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Subject: Your consultation relating to the Ombudsman's third party data subject policy

Dear [...],

We are writing to you concerning the consultation pursuant to Articles 12(2) and 28(1) of Regulation (EC) 45/2001 ("the **Regulation**") you sent to the EDPS on 28 July 2016 concerning the policy on the handling of personal data of third parties mentioned in a complaint or an inquiry (the "**policy**") and the accompanying statement (the "**statement**") that the European Ombudsman (the "**EO**" or "**Ombudsman**") has prepared.

You have informed us that the policy will be published on the Ombudsman's website, together with the accompanying statement, and that the policy is intended to, mainly, explain and provide guidance as to how the Ombudsman applies Articles 12 and 20 of the Regulation. You also informed us that point 6 of the statement in respect of the retention period is undergoing internal discussions.

Later on, you provided us with the link to the information note on data processing and confidentiality (the "**information note**") that is published on the Ombudsman's website to inform the general public that the EO may be processing personal data of persons other than the complainant's in the context of the EO handling of complaints¹.

I. Legal framework

Article 12(1) of the Regulation lists the information that must be provided to the data subject when personal data have not been collected from him or her. Article 12(2) lists cases when the obligation to inform does not apply, as of relevance here, in case the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by EU law. In these cases the EU institution or body shall

¹ This note was provided upon EDPS request (cf. email from the EDPS of 29 July 2016 and reply from the EO of 2 September 2016).

provide for appropriate safeguards after consulting the EDPS. In accordance with Article 46(h) of the Regulation, the EDPS shall determine, give reasons for and make public the safeguards mentioned in Article 12(2).

Moreover, even where the exception of Article 12(2) of the Regulation does not apply, there are cases where, according to Article 20(1) of the Regulation, the EU institutions and bodies may restrict the application of Articles 4(1), 11, 12(1) (right of information), 13 (right of access) to 17 and 37(1) if such restriction constitutes a necessary measure to safeguard:

- (a) the prevention, investigation, detection and prosecution of criminal offences;
- (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;
- (c) the protection of the data subject or of the rights and freedoms of others;
- (d) the national security, public security or defence of the Member States;
- (e) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (a) and (b).

II. Legal analysis and recommendations

The EDPS understands that the Ombudsman distinguishes three cases involving personal data of a third party in a complaint or an inquiry that have not been obtained from the third party data subject:

- outside the EO's mandate complaints,
- within the EO's mandate but inadmissible complaints and inquiries that do not give rise to a transfer of personal data of third parties to EU institutions or bodies,
- inquiries that give rise to a transfer of personal data of third parties to an EU institution or body.

In the **first two cases**, in line with Article 12(2) of the Regulation the EO does not consider the provision of individual information to third party data subjects to be required, because *“informing the third party data subjects individually, even if possible, would result in an unnecessary multiplication of personal data and, having regard to the EO's limited resources and limited actions involved (no transfers outside EO), involve disproportionate effort”*. The safeguards provided for by the EO in accordance with Article 12(2) are the **publication of the information note, including a link to the policy and the statement, on the EO's website** in order to inform the general public that the EO may be processing personal data of persons other than the complainant's in the context of EO's handling of complaints and inquiries and that individual information will not be provided in the first two scenarios described above.

The EDPS considers that the **safeguards are appropriate** in line with Article 12(2).

In the **third case**, the EO assesses whether the data relating to third parties is or is not relevant to the subject matter of the inquiry. The decision and the underlying analysis will be set out in the summary registered in the case file in the EO's case management system ("CMS").

For irrelevant data, the EO does not provide individual information to the third party in line with Article 12(2) considering that informing such data subjects individually, even if possible, would result in unnecessary multiplication of personal data and involve disproportionate effort having regards to the fact that EO will not use the data in question in the context of EO's inquiry. The information note, including a link to the policy and the statement, on the EO's website provides for general information of the public.

For relevant data, the EO normally provides individual information to third party data subjects in accordance of Article 12(1) of the Regulation, unless Article 12(2) applies, i.e. if the EO concludes that the third party data subject already has the information, or that providing information proves impossible or includes disproportionate effort (when for example, the person in question, has, in the meantime, left the service and cannot be traced). The safeguards provided for by the EO in accordance with Article 12(2) are the documented assessment leading to that conclusion in the summary of the case in the CMS, as well as the publication of the information note, including a link to the policy and the statement, on the EO's website.

Moreover, even where the exception of Article 12(2) of the Regulation does not apply, exceptions and restrictions under Article 20 may apply. The policy describes how the assessment of the application of Article 20 is made and the principal reasons and factors where restrictions and exceptions under Article 20 might apply and for how long. As a data protection measure, a case by case analysis of the application of Article 20 during inquiry is carried out and the assessment and conclusion are documented in the case file in the CMS, with a new case by case assessment on continued application of restriction made after closure of inquiry and documented in the case file in the CMS.

The EDPS considers the envisaged measures and safeguards to be **appropriate pending implementation of all the recommendations** respectively on the policy, the privacy statement and the information note.

For your convenience, we have included all the recommendations of the EDPS in the three documents provided by the EO (see annexes to this letter). Please find below the explanation of the main substantive recommendations of the EDPS regarding the information of data subjects, the rights of the data subjects and the restrictions and exceptions in EO's policy and statement. The other recommendations are included in the annexes and referred to for the record in this letter. The recommendations follow the structure of each of these texts.

1. Policy

Recommendations Nos. 1 and 2 are mere editing recommendations (see the revised policy in Annex 1 to this letter).

Right of access to personal data

The scope of the policy, which covers how the Ombudsman deals "with personal data in a complaint or in an inquiry that have not been obtained from the data subject" (cf. its title), is not clear. Whereas the policy seems to cover the information to the third party data subject, its title implies a wider scope, i.e. data protection principles (data quality, retention, etc.) and other third party data subject's rights, such the right of access. In this respect, one factor provided in the policy to illustrate how the EO carries out her balancing exercise under Article 20 of the Regulation seems to concern the exercise of the right of access by the third party data subject².

Recommendation No. 3: The EO should adapt the title of the policy to better reflect its scope.

Irrelevant data in EO inquiries (p. 4 of the policy)

On page 4 of the policy, the EO explains that it does not consider the provision of individual information to the third party data subject to be required in cases where the data is irrelevant to

² see p. 6 of the policy, third line of the policy.

the subject-matter of the EO's inquiry, as the individual provision would involve disproportionate effort having regard to the fact that EO would not use those data in the context of inquiry.

Recommendation No. 4: the EO should add a sentence stating that irrelevant data will not be further processed by the Ombudsman.

Relevant data - Assessment whether or not to inform the third party data subject in accordance with Article 12(2) of the Regulation (p. 4 of the policy)

Pages 4-6 of the policy explain how the EO will perform the assessment of whether or not to inform the third party data subject in case of data relevant to the subject-matter of the EO's inquiry.

In accordance with Article 12(2) of the Regulation, the EO considers three situations in which the provision of individual information to a third party data subject as regards relevant data would not be required:

- when a data subject is already aware of the information,
- when it would involve a disproportionate effort, or
- when an exception under Article 20 of the Regulation applies.

According to the policy (page 4), the Ombudsman records the assessment leading to that conclusion in the summary of the case in the CMS and the note published on the Ombudsman's website is deemed sufficient to provide the necessary information.

As for situation 2, the EDPS **reminds** the EO that individual information should be the rule and there must be solid reasons not to inform because of "disproportionate efforts". This would only occur in exceptional cases (e.g. the third party cannot be traced) and these reasons should also be duly documented.

Application of the exceptions under Article 20 of the Regulation (p. 5 of the policy)

When the EPO applies Article 20(1)(c) of the Regulation, the policy refers to the balancing of rights of the complainant and of the third party data subject during Ombudsman's assessment of whether to inform a third party data subject about the processing of his/her personal data.

Recommendation No. 5: The EO should add a sentence stating that the same balancing exercise is also applicable to reply to a request by the third party data subject for access to his/her personal data under Article 13 of the Regulation.

Relevant factors for balancing the rights of the complainant and of the third-party data subject (pp. 5-6 of the policy)

Section 3.C of the policy explains how the third party personal data is handled in inquiries that give rise to a transfer of personal data of third parties to an EU institution, body, office or agency. Among the factors most relevant for the Ombudsman's carrying out an assessment of whether to inform the third party data subjects or to apply an exception to its duty to inform in accordance with Article 20(1) of the Regulation, the policy states in the third indent (page 6) the following:

"[emphasis added] -Whether the data subject has offered sufficient evidence that the facts contained in the complaint and considered by the Ombudsman have already resulted or are likely to result in criminal or disciplinary proceedings, or administrative inquiries, against him or her and which have affected or are likely to affect his/her rights and interests (when, for example, the EU official alleged to have conflict of interest has already been subject to disciplinary action following a complaint)."

This factor seems to refer to an exception to the right of access (Article 13 of the Regulation) and should therefore not be included in the policy. In any case, this factor should at the very least be reconsidered and clarified.

Recommendation No. 6: The Ombudsman should either delete or redraft the third factor used to assess whether or not limiting the right of information of the third party data subject in accordance with article 20(1)(c) of the Regulation.

2. Statement

Recommendations Nos. 7 and 8 are mere editing recommendations (see the revised statement in Annex 2 to this letter).

Data quality and inquiry-related documents disclosed to the public following an access request

Section 3 of the statement explains who has access to the information of the data subjects and to whom is it disclosed. It states in the second paragraph on page 3: "*However, even if access is granted, personal information which it would be **unfair** [emphasis added] to disclose, including personal contact data, are always blanked out from the documents disclosed.*"

The disclosure of personal information could also be unlawful or more generally not in compliance with the data quality principle (Article 4 of the Regulation). The EDPS also draws the EO's attention to the need to take Article 8(b) of the Regulation into account before disclosing data to the public, i.e. have in mind the data subject's legitimate interest.

Recommendation No. 9: In the statement (section 3, second paragraph on page 3, the EO should refer to "*personal information which it would be **unfair, inadequate, irrelevant or excessive** to disclose in accordance with Article 4 of the Regulation, also taking into account the legitimate interests in accordance with Article 8(b) of Regulation 45/2001*".

Data quality and information forwarded to the institution targeted by the complaint/inquiry

The third paragraph on page 3 states that "[i]t is to be noted that even if a complainant identifies certain information in the complaint as confidential, the Ombudsman **will** [emphasis added] send that information to the EU institution, which is the object of a complaint/inquiry, to submit information, comments, or an opinion in reply to the complaint."

The EDPS wishes to point out that not all information that a complainant might identify as confidential might be relevant or necessary for the investigation of the case by EO. In this regard, see the last paragraph on page 2 of the statement, which states that "[w]here a complaint is sent to an EU institution for information, comments or an opinion, the **relevant** [emphasis added] personal data are forwarded to that institution."

Recommendation No. 10: The EO should change the text of the third paragraph on page 3 of the statement to "*will send that information, **if relevant and necessary**, to the EU institution*".

Disclosure of information to a third party whose personal data are processed in complaints and inquiries

Section 3 informs complainants about the EO's obligation to comply with data protection rules, including the duty to inform third party data subjects about the processing of their personal data and the right of those data subjects to have access to their personal data and to have errors in that data rectified, in accordance with those rules (page 3). It further informs the complainant that full confidentiality cannot be guaranteed if a third party's personal data are mentioned in the complaint and that the EO will, however always take into considerations of the circumstances of the complainant when complying with EO's data protection obligations, in particular where the complainant is in a vulnerable situation (page 4).

Recommendation No. 11: As all data subjects have the same rights to have access to their personal data, to have it corrected, blocked or deleted, the EO should make this clear for the third party data subjects in last paragraph of page 3. [See editing recommendation in Annex 2 to this letter]

Recommendation No. 12: In the interest of full transparency and equality, the EO should include in first paragraph on page 4 of the statement an explanation that the EO will perform a case by case assessment balancing the rights and legitimate interests of the complainant and the third party data subject.

Editing **Recommendations Nos. 13** (on section 4 of the statement) **and 14** (on section 5 of the statement) are included in the revised statement (Annex 2 to this letter).

Retention

Section 6 (page 5) explains how long the EO keeps the data: "*The retention of documents on the case files, and the data contained therein, may be **indefinite** [emphasis added] (with the exception of complaints which fall outside the mandate of the Ombudsman).*"

The EO informed us at the time of the request for consultation, that the retention period was undergoing internal discussions. We consider the possible indefinite retention of documents on the case files, and the data contained therein, disproportionate to the purposes for which the data are processed.

Recommendation No. 15: The EO should define an appropriate retention period, e.g. for up to ten years after the closure of the case and for complaints judged to be prima facie inadmissible for up to five years from closure, without prejudice to possible longer conservation for the purpose of ongoing legal proceedings linked to the complaint.

3. Information note

Editing **Recommendations Nos. 16 and 17** are included in the revised information note (Annex 3 to this letter).

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The EDPS concludes that if the EO implements all the recommendations and if safeguards are effectively implemented, there is no reason to believe the safeguards are not appropriate.

Please inform the EDPS about the implementation of the above recommendations with the documentary evidence thereof within **three months** of the date of this letter.

In line with Article 46(h) of the Regulation, the EDPS will publish this consultation on its website.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI

Annexes:

1. EO Privacy Policy with EDPS recommendations
2. EO Statement with EDPS recommendations
3. EO Information note with EDPS recommendations