

Opinion on a notification for Prior Checking received for the Data Protection Officer of the European Maritime Safety Agency concerning "Probationary Period Reports"

Brussels, 7 January 2008 (Case 2007-569)

1. Proceedings

On 17 September 2007, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Maritime Safety Agency (**EMSA**) a notification for prior checking concerning evaluation of temporary and contract agents during their probation period.

The notification was accompanied by a Note from the Head of the Unit A concerning Probationary period reports dated 15 June 2007 (A.1/ORA/2007/195), as well as the templates for the "Probationary Period Report" and the "Interim Probationary Period Report".

On 26 October 2007, the EDPS sent a request for additional information to the DPO. This information was supplied on 5 December 2007. The draft opinion was sent to the DPO for comments on 19 December 2007 and these were received on 3 January 2008.

2. Facts

The present case deals with evaluation of temporary and contract¹ agents during the initial period of their employment at the EMSA as foreseen in Articles 14 and 84 of the Conditions of Employment of Other Servants of the European Communities (**CEOS**). Reports elaborated at the end of this initial period serve as a basis for a confirmation or dismissal of the respective agent, as well as for the possible extension of the probation period².

2.1. Description of the data processing operations

Probationary Period Report: At the end of the first six months of the employment, a "final assessment meeting" shall take place and its content, as well as any progress and problems following the interim evaluation, shall be reflected in the Probationary Period Report drafted by the reporting officer (Head of Unit). Within five working days after the meeting, a copy of the report shall be provided to the respective agent who has five working days to submit

¹ Contract agents whose contract is concluded for a duration of at least one year

² As specified in the above mentioned Note from the Head of Unit A of 15 June 2007, the probationary period can be extended in the following circumstances:

- extension for a further period of three months in exceptional circumstances, such as employee's long sick leave, personal difficulties, re-organisation of the sector etc.,
- extension for a non-specified amount of time in case the manager believes that there is additional support or training that can be provided which, with additional time spent in the post, is likely to enable the probationer to reach the required standard.

written comments. Finally, the report is transmitted to the Executive Director for his decision on the confirmation of the employment (or on the extension of the probationary period).

Interim Probationary Period Report: In exceptional circumstances ("when difficulties are foreseen"), it is recommended³ that an interim evaluation of the performance of the respective agent takes place at the end of the first three months of his employment. To this aim an assessment meeting between the staff member and his reporting officer (Head of Unit) shall take place and the latter shall elaborate an Interim Probationary Report covering the agent's work performance and progress up to date, as well as expectations and targets for the next three months. A copy of the report is provided to the respective agent who can comment on it.

The administration of the (Interim) Probationary Period Report is being ensured by the Career Development Officer. In practice, this means sending the pre-filed report form (administrative data) to the relevant reporting officer, giving any necessary guidance to the reporting officer and the jobholder, ensuring the completing of the reports in timely manner, informing the agent on probation on the outcome of the evaluation and filling the completed report in the personnel file.

2.2. The purpose of the processing

The purpose of the data processing in question is the performance of the Probationary Period Report, as well as the management and the follow-up of the career of the Job Holder.

In fact, the primary use of the Probationary Period Report is to establish the confirmation (or dismissal) of the respective agent. In addition, it may be used for a follow-up of an individual training plan (in case certain training needs have been indicated in the Probationary Period Report) and as a basis of the first annual career development review.

2.3. Categories of data processed

The Interim Probationary Period Report contains the following information:

- jobholder's details: surname, first name(s), personnel number, current position, department/unit, category and grade;
- period of appraisal (from - to);
- reporting officer's details: surname, first name(s), department / unit;
- reporting officer's comments, as well as his signature and the date;
- jobholder's comments, as well as his signature and the date.

The Probationary Period Reports contains the following information:

- jobholder's details: surname, first name(s), current position, date of taking up current position, department / unit, category and grade;
- period of appraisal (from - to);
- reporting officer's details: surname, first name(s), department / unit;
- reporting officer's comments concerning efficiency, competencies and conduct of the jobholder;
- summary of the appraisal by the reporting officer: efficiency (satisfactory or unsatisfactory), competencies (satisfactory or unsatisfactory), conduct (satisfactory or unsatisfactory);
- breaks in service (if applicable);

³ In the above mentioned Note from the Head of the Unit A of 15 June 2007

- recommendation of the reporting officer: retention in the function or probationary period to be extended or dismissal at the end of the probationary period, as well as his signature and the date;
- jobholder's comments, as well as his signature and the date;
- Executive Director's comments;
- Executive Director's decision: confirm the contract or probationary period to be extended or not confirm the contract, as well as his signature and the date.

2.4. Data retention

The (Interim) Probationary Period Reports are kept in the personal file of the respective employee in line with Articles 11 (1) and 81 CEOS⁴.

According to the information provided in the notification, no time-limit for the storage of personal files at the EMSA has been established insofar (even though it is clear that it should be for a certain period after the termination of the service). EMSA acknowledges that such a storage period should be set up in accordance with the results of the Working Party on Time Limits and Blocking.

Storage for historical, statistical or scientific purposes is not being envisaged.

2.5. Information provided to the data subjects

According to the additional information provided on 5 December 2007, a following revised data protection clause will be added to the (Interim) Probationary Period Report:

Any personal data provided by the Job Holder shall be processed pursuant to Regulation (EC) No 45/2001 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. It shall be processed solely for the purposes of the performance of the Probationary Period Report, as well as the management and the follow-up of the career of the Job Holder. The Job Holder shall have the right of access to his/her personal data. Should the Job Holder have any queries concerning the processing of his/her personal data, (s)he shall address them to the delegated controller of the data, Head of Human Resources section. The Job Holder shall have a right to recourse at any time to the European Data Protection Supervisor.

In addition, the following general "data protection clause" has been posted on the Human Resources Intranet webpage:

"Any personal data provided by EMSA staff members in relation to the operations performed by the Human Resources is processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data.

The staff members can have access to their data and can exercise their rights in relation to this data as provided in Articles 13 - 20 of Regulation (EC) No 45/2001. For this reason they can address themselves to the Delegated Controller of the data, Head of Human Resources section.

The staff member can also access the notifications on the processing of personal data submitted by the Delegated Controller to the Data Protection Officer. The notifications are kept in a file in the DPO's office.

⁴ Article 26 of the Staff Regulations is applicable per analogy

The Data Subject shall have right of recourse at any time to the European Data Protection Supervisor."

Finally, a separate Intranet page of the DPO was created which informs EMSA staff about the personal data protection policy.

2.6. Rights of the data subjects

As already indicated above, each temporary and contract agent receives a copy of his (Interim) Probationary Period Report.

According to the information provided in the notification, "if the data subject requests the controller orally, by email or by letter to exert his/her rights, the controller will facilitate the applicant the exercise of his rights in relation to the access and acknowledgement of the data. However, the evaluation data in the Probation Period Report form cannot be changed".

In addition, in line with Articles 11 (1) and 81 CEOS, the temporary and contract agents have right of access to all the documents contained in their personal files even after leaving the service⁵.

2.7. Data transfers

The data processed within the evaluation of temporary and contract agents on probation can be disclosed to the following recipients:

- Head of Unit A;
- Human Resource Officer (Head of section Human Resources);
- Career Guidance Officer;
- Hierarchical superiors of the Job Holder evaluated;
- Executive Director (Authority authorised to conclude the contracts of engagement).

2.8. Security measures

(...)

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The evaluation of the initial performance of temporary and contract agents constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a Community body in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation). The processing of the data contained in the respective (Interim) Probationary Period Reports is manual, but the data form a part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the*

⁵ Article 26 of the Staff Regulations is applicable per analogy

European Data Protection Supervisor". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (b): *"processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct"*. The evaluation of the initial performance of temporary and contract agents clearly represents such a processing operation and is therefore subject to prior checking by the EDPS.

Ex-post prior checking: Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should have been given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

Deadlines: The notification of the DPO was received on 17 September 2007. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 55 days (40 + 15). Consequently, the present opinion must be delivered no later than on 14 January 2008 (12 January 2008 being a Saturday).

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5 (a) is that the *"processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institutions or body"*. The processing of personal data for performance of tasks carried out in the public interest includes *"the processing necessary for the management and functioning of those institutions and bodies"* (recital 27).

The evaluation of the initial performance of temporary and contract agents is a part of the legitimate exercise of official authority vested in the EMSA. The legal basis provided in Articles 14 and 84 CEOS confirms the lawfulness of the processing.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*. The information presented to the EDPS on the data processed during this initial evaluation exercise (as described in point 2.2) appears to meet those requirements. The processed data are of administrative nature and necessary to evaluate the initial performance of the temporary and contract agents.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and that *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*. As indicated above, all data processed within the initial evaluation exercise are provided by persons other than the data subject (apart from the job holder's comments). In this respect, it is important that the data subjects can make use of their rights of access and rectification to ensure the accuracy of their personal data processed (cf. point 3.7 in detail).

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.8)

3.4. Data retention

Article 4 (1)(e) of the Regulation states 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 were collected or for which they are further processed*".

As indicated above, no exact time-limits for the storage of the personal files have been established so far. That means that the oldest (Interim) Probationary Period Reports may be stored for about four years by now (since EMSA has been established in 2003).

EMSA is aware of the need to establish a storage period consisting of a certain time after the termination of the service and acknowledges that such a storage period should be set up in accordance with the results of the Working Party on Time Limits and Blocking.

The EDPS recommends the establishment of a reasonable time frame for the storage of documents kept in the personal files. In similar cases, the EDPS has considered a data retention period of ten years as of the termination of employment or as of the last pension payment as reasonable⁶.

3.5. Compatible use/ Change of purpose

Article 4(1) (b) of Regulation 45/2001 provides that personal data must be "*collected for specified, explicit and lawful purposes and not further processed in a way incompatible with those purposes*".

As indicated above, the data collected during the initial evaluation procedure can be further used for the follow-up of individual training, as well as the preparation of the first annual career development review. The EDPS is of the opinion that this further processing is not incompatible with the initial purpose. Consequently, Article 4 (1) (b) is duly respected.

3.6. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other Community institutions or bodies "*if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient*" (paragraph 1). The recipient can process the data "*only for the purposes for which they were transmitted*" (paragraph 3).

As mentioned above, the data are transferred to the hierarchical superiors of the respective agent (Head of Unit, Executive Director), as well as to certain members of the Human Resources Unit (Head of the Human Resources Unit, Head of the Human Resources section and the Career Guidance Officer).

⁶ cf. the following opinions concerning evaluation of statutory personnel: EDPS **2007-406** of 3 August 2007 (European Ombudsman), EDPS **2006-297** of 19 October 2006 (ECOSOC), EDPS **2005-218** of 15 December 2005 (Commission), EDPS **2004-293** of 28 July 2005 (OHIM), EPDS **2004-281** of 4 July 2005 (ECJ)

In addition, in the course of an investigation, the data might be transferred to other Community institutions and bodies, such as to the Civil Service Tribunal, the European Ombudsman or the EDPS.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. In fact, the data transmitted are necessary for the human resources management, as well as for the performance of the respective supervisory tasks. Therefore, Article 7 (1) of the Regulation is being complied with.

In order to ensure the full compliance with Article 7 (3) of the Regulation, the EDPS recommends that all EMSA internal recipients are reminded of their obligation not to use the data received for any further purposes than the one for which they were transmitted.

3.7. Right of access and rectification

The following provisions are applicable in the present case:

- Article 13 of Regulation 45/2001 that provides a right of access to personal data being processed;
- Article 14 of Regulation 45/2001 that provides a right to rectification without delay of inaccurate or incomplete data;
- Article 14 and 84 CEOS stating that the (Interim) Probationary Period Report shall be communicated to the person concerned who shall have right to submit his comments in writing;
- Articles 11 (1) and 81 CEOS read together with Article 26 of the Staff Regulation providing for a right of access to all documents contained in the statutory agents' personal files even after leaving the service.

As indicated above, each temporary and contract agent receives a copy of his (Interim) Probationary Period Report and, upon a request, can obtain access to his personal file even after leaving the service.

In addition, the temporary and/or contract agents are being asked to add their comments directly on the (Interim) Probationary Period Report Form so that these comments are clearly visible to the Executive Director taking the decision on the confirmation or dismissal of the respective agent.

Finally, they can address a rectification request to the delegated data controller (Head of the Human Resources section) seeking the modification of other than the (proper) evaluation data contained in the Probationary Period Report.

The EDPS considers the current practice as fully compliant with Articles 13 and 14 of the Regulation. In particular, he welcomes the fact that the agent concerned is allowed to correct his factual data contained in the (Interim) Probationary Period Report, as well as to add comments related to his (by nature subjective) evaluation data provided by his hierarchical superior.

3.8. Information to the person concerned

Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data processed have not been obtained from the person concerned (unless she already is in possession of such information).

As mentioned above, in the present case, the agents concerned will be informed through two separate documents, namely

- the data protection clause contained in the (Interim) Probationary Period Report;
- the general "data protection clause" posted on the Human Resources Intranet webpage.

The revised **data protection clause contained in the (Interim) Probation Report Form** provides for information about the identity of the controller, the purpose of the processing, the existence of the rights of access and rectification and the right of recourse to the EDPS. The information about data processed is contained directly in the (Interim) Probation Report Form transmitted to the person concerned at the initial stage of the processing.

In order to ensure the transparency and fairness of the processing in question, the EDPS recommends that the following information is added to the data protection disclaimer:

- the recipients in case of possible data transfers;
- the legal basis of the data processing;
- the time limits for the data storage (once established in line with comments provided in point 3.4).

In addition, the information provided about the rights of access and rectification shall be amended as to provide information on how these rights can be exercised (at least by indicating a functional mailbox).

Finally, the EDPS recommends that the revised data protection clause is also posted on the EMSA Intranet webpage (cf. below).

The general "data protection clause" posted on the Human Resources webpage concerns all processing operations performed by the EMSA Human Resources and provides for information about the existence of data subject's rights of access, rectification, blocking, erasure, notification and objection, as well as the right of recourse to the EDPS. In addition, the possibility to consult the prior checking notifications submitted by the EMSA DPO is mentioned.

The EDPS recommends that an introductory paragraph is being added to this general "data protection clause" providing information about specific data protection clauses applicable to particular processing operations (such as the elaboration of the (Interim) Probation Period Report). The links to such specific data protection clauses shall be provided in the annex to this general "data protection clause".

3.9. Security measures

(...)

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the above considerations are fully taken into account. In particular, EMSA should:

- set out an appropriate time-limit for the storage of the personal files (Article 4 (1) (e) of the Regulation);
- remind all recipients of their obligation not to use the data received for any further purpose than the one for which they were transmitted (Article 7 (3) of the Regulation);

- revise the specific "Probation Period Report" data protection clause in light of Article 12 of the Regulation so that information about possible recipients, legal basis and applicable time limits are included;
- put the revised "Probation Period Report" data protection clause on the EMSA Intranet webpage;
- modify the general "data protection clause" posted on the Human Resources Intranet so that an introductory paragraph with references to the "processing specific" data protection clauses is being added, as well as links to such clauses.

Done at Brussels, 7 January 2008

Peter HUSTINX
European Data Protection Supervisor