



## **Decision of the European Data Protection Supervisor in complaint case 2019-1135 against the European Union Agency for Cybersecurity (ENISA)**

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU, and Regulation (EU) 2018/1725,

Has issued the following decision:

### **PART I - Proceedings**

On 10 December 2019, the EDPS received a complaint under Article 68 of Regulation (EU) 2018/1725 (the Regulation) against the European Union Agency for Cybersecurity (ENISA) regarding alleged unauthorised access to appraisal reports. The complainant wished to remain anonymous to the institution concerned.

The EDPS examined this complaint pursuant to Article 57(1)(e) of the Regulation, and invited ENISA's observations on the allegations brought forward by the complainant by letter dated 10 February 2020.

ENISA replied on 5 March 2020. The EDPS requested the complainant's comments on ENISA's reply by email of 20 March 2020, but received no reaction.

### **PART II - Facts**

#### *Allegations of the complainant*

The complainant alleged that in the context of ENISA's reclassification exercise, annual appraisal reports (Career Development Reports) of staff eligible for reclassification were disclosed to all ENISA managers by giving them access to the e-secured tool for appraisals. In the complainant's view, this resulted in disclosure of confidential information, without prior consent of the staff eligible for reclassification.

#### *Comments of the data controller*

In July 2019, ENISA carried out the annual reclassification exercise (for the year 2018), that was concluded by the Executive Director's (ED) Decision 103/2019 of 15 October 2019. Procedural and material shortcomings were identified, relating in particular to the transparency of the procedure, which led to the annulment of the aforementioned Decision by the ED Decision 114/2019 of 26 November 2019.

A new reclassification procedure was launched by ED Decision 116/2019 of 4 December 2019, by which the Management Committee (MAC) and the Joint Reclassification Committee (JRC) were established. Based on the latter Decision, the MAC carried out the evaluation of staff

eligible for reclassification. The MAC consisted of two ENISA Heads of Department and seven Heads of Unit. The JRC consisted of two management representatives (with two designated alternates), and one representative of ENISA's Staff Committee. All MAC and JRC members, named in the Decision, received a note on confidentiality, independence and compliance requirements, as well as information relating to the processing of personal data in line with the Regulation.

The MAC Chairperson requested the ENISA HR department to grant all MAC members access to the Career Development Reports (CDR) for reference year 2018 of all staff eligible for reclassification. CDRs include the staff member's self-assessment, as well as management's assessment and staff comments thereto. Such access was granted for the period of 4 to 10 December 2019, and was, in ENISA's view, essential for MAC members to carry out their duties.

According to the controller, access to personal data, i.e. the CDRs, was a necessary measure for the MAC members in order to carry out their tasks, as defined in the ED Decision 116/2019 of 4 December 2019, for the reclassification exercise of the agency. Providing access to CDRs was not an excessive measure, because it was only provided to MAC members in relation to them carrying out the legitimate performance of their duties and a specific competence assigned to them, by means of an ED decision. Both the assigned competence and the purpose were duly justified, in line with Article 4 and Recital 21 of the Regulation, as well as the EDPS guidelines on staff evaluation, since management has the responsibility of carrying out the reclassification, also in line with the Staff Regulations. Had the MAC members not been given access to the CDRs, reclassification of eligible staff would have, in the words of the controller, "only been based on the subjective opinions of reporting officers (while some might have changed due to staff turnover), third party views or nothing at all". MAC members would lack relevant information, motivation and proof as regards staff appraisals and would be unable to make an informed decision.

Finally, ENISA claimed that they took all necessary measures to minimise access to personal data (CDRs) on the basis of the need-to-know principle. To this end, only personal data of staff eligible for reclassification, for the specific reference year (2018), and for a restricted period of time were provided solely to the duly authorised recipients.

### **PART III - Legal analysis**

The complainant is a staff member of ENISA. As such, they may lodge a complaint under Article 68 of the Regulation alleging a breach of the provisions of the Regulation. The complaint is therefore admissible.

The complainant alleges that disclosure of the content of their CDR, in the context of the reclassification exercise, took place without his consent. Article 5(1)(a) of the Regulation provides that personal data may be processed when it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the Union institution or body. Recital 22 of the Regulation further specifies that processing of personal data for the performance of tasks carried out in the public interest by the Union institutions and bodies, includes the processing necessary for their management and functioning.

The legal basis of processing operations relating to staff evaluation *stricto sensu*, including career development exercises, is found in the Staff Regulations, the Conditions of Employment of Other Servants (CEOS), as well as in implementing rules adopted pursuant to Article 110 of

the Staff Regulations. Considering that in such cases the processing of personal data is deemed necessary for the performance of, among others, the evaluation, promotion and regrading procedures provided for in the Staff Regulations, the processing of personal data carried out in this context is considered lawful.

ENISA's Executive Decision 116/2019 of 4 December 2019, which launched the reclassification exercise, is based on Articles 54 and 87(3) of the CEOS on the reclassification of temporary and contract agents, respectively, to a higher grade, as well as on ENISA's management Board Decisions on the general implementing provisions regarding Article 54 of the CEOS.

Since the legal basis for the processing operation in question is found in the Staff Regulations and in the ENISA's implementing rules regarding Article 54 of the CEOS, the processing is lawful and consent is not required.

Furthermore, the EDPS notes that ENISA verified that access to the personal data contained in the CDRs was necessary for the legitimate performance of the tasks within the recipients' (i.e. MAC members) competence, in line with Recital 21 of the Regulation. Finally, ENISA provided MAC members access to CDRs only of staff eligible for reclassification for the year 2018. Access was granted to the recipients for a limited period of time and was necessary for the performance of their tasks in the context of the reclassification exercise. In this respect, ENISA's reclassification procedure was in line with the principles of necessity and proportionality, as laid out in the Regulation.

#### **PART IV- Conclusion**

In light of the above, the EDPS concludes that ENISA did not infringe Article 5 of the Regulation.

Done in Brussels, 11 January 2021

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI