

Opinion on a notification for prior checking received from the Data Protection Officer of the Council concerning the "attestation procedure" dossier

Brussels, 18 April 2006 (Case 2006-92)

1. Procedure

By letter received on 22 February 2006, a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was made by the Data Protection Officer of the Council concerning the "attestation procedure" dossier. The procedure is being implemented, but has not yet been launched. A number of annexes on the subject are attached to this letter.

2. The facts

The Council organises a procedure for selecting officials authorised to follow training as part of the attestation procedure (Article 10(3) of Annex XIII to the Staff Regulations). In this case, the procedure was established by the Council Decision of 2 December 2004¹ and an attestation exercise will be held annually as from 2006. The processing subject to prior checking by the EDPS has not yet started. The objective of the procedure is to select those officials in service in categories C or D before 1 May 2004 who may become members of the assistants' function group (AST) without career restrictions. The attestation procedure comprises three stages:

- 1) determination by the Appointing Authority of the number of possible attestations and publication of an invitation to apply;
- 2) identification of the applicants eligible and listing of those applicants in order of priority;
- 3) inclusion in the assistants' function group "without career restrictions".

2.1 Purpose and persons covered

The purpose of the attestation procedure is to select those officials in service in categories C or D before 1 May 2004 who may become members of the assistants' function group without restriction.

Officials referred to in paragraph 1, appointed to an established post at the General Secretariat of the Council in accordance with Article 1a of the Staff Regulations, may seek attestation if, as at 1 September of the year concerned, they are in one of the following situations referred to

¹ Council Decision of 2 December 2004 on the arrangements for implementing the attestation procedure - Staff Note No 11/05 of 17 January 2005.

in Article 35 of the Staff Regulations: in active employment, on parental or family leave or on secondment, provided that such secondment is in the interests of the service within the meaning of Article 37 of the Staff Regulations.

2.2 Invitations to apply

Before 30 September each year the Appointing Authority determines the number of attestations that may be granted for the following year, in the light of budget possibilities and estimated staffing requirements. When that decision has been taken, the Appointing Authority publishes an invitation to apply.

2.3 List of eligible candidates

Officials referred to in Article 1 who have submitted an application are eligible for the attestation procedure if they meet the following two conditions:

- they fulfil the requirements of Article 5(3)(a) of the Staff Regulations for appointment as an official in the assistants' function group;
- they have at least five years' seniority in career stream C or D. If periods of active employment in career stream C or D are taken into account as regards fulfilment of the criterion in the preceding indent, the minimum seniority required is increased by the number of months making up those periods of active employment.

In each attestation exercise the Appointing Authority draws up and publishes a list of officials who have sought attestation and been deemed eligible for the procedure.

Officials who have applied in the belief that they meet the two criteria referred to in paragraph 1 but do not appear on the list referred to in paragraph 2, may refer their application to the Joint Attestation Committee within ten working days of publication of the list.

They must give reasons for referring the matter to the Joint Attestation Committee and supply it with all relevant official documents. The committee must deliver an opinion within ten working days and send it to the Appointing Authority, which decides on the action to be taken and duly informs the candidate.

If appropriate, a new list of applicants eligible for the attestation procedure is published by the Appointing Authority.

2.4 Criteria used to list the officials deemed eligible in order of priority

In each attestation exercise the Joint Attestation Committee exercise examines the applications from eligible officials and places them in order on a provisional list on the basis of the following criteria: seniority in career stream C or D, experience, merit assessed on the basis of the staff reports available and level of training.

The value and weighting of each criterion was determined by the Appointing Authority before 30 June 2005, after consulting the joint committee, and may be adjusted each year by decision of the Appointing Authority, acting on a recommendation from the joint committee.

On the basis of the list provided for in paragraph 1, the Appointing Authority draws up the definitive list, in order of priority, of the officials deemed eligible and published it.

Within ten working days of publication of the list, officials may:

- refer their application to the Joint Attestation Committee, if they wish to contest the Appointing Authority's decision concerning them.
 - They must give reasons for referring the matter to the joint committee and supply it with all relevant official documents.
 - The joint committee must deliver an opinion within ten working days and shall send it to the Appointing Authority, which decides on the action to be taken.
- withdraw their application. In the event of withdrawal of an application, the applicant at the top of the reserve list automatically replaces the applicant who has withdrawn, but enjoys the same right of withdrawal. If that right is exercised, the replacement procedure begins anew.

2.5 Officials awarded attestation

The first officials on the list provided for in point 2.3 are deemed to have been awarded attestation: the number of those so deemed corresponds to the number of possibilities determined by the Appointing Authority in accordance with Article 4. These officials become members of the assistants' function group without career restrictions. The career progression of the officials concerned is conditional on the actual taking up of a post of assistant "without career restrictions", identified as such.

The other officials on the list referred to in point 2.3 are automatically eligible for the following attestation procedure within the meaning of Article 4.

Before 31 March each year the Appointing Authority publishes the list of officials awarded attestation in the previous attestation exercise.

2.6 Role of the Joint Attestation Committee

The Chairman or any member of the committee who has an interest which would compromise his or her independence in the handling of a case must resign or refrain from taking part in the committee's proceedings on the case in question. Before 30 September each year the Appointing Authority informs the committee of the number of posts actually filled or in the process of being filled by officials referred to in point 2.5. On the basis of that information, the committee adopts, for submission to the Appointing Authority, any relevant recommendation designed to ensure that the number of possibilities set by the Appointing Authority under point 2.2 for the current attestation exercise is used.

At the beginning of each year, the joint committee adopts an opinion on the results of the previous attestation exercise. It may accompany that opinion with recommendations concerning, inter alia, the values and weightings referred to in the second paragraph of point 2.4 and the number of possible attestations set by the Appointing Authority under point 2.2. and the adequacy thereof in the light of number of applicants for the attestation procedure. This opinion is sent to the Appointing Authority.

2.7 Complaints

A complaint may be lodged under Article 90(2) of the Staff Regulations only if all possibilities of redress under points 2.3 and 2.4 have been exhausted.

2.8 Other information from the notification

Data subjects

Officials in service in categories C or D before 1 May 2004 with at least five years' seniority who meet the criteria set out in points 2.1 and 2.3 above.

Categories of data

The data needed to select officials are: staff reports, attestation(s) of seniority of service in the European institutions, any attestations from external employers where candidates need these years in addition to their diploma, copy of the highest diploma, attestations of any professional training, application form. The list containing this information is set out in the application form.

Information

The Council Decision of 2 December 2004 (Staff Note No 11/05) informs candidates concerning the procedure. A staff note on the Decision by the Appointing Authority regarding the number of persons to be selected and the criteria for classifying applications will be issued. The invitation to apply informs candidates as to the documents to be submitted with their application, the practical arrangements of the procedure and the information supplied in accordance with Article 11 of Regulation 45/2001 on data protection.

Annex to the invitation to apply in the framework of the attestation procedure

The attention of General Secretariat staff is drawn to the following information communicated in accordance with Article 11 of Regulation 45/2001 on data protection. The annex provides information on the identity of the controller, the purpose of the processing operation, the recipients of the data, as well as information on whether replies to the questions are obligatory or voluntary and the possible consequences of failure to reply, the rights of access and rectification, the legal basis and the time-limits for storing the data.

Rights of the data subjects

Applicants have the right to access and to rectify the information they have provided at any time, with the exception of the period when the Joint Attestation Committee is processing applications. Any rectification of data following the period of operation of that committee cannot alter the outcome for that particular year. Appeal procedures with regard to the eligibility of applications are primarily laid down in Article 5(3) of the Council Decision of 2 December 2004 (Staff Note No 11/05).

Automated/manual procedures

Partially automated procedures. The only fully automated procedure will consist of drawing up an internal list of candidates in Word and/or Excel in order to manage the applications and the publication by the Appointing Authority of the lists of candidates admitted.

Data storage medium

Data in paper format will be kept in the Career and Development of Competencies Unit of the Human Resources Directorate, in secure document storage rooms and/or furniture. Computerised data will be stored on the computers of the Career and Development of Competencies Unit; these computers may only be accessed by authorised persons, using a login and password.

Recipients

The following will have access to the data contained in applications: the Career and Development of Competencies Unit, its secretariat and the Joint Attestation Committee provided for in Article 8 of the Council Decision of 4 December 2004. With regard to the persons selected, the Personnel and Administration Directorate (DGA 1 B) will have access to the data supporting their admissibility.

Data storage policy

All documents are kept for as long as it is possible to contest the decision. The maximum time-limit for these appeal procedures is 20 working days following publication by the Appointing Authority of the list of officials selected, in the case of appeals provided for in Article 6(3) of the Council Decision of 4 December 2004, with an additional 7 months for appeals pursuant to Article 90 of the Staff Regulations, plus, finally, 3 months for bringing an appeal to the Court of Justice of the European Communities, as well as the time needed for the Court of Justice to hear the case. This amounts to approximately one year, not including the time for appeals to the Court. Those candidates who are eligible but are not selected are automatically deemed eligible for the next attestation procedure. Their files are kept for three years in case they apply again. They will be able to supplement or amend their data. There is no time-limit for blocking or deleting data.

Historical, statistical and scientific purposes

Anonymous statistics (for example, on the number of applications in each exercise) could be compiled for the purpose of monitoring the procedure.

Security measures

The data will be kept in compliance with Article 22 of Regulation (EC) No 45/2001: the procedures and measures in force in the Human Resources Directorate (DG A IA) and the duty of discretion of officials processing the data will be observed. Other measures will be taken for the storage of automated or non-automated data.

3. Legal aspects

3.1 Prior checking

The notification received on 22 February 2006 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The processing operation presented is carried out by an institution, in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)).

The processing for the attestation procedure is partly by automatic means. The remainder of the documents are on paper. The only automatic element consists of the drawing up of internal lists of candidates in Word and/or Excel, for the purpose of managing the applications and so that the Appointing Authority can publish a list of applicants. This processing is manual but the content is intended to form part of a filing system. Article 3(2) therefore applies.

Consequently, such processing comes under Regulation (EC) No 45/2001.

Under Article 27 of Regulation (EC) No 45/2001, processing operations that present specific risks to the rights and freedoms of data subjects are subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to

present such risks *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"*. The attestation procedure for Council officials is a personal data processing operation covered by Article 27(2)(b) and thereby subject to prior checking by the European Data Protection Supervisor.

Since the procedure has not begun, this case is considered as genuine prior checking. Consequently, the Council must introduce the EDPS' recommendations when the attestation procedure is implemented.

Official notification was received by letter on 22 February 2006. In accordance with Article 27(4) of the Regulation, the EDPS will deliver his opinion by 24 April 2006.

3.2 Legal basis and lawfulness of the processing operation

The legal basis for the data processing operation in question is to be found in:

- Article 10(3) of Annex XIII to the Staff Regulations (attestation procedure);
- the Council Decision of 4 December 2004 on the arrangements for implementing the attestation procedure (Article 10(3) of Annex XIII to the Staff Regulations)².

The legal basis is sufficiently clear and raises no particular questions.

As well as its legal basis, the operation's lawfulness also needs to be considered. Article 5(a) of Regulation (EC) No 45/2001 provides 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"*.

The attestation procedure, which involves the collecting and processing of personal data on officials comes within the legitimate exercise of official authority vested in the institution. The fact that the legal basis is to be found in the Staff Regulations supports the lawfulness of the processing operation.

3.3 Data quality

Data must be *"adequate, relevant and not excessive"* (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as satisfying these conditions as regards processing. The data required are administrative in nature and necessary to appraise the work of officials. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled in this respect.

The data must also be processed *"fairly and lawfully"* (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.8 below on this point.

Under Article 4(1)(d) of the Regulation, *"data must be accurate and, where necessary, kept up to date"*. The data subject has the right to access and the right to rectify data, so that the

² Council Decision of 4 December 2004 (Staff Note 11/05).

file can be as comprehensive as possible. This also makes it possible to ensure the quality of data. See point 3.7 below on the dual rights of access and rectification.

3.4 Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle that *"personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed"*.

All the documents necessary for the attestation applications will be kept until the official has exhausted all means of contesting the decision, including the time-limits for bringing an appeal to the Court of Justice.

If there is no appeal to the Court, files are kept for about one year: 20 days for the appeal procedure plus 7 months for appeals under Article 90 of the Staff Regulations, plus 3 months for bringing an appeal to the Court of Justice. The files of applicants who have not been selected will be kept for three years before destruction, in case they re-apply.

The attestation file of successful applicants will be added to their personal file. In that case, Article 26 of the Staff Regulations applies, in particular *"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"*.

Data are thus conserved for a long, but unspecified period. The European Data Protection Supervisor considers that a period during which data may be conserved needs to be set. In a similar case³, the EDPS considered that it was reasonable to fix the conservation period at 10 years, starting from the moment when the staff member leaves or after the last pension payment. The EDPS also considers that data of a purely informative nature no longer necessary for administrative reasons can be disposed of after a minimum retention period of 5 years.

This long-term data conservation will have to be accompanied by appropriate guarantees. The data conserved are personal. The fact that they are archived for long-term conservation does not divest them of their personal nature. For that reason, data conserved over a long period must be covered by adequate measures for transmission and conservation, like any other personal data.

Data may be kept for statistical purposes. Anonymous statistics may be compiled so that the procedure can be monitored. Since the data will be rendered anonymous, Article 4(1)(e) of the Regulation is complied with.

3.5 Change of purpose/Compatible use

Data are retrieved from or entered into the staff databases. The processing operation under review involves no general change to the stated purpose of staff databases, of which the attestation procedure is only one aspect. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

³ Case 2004/274 – Staff appraisal procedure – European Central Bank.

3.6 Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The data will be circulated between various departments at the Council. Personal data may only be transferred within an institution if they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

In the current case, transfer to staff in the Career and Development of Competencies Unit, the Appointing Authority, the Joint Attestation Committee and the Personnel and Administration Directorate is in accordance with the legitimate performance of the tasks of those involved.

Finally, files may be sent to the Civil Service Tribunal in connection with appeals⁴. In this case such transfers are legitimate, since they are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

3.7 Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, data subjects have access to their evaluation files so that they can complete all the sections required for the procedure to take its course.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In the same way that the data subject has a right of access, he or she may also directly change factual personal data or have them changed, if necessary.

In this case, these rights are ensured by Section 5 of the Council Decision of 13 September 2004 *"adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data"*, published in Official Journal L 296 of 21 September 2004.

Section 5 of the Council Decision covers the procedure for data subjects to exercise their rights, and includes general provisions as well as provisions on the rights of access, rectification, blocking, and objection available to the data subjects. It also includes information on notification to third parties, automated individual decisions, and exceptions and restrictions. However, the Staff Note does not refer to this Council Decision.

One restriction to the rights of access and rectification is clearly announced in the rules for data subjects, namely the temporary restriction of access and rectification while the Joint Attestation Committee is processing applications (see point 2.8 above). The European Data Protection Supervisor considers that this restriction is admissible, since it falls within the scope of Article 20(1)(c) of Regulation (EC) No 45/2001 (*"the Community institutions and*

⁴ The European Union Civil Service Tribunal, established by the Council Decision of 2 November 2004 (2004/752/EC, Euratom) is competent in place of the Court of First Instance. The latter is the appeal body.

bodies may restrict the application of (...) Articles 13 to 17 (...) where such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others") and is necessary to ensure objective, sure and stable conditions for all applicants to guarantee the fairness of the procedure.

The European Data Protection Supervisor asks that the Staff Note should mention the Council Decision of 13 September 2004 presenting the rights available to data subjects.

3.8 Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case. Inasmuch as the official or staff member personally fills in the data required of him or her, the data subject provides the data himself or herself.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since the information is collected from the different participants in the process (reporting officers, countersigning officer, committees etc.).

In this case, the data subject is informed by the Annex to the Staff Note "Call for applications for the 2005 attestation procedure".

The provisions of Article 11 (a) (identity of the controller), (b) (purposes of the processing operation), (c) (recipients or categories of recipients of the data), (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) and (e) ("the existence of the right of access to, and the right to rectify, the data concerning him or her") must be notified to the data subjects. To ensure that the processing is carried out completely fairly, paragraph (f) of this Article should also be mentioned. It states the following: *legal basis of the processing operation, time-limits for storing the data and right to have recourse at any time to the European Data Protection Supervisor.*

The provisions of Article 12 (a) (the identity of the controller), (b) (the purposes of the processing operation), (c) (the categories of data concerned), (d) (the recipients or categories of recipients of the data), (e) ("the existence of the right of access to, and the right to rectify, the data concerning him or her"), and (f) (*the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*) must be notified to the data subjects.

Only the point relating to recourse to the European Data Protection Supervisor is not mentioned in the current case. The European Data Protection Supervisor recommends that this point should be inserted in the various documents providing information about the attestation procedure.

3.9 Security

Under Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, *"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"*.

Other organisational and technical measures are taken to ensure maximum security of data processing.

In the light of all these measures, the European Data Protection Supervisor considers that they can be considered as appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means in particular that the Council should:

- determine a precise time-period for which data relating to successful applicants may be kept long-term on their personal files;
- in connection with this long-term data retention, establish appropriate measures for the transfer and retention of personal data;
- include in the Staff Note a reference to the Council Decision of 13 September 2004 *adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data*;
- insert a reference to recourse to the European Data Protection Supervisor in the various documents giving information on the attestation procedure.

Done at Brussels, 18 April 2006

Peter HUSTINX
European Data Protection Supervisor

Follow-up Note

23 August 2006

All acting measures have been taken by the Council on 5 May 2006.

The European Data Protection Supervisor