EUROPEAN DATA PROTECTION SUPERVISOR

PETER HUSTINX
SUPERVISOR

Mr Franz-Hermann BRÜNER
Director-General
European Commission
European Anti-Fraud Office (OLAF)
B-1049 Brussels

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Dear Mr Brüner,

Thank you very much for the consultation you sent to the EDPS under Article 46(d) of Regulation (EC) No. 45/2001.

In your consultation you describe a hypothetical case (based in part on real requests you have received) and you ask certain questions, as follows:

*"OLAF had opened four internal investigations concerning a certain fact pattern. The name of Mr H appears in each of the case files, and he is the person concerned in one of them (case A), which is ongoing. The lawyer for Mr H submitted a request to OLAF for a list of all cases in which the client's name appears in the case file, and asks for access to his personal data in those files. In addition to the electronic documents that appear in the CMS files, a box of paper documents, received from the European Agency, which employed Mr H, was placed in the OLAF archive for one of the case files (case B) but not scanned and is thus not in the CMS file. Case B has been closed as a "non case" before the request was received.*

*Question 1: According to Art. 13 of Regulation 45/2001, following a request from a data subject, OLAF must provide the personal data of the data subject which OLAF is processing. However, we do not believe that a request for a list of the cases in which the personal data appear would be covered by Art. 13. Do you agree?*

*Question 2: OLAF is able to do an electronic search for the documents that have been scanned and placed in the CMS files to find the personal data of Mr H. This would be done using the Zylab, the only search application available at this time for globally searching OLAF's CMS. This application is very efficient and produces good results. However, this application does not yield complete results in exceptional cases, for instance when characters are missing or very voluminous annexes have not been scanned. In light of these possible omissions can you confirm that the Zylab search may be considered a sufficient basis for a reply to the request, as regards the CMS file?*

Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 63
E-mail : edps@edps.europa.eu - Website: www.edps.europa.eu
Tel.: 02-283 19 00 - Fax : 02-283 19 50

*Question 3: It would require a considerable effort by the investigator in charge to review the case B paper file, consisting of more than 1000 documents, to determine whether Mr H's personal data appears in any of the documents. It is estimated that this would require several weeks of an investigator's time, which OLAF considers disproportionate. Do you agree?*

*Question 4: Since some of the documents are related to a "non case", a five year retention period applies. Would it be consistent with the data protection rules if OLAF were to grant a request for erasure of personal data, even though the five year retention period has not yet expired? Can you provide any general guideline on erasure of data, both electronic and paper?*

*Question 5: How much detail is it necessary to provide as to the data undergoing processing in response to a request for access? Is it necessary to summarise the data of each individual document or would it suffice to summarise the data by group of documents?"*

Please find below the EDPS' answers to the formulated questions:

Answer to question 1: The request for a list of cases in which personal data of the data subject appear would, in principle, be covered by Article 13, since it is a way to obtain *"confirmation as to whether or not data related to him or her are being processed"*, as foreseen in paragraph (a) of this Article.

The mentioned rule has to be read in light of the *ratio legis* of the right of access: that is to offer the possibility to the data subject to control whether data about him or her are processed in compliance with the data protection legislation. Indeed, this *ratio* is present in Recital (41) of Directive 95/46/EC[1], as follows: *"[w]hereas any person must be able to exercise the right of access to data relating to him which is being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing; (...)"*.

The way in which the "confirmation" could be provided depends, to a certain extent, on the nature and characteristics of the data and the processing activity involved. It also depends on whether or not a particular way of providing the confirmation would allow the data subject to exercise his or her different data protection rights.[2] Therefore, in the case under analysis, the provision of a list of cases would be a means to enable the verification by the data subject of his or her personal data. Furthermore, it does not appear, *prima facie*, to be a disproportionate request.[3]

Answer to question 2: The use of a given tool to reply to a request for access would be considered a sufficient basis if it constitutes a fair balance between, on the one hand, the

[1] Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

[2] See point 57, Judgement of the ECJ in C-553/07, Rotterdam v. Rijkeboer.

[3] See C-553/07, *"51. That right of access is necessary to enable the data subject to exercise the rights set out in Article 12(b) and (c) of the Directive, that is to say, where the processing of his data does not comply with the provisions of the Directive, the right to have the controller rectify, erase or block his data, (paragraph (b)), or notify third parties to whom the data have been disclosed of that rectification, erasure or blocking, unless this proves impossible or involves a disproportionate effort (paragraph (c))"*.

interest of the data subject in protecting his privacy and on the other hand, the burden which the obligation to search (to reply to the request for access) represents for the controller.[4] (...)

Answer to question 3: Case B is a paper file of more than 1000 documents. It is estimated that it would require several weeks of an investigator's time to determine whether Mr H's personal data appears in any document. Given these specific circumstances, the EDPS considers that this task would require, in principle, a disproportionate effort which would constitute an excessive burden on the controller.[5]

However, a note in the electronic and paper file must be included mentioning that information should be given to the data subject if any use is made of personal data related to him or her included in any of the mentioned paper documents, so that the data subject would be able to exercise the right of access.

Answer to question 4: Should any processing activity be considered unlawful, the personal data involved should be erased (see Article 16 of Regulation (EC) No. 45/2001). If this were the case, the erasure of unlawful data would not conflict with the retention policy (if this were to happen before the 5 years fixed as retention period), because it would be a measure adopted in order to ensure compliance with the Regulation.[6]

Answer to question 5: A casuistic approach has to be followed in the assessment of the access methods and parameters. The information provided to the data subject has to be "understandable" ("intelligible form"), that is stating which processing activity is taking place and which data are involved. The level of detail has to be connected with the possibility for the data subject to evaluate the accuracy of the data and the lawfulness of the processing, as well as with the burden of the task for the controller.

Furthermore, account should be taken of the potential risk for the protection of the fundamental rights and freedoms of the data subject, in particular the right to privacy, the different data and processing activities may involve. For instance, a more cautious approach is expected in relation to the cases where the data subject is the "person concerned" of the file, because of the obligation to ensure respect of the right of defence.

I trust you have found an answer to the issues raised. I remain at your disposal should you need any further clarification.

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[4] See, by analogy, point 70, C-553/07: *"(...) - Article 12(a) of the Directive requires Member States to ensure a right of access to information on the recipients or categories of recipient of personal data and on the content of the data disclosed not only in respect of the present but also in respect of the past. It is for Member States to fix a time-limit for storage of that information and to provide for access to that information which constitutes a fair balance between, on the one hand, the interest of the data subject in protecting his privacy, in particular by way of his rights to object and to bring legal proceedings and, on the other, the burden which the obligation to store that information represents for the controller.*

- Rules limiting the storage of information on the recipients or categories of recipient of personal data and on the content of the data disclosed to a period of one year and correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue, unless it can be shown that longer storage of that information would constitute an excessive burden on the controller. It is, however, for national courts to make the determinations necessary".

[5] See point 70, C-553/07.

[6] On the interpretation of "unlawful processing" see point 67, Arrêt du Tribunal de la Fonction Publique de l'Union Européenne, F-130/07, Vinci c. BCE.

Yours sincerely,

(signed)

Peter HUSTINX

Cc : Ms. Laraine Laudati, Data Protection Officer, OLAF