

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on the attestation procedure**

Brussels, 26 April 2007 (Case 2007-110)

### **1. Proceedings**

On 19 February 2007 the European Data Protection Supervisor (EDPS) received a notification for prior checking from the Data Protection Officer (DPO) of the European Parliament on the attestation procedure. The DPO enclosed the following documents with the notification: (a) the Internal Rules on Implementation of the Attestation Procedure ("Internal Rules"), (b) 'Frequently Asked Questions' relating to the attestation procedure, (c) the attestation procedure application form ("application form"), (d) call for applications used during the 2006 procedure ("call for applications") and (e) the notification received by the DPO from the controller, Staff Management and Career Unit (DG Personnel). Later on, the DPO forwarded a message to the EDPS including, as a sample, the list of attested officials following the 2006 attestation procedure. The EDPS requested further information on 8 March 2007, the DPO answered on 16 March 2007.

### **2. Examination of the matter**

#### **2.1. The facts**

On 1 May 2004 all officials in the former categories D and C were reclassified into categories D\* and C\*, respectively, and they became part of the assistants' function group (AST) being only enabled to pursue a career restricted to grades AST 5 and AST 7, respectively. The attestation procedure based on the evaluation of staff records shall enable officials who fulfil the conditions set out in the Internal Rules to continue their career up to grade AST 11 without restriction. The procedure does not apply to staff members recruited as officials in categories C\* and D\* after 30 April 2004. They are automatically members of the AST function group without career restriction.

The attestation exercise will take place every year as long as there are staff members from former categories C and D who fulfil the conditions for attestation. The attestation procedure comprises four phases. In the first phase, the Secretary-General shall inform the staff concerned of the opening, the career implications and the conditions for admission, and invite them to apply. Candidates shall complete and sign the application form, giving their data for identifying them (name, staff number, grade, date of appointment as official, date of birth, position), contact details (administrative and private address), data related to education (secondary or technical education, primary education), professional experience outside the European Institutions (starting and ending date in the given post, name and address of the

employer, tasks performed) and professional training (excluding language courses). Candidates having a post-secondary education diploma do not have to furnish details on education, professional experience and professional training. Candidates are invited to specify their language skills. Copies of all supporting documents proving that the candidate fulfils the conditions under Article 5(3) of the Staff Regulations for appointment to a post as an official in the assistants' function group shall be attached (i.e. post-secondary diploma or secondary education certificate attested by a diploma giving access to post-secondary education; the latter must be accompanied by documents presenting appropriate professional experience of at least three years; or documents manifesting professional training or professional experience of an equivalent level). In order to ensure that the data provided are up to date, the Call for applications draws candidates' attention to the fact that "it is the candidates' responsibility to notify the Staff Management and Career Unit in writing and in good time of any change in their particulars and/or address".

The attestation procedure is open to officials who had been in category C or D before 1 May 2004 and they must be in one of the following situations under Article 35 of the Staff Regulations at the time when the attestation period commences: active employment, secondment in the interest of the service, parental leave or family leave. Officials, who, during the year in question, will be automatically retired in accordance with Article 52 of the Staff Regulations, or are subject to a decision leading to termination of service within the meaning of Article 47 (i.e. resignation, compulsory resignation, retirement in the interests of the service, dismissal for incompetence, removal from post, retirement), or who have been granted an invalidity allowance to take effect in the course of that year (Article 78 of the Staff Regulations) will be declared inadmissible.

In the second phase of the attestation procedure, the Directorate-General for Personnel receives the applications and checks their admissibility. An Access file is drawn up to register the supporting documents received from each candidate. This file is kept for internal use only. DG Personnel uses its databases to verify the candidate's administrative position on the date of publication of the call for applications, the candidate's seniority in the European Institutions, whether the candidate is a 'deserving' staff member in the three most recent staff reports. Candidates who are not admitted to the procedure shall be informed in writing.

The applications are evaluated by the B\*/AST Promotions Committee in the third phase. The Committee draws up a list of candidates meeting every criteria and who may be attested. It means that candidates must be in post at the European Parliament on the opening date of the attestation period and have at least four years seniority as an official within the European Institutions at the end of the preceding year. Furthermore, candidates must have been considered a 'deserving staff member' for at least three years and they must fulfil the conditions for appointment to a post as an official in the assistants' function group. There is no limit regarding the number of officials who may be granted attestation. Any official fulfilling the above criteria will be allowed attestation.

The final list of the officials attested are approved by the Secretary General and published internally within the European Parliament (fourth phase). Not attested candidates are informed in writing. Officials on the final list and validated by the Secretary General shall be attested and gain unrestricted access to the assistants' career stream. Upon attestation, officials concerned remain in the same grade and step, keeping their seniority in the grade and the number of merit points accumulated since the last promotion.

Officials wishing to contest a declaration of inadmissibility and those wishing to contest a decision not to include them on the final list may refer the matter to the Secretary-General

within 10 working days following notification of the decision on inadmissibility or publication of the list. The referral must be substantiated. The Secretary-General shall decide within 15 working days whether any action must be taken. This remedy is without prejudice to Article 90(2) of the Staff Regulations.

Data processed during the attestation procedure stems from the official and from the databases of the Directorate-General for Personnel. None of the documents in the application file are returned to the candidates. Data related to the attestation procedure are kept for five years, as a general rule, following its closing date by the Staff Management and Career Unit. Data are kept both electronically and on paper documents. The Head of Staff Management and Career Unit (DG Personnel) is declared to be the controller. Data are forwarded to the AIPN (Secretary-General) and officials in the AIPN's service as well as to the B\*/AST Promotions Committee. Electronic data are stored on password-protected computers. Paper documents are kept in locked cupboards. The number of cases is recorded each year and is used for the annual statement of activity of the relevant service in DG Personnel.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The notification reveals that there is a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of Regulation (EC) No 45/2001 (hereinafter "the Regulation")). The processing implies collection, storage, consultation, use and transfer of personal data which qualifies the operation as processing of personal data (Article 2(b) of the Regulation). The processing operation is carried out by a Community institution, in the exercise of activities which fall under the scope of Community law (Article 3(1)).

The processing of personal data is carried out partly by automatic means. The attestation procedure is processed manually but the content forms part of a filing system. Thus Article 3(2) applies in this case.

Article 27(1) of the Regulation subjects to prior checking by the EDPS all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*". Article 27(2) contains a list of processing operations that are likely to present such risks, among others the "*processing operation intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). The attestation procedure is clearly designed to evaluate personal and professional aspects of the officials. Thus the processing has to be prior checked by the EDPS.

Since prior checking aims at addressing situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 19 February 2007. The two months period was suspended until the EDPS has obtained further information he requested in accordance with Article 27(4), and for 1 day to allow comments from the DPO, altogether for 10 days. Thus the present opinion must be delivered by 30 April 2007.

### **2.2.2. Lawfulness of the processing**

Article 5(a) of the Regulation stipulates that personal data may be processed if "*the processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body.*" The attestation procedure implying processing of personal data related to the staff of the European Parliament falls within the scope of the legitimate exercise of official authority vested in the institution. Thus the lawfulness of the processing is respected.

The legal basis of the processing can be found in Article 10 of Annex XIII to the Staff Regulations and in the Internal rules on implementation of the attestation procedure. The legal basis supports the lawfulness of the processing.

### **2.2.3. Data quality**

"*Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)(c) of the Regulation). During the attestation procedure data related to the assessment of the official's performance are collected and stored. The categories of data processed cover data related to the ability, efficiency, conduct of the official and also concerns career and education data of the applicant. After careful examination, the EDPS is of the opinion that the data listed in the notification and collected for the attestation procedure complies with the criteria set out in Article 4(1)(c).

The Regulation also provides for that "*personal data must be accurate and, where necessary, kept up to date*" (Article 4(1)(d)). Should the decision made during the attestation procedure be based on inaccurate information or should the decision be made on a false conclusion drawn from the data available, the official is granted with avenues to remedy the situation. The applicants' attention is drawn to the importance of the accuracy of data since they are asked to indicate if any of their data kept is inaccurate. The up to date nature is of crucial importance during the attestation procedure since strict time limits regarding the career of the official have to be taken into account. Data subjects have the right to access and to rectify data related to them, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data (in this regard see also point 2.2.8.). The EDPS considers that the procedure guarantees the quality of the data.

The data must also be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 2.2.2.). As regards fairness, this relates to information given to the data subject (see point 2.2.9).

### **2.2.4. Conservation of data**

The Regulation states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*" (Article 4(1)(e)).

The Secretary-General's decision on the attestation will be added to the official's personal file. Article 26 of the Staff Regulations guarantees an unrestricted access to the personal files providing for that "*an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them*". This implies that the

decision in question is stored for a long, but unspecified period. The European Data Protection Supervisor considers that the period during which data may be conserved needs to be set. In a similar case <sup>1</sup>, the EDPS considered that it was reasonable to fix the conservation period at 10 years, starting from the moment when the staff member leaves or after the last pension payment.

The EDPS approves the current practice according to which the attestation files are kept for five years following the closing date of the procedures.

As to the attestation files of unsuccessful candidates, the EDPS recommends that a policy be established on whether or not documents included in unsuccessful applications can be taken into consideration in future attestation exercises and set a retention period which leaves room for legal remedies and new application. In this regard the EDPS considers that the retention period should not exceed a period of three years.

Furthermore, the issue of retention of the Access file including the supporting documents received from the candidates shall be addressed. The EDPS considers that this file shall be deleted once the time limits open for legal remedies have elapsed.

Data processed in the framework of attestation procedure are used for annual statistics, but only in anonymous form. Thus Article 4(1)(e) is complied with.

#### **2.2.5. Compatible use**

Article 4(1)(b) of the Regulation provides that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*". The European Parliament does not use the data processed in the analysed context for any purposes other than for establishing whether or not the official shall be attested. The latter inclusion of data in the personal file is in accordance with the above provisions. Moreover, the administrative data are collected from existing databases. The purpose of conducting attestation procedure involves no general change of the specified purposes of the various databases at issue and is not incompatible with those purposes. Thus Article 4(1)(b) is fully respected.

#### **2.2.6. Transfer of data**

The processing shall be also scrutinised in the light of Article 7(1) of the Regulation, according to which "personal data shall only be transferred within or to other Community institutions if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient". During the attestation procedure personal data are only transferred to a few units and officials, as described above. The EDPS considers that the transfers carried out are in accordance with Article 7(1) since the data in question are necessary for the tasks carried out by them.

It must be added that files may be sent to the Civil Service Tribunal in connection with appeals. In this case such transfers are legitimate since they are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The EDPS considers that Article 7 of the Regulation is thus complied with.

---

<sup>1</sup> Case 2004/274 – Staff appraisal procedure – European Central Bank.

### **2.2.8. Right of access and rectification**

Article 13 of the Regulation establishes a right of access and the arrangements for exercising it upon request by the data subject. Under Article 14 of the Regulation the data subject has the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

Data considered during the attestation procedure stem either directly from the candidates or from the candidates' personal file. The Staff Management and Careers Unit verifies the following particulars consulting the candidates' personal files: the candidate's administrative position on the date of publication of the call for applications, the candidate's seniority in the European Institutions and whether or not the candidate is a 'deserving' staff member in the three most recent staff reports. Article 26 of the Staff Regulations provides for a right of access to personal files. However, no specific rules exist on the right of access to documents processed in the framework of the attestation procedure. The EDPS recommends that this right shall explicitly be foreseen and that data subjects are informed about it accordingly.

Officials' attention is drawn to the fact that "it is the candidates' responsibility to notify [...] any change in their particulars and/or address" (point 5.2.f of the 'Call for applications'). This information implies that the controller is prepared at any time to rectify any inaccurate or incomplete personal data and thus data subjects have broad possibility to exercise the right of rectification. The EDPS considers that Article 14 is complied with.

### **2.2.9. Information to the data subject**

The Regulation states that a data subject must be informed of the processing of data relating to him/her and lists a range of compulsory items of information which must be provided (identity of the controller, categories of data concerned, purposes of processing, recipients, whether replies to the questions are obligatory or voluntary, origin of the data, right of access). Insofar as such information is necessary to guarantee the fair processing, additional information has to be supplied regarding the legal basis, time-limits and the right to have recourse at any time to the EDPS.

The provisions of Article 11 of the Regulation (*Information to be supplied where the data have been obtained from the data subject*) and Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) are thus both applicable to the present case. This means that the relevant information must be given, either at the time of collection (Article 11), or when the data are first recorded or disclosed (Article 12), unless the data subject already has it. The latter may be the case, *inter alia*, if the same information has been given before.

Information on the processing operation is available for data subjects on the Intranet (whole text of the Internal rules). Frequently Asked Questions can be also consulted on the Intranet and the application form gives further details on the processing.

In order to ensure full compliance with Articles 11 and 12 of the Regulation the EDPS recommends adding the time limits for storing the data (Article 11(f)(ii)), also indicating whether there is a possibility of unsuccessful applications to be taken into consideration in future exercises and the right to have recourse at any time to the European Data Protection Supervisor (Article 12(f)(iii)).

### **2.2.10. Security measures**

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

#### **Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 providing the considerations are fully taken into account. This means in particular that the controller should:

- Set a retention period during which data related to the attestation procedure may be conserved in the personal file and in the Access file;
- Establish a policy on whether or not documents included in unsuccessful applications can be taken into consideration in future attestation exercises and set a retention period which allows for legal remedies and a new application;
- Make sure that the right of access to documents processed in the framework of the attestation procedure is explicitly foreseen and data subjects are informed about it accordingly;
- Add to the information available for data subjects the time limits for storing the data and the right to have recourse at any time to the European Data Protection Supervisor.

Done at Brussels, 26 April 2007

Joaquín BAYO DELGADO  
European Data Protection Assistant Supervisor