in the Plant Variety Rights (PVR) central database of the CPVO to provide operational information to both the staff members and the hierarchy, facilitating the decision-making and evaluation processes in the Office.

Two **types of reports** will be produced by a limited number of staff members authorized to use the reporting software: operational and productivity reports using aggregated data and reports with individual staff information, from which individual performance indicators may be derived.

Where felt necessary for management purposes, the hierarchy may decide that productivity reports and individual performance indicators should be produced. They may be produced provided that the staff member at the origin of data has been involved in their validation and the purposes have been clearly identified prior to the production of the reports and agreed upon by the Management Team of the Office. Report(s) on output and efficiency are only used in a given annual assessment of a staff member for a given year if referred to in the objectives defined for that staff member in a previous annual staff evaluation. Staff member(s) concerned by such reports or indicators are allowed to comment the report(s) produced. Such reports will not be the sole basis for an assessment but complement other elements.

The CPVO lists as **legal bases** for the processing operation:

- the CPVO Procedure on Management and production of IT reports which describes also the procedure applying to productivity reports and individual performance indicators used for the annual evaluation of staff members,
- Articles 43 and 100 of the Staff Regulations;
- Articles 15(2) and 87 of the Conditions of Employment of Other Servants of the European Union;

¹ The case was suspended from 13 to 17 June and from 29 to 30 June 2016.

- Commission Decision on general implementing provisions for Article 43 of the Staff Regulations.

Article 5(a) of the Regulation is considered as the legal basis for making data processing legitimate taking into account the aforesaid legal provisions.

All staff members of the CPVO, including seconded national experts, trainees and interim staff are concerned by the processing operation.

According to the notification, **data** which are used to produce reports are raw data taken from the central CPVO database PVR². Performance indicators identified in the report³ generally reflect workflow related events: the initials of the staff member(s) working on a specific file, the date of the workflow event, the nature of the workflow event.

A **specific privacy statement** is available on the CPVO's SharePoint intranet site. It contains the information on the controller and the team responsible for the processing, the purpose of the processing, what personal data are processed, who has access to them and to whom are they disclosed, retention period, how to access one's personal data and correct it and who to contact in case of questions about the protection of personal data.

Some **useful information** is also provided in other relevant documents accessible to all CPVO staff members. An internal note reminds the CPVO staff who will process the personal data and produce the reports that they should only collect and share data for the purposes laid down in the CPVO Procedure on Management and production of IT reports, and recalls the set data retention periods for different reports. It also states they can address any questions to the DPO in case of doubt either on the use of data, its collection, its publication, or its definition and the consequences of data processing. Furthermore, the CPVO Procedure on Management and production of IT reports also provides information on the procedure for the production, quality, publication and retention of different reports as well as to address questions to the controller or the DPO in case of doubt.

The notification states that the CPVO Internal Procedure defining accessing, correcting, erasing and blocking of personal data applies to granting **rights of data subjects** in this processing operation. It further lists the time limits for the blocking of data and erasure of data and handling these requests. The privacy statement refers the data subjects, who wish to access, correct or delete their personal data, to contact the unit designated as the controller and the team responsible for the processing, and to the DPO and the EDPS in case of questions about the processing of personal data.

The notification states that the **recipients** of personal data for reports where individual staff information can be identified are the hierarchy and, in identified case, more widely distributed only upon agreement of the all staff member(s) concerned.

The **retention period** of the reports that contain individual staff information from which individual performance indicators of staff member(s) can be derived is no longer than one

² The specific privacy statement mentions that the raw data are taken from the central databases (CPVO database PVR and EPM (expenditure and purchase management)).

³ Examples of reports include:

- Processing of input and payment of invoices (receipt date, input date, approval date, payment date);
- Total commitments open (RAL) by staff member (but the staff member only sees their own information) necessary to carry out their work.

year. The reports will then be erased. The notification and privacy statement state that reports allowing individual performance indicators will be destroyed after a period of a year from the date of the end of appraisal process.

[...]

3. Legal analysis

3.1. Prior checking

The processing of personal data is performed by an agency of the European Union. Furthermore, the processing is done through automatic means. Therefore, the Regulation is applicable.

The establishment and use of individual performance indicators for the annual evaluation of staff members is subject to prior checking on the basis of Article 27(2)(b) of the Regulation since it is intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct. The EDPS understands that although different underlying databases feed raw data into the central database, the reporting software only extracts the information from the central database and there is no interaction between the reporting software and the databases underlying the central database. Article 27(2)(c) of the Regulation is therefore not applicable.

3.2. Legal basis and ground for lawfulness of the processing

The notification and privacy statement refer to Articles 43 and 100 of the Staff Regulations. The EDPS would like to point out that **reference to Article 100 should be checked as that article has been deleted from the Staff Regulations and the specific privacy statement revised accordingly.**

Article 5(a) of the Regulation is stated as the legal basis of the processing. The EDPS, however, wishes to point out that **Article 5(a) of the Regulation relates to the lawfulness of the processing. The notification and the privacy statement should be revised accordingly.**

The CPVO grounds the lawfulness of the wider distribution of reports with individual staff information on the agreement of all the staff members concerned, therefore on Article 5(d) of the Regulation. The EDPS considers that **Article 5(d) should not be relied on since consent is not necessarily unambiguous and freely given in the employment context.** The necessity of this transfer of personal data is further analysed in point 3.6.

3.3. Data quality

According to Article 4(1)(c) of the Regulation, personal information must be adequate, relevant and non-excessive in relation to the purposes for which they are collected and/or further processed. They must also be accurate and, where necessary, kept up to date (Article 4(1)(d)). Granting a data subject the right to access, check and rectify inaccurate data and to justify certain figures contributes to ensuring the accuracy of the data in line with Article 4(1)(d) of the Regulation.

The EDPS welcomes the safeguards the CPVO has put in place to ensure that productivity reports and performance indicators are complete and accurate and that staff members are aware of the data quality requirements under Article 4(1)(c) and (d).

3.4. Change of purpose

According to Article 4(1)(a), personal data must be processed fairly and lawfully. Pursuant to Article 4(1)(b) of the Regulation, personal data should be collected for specified, explicit and legitimate purpose and not further processed in a way incompatible with those purposes. Possible change of purpose is only permissible if explicitly allowed by the internal rules of the EU institution or body, as provided for in Article 6(1) of the Regulation.

The EDPS understands that the CPVO Procedure on the management and production of IT reports, was approved by the President, that it is equivalent to a decision by the President, that it is not valid retroactively and that it was included in the "Vademecum of the CPVO procedures" available to all staff. The EDPS considers the CPVO Procedure on the management and production of IT reports as a sufficient instrument providing a specific legal basis in accordance with Article 6 of the Regulation for the change of purpose of the collected data and for the use of derived individual performance indicators as a support tool for the annual assessment of a staff member. Nevertheless, the title of the internal rules "the CPVO Procedure on Management and production of IT reports" is not explicit as to the purpose of the processing operation.

Given the specific risks of the processing, namely its influence on assessments of the performance of data subjects, the EDPS recommends **including a reference to the CPVO Procedure on the management and production of IT reports in the Decision on appraisal of officials and temporary agents, Decision on appraisal of contract agents and the CPVO appraisals guide**. This will reinforce the legal basis of the processing of individual performance indicators for staff evaluation and will provide transparency, fairness and certainty to staff members.

3.5. Data retention

As a general principle, personal information must not be kept in a form which permits identification of persons for longer than is necessary for the purpose for which the data are collected and/or further processed.⁴

The EDPS considers that the storage period of one year from the date of the end of appraisal process is in accordance with the Regulation.

A possible uncertainty or conflict of interpretation might arise between the retention periods indicated in the CPVO Procedure on Management and production of IT reports and the internal note to the attention of the "Tableau Desktop" users on the one hand and in the notification and the specific privacy statement on the other hand. To avoid it, the EDPS recommends to **clarify in the first two documents that the operational and productivity reports with individual staff information or from which individual performance indicators of staff member(s) can be derived shall be kept during a short period limited to serve the purpose for which they were produced, and not longer than one year after that purpose has been served, after which they will be erased.**

⁴ See Article 4.1(e) of the Regulation.

3.6. Transfer of data

In line with Article 7(1) of the Regulation, personal data can be transferred within or to other institutions if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. In line with Article 7(3) of the Regulation, the recipient can process the data only for the purposes for which they were transmitted.

The EDPS considers that transfer of the reports where individual staff information can be identified to the hierarchy is in accordance with the Regulation, as the transfer to the hierarchy is necessary for the evaluation purposes.

The EDPS notes that in identified cases reports with individual staff information can be more widely distributed with the agreement of the concerned staff member. The EDPS considers that it is not appropriate to rely on consent of the data subject as the justification for the legitimacy of this transfer. Furthermore, as to the necessity of the transfer, the EDPS does not see a reason why the reports should be more widely distributed other than to the hierarchy. Consequently, the EDPS recommends that **the CPVO does not distribute more widely reports with individual staff information or otherwise provide for justification about this distribution.** The CPVO should **remove from the privacy statement the reference to wider distribution of reports with individual staff information with consent of the staff member concerned.**

3.7. Information to the data subject

Articles 11 and 12 of the Regulation provide a minimum list of information on the processing of personal data that need to be provided to the concerned individuals. The specific privacy statement attached to the notification includes the required information and is available on the CPVO's SharePoint intranet site along with other documents relevant for the processing operation, that also provide useful information to the data subject.

The EDPS considers that the right of information seems to be respected; the CPVO should however:

- **reference the detailed information on the use of performance indicators for staff evaluation in the information available on the appraisal procedures** in order to enhance transparency, fairness and certainty to staff members.
- **provide the information to the data subject on the use of performance indicators for staff evaluation before the collection of production data for evaluation purposes starts**, for example by including a link to the procedure and privacy statement in the announcement.
- **indicate in the privacy statement time limits for the exercise of the data subject's rights and the time limit within which the controller will react to requests of the data subjects for blocking or erasure of data.**

3.8. Rights of the data subject

Pursuant to articles 13 and 14 of the Regulation, the data subjects have the right to access and rectify their personal data processed by the controller and pursuant to articles 15 and 16 of the Regulation, to have that personal data blocked and erased. Under Article 19 the data subjects have the right not to be subject to an automated decision.

The EDPS takes note of the procedure, time limits and modalities for the exercise of data subject's rights laid down by the CPVO, including that the staff member concerned by the production reports and individual performance indicators is involved in their validation and can comment on them. The EDPS also notes that such reports will not be the sole basis for an assessment but complement other elements of annual staff evaluation. The EDPS nevertheless wishes to stress the controller's duty to **ensure the effective exercise of data subject's rights, in particular with regard to data generated automatically**. Because the right to rectify data is of the outmost importance in view of the fact that reports are generated automatically, the staff members must understand the logic involved in the processing so that they understand how such data are generated and so that they can have the data rectified if they are not correct or can justify them, prior to the evaluation exercise.

[...]

4. Conclusion

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

- 1) check the reference to Article 100 as that article has been deleted from the Staff Regulations and revise the specific privacy statement accordingly (point 3.2.);
- 2) revise the specific privacy statement to mention Article 5(a) as the ground for lawfulness of the processing (point 3.2.);
- 3) include a reference to the CPVO Procedure on the management and production of IT reports in the Decision on appraisal of officials and temporary agents, Decision on appraisal of contract agents and the CPVO appraisals guide (point 3.4.);
- 4) clarify in the CPVO Procedure on Management and production of IT reports and the internal note to the attention of the "Tableau Desktop" users that that the operational and productivity reports with individual staff information or from which individual performance indicators of staff member(s) can be derived shall be kept during a short period limited to serve the purpose for which they were produced, and not longer than one year after that purpose has been served, after which they will be erased (point 3.5.);
- 5) remove from the privacy statement the reference to wider distribution of reports with individual staff information with consent of the staff member concerned and not distribute more widely reports with individual staff information or otherwise provide for justification about this distribution (points 3.2 and 3.6.);
- 6) reference the detailed information on the use of performance indicators for staff evaluation in the information available on the appraisal procedures in order to enhance transparency, fairness and certainty to staff members (point 3.7.);
- 7) provide the information to the data subject on the use of performance indicators for staff evaluation before the collection of production data for evaluation purposes starts, for example by including a link to the procedure and privacy statement in the announcement (point 3.7.);

- 8) indicate in the privacy statement time limits for the exercise of the data subject's rights and the time limit within which the controller shall react to data subjects' requests for blocking or erasure of their personal data (point 3.8.);
- 9) ensure the effective exercise of data subject's rights, in particular with regard to data generated automatically (point 3.9.).

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

Done at Brussels, 04 July 2016

[signed]

Wojciech Rafał WIEWIÓROWSKI