



WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

[...]
European Ombudsman
1, Avenue du Président Robert Schuman
CS 30403
F-67001 STRASBOURG CEDEX

Brussels,
WW/GC/sn/D(2018)1646 C 2017-1064
Please use edps@edps.europa.eu for all
correspondence

Subject: Non-Prior-checking Opinion regarding a procedure for avoiding conflicts of interest at the European Ombudsman (EDPS case 2017-1064)

Dear [...],

On 30 November 2017, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ('the Regulation') on a procedure for dealing with the declaration of exercise of occupational activity after leaving the service of the European Union from the Data Protection Officer (DPO) of the European Ombudsman². This procedure intended to assess possible conflicts of interest of former staff when engaging with new occupational activities.

The EDPS has issued Guidelines concerning the processing of personal data with regard to the management of conflicts of interest³ ('the Guidelines'). Therefore, this Opinion analyses and highlights only those practices, which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for the management of conflicts of interest at the European Ombudsman.

Although the European Ombudsman is not processing data in order to 'evaluate personal aspects relating to the data subject' – in which case the EDPS assessment would fall under Article 27(2)(b) of the Regulation⁴ –, and the notified processing operations thus are not subject to prior checking, the EDPS nonetheless has a number of recommendations and remarks to make.

¹ OJ L 8, 12.1.2001, p. 1.

² As this is an ex-post case, the deadline of two months does not apply. The EDPS has dealt with this case on a best-effort basis.

³ Available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/14-12-08_coi_guidelines_en.pdf.

⁴ See p. 22 and following of the Guidelines.

1. Facts and analysis

The European Ombudsman has adopted internal rules on the exercise of a new occupational activity of officials, temporary and contract agents after leaving the service. In accordance with the Staff Regulations⁵ and those internal rules, a staff member intending to engage in an occupational activity, whether gainful or not, within two years after leaving the European Ombudsman public service, shall inform the Ombudsman in writing. He/she should complete a specific declaration, and the European Ombudsman assess if there are conflicts of interests with the exercise of a new occupational activity.

Regarding senior officials, the Ombudsman additionally publishes on the ‘ethics section’ of its website the name and date of departure from the Ombudsman’s office, a description of the tasks carried out in the Ombudsman's Office during the previous three years, a description of the duties intended to be exercised in the future occupational activity and the Ombudsman’s assessment regarding conflict of interests, in accordance with Articles 16 (3) and 16 (4) of the Staff Regulations.

1.1. Lawfulness

Article 16 (2) of the Staff Regulations, as well as Articles 11 and 81 of the Conditions of Employment of Other Servants of the European Union (CEOS) state that Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof using a specific form.

Consequently, this data processing has as legal basis Article 5 (a) and (b) of the Regulation, since it is necessary for the performance of a task carried out in the public interest, namely the management and functioning of the institution and for complying with a legal obligation to which the controller is subject.

However, the European Ombudsman has also stated in the notification to the EDPS that former staff members will be asked to give their consent for this data processing. It is furthermore included in the Privacy Statement attached to the form, that ‘By fulfilling this form, the candidate is understood, in the sense of Article 5(d) of the Regulation, to have given his/her consent to the processing of the personal data contained in the form’. As further explained in the Guidelines, any ‘consent’ would not be given ‘freely’ in this situation, and therefore would not be valid as a legal ground for this processing.

As regards lawfulness, the European Ombudsman has issued a Decision on internal rules concerning the exercise of an occupational activity after leaving the service of the European Union.

The EDPS **recommends** that the European Ombudsman change the text of the Privacy Statement by deleting the reference to consent under Article 5 (d) of the Regulation.

1.2. Data Quality

According to the Regulation and the Guidelines, only relevant categories of data should be collected.

⁵ Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and Conditions of Employment of Other Servants of the Economic Community and the European Atomic Energy Community, OJ 45, 14.6.1962, p. 1385, as amended. The Staff Regulations apply to officials and the CEOS to contract and temporary agents, parliamentary assistants and special advisers. Any further refer to the Staff Regulations will include CEOS.

The European Ombudsman stated in the notification of this processing to the EDPS that information about ‘remuneration or other pecuniary advantages if applicable’ is going to be collected. Following that question, an open question ‘provide details’ is asked.

However, since the conflict of interests assessment applies whether the new occupational activity is gainful or not, remuneration and other pecuniary advantages are not relevant for this purpose and thus are excessive⁶.

The fact that the form includes open questions like ‘provide details’ or ‘other relevant information’ can lead to the collection of excessive information since the data subjects may feel obliged to provide any other additional information. Therefore, the form should ask precise and relevant questions.

The EDPS **recommends** that the European Ombudsman do not collect future remuneration or other pecuniary advantages of former officials, temporary and contract agents after leaving the service. Hence, the ‘Declaration of exercise of an occupational activity after termination of functions in the EU public service’ form should be amended accordingly.

1.3. Data retention

Personal data must be kept for no longer than necessary for the purposes on behalf of which the data was collected, as enshrined in the Regulation.

According to the information provided, the personal data in question will be kept by the European Ombudsman's Office for ten years after the staff member has left the institution or was granted a retirement pension.

However, since the conflict of interest assessment is performed during the two years after the staff member has left the European Ombudsman, it seems excessive to keep this data for ten years.

The EDPS **recommends** that the European Ombudsman establish a maximum retention period of five years for the ‘Declaration of exercise of an occupational activity after termination of functions in the EU public service’.

1.4. On-line publication of senior officials leaving the EU public service

Article 16 (3) and (4) state that each institution shall publish annually information on former senior officials leaving the service, including a list of the cases assessed.

Following those legal provisions, the European Ombudsman publishes on the ‘ethics section’ of its website: the name of the senior official, the date of departure from the Ombudsman's Office, a description of the tasks he/she carried out in the Ombudsman's Office during the previous three years, a description of the duties he/she intends to carry out in the new position (including the name of the new employer/organisation) and the Ombudsman's assessment on the conflict of interests and conclusions.

As to the understanding of the EDPS, the European Ombudsman does not inform the senior officials of this publication. The Privacy notice simply mentions Article 16 (3) of the Staff

⁶ Other procedures for declarations of interests assessed by the EDPS are performed without collecting this data. Please see Case 2010-0914 and 2013-0269.

Regulations⁷, but does not say the information will be published on the European Ombudsman website.

The EDPS **suggests, as an improvement**, that the European Ombudsman include in the Privacy Statement a reference to the publication on its website of the abovementioned personal data from former senior officials. This on-line publication should be removed from the website two years after the staff member has left the European Ombudsman service.

2. Conclusion

In this Opinion, the EDPS has made recommendations to ensure compliance with the Regulation, as well as suggestions for improvement. Provided that the abovementioned recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

In light of the accountability principle, the EDPS expects the European Ombudsman to implement the aforementioned recommendations accordingly and has therefore decided to **close the case**.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI

Cc.: [...], DPO, European Ombudsman

⁷ Article 16 (3) of the Staff Regulations: In compliance with Regulation (EC) No 45/2001 of the European Parliament and of the Council, each institution shall publish annually information on the implementation of the third paragraph, including a list of the cases assessed'.