Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Auditors on the issue of internal administrative enquiries and disciplinary proceedings

Brussels, 22 December 2005 (Case 2005-316)

Procedure

On 8 July 2005, in the course of the prior checking of the dossier relating to the draft decision of the Court of Auditors on harassment, the controller (Ms Rose Marie WEGNEZ) informed the European Data Protection Supervisor by e-mail that the general provisions for implementation of Article 86 (disciplinary measures) and of Annex IX (disciplinary proceedings) to the Staff Regulations were being drawn up.

The final version of the notification on prior checking relating to internal administrative enquires and disciplinary proceedings within the Court of Auditors was sent to the European Data Protection Supervisor by e-mail on 24 October 2005.

The facts

Article 2(3) (on administrative enquiries) of Annex IX (on disciplinary proceedings) to the new Staff Regulations provides that each institution shall adopt general implementing provisions for this Article, in accordance with Article 110 of the Staff Regulations. In addition, Article 30 of Annex IX provides that each institution shall, if it sees fit, adopt implementing arrangements for that Annex, after consulting its Staff Committee.

The Court of Auditors has adopted a draft decision on general implementing provisions on the conduct of administrative enquiries and a draft decision on implementing provisions for Annex IX of the Staff Regulations on disciplinary proceedings. These two drafts are being submitted for prior checking.

Procedure relating to the conduct of administrative enquiries

Definitions and scope

For the purposes of the draft provisions, the term "official" includes former officials, as well as servants or former servants within the meaning of the Conditions of Employment of Other Servants of the European Community.

"Administrative enquiry" within the meaning of the draft provisions refers to any action taken by an official to whom the Appointing Authority (AA) has assigned responsibility for establishing the facts and circumstances which will enable it to determine whether an official has failed to fulfil his/her obligations.

For the purposes of the draft provisions, "official concerned" means any official whose conduct is the subject of an administrative enquiry.

Opening an enquiry

The decision to open an administrative enquiry pursuant to Article 86(2) of the Staff Regulations and Article 2 of Annex IX to the Staff Regulations lies with the Appointing Authority.

A proposal to open an administrative enquiry may be made by the member, Director or Head of Unit to whom the official concerned by the request is answerable, or by the Director of Human Resources, IT and Telecommunications.

The Appointing Authority may also open an administrative enquiry on its own initiative.

Before the Appointing Authority opens an administrative enquiry, if there is a possibility that the European Anti-Fraud Office ("OLAF") is preparing or is in the process of conducting an enquiry into the same facts or circumstances as those concerned by the enquiry it has envisaged, the Appointing Authority consults OLAF about the matter. As long as OLAF is preparing or conducting such an enquiry, the enquiry envisaged by the Appointing Authority can not be opened.

Once the Appointing Authority has received a copy of OLAF's findings, it may ask OLAF for further details, decide to open its own administrative enquiry, initiate immediate disciplinary proceedings on the basis of OLAF's findings, or decide to take no further action.

The Appointing Authority's decision to open an administrative enquiry defines the subject and scope of the enquiry and appoints one or more appropriately qualified officials or former officials (hereinafter "the investigating official") to conduct the enquiry.

The Appointing Authority informs the official concerned that an enquiry has been opened, unless it considers that disclosing this information would hinder the enquiry.

Without prejudice to the previous paragraph, if an administrative enquiry suggests that an official other than the official concerned has failed to fulfil his/her obligations, the Appointing Authority may as a result decide to extend the scope of the enquiry. Where this is the case, it informs the official in question, unless it considers that disclosing this information would hinder the enquiry.

Conduct of the inquiry

The investigating official exercises his/her powers in an independent capacity. He/she neither seeks nor receives instructions. The enquiry is carried out diligently and lasts for a period appropriate to the circumstances and complexity of the case.

The investigating official conducts the enquiry thoroughly and assembles evidence both in favour of and against the official under investigation. Where the purposes of the enquiry so require he/she has the power to obtain documents of any kind or in any format and to ask any present or former Court employee for information.

The investigating official may receive assistance, in particular of a logistical nature, from other officials and from the Court's various specialist departments.

At any stage of the enquiry, the official concerned may be accompanied by a lawyer, in which case the official will be responsible for any fees incurred, or by another person of his/her choosing, subject to prior approval by the Appointing Authority.

Findings of the enquiry

The investigating official submits a report to the Appointing Authority. The report indicates all relevant facts and circumstances, as well as the corresponding degree of certainty or doubt. It also mentions, where appropriate:

(a) the rules and procedures applicable to the relevant facts and circumstances;
(b) the information which, in the investigating official's opinion, could be relevant but which he/she has been unable to obtain.

The report contains no appraisal of the relevant facts and circumstances, in particular as to whether the official concerned has failed to fulfil his/her obligations.

No facts or circumstances relating to an official may be mentioned in the report before he/she has been given an opportunity to express an opinion as to these facts and circumstances to the investigating official. The report notes this opinion.

Copies of all relevant documents and records of the interviews conducted by the investigating official are attached to the report.

The Appointing Authority informs the official concerned of the conclusion of the enquiry and provides the official with a copy of the report and, on request, a copy of any document mentioned in the report which is directly linked to the allegations made against him but which is not yet in the official's possession, subject to the protection of the legitimate interests of third parties.

Reopening an enquiry

The conclusion of the enquiry does not prevent its being reopened by the Appointing Authority in the light of new information supported by relevant evidence.

Disciplinary proceedings

Definitions and scope

For the purposes of the draft provisions, the term "official" includes former officials, as well as servants or former servants within the meaning of the Conditions of Employment of other servants of the Communities.

For the purposes of the draft provisions, the expression "the official concerned" means any official who is subject to disciplinary proceedings.

Hearing

The hearing envisaged in Article 3 of Annex IX to the Staff Regulations is held by the Appointing Authority with the assistance of a member of the Legal Service or, where this is not possible owing to a conflict of interests, by another appropriately qualified official chosen by the Appointing Authority.

The official concerned is given at least two weeks' notice of the hearing. He/she may be accompanied by a lawyer, in which case the official will be responsible for the fees incurred, or by another person of his/her choosing, subject to prior approval by the Appointing Authority.

A draft account of the hearing is sent to the official concerned.

Within five working days of receiving the record, the official sends a signed copy of the draft or any related comments to the Appointing Authority. Failure to do so within this period results, except in cases of *force majeure*, in the record being considered approved, and a copy of the record signed by the Appointing Authority is sent to the official concerned. If the official concerned has submitted comments, the Appointing Authority approves and signs the version of the record which it considers correct, together with those comments which have not been included, and sends a copy of the entire document to the official concerned.

If, following a hearing, the Appointing Authority considers it necessary for it or its duly appointed representative to conduct another interview with a present or former Court employee, the official concerned receives a copy of the record of the interview, provided that the facts mentioned therein have a direct bearing on the preliminary allegations made against him.

Decision to take no further action

If, under Article 3(1)(a) of Annex IX to the Staff Regulations, the Appointing Authority decides that no case can be made against the official concerned, it informs the latter accordingly. At the request of the official concerned, a copy of this decision may be placed in his/her personal file.

Decision to take no disciplinary action or to issue a warning

If the Appointing Authority decides, under Article 3(1)(b) of Annex IX to the Staff Regulations to take no disciplinary action and, where appropriate, to issue a warning to the official concerned, it informs the latter accordingly. A copy of this decision is not placed in his/her personal file.

Disciplinary proceedings not involving the Disciplinary Board

If the Appointing Authority decides, under Article 11 of Annex IX to the Staff Regulations, to issue the official concerned with a written warning or reprimand without consulting the Disciplinary Board, it informs the official concerned accordingly. A copy of this decision is placed in his/her personal file.

Disciplinary proceedings before the Disciplinary Board

If, under Article 12 of Annex IX to the Staff Regulations, the Appointing Authority decides to initiate disciplinary proceedings before the Disciplinary Board, it refers the matter to the Board by sending a report to the Chairman. The Legal Service and the official concerned receive a copy of the report.

Pursuant to Article 16(2) of Annex IX to the Staff Regulations, the Appointing Authority notifies the Chairman of the Disciplinary Board of the name of its representative.

Where an administrative enquiry has already been held into a case before the Disciplinary Board, the official who conducted the enquiry may not represent the Appointing Authority. He/she may, however, be called before the Board as a witness.

As soon as proceedings are initiated before the Disciplinary Board, the Chairman informs the official concerned, pursuant to Article 14(3) of Annex IX to the Staff Regulations, of the consequences of his/her admission of misconduct.

Withdrawal of the case from the Disciplinary Board

If, under Article 14(1) of Annex IX to the Staff Regulations, the Appointing Authority decides to withdraw the case from the Disciplinary Board and to impose a direct penalty without the Board's opinion, it seeks the opinion of the Chairman of the Disciplinary Board on the penalty envisaged and informs the official concerned. The official concerned is also notified of the Chairman's opinion. The decision taken by the Appointing Authority under Article 14(2) of Annex IX to the Staff Regulations is forwarded to the official concerned. A copy is placed in his/her personal file.

The purpose of the data processing is to put together a file to enable the Appointing Authority to determine whether an official or other servant has failed to fulfil his/her obligations under the Staff Regulations and, where appropriate, impose a disciplinary penalty in accordance with the Staff Regulations.

The data undergoing processing are as follows:

- surname, first name, personnel number,
- data relating to status under the Staff Regulations and conditions of employment,
- data relating to the conduct, action or inaction of persons under investigation and/or subject to disciplinary proceedings,
- data relating to the legal definition of such action or inaction with regard to the Staff Regulations and to other obligations by which the persons in question are bound,
- data relating to the individual responsibility of the persons concerned, including financial liability (Article 22 of the Staff Regulations),
- data relating to penalties imposed on the persons concerned, if required.

In the planned decisions there is no mention of any processing of traffic data.

Information is given to the person concerned in the following manner: the person concerned is officially informed by the Appointing Authority of the opening of an administrative enquiry, except in the case provided for in Article 2(7) of the DG E draft on the subject. The official

concerned is informed during the enquiry about the facts and circumstances involving him. He is also notified by the Appointing Authority of the end of the enquiry and of its conclusions. The Appointing Authority notifies the official concerned of any opening of a disciplinary proceeding concerning him and of its decision.

The data may be disclosed to the following recipients: the Appointing Authority, the Director and Head of the HR Division, the Legal Service. They may also be disclosed to the person responsible for conducting the inquiry, the Chairman, the members and the secretary of the Disciplinary Board, the official responsible for keeping personal files. If appropriate, the decision is communicated to OLAF if OLAF has requested disciplinary follow-up. Where the disciplinary decision has a financial impact, it is forwarded to the Administrative Applications Unit for adjustment of the salary and of SYSPER. If the official concerned contests the Appointing Authority's disciplinary decision, the dossier may be referred to the Court of First Instance or to the Court of Justice of the European Communities.

There is no time limit for the blocking and deletion of data. There are plans to reorganise the management system for documents of the Human Resources Division. In this context, the problem of time limits for the conservation of documents of a personal nature will be subject to precise regulation. With regard to the length of time for which the disciplinary decision is kept in the personal file, Article 27 of Annex IX to the Staff Regulations establishes the time limits after which the person concerned may request that all reference to the penalty be removed from the file. The final decision nevertheless remains with the Appointing Authority.

Data are not kept with a view to historical, scientific or statistical purposes.

The security measures are as follows:

- all data processing is confidential,
- communication of data is restricted to those persons who "need to know" for the performance of their duties,
- in accordance with Article 26 of the Staff Regulations, the decision taken at the end of the disciplinary proceedings is placed in the personal file of the official concerned. The personal files of the persons concerned are locked into a secure system. This system allows access only to authorised persons. Access to the personal file of the official concerned is limited to the data subject and to Court personnel specifically authorised to have access to personal files. The data subject does not have direct access. The personal file is taken out of the secure system by the authorised official/servant and handed to the data subject for consultation on the spot.

Legal aspects

1. Prior checking

The notification received by e-mail on 24 October 2005 relates to the processing of personal data ("any information relating to an identified or identifiable natural person" - Article 2(a)). Such data processing is carried out by an institution, in the exercise of activities falling within the scope of Community law (Article 3(1)), and it is carried out wholly or partly by automatic means or is intended to form part of a filing system (Article 3(2)). It therefore comes within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 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) of the Regulation contains a list of processing operations that are likely to present such risks. Administrative enquiries and disciplinary files must be subject to prior checking for several reasons. They may contain data relating to suspected offences, offences, criminal convictions or security measures, as provided for in Article 27(2)(a). In addition, the documents are intended to evaluate personal aspects relating to the data subject, particularly his or her conduct, and in that respect are covered by Article 27(2)(b).

Prior checking concerns the processing of personal data in the framework of an administrative enquiry or disciplinary proceedings. It does not aim to issue an opinion on the administrative enquiry or disciplinary proceedings as such.

The notification from the Court of Auditors' Data Protection Officer was received on 24 October 2005. The European Data Protection Supervisor will therefore issue an opinion by 3 January 2006 at the latest (on account of the institutional holidays), as provided for in Article 27(4) of the Regulation.

2. Legal basis and lawfulness of the processing operation

The legal basis for data processing is covered by the two draft decisions to be adopted, which were taken on the basis of Article 86 of the Staff Regulations of officials of the European Communities and Annex IX to the Staff Regulations, in particular Article 2(3) thereof *"The institutions shall adopt implementing arrangements for this Article, in accordance with Article 110 of the Staff Regulations"* and Article 30 thereof *"Without prejudice to Article 2(3), each institution shall, if it sees fit, adopt implementing arrangements for this Annex after consulting its Staff Committee"*. The legal basis is therefore valid.
Alongside the legal basis in relation to Regulation (EC) No 45/2001, the lawfulness of the processing must also be considered. Article 5(a) of Regulation (EC) No 45/2001 stipulates that "*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 in the legitimate exercise of official authority vested in the Community institution …*".

As administrative enquiries and disciplinary proceedings which involve collecting and processing personal data relating to officials or other servants come under the legitimate exercise of official authority vested in the institution, the processing is lawful. The legal basis found in the Staff Regulations of officials of the European Communities (Article 86 and Annex IX) supports the lawfulness of the processing.

3. Processing of special categories of data

In the context of administrative enquiries and disciplinary proceedings, the file of the data subject may reveal data which Article 10 of Regulation (EC) No 45/2001 classes as "special categories of data". Personal data such as political or trade-union affiliation, religious or philosophical beliefs, data revealing racial or ethnic origin, or data concerning health or sex life, may come to light in the file.

The European Data Protection Supervisor draws the controller's attention to the use of such

data. Such processing must be "necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof" (Article 10(2)(b)). The other exceptions set out in Article 10(2) could potentially be applicable. If, in the context of these investigations, such data were to appear, they should be relevant in the light of the file and in proportion to the intended purpose. The processing must comply with Article 10(2) of Regulation (EC) No 45/2001.

Disciplinary files may contain data on offences and criminal convictions, which can be processed only if they are authorised, in accordance with Article 10(5) of Regulation (EC) No 45/2001. The decisions implementing Article 86 of the Staff Regulations must be regarded as authorising the processing of such data.

4. Data quality

Article 4 of Regulation (EC) No 45/2001 sets out certain obligations with regard to the quality of personal data. Such data must be "adequate, relevant and not excessive" (Article 4(1)(c)) in relation to the purposes for which they are collected. The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation to the processing operation.

Article 2 of the draft Decision laying down general implementing rules for conducting administrative enquiries defines the concept of an administrative enquiry (see last paragraph of page 1 above) and complies with the obligations of Article 4(1)(c). Furthermore, Article 2(6) of the draft Decision provides that "the Appointing Authority's decision to open an administrative enquiry shall define the subject and scope of the enquiry". This is essential in the light of the data collected and stored during the procedure. The disciplinary proceedings are defined in Article 86 of the Staff Regulations, reference to which is made in the first citation of the draft Decision laying down rules for implementing Annex IX to the Staff Regulations concerning disciplinary proceedings. Article 4(1)(c) is therefore duly complied with.

Furthermore, the data must be processed fairly and lawfully (Article 4(1)(a) of Regulation (EC) No 45/2001). Lawfulness has already been examined (see point 2 above). As for fairness, in the context of a sensitive subject, it must be given careful attention. It is linked to the information which must be given to the data subject (see point 10 below).

Finally, the data must be "accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified" (Article 4(1)(d) of the Regulation).

There are no systematic rules regarding the type of data which may be included in a file on an administrative enquiry or disciplinary proceedings. The nature of the data to be stored in the disciplinary file will largely depend on the case in question. Rules should, for example, provide that a copy of all the decisions taken by the Appointing Authority must be placed in the disciplinary file. Any subsequent modifications or rectifications must also be placed in the file. Furthermore, rules should be drawn up on the criteria to be applied before entering evidence or data in a disciplinary file in order to ensure that only relevant data are kept. Staff responsible for processing disciplinary files must be informed of these rules and comply with

them.

5. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 sets forth the principle that data should 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".

Data may be kept in the personal file, in the disciplinary file and within the Human Resources Division. In the case of manual processing, as it is assumed that documents are drafted by electronic means (computers) the electronic files and documents must follow the same rules as paper documents.

- personal files

According to the draft Decision laying down rules for implementing Annex IX to the Staff Regulations concerning disciplinary proceedings, Articles 3 and 5 establish the decisions which are to be placed in the personal file, i.e. a copy of the decision to take no further action (unless the person concerned makes a request to the contrary) and of the decision to issue a written warning or reprimand. It may therefore be assumed that any other type of decision may be placed in the file. It would be preferable if the decisions were to lay down more precise rules on those decisions which may be placed in the personal file.

Retention in the personal file of data relating to disciplinary penalties is governed by the application of Article 27 of Annex IX to the Staff Regulations. The data subject may therefore request that certain information be deleted from his/her personal file, although this is not an absolute right and remains subject to the Appointing Authority's discretion. There is therefore no automatic erasure of the information after a given period of time. The reason for this provision is to avoid certain penalties being taken into account when the data subject is being evaluated.

However, the data protection rules imply that the Appointing Authority must justify the reasons for which the data are being kept and any refusal to erase data where the data subject so requests.

The data concerning disciplinary measures in personal files should only be kept until the end of the period during which an official in active employment, a retired official or his/her legal successor may claim entitlement. Any subsequent storage of data beyond that period may be justified only on historical, statistical or scientific grounds - which is ruled out by the notification received.

- Disciplinary files

There are no provisions mentioning the documents that must be kept in the disciplinary files. Although the concept of a disciplinary file is not defined explicitly in the Staff Regulations, it is clear that all documents must be stored in the disciplinary file and that under no circumstances should they all be kept in the data subject's personal file.

In any case, time limits for storing data in personal and disciplinary files must be established by the Court of Auditors within the actual draft decisions.

6. Change of purpose/compatible use

Some of the data come from the staff databases. The processing operation under consideration does not involve a general change in the purpose of staff-related databases and is not incompatible with that purpose. Article 6(1) of Regulation (EC) No 45/2001 does not therefore apply and Article 4(1)(b) is complied with.

The European Data Protection Supervisor recommends sending to the Administrative Applications Unit only the data that are relevant for adjusting salaries and adapting SYSPER.

7. Transfer of data

Article 7 of Regulation (EC) No 45/2001 lays down rules that both the controller and recipient must follow when data are transferred within or between Community institutions or bodies.

Personal data may be transferred to or received from the European Anti-Fraud Office (OLAF). Moreover, if the official concerned appeals against the Appointing Authority's disciplinary decision, the file may be sent to the Court of First Instance (CFI) or to the Court of Justice of the European Communities (CJEC). Bearing in mind the definition of "recipient" in Article 2(g) of the Regulation, it is necessary to consider whether such transfers of data are to be regarded as taking place between or within Community institutions or bodies within the meaning of Article 7 of the Regulation.

Under Article 2(g) "recipient" means "a natural or legal person, public authority, agency or body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients".

By the same token, transfers of data to national authorities fall under Article 8(a) of the Regulation and must meet the requirements of that provision, in particular those regarding the recipient's need and its remit.

All transfers of data must be regarded as taking place "in the framework of an inquiry". But, taken in context, Article 2(g) is to be understood as an exception to the right to information (see below Section 10.2) rather than as an exception to the application of Articles 7 and 8.

8. Processing including a personnel number or identifying number

The Court of Auditors uses personnel numbers. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller, its effects may nevertheless be significant. This is what led the European legislator to regulate the use of identifying numbers by means of Article 10(6) of the Regulation, which provides for the involvement of the European Data Supervisor. In this case, the use of the personnel number may allow linkage between data processed in different contexts. The issue here is not to establish the conditions under which the Court of Auditors may process personal numbers, but rather to stress the attention that must be paid to this point in the Regulation. In this instance, The Court of Auditors' use of the personnel number is reasonable because it is a means of facilitating the processing task.

9. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 provides that:

> *"The data subject 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 or her are being processed;*
> *(b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the 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 or her."*

Under Article 26 of the Staff Regulations officials have a general right of access to their personal files. The Article provides 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."* During the disciplinary procedure officials have a right of access to all evidence in the files (Article 3 of Annex IX to the Staff Regulations). In addition, Article 13 of that Annex provides that "*On receipt of the report, the official concerned shall have the right to obtain his complete personal file and take copies of all documents relevant to the proceedings, including exonerating evidence".*

Under Article 20 of the Regulation (EC) No 45/2001 that right may be restricted, in particular if such restriction constitutes a necessary measure to safeguard "the prevention, investigation, detection and prosecution of criminal offences" or "the protection of the data subject or the rights and freedoms of others".

Article 1(2) of Annex IX to the Staff Regulations specifies that: *"In cases that demand absolute secrecy for the purposes of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite the official to comment may, in agreement with the Appointing Authority, be deferred. In such cases, no disciplinary proceedings may be opened before the official has been given a chance to comment."* This restriction is in accordance with Article 20, given that criminal procedures fall within the remit of national judicial authorities.

There appears to be no mention of any rule regarding the opportunity given the official to update his personal data. Rules must be established to enable the official to rectify his personal data so that they may be updated in the light of subsequent developments (a decision by the Court of Justice ruling otherwise for example).

10. Information to be given to the data subject

1. Duty to inform

Articles 11 and 12 of Regulation (EC) No 45/2001 lay down that the controller must provide the data subject with certain information. Under Article 11, if the information has been obtained directly from the data subject, it must be provided at the time of collection. Data which are not obtained directly from the data subject must be supplied either at the time they

are recorded or, if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed.

Article 20 of the Regulation provides for certain restrictions on the duty to inform, including where such a restriction constitutes "a necessary measure to safeguard: (a) the prevention, investigation, detection and prosecution of criminal offences; [...] (c) the protection of the data subject or of the rights and freedoms of others".

The personal data for disciplinary files may be collected directly from the data subject but may also be obtained from third parties. The information must therefore be given either when the data are collected, or before they are first recorded or first disclosed to a third party.

In this case, as far as administrative enquiries are concerned, the Appointing Authority informs the official concerned that it has opened such an enquiry unless it considers that disclosing this information would hinder the enquiry. The official is also informed if the scope of the enquiry is extended. The Appointing Authority informs the official concerned of the conclusion of the enquiry and provides him/her with a copy of the report and copies of the documents subject to certain conditions. Under the disciplinary procedure the data subject receives the notice of the hearing, the draft record of the hearing, the record signed by the Appointing Authority and the official concerned, a copy of the report referring the matter to the Disciplinary Board. The official concerned is also informed of the consequences of his/her admission of misconduct. Lastly, the official concerned receives a copy of the decision taken by the Appointing Authority pursuant to the Disciplinary Board's report.

The preambles to both draft Decisions cite Annex IX to the Staff Regulations, which provides for certain restrictions on the duty to inform the data subject when OLAF is conducting a parallel investigation:

> *Article 1(1) of Annex IX to the Staff Regulations: "Whenever an investigation by OLAF reveals the possibility of the personal involvement of an official, or a former official, of an institution, that person shall rapidly be informed, provided this is not harmful to the investigation*". *This provision presumably refers to the case where an investigation by OLAF could lead to disciplinary measures being undertaken. In such a case, the data subject must be informed of his personal involvement unless this proves "harmful to the investigation".*

The words "not harmful to the investigation" cover exceptions, including the "protection of the data subject or the rights and freedoms of others" or "the prevention, investigation, detection and prosecution of criminal offences", but they have a much broader scope. Indeed it may prove necessary not to inform the data subject in order to ensure not only the protection of witnesses (rights and freedoms of others) but also the smooth conduct of the investigation. *Stricto sensu* Article 20 of Regulation (EC) No 45/2001 does cover this exception where the investigation is not into a criminal offence.

Nevertheless, the EDPS considers that Article 20 has to be interpreted in the light of the *ratio legis* of the provision, so as to provide for certain restrictions on the duty to inform the data subject during a disciplinary investigation. This view is supported by the fact that Article 13 of Directive 95/46/EC provides for exceptions from and restrictions on certain rights "when such a restriction constitutes a necessary measure to safeguard [...] (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for

regulated professions". Article 13(1)(d) of the Directive is far-reaching, extending from the prevention, investigation, detection and prosecution of criminal offences to breaches of ethics for regulated professions. Therefore, although not explicitly mentioned, there is no reason to believe that disciplinary offences by public sector officials are not also covered by this restriction.

Regulation (EC) No 45/2001 must be read in the light of Directive 95/46/EC. Recital 12 to the Regulation advocates "consistent and homogeneous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data". Moreover Article 286 of the Treaty requires that acts on the protection of individuals with regard to the processing of personal data and the free movement of such data apply to Community institutions and bodies.

Nothing would therefore appear to stand in the way of application of a similar restriction on the duty to inform and the corresponding right of access during a disciplinary investigation. The withholding of information during the investigation period is also supported by the fact that no information need be provided regarding the "recipients" of information during a particular enquiry (see above).

It should be stressed that the words *"not harmful to the investigation"* suggest that the need for non-disclosure must be clearly demonstrated and that the information may be withheld for a finite period only. As soon as the information ceases to be harmful to the investigation, it must be disclosed to the data subject.

Furthermore, the fair processing of personal data during disciplinary proceedings implies the exercise of the right of defence. In order to exercise that right the official must normally be in a position to know when proceedings have been initiated against him. Any exception must therefore be strictly limited.

It should be noted, however, that the draft Decision of the Court of Auditors laying down rules for implementing Annex IX to the Staff Regulations concerning disciplinary procedures does not mention the official's rights under Article 13 of that Annex to obtain, on reception of the Disciplinary Board's report, his complete personal file and take copies of all documents relevant to the proceedings, or the official's right to a period of fifteen days to prepare his defence. In order to ensure that the official is kept fairly informed, the European Data Protection Supervisor recommends that this information be incorporated into the draft Decision.

Lastly, the draft Decision does not specify how the actual disciplinary procedure is to be conducted before the Disciplinary Board. This militates against the data subject's right to information. The European Data Protection Supervisor accordingly recommends that the relevant provisions (Articles 16 and 22 of Annex IX to the Staff Regulations) should be inserted.

2. Content of the information

The information to be provided to the data subject includes the identity of the controller, the purposes of the processing operation for which the data are intended, the recipients or categories of *recipients* of the data and the existence of the right of access to, and the right to rectify, the data concerning him or her. Further information may also be supplied insofar as it

is necessary to guarantee fair processing in respect of the data subject. Steps must also be taken to ensure that the officials concerned are given this information in clear terms.

The official must also be told that although information may be withdrawn from the personal file, it will be kept in the disciplinary file for the duration of the official's career.
There is no specific requirement to give the data subject information on the transfer of the file between institutions (OLAF, CFI or CJEC) or within the institution, since such transfers do not involve recipients within the meaning of Article 2(g) of the Regulation; however, general information as to who may be receiving the information should be provided in order to make the procedure transparent.

11. Security

Under Article 22 of Regulation (EC) No 45/2001 "the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected". Such measures are designed in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

The data involved in these cases are particularly sensitive and call for appropriate security measures.

The measures provide a level of security which seems to be adequate given that the files are in paper form.

Conclusion

The proposed processing operation does not appear to breach any infringement of Regulation (EC) No 45/2001, provided that the observations made above are taken into account. This means, in particular, that the Court of Auditors must:

- pay particular attention to the use of special categories of data, which in order to comply with Article 10(2) of Regulation (EC) No 45/2001, should be relevant in the light of the file and in proportion to the intended purpose;

- provide for a copy of all decisions taken by the Appointing Authority be placed in the disciplinary file. Any subsequent modifications or rectifications must also be inserted;

- draw up rules on the criteria to be applied before entering evidence or data in a disciplinary file, in order to ensure that only relevant data are kept. Staff responsible for processing disciplinary files must be informed of those rules and comply with them;

- lay down more precise rules on those decisions which may be placed in an official's personal file;

- require the Appointing Authority to give reasons for storing the data and any refusal to erase data where the data subject so requests;

- ensure that data relating to disciplinary measures is not stored in personal files beyond the end of the period during which an official in active employment, a retired official or his/her legal successor may claim entitlement.

- store all the documents in the disciplinary file. Under no circumstances should they all be kept in the personal file of the official concerned;

- lay down in the draft Decisions the time limits for storing data in personal and disciplinary files and apply those time limits forthwith; the forthcoming rules on document storage will incorporate those time limits at the drafting stage;

- send to the Administrative Applications Unit only the data that are relevant for adjusting salaries and adapting SYSPER,

- inform the official that he has the opportunity to update his personal data. Rules must be established so that the official can rectify his personal data so as to ensure that they are updated in the light of subsequent developments (a decision by the Court of Justice ruling otherwise for example);

- ensure – by incorporating this information into the draft Decisions – that the official is informed that, having received the Disciplinary Board's report, he has the right to obtain his complete personal file and take copies of all documents relevant to the proceedings and is entitled to a period of fifteen days to prepare his defence;

- insert into the texts in preparation the relevant provisions regarding the conduct of the disciplinary proceedings before the Disciplinary Board in order to safeguard the data subject's right to information;

- take steps to ensure that officials concerned are given the information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001 in clear terms.

- inform the official that although information may be withdrawn from the personal file, it will be kept in the disciplinary file for the duration of the data subject's career;

- in order to ensure a transparent procedure, inform officials that the data subject is not specifically given general information on the file's transfer to other institutions (OLAF, CFI or CJEC) on the grounds that these are not recipients within the meaning of Article 2(g) of the Regulation.

Done at Brussels on 22 December 2005

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