EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Mr Markku MYLLY
Executive Director
European Maritime Safety Agency
(EMSA)
Praça Europa 4
1249-206 Lisbon
PORTUGAL

Brussels, 19 December 2016
WW/XK/ssp/D(2016)2757 **C 2014-0287**
Please use edps@edps.europa.eu for all correspondence

Subject: **EDPS prior checking Opinion on *"administrative inquiries and disciplinary proceedings"* at EMSA (case 2014-0287).**

Dear Mr Mylly,

We have analysed EMSA's notification on administrative inquiries and disciplinary proceedings at EMSA sent on 6 March 2014 for prior-checking under Articles 27(2)(a) and 27(2)(b) of Regulation 45/2001 (the Regulation).

As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply[1].

The EDPS has revised his current Guidelines[2] on the processing of personal data in administrative inquiries and disciplinary proceedings by the EU institutions and bodies (the EDPS Guidelines). On this basis, the EDPS will identify and examine the Agency's practices which do not seem to be in conformity with the principles of the Regulation as further outlined by the EDPS Guidelines, providing EMSA with specific recommendations in order to be in compliance with the Regulation.

---

[1] On 12 March 2014, the EDPS sent questions to EMSA for further information and documents. On 7 October 2015, the EDPS sent a reminder and EMSA replied on 9 October 2015 providing some documents. EMSA sent a copy of a confidentiality declaration to be signed by the investigators and a copy of a privacy notice.

[2] Available on our website: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-04-23_Guidelines_inquiries_EN.pdf

1) Necessity and proportionality when collecting and further processing data

On the basis of the information provided, it seems that EMSA has not adopted written rules on the use of different means for collecting potential evidence in the context of an administrative inquiry or disciplinary proceeding.

In light of Article 4(1)(c) of the Regulation[3], investigators should rigorously apply the principles of necessity and proportionality when choosing the means of inquiry. The principle of data minimisation should be applied for all means and steps of the investigation. Investigators should limit the collection of personal information to what is directly relevant and necessary to the purpose of the inquiry and of the disciplinary proceeding. They should also retain the information only for as long as it is necessary to fulfil that purpose. In other words, investigators should collect only the personal data they really need, and they should keep it only for as long as they need it.

There are some more and less intrusive means of collecting data in the context of an inquiry or a disciplinary proceeding.

For example, the *hearing* of the person under investigation and of witnesses and victim is usually a proportionate option, as it is the least intrusive and the most transparent means to conduct an inquiry and establish the alleged facts relevant to the inquiry.

When collecting *paper information*, investigators should consider blanking out irrelevant or excessive information to the inquiry.

If *electronic information* related to the person under investigation is necessary and relevant evidence to the inquiry, the IT service should be in charge of implementing the technical aspects of the collection on instructions of the investigators. The number of authorised IT officers in charge should be strictly limited (need-to-know principle). The investigators' request should be specific so that the IT service will extract only relevant information[4].

EMSA should consult its DPO in this regard and take into consideration the DPO's practical guidance and advice.

Recommendation:
1. EMSA should ensure that the data protection rules on the use of different means for collecting potential evidence for the investigation are reflected in a Manual including specific guidance.

---

[3] *"Personal data must be adequate and not excessive in relation to the purposes for which they are collected and/or further processed".*

[4] See section 2.6 of the "EDPS Guidelines on personal data and electronic communications in the EU institutions" about different methods that can be employed to investigate serious offences (access to e-Communications data, covert surveillance, forensic imaging of the content of computers and other devices, available on our website: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/15-12-16_eCommunications_EN.pdf.

2) Retention periods

In accordance with Article 4(1)(e) of the Regulation, personal data must not be kept longer than necessary for the purpose for which they are collected or further processed.

The notification does not clearly indicate any retention periods of the data processed. The privacy notice mentions the retention period of 20 years for a disciplinary file. The Decision of the Agency's Administrative Board of 24 January 2014 laying down the General Implementing provisions on the conduct of administrative inquiries and disciplinary procedures (the Decision) refers to the different potential penalties and to the possibility of staff members to submit a request for the deletion of a disciplinary penalty (other than removal from post) in their personal file.

The EDPS has re-considered the issue of retention periods in light of three possible scenarios:

Pre-inquiry file: When EMSA makes a preliminary assessment of the information collected and the case is dismissed. In such cases, EMSA should set up a maximum retention period of two years after the adoption of the decision that no inquiry will be launched. This maximum retention period could be necessary for audit purposes and complaints to the Ombudsman.

Inquiry file: When EMSA launches an inquiry including the collection of evidence and interviews of individuals, there are three possibilities: i) the inquiry is closed without follow-up, ii) a caution is issued or iii) the Appointing Authority of the institution adopts a formal decision that a disciplinary proceeding should be launched.

For cases i) and ii), a maximum of five-year-period from closure of the investigation is considered to be a necessary retention period, taking into account audit purposes and legal recourses from the affected individuals.

For case iii), EMSA should transfer the inquiry file to the disciplinary file, as the disciplinary proceeding is launched on the basis of the evidence collected during the administrative inquiry.

Disciplinary file: EMSA carries out a disciplinary proceeding with the assistance of internal and/or external investigators on the basis of a contract. In principle, EMSA should take into consideration the nature of the sanction, possible legal recourses as well as audit purposes and set up a maximum retention period, after the adoption of the final Decision. If the staff member submits a request, under Article 27 of Annex IX to the Staff Regulations, for the deletion of a written warning or reprimand (3 years after the Decision) or in the case of another penalty (6 years after the Decision, except for removal from post) and the Appointing Authority grants the request, the disciplinary file which led to the penalty should also be deleted. If the Decision on the penalty stored in the personal file is deleted, there is no reason to keep the related disciplinary file. In any case, EMSA could grant the possibility to the affected individual to submit a request for the deletion of their disciplinary file 10 years after the adoption of the final Decision. The Appointing Authority should assess whether to grant this request in light of the severity of the misconduct, the nature of the penalty imposed and the possible repetition of the misconduct during that period of 10 years.

Recommendation:
2. EMSA should make a distinction of different retention periods according to the above possible scenarios and update the notification and its Decision of the Administrative Board of 24 January 2014 laying down the General Implementing Provisions on the Conduct of Administrative Inquiries and Disciplinary Procedures.

3) Information to be given to the affected individuals
Informing affected individuals

The privacy notice prepared by EMSA is a first important step, but it is not sufficient. Personal data must be processed fairly[5]. In order to guarantee fairness and transparency about the information processed regarding a specific inquiry, affected individuals should be informed about it in accordance with Articles 11 and 12 of the Regulation. EMSA should therefore provide them with the privacy notice as soon as it is practically possible, for example before starting the interview of the person. In principle, EMSA should inform them of the opening and closing of the administrative inquiry related to them. This concerns the formal opening of an inquiry as well as the following stage, when the available information will for example be transferred to a Disciplinary Board appointed by EMSA.

Content of the privacy notice

In light of Articles 11(1)(e) and 12(1)(e) of the Regulation, EMSA should include in the privacy notice some explanation as to the meaning of the right of rectification in the context of an administrative inquiry and a disciplinary proceeding. It does not only refer to factual inaccuracies, but also that affected individuals should be allowed to add second opinions and include their comments as well as any additional testimonies, or other relevant documents to their inquiry file (i.e. a legal recourse or appeal decision)[6].

Under Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation, EMSA should indicate clearly the three different scenarios and their respective retention periods.
Finally, Articles 11(1)(f)(iii) and 12(1)(f)(iii) of the Regulation, provide that affected individuals have the right to have recourse at any time to the EDPS and this should also be mentioned in the privacy notice.

Recommendations:
3. EMSA should amend the privacy notice so as to (i) include the meaning of the right of rectification in the context of an administrative inquiry and of a disciplinary proceeding, (ii) indicate the applicable retention periods depending on the various scenarios and (iii) add the right of affected individuals to have recourse at any time to the EDPS.

4. EMSA should ensure that the privacy notice is easily accessible to all staff, for instance on intranet where EMSA's Decision of 14 January 2014 is uploaded.

5. EMSA should inform all affected individuals about the opening, the different steps and the closing of a specific administrative inquiry or a disciplinary proceeding and provide them with the privacy notice on this occasion.

---

[5] See Article 4(1)(a) of the Regulation.

[6] To give an example: "this is not the statement I made in my hearing" as opposed to "this is an incorrect inference from the statement I made in my hearing" - for the latter case, review procedures or the possibility to provide second opinions are the appropriate way of remedying any issues.

Possible limitations to the rights of information, access and rectification of the affected individuals:

The privacy notice does not refer to the possibility that EMSA might need to restrict the right of information, access or rectification of an individual involved in the specific processing of their personal data in accordance with Article 20 of the Regulation.

For example, **informing** the person under investigation about the inquiry or the disciplinary proceeding at an early stage may be detrimental to the investigation. In these cases, EMSA might need to restrict the information to the person under investigation to ensure that the inquiry or disciplinary proceeding is not jeopardised[7].

The **right of access** of a person under investigation to the identity of a witness may be restricted in order to protect the witness' rights and freedoms. Furthermore, a witness of the case might ask to have access to the final decision of the inquiry; yet, it is possible that the final decision does in the end not include personal data of that witness; it would thus be out of scope for a request for access from that person. EMSA should however inform the person under investigation or the witness of the principal reasons on which the application of the restriction is based as well as of their right to have recourse to the EDPS[8]. In some specific circumstances, it might be also necessary to defer the provision of such information so that the investigation process will not be harmed[9].

Recommendations:
6. EMSA should make reference in the privacy notice to possible restrictions to the rights information and access in light of Article 20 of the Regulation.

Reminder:
In cases where EMSA decides to apply a restriction of information, access, rectification etc. under Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4)[10], such decision should be taken strictly on a case by case basis. In all circumstances, EMSA should document the reasons for taking such decision (i.e. motivated decision). These reasons should prove that the restriction is necessary to protect one or more of the interests and rights listed in Article 20(1) of the Regulation and they should be documented before the decision to apply any restriction or deferral is taken[11].

In light of the accountability principle, the EDPS trusts that EMSA will implement the above recommendations and reminders.

We have therefore decided to close the case.

Should you have any doubts, do not hesitate to contact us.

---

[7] See Article 20 of the Regulation regarding the exemptions and restrictions.
[8] See Article 20(3).
[9] See Article 20(5).
[10] under Article 20(5) of the Regulation.
[11] This is the kind of documentation the EDPS requests when investigating complaints relating to the application of Article 20.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI

Cc: Ms Radostina NEDEVA-MAEGERLEIN, Data Protection Officer.