

**From:** European Data Protection Supervisor  
[REDACTED]  
**To:** [REDACTED]  
**CC:** [REDACTED]  
**Sent at:** 22/09/20 17:27:50  
**Subject:** Our ref.: 2018-0577 - D(2020) 2084

Dear Madam,

Please find attached a letter signed electronically by Mr Wiewiorowski together with the Decision, for the above mentioned subject.

Kind regards,

---

**EDPS Secretariat**



| Tel. (+32) 228 31900 | Fax +32(0)22831950 | >

Email [edps@edps.europa.eu](mailto:edps@edps.europa.eu)

**European Data Protection Supervisor**

Postal address: Rue Wiertz 60, B-1047 Brussels

Office address: Rue Montoyer 30, B-1000 Brussels

[@EU\\_EDPS](https://twitter.com/EU_EDPS) [www.edps.europa.eu](http://www.edps.europa.eu)

This email (and any attachment) may contain information that is internal or confidential. Unauthorised access, use or other processing is not permitted. If you are not the intended recipient please inform the sender by reply and then delete all copies. Emails are not secure as they can be intercepted, amended, and infected with viruses. The EDPS therefore cannot guarantee the security of correspondence by email.



WOJCIECH RAFAŁ WIEWIÓROWSKI  
SUPERVISOR

Ms Minna VUORIO  
Director  
EPSO  
Avenue de Cortenbergh, 25  
1040 - Brussels

Brussels, 22th September 2020

WW/ [REDACTED] D(2020) 2084 C 2018-0577  
Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu) for all  
correspondence

**CONFIDENTIAL**

**Subject: Complaint submitted by [REDACTED] against EPSO  
(Case 2018-0577)**

Dear Ms Vuorio,

We are writing to you with reference to the complaint of [REDACTED] submitted to the European Data Protection Supervisor (the EDPS) against EPSO on 15 June 2018.

Please find attached the EDPS decision with regard to the complaint against EPSO referred to in the subject line (Case 2018-0577).

Both the complainant and EPSO may ask for a review by the EDPS of the present Decision within one month of receiving this letter. The request for revision should be lodged with the EDPS in writing and contain new factual elements or legal arguments which so far have not been taken into account by the EDPS.

Both the complainant and EPSO may bring an action for annulment against this decision before the Court of Justice of the European Union, within two months<sup>1</sup> from the adoption of the present Decision and according to the conditions laid down in Article 263 TFEU.

Yours sincerely,

[E-signed]

Wojciech Rafał WIEWIÓROWSKI

Cc: [REDACTED] Data Protection Officer, Commission

*The present transmission of personal data is carried out under Regulation (EU) 2018/1725 (see recital 21). As the controller of the personal data hereby transmitted, you are responsible for ensuring that they are lawfully processed and used only for the purpose for which they were transmitted. Processing the data in a manner incompatible with that purpose, such as transmitting them to another recipient where this is not necessary or legally required, is contrary to the conditions upon which these data have been transmitted to you.*

---

<sup>1</sup> Please note that any request for revision of the present Decision lodged with the EDPS does not interrupt this deadline.



**Decision of the European Data Protection Supervisor in the complaint submitted by [REDACTED] against EPSO, (case 2018-0577)**

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU and Regulation (EC) 45/2001 ('the Regulation')<sup>1</sup>,

Has issued the following decision:

**PART I**

*Proceedings*

On 15 June 2018, the EDPS received a complaint under Article 33 of the Regulation from [REDACTED] ('the complainant') against EPSO. The subject matter of the complaint concerns EPSO's refusal to give access to the complainant's request to

- the Selection Board's sub-score suggestions and observation notes during the preliminary stage of the competition he participated and
- the log files and audit trail related to his EPSO file.

On 25 July 2018, the EDPS addressed a letter to the controller (EPSO) requesting them to provide comments on the allegations made by the complainant and to provide certain information.

EPSO provided their comments and observations on 10 September 2018.

On 16 October 2018, the EDPS requested the complainant to comment on EPSO's letter of 10 September 2018. The complainant provided his comments on 13 November 2018.

**PART II**

*Facts*

In 2015, the complainant applied for the Open Competition EPSO/AST-SC/03/15 (the competition), a competition based on tests, organised to constitute a reserve list from which to recruit secretaries and clerks in several fields.

---

<sup>1</sup> OJ L8, 12.1.2001, p. 1. On 11 December 2018, Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, entered into force and repealed Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, (OJ L 295, 21.11.2018). Nevertheless, the present complaint (case 2018-0577) has been examined in the light of Regulation (EC) 45/2001, which was applicable when the facts occurred and when the complaint was submitted.

By letter of 12 June 2015 published on his EPSO account, the complainant was informed that following an examination of his on-line application, the Selection Board had decided to admit him to the competition and invite him to the Assessment Centre tests. He took those tests in Brussels on 14 July 2015.

Upon finalisation of the results of the competition, it had come to the Board's attention that the complainant was [REDACTED], and that he had omitted to inform EPSO and the Selection Board about this conflict of interest. By letter of 27 October 2015 published on his EPSO account, the complainant was informed that the Selection Board had consequently decided to put an end to his participation in the competition due to the conflict of interest.<sup>2</sup>

In the context of the EDPS's inquiry, EPSO provided the EDPS with a number of documents showing the exchanges of correspondence between the complainant and EPSO.

By e-mail of **30 November 2017** (sent to EPSO's functional mailbox for access to documents requests), the complainant requested access to *inter alia* "the **Selection Board report** (or other form of document) which ha[d] [his] individual results of [his] participation for competition EPSO/AST/-SC/03/15"

On **13 December 2017**, the complainant sent an e-mail to EPSO asking them not to handle his request as an access to documents request, but to "provide him with the requested information".

On **21 December 2017**, EPSO replied to the complainant that pursuant to Section 3.3.1.1 of the relevant General Rules on Open Competitions, "candidates who fail to complete one or more tests, or are excluded from the competition due to non-compliance with the procedural rules, will not receive a competency passport".<sup>3</sup>

On **22 December 2017**, the complainant wrote back to EPSO clarifying that he did not request access to his competency passport, as he was aware of Section 3.3.1.1 of the General Rules, but to his tests results of 24 September 2015, already noted and registered for the preparation of his competency passport, as well as the comments of the markers, which he considered to be personal data.

By e-mail of **23 January 2018**, EPSO replied to the complainant by referring to the judgment in case F-127/11 (the De Mendoza case)<sup>4</sup>, concerning a request for access to documents where the Civil Service Tribunal held that:

*"EPSO was not required [...] to transmit to the applicant the marked version of his papers, the reasons why his answers were incorrect, and the assessment sheets used for the written and oral tests, since those documents formed an integral part of the*

---

<sup>2</sup> The Selection Board decided to exclude the complainant from the competition, acting in light of the judgment of the Civil Service Tribunal in the case F-82/14, *Gioria v Commission*. In this judgment, the Tribunal concluded that a Selection Board member at a time when the tests of the competition have already taken place, has no other means to ensure that the competition is conducted in strict compliance with the principle of equal treatment than to exclude the candidate from the competition (para 54).

<sup>3</sup> "Please note that candidates who fail to complete one or more tests, or are excluded from the competition due to non-compliance with the procedural rules, will not receive a competency passport", Section 3.3.1.1 of the General Rules Applicable to Open Competitions, published in OJ C 60 A of 1 March 2014:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:060A:FULL&from=DE>.

<sup>4</sup> Judgment of 12 February 2014, F-127/11, *De Mendoza v Commission*.

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=DF49807385FC5061BBDF183DBC2A2DBA?text=&docid=147765&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4070023>.

*assessment of a comparative nature which the competition Selection Board makes and are covered by the secrecy surrounding the board's proceedings.*

[...]

*Lastly, those findings are not called into question by Article 8 of the Charter or by Regulation No 45/2001. It should be noted that, as stated in Article 2 of Regulation No 45/2001, "personal data" means only information enabling a person to be identified. It follows that under the above-mentioned provisions the applicant is entitled to obtain access to data held by EPSO that enables him to be identified but not access to his marked test paper, the questions on which he failed, the reasons why his answers were incorrect or the assessment chart used. That is all the more so since, if it were to be considered that a candidate's marked test paper constitutes personal data, he could, under Article 14 of Regulation No 45/2001, request that it be rectified, which would be absurd" (para 99-101, emphasis added).*

In light of the above, EPSO explained to the complainant that they could not grant him access to his test results “because if it were be considered that your tests results or the comments linked to them constitute your personal data - as you allege - you could request to have them rectified, which would be (using the Court's words) ‘absurd’”.

On **2 February 2018**, the complainant replied to EPSO's e-mail, reiterating his request to receive his individual results of his participation in the competition together with the assessors' comments, emphasising that he considered them his personal data. The complainant also claimed that EPSO aimed to restrict his right to access his personal data.

On **31 May 2018**, the complainant sent another e-mail to EPSO, asking them to confirm whether they were still handling his access request of 2 February 2018. He referred to the judgment of the Court of Justice of the European Union (CJEU) of 20 December 2017, in case C-434/16 Peter Nowak v Data Protection Commissioner (the Nowak case)<sup>5</sup>, and stated that he “would expect relevant law and case law to be implemented” in EPSO's decision.

On **6 June 2018**, EPSO replied that:

- his individual Assessment Centre results for the competition were available to him in his EPSO account, and he could access them anytime, in conformity with EPSO's data privacy statement published on its website;
- the assessors' comments and observations related to his performance in the Assessment Centre of the competition, could not be disclosed to him, since they were covered by the secrecy of Selection Board proceedings under Article 6 of Annex III to the Staff Regulations. EPSO referred to the De Mendoza case , where the Civil Service Tribunal held that “*the secrecy surrounding the proceedings of the selection board was introduced with a view to guaranteeing the independence of competition selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the administration itself or the candidates concerned or third parties. Observance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of*

---

<sup>5</sup> Judgment of 20 December 2017, C-434/16, Peter Nowak v Data Protection Commissioner:  
<http://curia.europa.eu/juris/document/document.jsf?jsessionid=6CDB4BCA1E798967A0035CF6405FA576?text=&docid=198059&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8313940>.

*candidates.*”<sup>6</sup> The Civil Service Tribunal furthermore confirmed that “*those findings are not called into question by Article 8 of the Charter [of Fundamental Rights of the European Union] or by Regulation No 45/2001*”.<sup>7</sup>

In the meantime, the complainant sent to EPSO on **12 and 27 February 2018**, requests to have access to the following data and information:

1. access to his log file, audit trail system generated file or similar source, which would give him “detailed information when, who, and the role of user that authorised him/her to access his application files as a candidate in EPSO competitions” for the period from 1 January 2015, until the date of his request;
2. the text submitted during his case study for the competition together with all marks and comments made by markers and assessors;
3. all evaluation grids his assessors prepared during his group exercise, and general and specific competency tests for the competition;
4. the log file of the Assessment Centre management software where he would be able to identify all users who created, made input, changed and closed his file for the competition;
5. the names of all Selection Board members who assessed his competencies during the general competency interview, specific competency interview and group exercise in the competition;
6. information on “how EPSO managed his request with reference number EPSO CRS-9620 concerning potential conflicts of interest” in the competition; and
7. information on “who was the appointed EPSO Selection Manager(s) during the whole competition”.

On **7 September 2018**, EPSO presented their apologies about the delay, referred to Article 13 of the Regulation, and replied the following:

- The data requested under points (1-7) do not fall into any of the categories to which data subjects have a right of access.
- In particular, the information under points 2 and 3 is explicitly excluded by section 5.6 of Annex III to the Notice of Competition EPSO/AST/139/16, which states the following: “You may request an uncorrected copy of your answers in written tests where the content is not intended for re-use in future competitions. This explicitly excludes answers to case studies. Your corrected answer papers and the details of the marking, in particular, are covered by the secrecy of selection board proceedings and will not be disclosed”.
- EPSO referred to the De Mendoza case<sup>8</sup>, and highlighted that candidates’ corrected answers and the details of the marking, as well as the comments and evaluation grids drawn up by the assessors in relation to candidates’ performance, are covered by the secrecy of Selection Board proceedings under Article 6 of Annex III to the Staff Regulations, and may consequently not be disclosed to candidates.
- As to the data requested under points 5 and 7, EPSO stated that “the selection board members who evaluated your performance in the Assessment Centre tests of

---

<sup>6</sup> Case F-127/11, paragraph 93.

<sup>7</sup> Case F-127/11, paragraph 101.

<sup>8</sup> “*The secrecy surrounding the proceedings of the selection board was introduced with a view to guaranteeing the independence of competition selection boards and the objectivity of their proceedings, by protecting them from all external interference and pressures, whether these come from the administration itself or the candidates concerned or third parties. Observance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members of selection boards and disclosure of any factors relating to individual or comparative assessments of candidates*” (paragraph 93).

competition EPSO/AST/139/16, and the name(s) of the Selection Manager(s) of that competition, constitute personal data, and no legal basis exists for their transfer to an individual candidate pursuant to a simple request of the latter”.

- With regard to point 6, EPSO stated that “your declaration of potential conflict of interest registered under the reference EPSO CRS-9620 was given due follow-up, and none of the selection board members identified in your declaration were involved in the assessment of your performance in competition EPSO/AST/139/16”.

## **1. Comments of the data controller**

In the context of the EDPS’ inquiry, EPSO provided the following comments to the EDPS’ questions regarding the complaint at hand:

### **1.1 Complainant’s personal data held by EPSO**

EPSO explained thoroughly the assessment and scoring process applied by the selection boards at the Assessment Centre in EPSO competitions.<sup>9</sup>

The complainant was excluded from the competition after having passed all the Assessment Centre tests, but before the Selection Board established the final results and drew up the reserve list.

Therefore, the data available with regard to his participation in the Assessment Centre, relate to sub-score suggestions and observation notes drawn up by the individual assessors/markers who evaluated his various tests. However, no final competency scores exist for the complainant, since the Selection Board excluded him from the competition before establishing those scores. Furthermore, because of his exclusion from the competition, the Selection Board also did not draft any comments for the purpose of drawing up his competency passport. This is in line with Section 3.3.1.1 of the General Rules as explained above.

### **1.2 Obligation to state reasons and secrecy of the Selection Board**

In light of Article 25 of the Staff Regulations and the relevant case law,<sup>10</sup> EPSO and the Selection Board must inform candidates of their final results obtained at each competition stage, in line with the obligation to state reasons. The communication of the final scores, which

---

<sup>9</sup> “An EPSO Assessment Centre normally consists of a combination of written/computer-based tests and oral tests. Each written test is corrected and marked by two markers working independently of each other. Markers make scoring suggestions to the Selection Board, which the Board reviews and possibly modifies before establishing and approving the final competency scores. As for the oral tests, each of them is assessed by two Selection Board (SB) members. For each candidate, the Board members record scoring suggestions per competency and take personal observation notes during/after each test. The Selection Board then holds periodical harmonisation meetings during the Assessment Centre testing period, where the scoring suggestions resulting from individual oral exams might be adjusted to ensure coherence of evaluation. At the end of the testing period, the competency scores of each individual candidate are fixed and officially approved by the full SB, based on the individual observations and scoring suggestions of the assessing SB members/markers. Each final competency score is thus, in fact, an aggregate of the sub-score suggestions made by the Board members/markers who evaluated the various tests where that competency was measured. Once the final competency scores fixed and validated by the full SB, the Board establishes the reserve list, and it draws up comments per competency for each candidate for the purposes of compiling their Competency Passport. The Competency Passport is a document that contains the candidate’s final results obtained at the Assessment Centre of the competition. It provides both quantitative and qualitative feedback about the candidate’s performance, in the form of the competency scores and the SB’s related comments”.

<sup>10</sup> Cases 69/83, Lux/Court of Auditors, point 36 and T-145/02, Petrich/Commission, point 54.



determine whether a candidate succeeded at the competition stage in question (and of the relevant scoring minima and/or thresholds), constitutes a sufficient statement of reasons.<sup>11</sup> EPSO claims that at the Assessment Centre stage, EPSO and the Selection Board meet their obligation to state reasons by providing candidates with the competency Passport (or, in exceptional cases, like the case of the complainant, by communicating the Selection Board's decision to exclude the candidate without establishing any scores).

EPSO pointed out that in the case of decisions taken by a Selection Board in a competition, the obligation to state reasons must be reconciled with the requirement of secrecy surrounding the proceedings of selection boards under Article 6 of Annex III to the Staff Regulations.<sup>12</sup> This secrecy was introduced in order to guarantee the independence of the members of the Board, the objectivity of their proceedings and to protect them from all external interference and pressures coming from the EU administration itself, the candidates, or third parties. Observance of this secrecy therefore precludes both disclosure of the attitudes adopted by individual members and of any factors relating to individual or comparative assessments of candidates.<sup>13</sup>

In particular, the correction methods and details of marking form an integral part of the comparative assessment performed by the Selection Board with regard to the candidates' merits and they are therefore covered by the secrecy of the Board's proceedings under Article 6 of Annex III to the Staff Regulations.<sup>14</sup>

In light of the above case law, EPSO considers that providing candidates with their final results (either their scores or, exceptionally, an exclusion decision) adequately fulfils the legal obligation to state reasons. On the other hand, EPSO considers that details of the marking such as sub-score suggestions made by the assessors/markers but not validated by the Selection Board as final, observation and correction notes, evaluation grids, scoring criteria, etc., are covered by the secrecy of Selection Board proceedings, and consequently may not be disclosed to candidates.

### **1.3 EPSO's interpretation of personal data regarding the final competency scores, the Selection Board's comments in the competency passport and background marking details**

EPSO referred to the De Mendoza case and stated that the broad definition of personal data has been interpreted "in a somewhat more restrictive way by the Civil Service Tribunal" that "personal data means only information enabling a person to be identified".

EPSO pointed out that the categories of data during a candidate's evaluation at the Assessment Centre, namely the final competency scores and the Selection Board's comments in the competency passport, as well as background marking details, i.e. the sub-score suggestions and observation notes concerning a candidate's performance in the various tests, qualify as "information relating to an identified or identifiable natural person". However, in EPSO's view, "they are certainly not - at least on their own - information enabling a person to be identified". Therefore, in light of the De Mendoza case, EPSO claimed that these categories of data do not qualify as personal data.

In fact, the above categories of data, EPSO continued, relate to at least two different data subjects at the same time, namely the candidate who was evaluated, and the Selection Board member or marker who performed the evaluation. Therefore, under Article 2(a) of the Regulation, the above data "qualify simultaneously as personal data of both the candidate and the assessor, where the data subjects might have opposing interest with regard to its processing".

---

<sup>11</sup> C-254/95 P, *Parliament v Innamorati*, paras 30-32; F-16/07; *Dragoman v Commission*, para 63.

<sup>12</sup> "The proceedings of the Selection Board shall be secret".

<sup>13</sup> C-254/95 P, *Parliament v Innamorati*, para 24.

<sup>14</sup> C-254/95 P, *Parliament v Innamorati*, para 29.

#### **1.4 EPSO's point of view on Article 6 of Annex III of the Staff Regulations (lex specialis) and on Article 13 of the Regulation (lex generalis).**

EPSO is of the opinion that “working on the assumption that the data in question can indeed be considered as personal data of the complainant”, Article 6 of Annex III to the Staff Regulations constitutes a *lex specialis* which, in the present case, precludes the application of the general rule contained in Article 13 of the Regulation with regard to those categories of the complainant’s personal data that are covered by the secrecy of the Selection Board proceedings”.

EPSO puts forward that it is a general principle of law that wherever there exists a specific rule governing a subject matter (a *lex specialis*), it takes precedence over the general rule(s) (*lex generalis*) that may have otherwise applied.

In other words, Article 6 of Annex III of the Staff Regulations specifically precludes the disclosure to candidates of the details of individual and comparative assessment performed by the Selection Board with regard to them, such as sub-score suggestions and observation notes related to the Assessment Centre tests. Consequently, EPSO takes the view that since Article 6 of Annex III of the Staff Regulation, as *lex specialis*, overrides the data subjects’ general access rights defined in Article 13 of the Regulation (*lex generalis*), the complainant is not entitled to receive those types of data relating to his participation in the Assessment Centre of the competition.

The only data that the complainant are entitled to receive are the final results of his participation in the Assessment Centre, i.e. the Selection Board’s decision to exclude him from the participation due to a breach of the applicable rules. The complainant is not entitled to receive the related un-validated sub-score suggestions and observation notes.

Moreover, EPSO argues that the Nowak case, highlighted by the EDPS in his letter requesting comments, is a reply to a request for a preliminary ruling under Article 267 TFEU from the Supreme Court of Ireland, and that paragraph 62 of the ruling restricts the application of the conclusions stemming therefrom to “circumstances such as those of the main proceedings”. EPSO stresses that even if the conclusions of the Nowak case were to be applied in the present complaint, namely “the written answers submitted by a candidate at a professional examination and any comments made by an examiner with respect to those answers constitute personal data”, “they are not liable to call into question the argument exposed above according to which Article 6 of Annex III, as *lex specialis*, may preclude communication of certain categories of personal data to the data subjects.”

#### **1.5 EPSO's interpretation of personal data regarding the complainant's log file, audit trail system generated file or similar source**

EPSO puts forward that the “detailed information when, who and the role of user that authorised him/her to access his application files as a candidate in EPSO competitions” cannot qualify as personal data within the meaning of Article 2(a) of the Regulation, as it is clearly not information relating to the complainant himself. It is rather “information relating to the processing of the complainant’s personal data and it does not fall into any of the categories to which data subjects have a right of access under Article 13 of the Regulation”.

## *2. Comments of the complainant*

The complainant provided the following comments to the EDPS on EPSO's reply:

Article 6 of Annex III to the Staff Regulations states that the proceedings of the jury should remain secret, but it is silent on access requests of data by the candidates.

If Article 6 were to be considered as *lex specialis*, it should contradict or specify a *lex generalis*, which in this case would be the provisions of the Regulation and not the General Rules of EPSO.

EPSO does not explain how access to his sub-score marks or log files would overstep the independence and objectivity of the Selection Board.

## **PART III**

### ***Legal analysis***

#### *1. Admissibility of the complaint*

The complaint is lodged by a candidate to an EPSO competition who considers that the processing by EPSO of personal data relating to him infringes the Regulation. The subject matter of the complaint at hand falls under the Regulation and EPSO, being an EU body, is within the EDPS competence. The complaint is therefore admissible under Article 32 of the Regulation.

#### *2. Alleged violation of Article 13 of the Regulation - right of access*

##### **2.1 What does personal data and access request mean in the context of a selection procedure**

“Personal data” under Article 2 of the Regulation means “any information relating to an identified or identifiable natural person”. The use of the expression “any information” in the definition of the concept “personal data” reflects the aim of the EU legislator to assign a wide scope to that concept. Personal data are therefore not restricted to information that is sensitive or private, but as the CJEU highlighted in the Nowak case, “potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it ‘relates’ to the data subject”.<sup>15</sup>

In the case of selection procedures (pre-selection tests, interviews and written examinations), considering that “personal data” includes opinions and assessments, data subjects should be given access to their own evaluation results derived from the assessment of the selection board regarding all stages of the procedure, i.e. they should be provided with aggregated results.<sup>16</sup> The processing of the complainant’s tests results at the Assessment Centre for the preparation of his competency passport (despite the fact that it was not finalised), is considered as part of the processing operation regarding the selection procedure of the competition.

Given the above definition of personal data, the sub-score suggestions attributed by the Selection Board to the complainant on the different tests he took, constitute the evaluation results at the Assessment Centre stage of the competition related to an identified natural person

---

<sup>15</sup> See para 40, judgment of the CJEU of 20 December 2017, C-434/16:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=6CDB4BCA1E798967A0035CF6405FA576?text=&docid=198059&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8313940>.

<sup>16</sup> EDPS Guidelines on the individuals’ data protection rights (the Guidelines): [https://edps.europa.eu/press-publications/press-news/press-releases/2014/edps-guidelines-rights-individuals-data-protection\\_en](https://edps.europa.eu/press-publications/press-news/press-releases/2014/edps-guidelines-rights-individuals-data-protection_en).

- the complainant - and therefore qualify as his personal data. The observation notes of the Selection Board are inextricably linked with the sub-score suggestions, because the members of the Selection Board have suggested the respective sub-scores based on those notes. In light of the Nowak case, it follows that the sub-score suggestions and observation notes of the Selection Board related to the tests carried out by the complainant are personal data under Article 2 of the Regulation.

Article 13 of the Regulation provides that the complainant shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller

- a) confirmation as to whether or not data related to him are being processed,
- b) information at least as to the purpose of the processing operation, the categories of data concerned and the recipients or categories of recipients to whom his data are disclosed,
- c) communication in an intelligible form of the data undergoing processing and of any available information as to their source,
- d) knowledge of the logic involved in any automated decision process concerning him.

It must be noted that the complainant has a continuous and permanent right of access to those data “at any time”.<sup>17</sup>

In the case at hand, Article 13(b) (“the categories of data concerned”) and Article 13(c) are relevant: the sub-score suggestions and observation notes of the complainant’s test results are categories of his personal data undergoing processing to which the complainant requested access and EPSO, being the controller, should communicate them to him in an intelligible and comprehensive form.

In light of the above, the EDPS stresses that the case law has evolved since the De Mendoza case and disagrees with EPSO’s narrow interpretation of personal data. EPSO should apply a broad interpretation of personal data in order to be in conformity with the most recent case law by the CJEU. The sub-score suggestions and observation notes are categories of personal data which are undergoing processing and are therefore personal data related to an identified person, the complainant, as long as they do not directly or indirectly identify any individual member of the Selection Board (see further on point 2.3).

## **2.2 EPSO’s legal obligation to provide the complainant with his test results (sub-score suggestions and observation notes)**

According to EPSO’s interpretation, in order to fulfill its legal obligation to state reasons, EPSO should provide the complainant with his final scores. Since the complainant was excluded from the competition, the Selection Board never established his final scores. EPSO informed the complainant of the decision to exclude him, which, in EPSO’s view, was enough to comply with its obligation to state reasons.

The EDPS clarifies that EPSO’s legal obligation to state reasons under Article 25 of the Staff Regulations is different from EPSO’s obligation to grant access to the complainant’s personal data under Article 13 of the Regulation. The fact that the complainant was excluded from the competition and the Selection Board as a result was not able to establish any final scores, does

---

<sup>17</sup> See paras 46 and 69 of Case T-903/16, judgment of the General Court of 14 February 2019, RE v European Commission:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=DB84EE967FEE96E9236FAFBB572547D6?text=&docid=210763&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1482463>.

not prevent the complainant from exercising his right to have access to the results of the tests that he took before his exclusion, i.e. the sub-score suggestions and observation notes of the evaluators related to those tests.

The fact that EPSO excluded the complainant from the competition does not mean that the data protection rules and principles do not apply. Notwithstanding the rules on conflict of interests, EPSO should ensure that the data protection rules and principles of the Regulation are duly applied throughout the whole selection procedure, from the preliminary to the final stages of the competition. This includes the obligation to ensure that the complainant's right of access to his personal data is respected.

As established above, the sub-score suggestions and observation notes are the evaluation results of the complainant during the preliminary stage of the competition in which he participated. Since these results qualify as personal data, the complainant has the right to have access to them in order to be able to understand his performance during that part of the competition. EPSO should therefore communicate to the complainant in a concise, transparent, intelligible and easily accessible form, using clear and plain language, those "categories of personal data concerned" in line with Article 13(b) and (c) of the Regulation.

### **2.3 The secrecy of the selection board, their sub-score suggestions and their observation notes**

As to the disclosure to candidates of the details of the individual assessment given by the Selection Board with regard to them, the EDPS has stressed that "...the data subjects should be provided with aggregated results and informed of the principal reasons on which the application of the restriction of their right of access is based..."<sup>18</sup> Aggregated results means that no information regarding the individual marks or assessments attributed by individual members of the Selection Board should be given. However, the average mark resulting from the aggregation of the individual marks/assessments by all members of the Selection Board should be disclosed in an intelligible and transparent manner.<sup>19</sup>

The EDPS agrees that EPSO should not reveal sub-score suggestions and observation notes given by *individual* members of the Selection Board, in order not to prejudice the secrecy, the impartiality and the independence of the Board. The identity of the individual members of the Selection Board who were assessors in the various tests of the Assessment Centre should also be protected. It is true that if a member of the Board knows that their individual comments can be communicated to the candidates, they may feel an external pressure and will not fulfill their tasks as evaluators with objectivity.

However, the purpose of the sub-score suggestions and observations notes is to record the evaluation by the evaluator of the candidate's performance. As the CJEU highlighted in the Nowak case, they are liable to have an effect on the candidate's rights and interests, in that they may determine or influence the chance of entering the profession aspired to or of obtaining the post sought.<sup>20</sup>

---

<sup>18</sup> [https://edps.europa.eu/sites/edp/files/publication/14-02-25\\_gl\\_ds\\_rights\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-02-25_gl_ds_rights_en.pdf), page 13.

<sup>19</sup> In a recruitment case, the EDPS established that the EU body concerned "should be in a position to give a detailed breakdown of the mark given for the oral test, i.e. to give the mark for each section on which the applicant was assessed at the oral, without that interfering in any way with the principle of the secrecy of selection board proceedings, as set out in Article 6 of Annex III to the Staff Regulations, since the marks given would be overall averages. There is certainly no question of revealing marks given by individual members of the board or any information on comparison with other applicants" (see case 2004-0236).

<sup>20</sup> Paras 39 and 43, judgment of the CJEU of 20 December 2017, C-434/16.

In order to comply with the right of access under Article 13 of the Regulation, EPSO should therefore give the complainant the sub-score suggestions and observation notes as *a whole* (i.e. an overall assessment) with respect to each test, without that interfering in any way with the principle of the secrecy of the panel's proceedings, as set out in Article 6 of Annex III to the Staff Regulations.

The EDPS highlights that a summary - in an intelligible form - of the sub-score suggestions and the observation notes of the members of the Selection Board would be sufficient.<sup>21</sup> EPSO should ensure that individual members of the Board cannot be identified or be directly or indirectly identifiable by the information given, since that would prejudice the protection of the impartiality and independence of the Board.

#### **2.4 Article 6 of Annex III to the Staff Regulations v Article 13 of the Regulation**

EPSO puts forward that the Regulation is not applicable since the Staff Regulations, and in particular Article 6 of Annex III, applies as *lex specialis*.

If Article 6 were to be considered *lex specialis*, it should contradict or specify a *lex generalis*, which in this case would be Article 13 of the Regulation. However, there is no such contradiction or specification in the present case. The Staff Regulations remain silent as to data protection rules, let alone any principle on the specific right of access of an EPSO candidate to personal data, that would be relevant to the present case. On the contrary, the Regulation lays down a general legal framework for data protection law. Given that there is no provision in the Staff Regulations relating to any restriction to the right of access of an EPSO candidate to personal data, the right of access as laid down in Article 13 of the Regulation must fully apply.

Furthermore, Article 8(2) of the Charter of Fundamental Rights recognises that everyone has a right of access to data concerning them and confers positive obligations on EUIs. The EDPS highlights that a *lex specialis* can never deprive an individual from a subjective right that was given to him and, *a fortiori*, not a fundamental right, unless a restriction of the right meets the conditions set out in the Regulation. The complainant's request for access should therefore be examined under the provisions of the Regulation.

The Regulation contains exceptions to the right of access. Under Article 20 of the Regulation, EPSO can restrict the application of Article 13 where such a restriction constitutes a necessary measure to safeguard specific interests and rights, for example to protect the rights and freedoms of the others, such as the identity (directly or indirectly identifiable) of other candidates' or of the members of the Selection Board.

In the present case, however, the application of Article 13 should not be limited since there is no particular right or interest that falls within the scope of Article 20. The complainant's request for access does not concern other candidates' scores, nor individual comments, suggestions and notes of individual members of the Selection Board. As explained above, in point 2.3, the complainant is entitled to have access to the sub-score suggestions and observation notes as *a*

---

<sup>21</sup> Judgment of the CJEU of 17 July 2014, Court of Justice of the European Union, joined cases C-141/12 and C-372/12, YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v M and S.

*whole* (overall assessment) related to each test, as long as the individual members of the Selection Board cannot be identified directly or indirectly.

### **2.5 The complainant's requests of 12 and 27 February 2018**

In his correspondence of 12 and 27 February 2018, the complainant requested to have access to a number of different items (numbered 1-7 on page 5 above). Point 6<sup>22</sup> is not a data protection issue, thus the EDPS will not address it.

#### ***First and fourth points concerning the log files and audit trail related to the complainant's file:***

The complainant requested access to detailed information as to who entered his log file and when, including information on their role authorising them to access his application file. He also requested access to the log file of the Assessment Centre management software, which would enable him to identify all relevant users.

Under Article 13(c) of the Regulation, the complainant is entitled to have access to the recipients and categories of recipients to whom his data were disclosed in the context of his selection procedure.

Authorised EPSO user(s), acting in the context of their legitimate tasks and competences, who accessed the complainant's file for the purpose of creating, adding, modifying and closing it, should be considered recipients to whom the complainant's personal data are disclosed. It is important to clarify that the complainant has the right to know the role of the authorised recipients<sup>23</sup>, but not their identity. A disclosure of the identity of the recipients would be unnecessary and excessive to the purpose of the processing and would not be compliant with the data minimisation principle.

The complainant is entitled to have access to the recipients of his personal data, since he has the right to know whether EPSO has processed his personal data fairly and lawfully<sup>24</sup>, and whether EPSO has implemented appropriate technical and organisational measures to ensure that "it will subsequently be possible to check which personal data have been processed, at what times and by whom".<sup>25</sup>

The information related to recipients should also be indicated in the data protection notice regarding the processing at hand, in line with Article 11(1)(c) of the Regulation.<sup>26</sup>

#### ***Second and third points concerning the sub-score suggestions and observation notes of the Selection Board:***

The complainant requested access to the marks he got in the case study and the group exercise, as well as the comments of the members of the Selection Board. These elements are the sub-score suggestions and observation notes that the EDPS has thoroughly analysed in points 2.1, 2.2 and 2.3 above.

---

<sup>22</sup> Information on "how EPSO managed his request with reference number EPSO-CRS-9620 concerning potential conflicts of interest" in the competition EPSO/AST/139/16.

<sup>23</sup> For instance, IT staff, administrative assistants, case officers, etc.

<sup>24</sup> Article 5(a) of the Regulation.

<sup>25</sup> Article 22(g) of the Regulation.

<sup>26</sup> "The controller shall provide a data subject from whom data relating to himself/herself are collected with at least the following information ...the recipients or categories of recipients of the data".

As established above, the complainant is entitled to have access to the overall assessment with respect of each test without revealing the individual opinion or/and identity of a member of the Selection Board.

***Fifth and seventh points concerning the identity of the members and the chair of the Selection Board:***

The complainant requested access to the names of the members of the Selection Board who assessed him in three specific tests (the general competency interview, the specific competency interview and the group exercise), as well as to the chair of the Board.

In principle and to the EDPS's knowledge, the names of all members and the chair of a selection board are published on EPSO's website for transparency reasons.

In any event, the names of the members of the Board who assessed the complainant in the specific tests mentioned are not part of his personal data processed in the selection procedure and he can therefore not rely on Article 13 of the Regulation to access this information.

## **PART IV**

### ***Conclusions***

The EDPS concludes that:

There has been a violation of Article 13 of the Regulation.

EPSO, in collaboration with their DPO, should therefore ensure that the complainant is given access to the above-mentioned personal data and information, namely to

1) the summary of the sub-score suggestions and observation notes of the Selection Board during the preliminary stage of the competition (as explained in points 2.1, 2.2, 2.3 and 2.4) and  
2) the role of authorised EPSO recipients (as explained in point 2.5)  
in conformity with Article 13 of the Regulation, as recommended by the EDPS, within a month of this Decision.

**[E-signed]**

Wojciech Rafał WIEWIÓROWSKI

Done at Brussels, 22 September 2020