

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament regarding the processing operation "Career Mobility".**

Brussels, 17 September 2008 (Case 2008-329)

### **1. Proceedings**

On 27 May 2008, the European Data Protection Supervisor (hereinafter "EDPS") received from the Data Protection Officer of the Parliament a notification for prior checking regarding the data processing operations that take place in the context of the processing for career mobility purposes ("the Notification"). The data processing operations are mainly carried out by Directorate General for Personnel.

On 16 July 2007, the EDPS requested complementary information from the Directorate General for Personnel of the Parliament regarding the data processing which was provided on 29 July 2008. On 09 September 2008, the EDPS sent the draft Opinion to the Directorate General for Personnel for comments which were received on 16 September 2008.

### **2. Examination of the matter**

#### **2.1 The Facts**

The *purpose* of the data processing operations is to foster and manage the mobility of staff employed in the Parliament's Secretariat.

The *primary responsibility* for the data processing lies within the Directorate General for Personnel.

The data processing operations are both manual and electronic and can be *summarised* as follows:

(i) The Secretary General adopts a list of job profiles subject to and exempt from mobility on the basis of a proposal from the Directorate General for Personnel. The list also includes the names and job profiles subject to mobility. To draw up the proposal the Directorate General for Personnel consults various databases including Streamline, Skills, Rapnot; (ii) The Directorate General for Personnel sends to the Directorates General a list of names and job profiles of their officials who are subject to mobility; (iii) The Directorate General for Personnel informs officials subject to the rules of mobility by email; (iv) The Directorate General for Personnel, in particular, the Internal Organisation Unit ("IOU"), offers career guidance to enable the individual to have all the relevant information on the possibilities for transfer/mobility. In doing so the IOU verifies the skills of staff concerned in relation with vacant posts and also with job creations foreseen in the forthcoming budgetary procedure. Such guidance is provided by the Career Counselling and Professional Guidance Service (SCOPE) which is set up by the Directorate General for Personnel. In this context the

analysis of the profile of the concerned staff is based upon information included in the skills database, Rapnot, Streamline, "photographie des services" (internal document on the EP0 workload indicators of the EP). Normally the career guidance is an ongoing process, provided that the individual still agrees on the procedure. (v) The Directorate General for Personnel or IOU will send proposals to the Appointing Authority for given individuals to fill post. It is up to the Appointing Authority to take the decision according to the relevant provisions of the Staff Regulations. If an individual does not find an appropriate post, he/she keeps applying for other vacant posts.

The *types of data subjects* whose data are collected include AD officials of the EU Parliament. (hereinafter "officials").

The *categories of data* collected and further processed include the following: (i) Identification data, which may include surname, first name, date (and place) of birth, sex, nationality, telephone number, email address; (ii) Education and professional experience, which may include the degree/diploma giving access to doctoral studies, date of award of degree, length of professional experience, length of management experience, languages spoken and level, working experience in the European Institutions and personnel number (if applicable); (iii) Data related to the suitability of a candidate for a particular post. In addition, data related to the data subject's family may also be processed if such information has been put forward by the official. The *sources of personal data* are twofold: In the first place, data are provided directly by candidates, mostly as part of the interviews with the SCOPE. In the second place, data are also collected from various databases including Streamline, Skills, Rapnot and personal files.

According to the Notification, there is no policy regarding *conservation* of the data.

The data controller may *transfer* personal data to the Secretary General and to the Appointing Authority.

As far as the *right to information* is concerned, the Notification explains that information is given to officials, which includes the legal basis for the mobility exercise and an overview of the practical measures. A copy of the privacy statement was annexed to the Notification.

The Notification states that individuals have the rights of *access and rectification*. No further information is given about the procedure.

## **2.2. Legal Aspects**

### **2.2.1. Prior Checking**

This prior check will assess the data processing operations that take place within the context of fostering and managing the career mobility of staff employed in the Parliament's Secretariat. It will not look into the processing operations carried out in the context of the various databases (such as Streamline, Skills and Rapnot) which are consulted in the context of managing career mobility. Some of these databases have already been prior checked by the EDPS.

*Applicability of the Regulation.* Regulation (EC) No 45/2001 applies to the "processing of personal data wholly or partly by automatic means, and to the processing otherwise than by

*automatic means of personal data which form part of a filing system"* and to the processing *"by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law"*. For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the data processing to foster and manage the mobility of staff employed in the Parliament's Secretariat entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Second, as described in the Notification, the personal data collected undergo *automatic and manual* operations, as defined under Article 2(b) of the Regulation (EC) No 45/2001. Some of the personal information is collected and stored on paper or electronically and is subject to evaluations. Finally, the processing is carried out by a Community institution, in this case mostly by the Directorate General for Personnel of the European Parliament in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001). Therefore, all the elements that trigger the application of the Regulation are present.

**Grounds for Prior Checking.** Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS *"processing operations likely to present specific risks to the rights and freedoms of data subject 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. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. The processing operations that occur in the context of fostering and managing the mobility of staff employed in Parliament's Secretariat require evaluating the capacity officials for given position. In order to carry out such evaluation, the data controller will perform various assessment activities such as verifying the CVs and other professional experience, weighing up the capacities of certain officials for given positions, judging his/her performance from interviews and from other information. In sum, taking the above into account, clearly the data processing operations fall within Article 27(2) (b) and must therefore be prior checked 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 be given prior to the start of the processing operation. In this case, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

**Notification and Due Date for the EDPS Opinion.** The Notification was received on 27 May 2008. The period within which the EDPS must deliver an opinion was suspended for a total of 20 days to request further information from DG Directorate General for Personnel and allow for comments on the draft EDPS Opinion. In addition, the two months period deadline was also suspended during the month of August. The Opinion must therefore be adopted no later than 17 September 2008.

## **2.2.2. Lawfulness of the Processing**

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, the grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if 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".*

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) No 45/2001, two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

**Legal Basis.** In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations that take place in the context of fostering and managing the mobility of staff employed in the Parliament's Secretariat, the EDPS takes note of the following legal instruments: (i) Article 7(1) of the Staff Regulations *"The Appointing Authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his function group which corresponds to his grad."*; (ii) the Regulation Governing Mobility Policy of 29 March 2004.

These legal instruments set forth the overall policy and specific procedures that the Parliament must follow in order to foster and manage the mobility in the Parliament. Upon analysis of the above legal framework, the EDPS is convinced that the data processing that takes place in connection with the fostering and managing of mobility is carried out on the basis of these legal instruments.

**Necessity Test.** According to Article 5(a) of Regulation (EC) No 45/2001, the data processing must be *"necessary for performance of a task"* as referred to above. It is therefore relevant to assess whether the data processing that occurs in the context of this prior check is *"necessary"* for the performance of a task, in this case, for the fostering and managing of the Parliament's personal for mobility purposes.

As outlined above, under the Staff Regulations and secondary legislation, the Parliament must adopt procedures to ensure the mobility of its staff. To put into practice this provision, it is necessary for the Parliament to collect and further process personal information of officials. Unless the Parliament collected officials' professional information in order to evaluate their competences and whether they matched the criteria for given posts, it would not be possible for the Parliament to ensure proper mobility of its staff.

### **2.2.3. Processing of Special Categories of Data**

Article 10.(1) of Regulation 45/2001 establishes that *"the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited"*. The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject ex Article 10(2)(a), which would be the case if these categories of data would be put forward by the official concerned, provided they are relevant. Article 10.5 of Regulation (EC) No 45/2001 establishes that *"[processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor."* No such data seem to be collected in the context of this data processing.

### **2.2.4. Data Quality**

***Adequacy, Relevance and Proportionality.*** Pursuant to Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This is referred to as the data quality principle.

The type of information collected includes identification data and education and professional experience as well as data related to the suitability of a candidate for a particular post. In addition, data related to the data subject's family may also be processed if such information has been put forward by the official. The EDPS considers that the information collected from officials in the context of fostering and managing career mobility complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

***Fairness and Lawfulness.*** Article 4(1)(a) of the Regulation requires that data be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.8.

***Accuracy.*** According to Article 4(1)(c) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date, and "every reasonable step must be taken to ensure that the 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"*". In this case, an important part of the data has been provided by the applicant himself/herself. This procedure itself helps to guarantee the accuracy of the personal data. However, other information is not provided directly by the officials but generated through the procedure (during the interviews with SCOPE). In this context, as further developed below, it is important for the officials to be able to exercise the right of access and rectification insofar as it enables them to control whether the data held about them is accurate. In this respect, see also Section 2.2.7.

### **2.2.5. Conservation of Data**

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

As stated in the facts, there is no policy for conservation of this data, which seem to be kept for an undefined period. The EDPS considers that an appropriate practice would be to keep the data until the procedure to redeploy officials for each period of time has been concluded plus some additional time, e.g. two years.

The possibility for storing data for historical, statistical or scientific reasons appears to be excluded.

### **2.2.6. Transfers of Data**

Article 7, of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to within Community institutions or bodies as occurs in this case. Article 7 of Regulation (EC) No 45/2001 requires personal data to be transferred "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary. The EDPS

considers that the transfers of information to the recipients described in the Notification, namely to the Secretary General and to the Appointing Authority for the purposes stated comply with the two requirements.

### **2.2.7. Right of Access and Rectification**

According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

According to the Notification, individuals are entitled to these rights. No further information is given about how and at which stages this can be done. The EDPS wishes to remind the controller that officials should be able to have access to their entire file, including the assessment notes concerning them drafted by SCOPE. Because part of the assessment procedure is based on the performance given in oral interviews, officials should be able to receive the comments obtained in this type of test. For example, one of the means for providing access to such information could be by preparing a version of any notes omitting the information about third parties or other information not relevant to the data subject.

The EDPS is aware that there is a limitation to this rule. Indeed, pursuant to Article 20 (1) access may not be granted if doing so would impact the protection of the rights of others, in this instance both the right of SCOP members "*The Community intuitions and bodies may restrict the application of ( ) Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject of the rights and freedoms of others*". Accordingly, no comments/marks given by individual members of SCOPE should be given. Furthermore, information comparing the data subject with other officials should not be provided and no information should be given regarding the particular remarks of members of SCOPE. The EDPS calls upon the Directorate General for Personnel to ensure the application of the right of access as described above.

The right of rectification, on the other hand, can obviously apply only to factual data. Marks /comments could not under any circumstances be open to a right of rectification by the data subject, except in the context of the appeals established under the appeals procedures.

In the light of the above, the EDPS recommends that the Directorate General for Personnel sets up procedures to ensure access to officials' personal data as described above. Information about the procedures to exercise the right of access should be given to individuals, as described under 2.2.8

### **2.2.8. Information to the Data Subject**

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights to which individuals, as data subjects, are entitled.

In order to comply with this obligation, the Notification explains that that information is given to officials by regular mail which includes the legal basis for the mobility exercise and an overview of the practical measures. A copy of the information provided was annexed to the Notification. Individuals are also notified by email that they are subject to mobility and that

as of a particular date they are required to change jobs.

The EDPS considers the provision of information by regular email as pointed out above and paper appropriate. However, the EDPS finds that the content of the information does not entirely meet the requirements of Articles 11 and 12 of Regulation (EC) No 45/2001. In particular, the following information should be provided:

- (i) A thorough description of the processing operations;
- (ii) It would be appropriate to add a contact address (that of the data controller or someone from his Unit) where individuals could send questions regarding the privacy statement and the overall data processing;
- (iii) The information regarding the right of access and rectification and how to carry them out;
- (iii) Clear information on the time limits for storing the data should be included.
- (iv) The right to have recourse to the EDPS

### **2.2.9. Security measures**

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing. No indication exists to believe that the Directorate General for Personnel has not applied such measures.

## **3. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations in this Opinion are fully taken into account. In particular the, Directorate General for Personnel must:

- Set up storage periods: the end of the career mobility exercise for each given period, plus some reasonable additional time, is proposed as an appropriate conservation deadline.
- Ensure that individuals have the rights of access and rectification. In particular ensure that officials have access to their file comprising the assessment notes concerning them drafted in SCOPE.
- Provide additional information as recommended in this Opinion.

Done at Brussels, 17 September 2008

(signed)

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