



EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

## **Review decision of the European Data Protection Supervisor following the complainant's request for review of the EDPS decision of 16 June 2023 on his complaint against European Personnel Selection Office (Case 2022-1189)**

The European Data Protection Supervisor,

Having regard to Regulation (EU) 2018/1725, and in particular its Article 58(2)(d) thereof,

Having regard to Article 18 of the EDPS Rules of Procedures,

Has issued the following Decision:

### **PART I**

#### **1. Proceedings**

1.1. On 16 June 2023, the European Data Protection Supervisor (EDPS) issued his decision (the EDPS decision) in a complaint submitted by ██████████ the complainant) against the European Personnel Selection Office (EPSO) in Case 2022-1189. In that decision, the EDPS concluded in particular that the fact that EPSO had not provided the complainant with the log files including the identity of employees and the time they consulted his data upon the instructions of EPSO and as part of their tasks and duties, did not constitute an infringement of Article 17(1)(c) of Regulation (EU) 2018/1725 (the Regulation).

1.2. On 22 June 2023, the Court of Justice issued a ruling in Case C-579/21 *Pankki S'* interpreting Article 15(1) of Regulation 2016/679 (GDPR)<sup>2</sup> (which corresponds to Article 17(1) of the Regulation) and which clarified that information relating to consultation operations carried out on a data subject's personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under that provision, i.e. concerning information contained in log data.

1.3. On 4 July 2023, the complainant submitted a request for review of the EDPS decision of 16 June 2023.

1.4. On 18 September 2023, the EDPS asked EPSO to comment on the complainant's request for review. EPSO did not submit any written comments on the substance within the deadline of 26 September 2023.

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<sup>1</sup><https://curia.europa.eu/juris/document/document.jsf?text=&docid=274867&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2506064>

<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

1.5. On 4 and 16 October 2023, the EDPS reminded EPSO of the request to submit its comments.

1.6. On 18 October 2023, EPSO replied that they were discussing the matter internally and suggested a meeting with the EDPS to discuss. In his reply of 19 October 2023, the EDPS underlined that he would follow the judgment in C-579/21 in his decision on the request for review, and asked EPSO whether it (i) had any written comments in that respect, and (ii) whether it intended to follow the conclusions of the judgment regarding access to log data.

1.7. On 20 October 2023, the EDPS again brought EPSO's attention to the judgment of the Court of Justice of 22 June 2023, in Case C-579/21 *Pankki S*, and gave EPSO until 26 October 2023 to provide its comments. In this email, the EDPS specifically informed EPSO that he would proceed to swiftly adopt a review decision drawing the consequences from the ruling in Case C-579/21, recognising the right of access to logfiles in situations like the one of the complainant.

1.8. On 26 October 2023, the EDPS received EPSO's reply. On the same day, the EDPS requested EPSO to provide further clarifications with regard to the reply.<sup>3</sup>

1.9. EPSO did not provide the further clarifications requested within the deadline of 27 October 2023.

## 2. Complainant's request for review

2.1. In his request for review, the complainant expresses his disagreement with the EDPS's conclusion, in point iii) of the EDPS decision, that the logfiles related to EPSO's consultations of his profile do not contain his personal data and that he is therefore not entitled to have access to such information under Article 17(1)(c) of the Regulation. The complainant also clarifies that he does not request to receive information on the identity of the EPSO's employees who have consulted his EPSO profile.

2.2. In his request for review, the complainant refers to the judgment of 22 June 2023 in Case C-579/21. In light of this ruling, he requests to have access to the log data related to his EPSO profile in the context of four different selection procedures carried out by EPSO.<sup>4</sup>

2.3. In addition, the complainant presents a 'non-exhaustive list of personal data' to which he requests access, namely 'a copy of:

- all personal data on EPSO systems currently and recently deleted,
- all version of the raw documents provided to [him],
- all versions of [his] profile,

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<sup>3</sup> "[...]can you please confirm that EPSO will give access to the complainant in Case 2022-1189, i.e. to his IT logfiles related to the consultation operations of his EPSO profile by authorised EPSO staff? [...] does EPSO's data management system keep traces of when these authorised staff members accessed the 'Recruiter Portal' as such? In other words, can EPSO see when an authorised staff member of an EU institution accessed the 'Recruiter Portal' as such, and to which EU institution the authorised staff member belongs?"

Are there any logfiles of when authorised EPSO staff members access the file of a specific candidate in the 'Recruiter Portal'? Are there logfiles of when authorised EPSO staff members access the 'Recruiter Portal' as such? If so, would such logfiles be considered part of the logfiles listed under point 1) to which EPSO will grant access from now on?"

<sup>4</sup> Selection procedures 4220689, 3921833, 700311 and 539001.

- any kind of logs (audit, modifications, access, delete logs, etc),
- the time and purpose of each access,
- the recipients or third parties to whom [his] personal data have been disclosed
- the recipients that accessed [his] personal data (CV, profile, application, etc.)’.

### 3. Controller’s comments

3.1. In its comments of 26 October 2023, EPSO states that in line with Case C-579/21, it will ‘as of now give access to data subjects to IT log-files that document consultation operations carried out on their personal data (except for information on users’ identity), whenever such log-files are available.’

3.2. With regard to the situation of the complainant in the case at hand, however, EPSO ‘regrets to confirm that the type of log-file information he seeks to obtain is not available’.

3.3. EPSO adds that in their understanding, the complainant had narrowed down his access request, and quoted the following email of the complainant of 20 November 2022:

*“On 20/11/2022 I even re-focused the request being less strict: “[...] Could you please try with a very specific request to EPSO's DPO? ” I would like know when my personal data was access by EUIPO/OHIM's personnel (OHIM is former EUIPO's name) I need to know when EUIPO/OHIM has accessed my personal data in order to work on my letter before action. Knowing the time window of these accesses is essential. ” [...]*”

3.4. EPSO confirmed that ‘authorised staff members of the EU institutions, as potential recruiters, do have access to personal data of successful candidates through the ‘Recruiter Portal’ element of EPSO’s candidate data management system. However, there is no feature in the ‘Recruiter Portal’ that would allow to capture and record data showing who accessed a specific candidate’s file’.

3.5. For this reason, ‘EPSO regrets to confirm that it is not in a position to provide the complainant with log-file data which would show if / when EUIPO/OHIM’s personnel accessed his personal data, since EPSO does not collect or otherwise process such data’.

## PART II

### 4. Legal analysis

4.1. Article 18(1) of the EDPS Rules of Procedure (RoP)<sup>5</sup> provides that ‘[w]here the EDPS issues a decision on a complaint, the complainant or institution concerned may request that the EDPS review its decision. Such a request shall be made within one month of the decision. The EDPS shall review its decision where the complainant or institution advances new factual evidence or legal arguments.’

#### a) Admissibility

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<sup>5</sup> OJ L 204, 26.6.2020, p. 49.

4.2. The complainant requested a review of the EDPS decision within the deadline stipulated by Article 18(1) RoP. In his request, the complainant refers to the Court's judgment in Case C-579/21, and requests the EDPS to review his decision with regard to his request to have access to the log data relating to his EPSO profile.

4.3. The EDPS notes that the Court's judgment in Case C-579/21 clarifies that information relating to consultation operations carried out on a data subject's personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under that provision. This interpretation by the Court is different from the EDPS interpretation offered in the previous EDPS decision, and was issued after the EDPS decision. As a consequence, the EDPS finds that the complainant advances a new legal argument in support of this request. It follows that the complainant's request for review on this aspect is admissible in accordance with Article 18(1) RoP.

4.4. The EDPS also notes that the complainant, in his request for review, seems to extend the scope of his initial complaint, submitted to the EDPS on 16 November 2022. The complainant now requests EPSO to grant him access to additional categories of personal data ('all personal data on EPSO systems currently and recently deleted, all version of the raw documents provided to [him] and to all versions of [his] profile'). These categories of personal data are not covered by his request to have access to his log data and were consequently not covered by his initial complaint.<sup>6</sup> The objective of the review procedure is however to reconsider how the EDPS decided on the complaint, and not to expand the scope of the original complaint. In any case, in this regard, the complainant does not advance new factual evidence or legal arguments. It follows that the part of the complainant's request aiming to grant him access to additional categories of personal data must be dismissed as inadmissible. The EDPS invites the complainant to contact EPSO and to request access to the above categories of his personal data under Article 17(1) of the Regulation.

4.5. Furthermore, the EDPS notes that the complainant requests EPSO to grant him access to 'the recipients or third parties to whom [his] personal data have been disclosed' and to 'the recipients that accessed [his] personal data (CV, profile, application, etc.)'. The EDPS underlines that the complainant had already been given access to the above categories of his personal data. As the EDPS stated in his decision, 'on 5 August 2022, EPSO provided the [complainant] with i) the status of the processing of [his] personal data regarding each of the four selection procedures and ii) the categories of authorised recipients of [his] personal data and their function'.<sup>7</sup> In any case, in this regard, the complainant does not advance new factual evidence or legal arguments. It follows that this part of the complainant's request must be dismissed as inadmissible.

4.6. In light of the above, for the purposes of this review decision, the EDPS will focus only on the complainant's request covered by the subject matter of his initial complaint to the EDPS.

## **b) The complainant's request to have access to his log data**

4.7. Article 17(1) of the Regulation provides that 'the data subject shall have the right to

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<sup>6</sup> In his complaint, the complainant requested that EPSO provide him access to his log (with timestamp) of his EPSO profile, namely 'when and by whom his personal data were accessed'.

<sup>7</sup> The complainant attached EPSO's reply of 5 August 2022 to his complaint to the EDPS.

obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: a) the purposes of the processing, ... c) the recipients or categories of recipient to whom the personal data have been or will be disclosed...’.

4.8 The complainant requests EPSO to grant him access to his personal data, under Article 17(1) of the Regulation, namely to any kind of log data, to the time and to the purpose of each access of his EPSO profile, in the context of the four EPSO selection procedures to which he participated.

4.9. As stated in the EDPS decision, EPSO keeps logfiles of all candidates who create EPSO profiles for different competitions for security and audit trail purposes. These log files make it possible to establish the justification, date and time of a consultation. Log data also contain information relating to the identity of the persons who carried out the consultation operations.<sup>8</sup>

4.10. According to Article 3(1) of the Regulation, personal data are ‘any information relating to an identified or identifiable natural person (...)’. The use of the expression ‘any information’ in the definition of the concept of ‘personal data’ reflects the aim of the EU legislature to assign a wide scope to the concept. In this regard, that information relates to an identified or identifiable natural person where, by reason of its content, purpose or effect, it is linked to an identifiable person.<sup>9</sup> Therefore, the broad definition of the concept of ‘personal data’ covers not only data collected and stored by the controller, but also includes all information resulting from the processing of personal data relating to an identified or identifiable person.<sup>10</sup>

4.11. In his decision of 16 June 2023, the EDPS found that logfiles did not fall within the scope of personal data and that the complainant was therefore not entitled to have access to such information under Article 17(1)(c) of the Regulation.

4.12. However, in the judgment issued on 22 June 2023, i.e. less than a week after the EDPS issued his decision, the Court took a different view and found that ‘information relating to consultation operations carried out on a data subject’s personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under that provision.’<sup>11</sup> In that judgment in *C-579/21, Pankki S*, the Court held that ‘log data reveal the existence of a data processing, information to which the data subject must have access (...) and they provide information on the frequency and intensity of the consultation operations, thus enabling the data subject to ensure that the processing carried out is actually motivated by the purposes put forward by the controller’.<sup>12</sup>

4.13 In particular, the Court held that Article 17(1) of the Regulation must be interpreted as meaning that ‘information relating to consultation operations carried out on a data subject’s personal data and concerning the dates and purposes of those operations constitutes information which that person has the right to obtain from the controller under that

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<sup>8</sup> This issue has been thoroughly analysed in points i) and ii) of the EDPS decision and are not within the scope of the complainant’s request for review in the present decision (see paragraph 2.1. of the present decision).

<sup>9</sup> See *C-579/21, Pankki S*, paragraph 43.

<sup>10</sup> See *C-579/21, Pankki S*, paragraph 45.

<sup>11</sup> See *C-579/21, Pankki S*, paragraph 83.

<sup>12</sup> See *C-579/21, Pankki S*, paragraph 70.

provision.<sup>13</sup>

4.14. As the Court highlighted, Article 17(1) of the Regulation ‘is one of the provisions intended to ensure transparency vis-à-vis the data subject of the manner in which personal data are processed, without which that data subject would not be in a position to assess the lawfulness of the processing of his or her data’.<sup>14</sup>

4.15. In light of the above, the EDPS concludes that the complainant has the right, in accordance with Article 17(1) of the Regulation, to receive from EPSO his log data, the time and purpose of each access generated by consultation operations of his EPSO profile in the context of the four EPSO selection procedures to which he participated.

## **PART III**

### **5. Conclusions**

5.1. The complainant requested a review of the EDPS decision referring to the Court’s judgment of 22 June 2023, in *Pankki S*, Case C-579/21. In light of the above, and having carefully assessed the complainant’s request of access to his log data, time and purpose, the EDPS concludes that the complainant put forward new legal elements to be considered in the case at hand.

5.2. The EDPS finds that the Court’s judgment of 22 June 2023 leads him to revise his finding related to point iii) of his decision.

5.3. This review decision therefore repeals and replaces the EDPS decision regarding point iii) only. Points i) and ii) of the EDPS decision are maintained.

### **6. Corrective measures**

6.1. In the EDPS decision, the EDPS did not consider necessary the exercise of his corrective measures under Article 58 of the Regulation in relation to EPSO.

6.2. Article 58(2)(d) of the Regulation provides that the EDPS shall have the corrective power ‘to order the controller ... to comply with the data subject’s requests to exercise his or her rights pursuant to this Regulation’.

6.3. The EDPS concludes in this review decision that the complainant has the right, in accordance with Article 17(1) of the Regulation, to receive from EPSO his log data, the time and the purpose of each access generated by consultation operations of his EPSO profile in the context of the four EPSO selection procedures to which he participated.

6.4. The EPDS took note of EPSO’s statement in its submission of 26 October 2023 that it will from now on, in light of Case C-579/21, provide access to the data subjects to the IT log-files that document consultation operations carried out on their personal data (except for information on users’ identity), whenever such log-files are available.

6.5. However, the EDPS observes that EPSO did not confirm in that submission that it will grant the complainant access to such logfiles, if available, in the case at hand. In other words, there is no clear indication as to whether EPSO will comply with its obligations to grant

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<sup>13</sup> See C-579/21, *Pankki S*, paragraph 83.

<sup>14</sup> See C-579/21, *Pankki S*, paragraph 59.

access to logfiles under the Regulation in this specific case. It remains therefore unclear to the EDPS whether or not EPSO will comply with the complainant's request, made in accordance with Article 17(1) of the Regulation, despite the clear interpretation provided by the Court's ruling in Case C-579/21.

6.6. The EDPS further notes that EPSO stated that the kind of logs to which the complainant, in its understanding, requested access, i.e. only recordings showing when EUIPO personnel had accessed his personal data related to his EPSO profile in the 'Recruiter Portal', are not available.

6.7. However, the EDPS notes that EPSO has not submitted any evidence or documentation to support its statement in the reply of 26 October 2023 that this type of logfile does not exist.

6.8. Moreover, the EDPS remarks that the complainant's initial access request and subject matter of his complaint against EPSO – reiterated in his request for review – had a broader scope and covered also access to logs related to his EPSO profile, and not only those related to his candidate file in the 'Recruiter Portal'.

6.9. The EDPS therefore does not share EPSO's view that the complainant's access request should be interpreted narrowly, notwithstanding his communication of 21 November 2022.

6.10. Lastly, the EDPS underlines that despite a request to do so, submitted on 26 October 2023, EPSO did not provide any information to the EDPS in relation to

- (i) whether it will grant the complainant access to any existing logfiles regarding his EPSO profile;
- (ii) its statement that the type of logfiles showing if and when authorised EU staff members accessed the complainant's personal data in the candidate file in the 'Recruiter Portal' does not exist; and
- (iii) whether there are logfiles of when authorised EPSO staff members access the candidate files in the 'Recruiter Portal', and, in the affirmative, whether they are considered part of the logfiles to which EPSO will grant access from now on.

6.11. In this context, the EDPS draws the attention of EPSO to the principle of accountability laid down in Article 4(2) of the Regulation, which states that "the controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability')." Moreover, Article 26(1) EUDPR requires the controller "to implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with that Regulation, taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons. Those measures shall be reviewed and updated where necessary" (emphasis added).

6.12. In relation to Article 5(2) of the GDPR the Court has recently confirmed its case-law: "The controller, in accordance with the principle of 'accountability' laid down in that provision, is responsible for compliance with paragraph 1 of that article and must be able to demonstrate its compliance with each of the principles set out in paragraph 1 of that article, the burden of such proof thus being placed on it".<sup>15</sup> On 4 July 2023, the Grand Chamber

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<sup>15</sup> Judgment of the Court of 4 May 2023, UZ v. Bundesrepublik Deutschland, C-60/22, paragraph 53 and case

clarified even further that “in accordance with Article 5 of the GDPR, the controller bears the burden of proving that those data are collected, inter alia, for specified, explicit and legitimate purposes and that they are processed lawfully, fairly and in a transparent manner in relation to the data subject.” (emphasis added).<sup>16</sup>

6.13. In his Opinion of 27 April 2023 in Case C 340/21, Natsionalna agentsia za prihodite, Advocate General Pitruzella confirmed that “[t]he principle of accountability is one of the central pillars of the GDPR and one of its most significant innovations. It places responsibility firmly on the controller to take proactive action to ensure compliance and to be ready to demonstrate that compliance.”<sup>17</sup>

6.14. The European Commission refers to the principle of accountability as one of the shared concepts and principles on which the GDPR, the EUDPR and Directive 2016/680<sup>18</sup> are based, resulting in the consistent interpretation and application of EU data protection rules.<sup>19</sup>

6.15. The principle of accountability therefore places on the controller the duty to prove its compliance with the Regulation. Any uncertainties in that regard must be borne by the responsible controller.

6.16. In accordance with the principle of accountability, it is thus for EPSO to demonstrate its compliance with the complainant’s right to access in accordance with Article 17(1) of the Regulation and EPSO must bear the burden of proof that some of the logfiles that the complainant requested in his email of 20 November 2022 do not exist.

**6.17. Therefore, the EDPS under Article 58(2)(d) of the Regulation hereby ORDERS EPSO to comply with the complainant’s request to be granted access to all his log data, the time and the purpose of each access generated by consultation operations of his EPSO profile in the context of the four EPSO selection procedures to which he participated, where available.**

6.17. The EDPS considers that such an order under Article 58(2)(d) of the Regulation is an appropriate, necessary and proportionate corrective measure in this case.

6.18. The order is appropriate for achieving the intended objective: The purpose of this order is to ensure that EPSO, in light of the complainant’s right to access to his personal data in accordance with Article 17(1) of the Regulation, and in light of EPSO’s obligations stemming from the accountability principle, grants access to the complainant’s log data, time and

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law quoted therein.

<sup>16</sup> Judgment of the Court of 4 July 2023, Meta Platforms Inc. a.o. v Bundeskartellamt, C-252/21, paragraph 95.

<sup>17</sup> Opinion of Advocate General Pitruzella of 27 April 2023, VB v Natsionalna agentsia za prihodite, C-340/21, paragraph 21, quoting C. Docksey, Article 24 - Responsibility of the controller, in Christopher Kuner, Lee A Bygrave and Christopher Docksey (eds.), The EU General Data Protection Regulation (GDPR): A Commentary Oxford University Press, 2020, p.557.

<sup>18</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.OJ L 119, 4.5.2016, p. 89

<sup>19</sup> European Commission, ‘Communication from the Commission to the European Parliament and the Council - First report on application and function of the Data Protection Law Enforcement Directive (EU) 2016/680’, COM(2022)364 final, 25 July 2022, p. 4 and footnote 10.



purpose, where available, and that they respect the complainant's rights and freedoms laid down in the Regulation.

6.19. The order is also necessary, since EPSO has so far not demonstrated to the satisfaction of the EDPS that EPSO would grant the complainant's right to access in accordance with Article 17(1) of the Regulation, despite the EDPS's request for clarification.

6.20. The order is also proportionate since ordering EPSO to comply with the complainant's request to be granted access to all his log data, the time and the purpose of each access generated by consultation operations of his EPSO profile in the context of the four EPSO selection procedures to which he participated, where available, will fulfil the complainant's right to access in accordance with Article 17(1) of the Regulation, once implemented by EPSO and end a possible further time of uncertainty for the complainant, whilst permitting EPSO to indicate more in detail in case that some of the logfiles that the complainant requested in his email of 20 November 2022 do not exist.

6.21. In addition, in accordance with Article 59 of the Regulation, **EPSO is obliged to inform the EDPS** of the measures taken in response to the EDPS order and demonstrate to the EDPS within one month after receipt of the present decision that they have granted access to the complainant's request to be granted access to all his log data, the time and the purpose of each access generated by consultation operations of his EPSO profile in the context of the four EPSO selection procedures to which he participated, where available.

## 7. Judicial remedy

7.1. An action for annulment against this review decision can be brought before the Court of Justice of the European Union, within two months from its adoption and according to the conditions laid down in Article 263 TFEU.

Signature

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI

Done at Brussels, 31 October 2023