



The European Data Protection Supervisor's Opinion on a notification for Prior Checking on the European Research Council Executive Agency's procedure on handling internally and reporting potential fraud and irregularities (Case 2015-0061)

Brussels, 7 May 2015

1. Proceedings

On 20 January 2015, the European Data Protection Supervisor ("EDPS") received a notification for prior checking from the Data Protection Officer ("DPO") of the ERCEA regarding the procedure on potential fraud and irregularities to be established at the ERCEA.

According to Article 27(4) of Regulation 45/2001 (the "Regulation") this Opinion must be delivered within a period of two months, not counting suspensions for requests for further information¹, in other words, 8 May 2015.

2. The facts

The **purpose** of this procedure is to detail how to process internally irregularities and potential fraud identifying cases which requires to be transmitted to OLAF either for information, possible investigation or for expert assistance relating to irregularities cases that requires to be addressed by ERCEA. In addition, the procedure defines possible precautionary and conservatory measures to be taken by ERCEA and it foresees the creation and maintenance of the irregularity and potential fraud register, for internal monitoring purposes.

The **personal information processed** are contained in the report and covers name and surname of the person involved in the potential fraud, his/hers grant agreement, contract and/or staff number and data on the nature of the facts potentially constituting fraud.

Information will be provided through a **privacy statement** published on ERCEA's intranet. Furthermore, the persons involved in a case will be informed and regularly updated about the important steps of the proceedings. However, the provision of such information can be deferred so as to not jeopardise the process and possible future OLAF investigation. In that case, the information will be provided to the data subject at a later stage.

The notification states that personal information will be **disclosed** on a need-to-know basis to a restricted number of authorised ERCEA staff, OLAF, Directorate-General for Budget, Directorate-General for Research and Innovation and Steering Committee Members.

The **retention period** depends on whether OLAF starts an investigation or not. If the information is relevant to an OLAF investigation, the information will be kept for 20 years, 10 years if the information was part of a closed investigation without follow-up and 5 years if

¹ The case was suspended for information from 29 January 2015 to 13 February 2015, from 19 February to 11 March and for comments of the DPO from 20 April 2015 to 4 May 2015. The EDPS shall thus render its Opinion before 8 May 2015.

the case was closed by OLAF without investigation. If the case is not sent to OLAF as not relevant, the information will be retained in the ERCEA services for a maximum of 5 years.

Regarding the **security measures** [...]

3. Legal analysis

3.1. Prior checking

The processing of personal data is performed by an agency of the European Union. Furthermore, the processing is partly done through automatic means. Therefore, the Regulation is applicable.

This processing activity is subject to prior checking since it presents specific risks. Indeed ERCEA will process information on suspected offences related to potential fraud and evaluate personal aspects to decide whether the information should be transferred to OLAF.²

3.2. Data quality and special categories of data

According to Article 4(1)(c) of the Regulation, personal information must be adequate, relevant and non-excessive in relation to the purposes for which they are collected and/or further processed. They must also be accurate and where necessary, kept up to date (Article 4(1)(d)).

There is a possibility that ERCEA, perhaps involuntarily, receives information that is of no interest/relevance to the investigation, also concerning special categories of data (see Article 10(1) of the Regulation).

Personal data and in particular special categories of data that are not relevant for the purposes of investigating fraud, should not be further processed. **ERCEA should therefore ensure that staff members are aware of the data quality requirements.**

3.3. Data retention

As a general principle, personal information must not be kept in a form, which permits identification of persons for longer than is necessary for which the data are collected and/or further processed.³

With regard to the cases which will not be sent to OLAF and for which no further action is needed, a retention period of 5 years seems excessive. The EDPS would therefore recommend ERCEA to **re-evaluate the data retention period or provide further justification about the necessity to retain data for 5 years if a case is not relevant to be transferred to OLAF.**

Concerning the conservation periods for the three other categories, it should be noted that OLAF's own conservation periods for such cases are 15, 8 and 5 years after closure,

² Article 27 of the Regulation subjects to prior checking by the EDPS processing activities 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) of the Regulation contains a list of processing operations that are likely to present such risks including under point (a) the processing of data related to suspected offences and under point (b) processing intended to evaluate personal aspects relating to the data subject, including his or her conduct.

³ See Article 4(1)(e) of the Regulation.

respectively.⁴ There are no obvious reasons why ERCEA should keep these files for longer than OLAF and **ERCEA should therefore align its conservation periods with those of OLAF.**

3.4. Transfer of data

In accordance with Article 7(1) of the Regulation, ERCEA is required to verify both that the recipients are competent and that the personal information is necessary to the performance of the related tasks.

One of the possible recipients is the Steering Committee which is the body that supervises the operations of the ERCEA and is appointed by the Commission. It is composed of five members, out of which two belong to the Scientific Council. The members of the Scientific Council are scientists and scholars that do not belong to the Commission.

The EDPS notes that the personal information transferred could indirectly lead to the identification of suspected person, in particular through the description of the facts. Consequently, the EDPS recommends that ERCEA **verifies on a case by case basis that only necessary personal information is transferred to the representatives of the Steering Committee in accordance with the performance of their tasks.**

3.5. Information to the data subject

Articles 11 and 12 of the Regulation provide a minimum list of information about the processing of personal data that need to be provided to individuals involved in a case.

ERCEA mentions that persons involved in a case will be informed and regularly updated about the important steps of the proceedings. Since this could include information about different persons, **the EDPS would like to remind ERCEA that the persons involved should only receive information about themselves.**

With regard to the procedures for data subjects notably to exercise their rights (access, rectification and others), **it is good practice to include information regarding within which time limit a reaction can be expected** (e.g. 3 months for access request, without delay for rectification, etc.).

During the handling of this case, ERCEA explained that the privacy statement would be amended to include the fact that ERCEA will also process data related to the actual allegations. **The EDPS expects the ERCEA to implement this as announced.**

3.6. Security measures

[...]

4. Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation providing that the recommendations contained in this Opinion are fully taken into account. ERCEA should:

⁴ See OLAF Instructions to Staff on Data Protection for Investigative Activities, available at: http://ec.europa.eu/anti_fraud/documents/data-protection/2013/isdpfinal_2013.pdf, Article 13(2).

- Ensure that staff members that handling information on potential fraud and irregularities are aware of the data quality requirements (point 3.2.);
- Re-evaluate the data retention period or provide further justification about the necessity to retain personal data for 5 years regarding cases which are not sent to OLAF and for which no further action is taken by ERCEA (point 3.3.);
- Align its conservation periods with those of OLAF for the cases sent to OLAF (point 3.3.);
- [...]
- [...]
- [...]
- Verify on a case by case basis that only the necessary personal information are transferred to the Steering Committee; the personal information must be necessary of the performance of the tasks of the Steering Committee (point 3.4.);
- Adjust the privacy statement so it mentions all the categories of data that ERCEA process (point 3.5.).

Please inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Done at Brussels, 7 May 2015

(signed)

Giovanni BUTTARELLI