

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Union Agency for Fundamental Rights (FRA) regarding "FRA policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment".

Brussels, 21 December 2010 (Case 2010-722)

1. Proceedings

On 24 September 2010, the European Data Protection Supervisor (EDPS) received by regular mail from the Data Protection Officer (DPO) of the European Union Agency for Fundamental Rights (FRA) a notification for prior checking data processing operations related to the "FRA policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment".

On 18 October 2010, the EDPS requested further information from the controller. He received the responses on 4 November 2010. A second set of questions was sent on 9 November 2010 and answered the same day.

On 25 November 2010, the EDPS sent the draft opinion for comments to the controller. He received the comments on 13 December 2010.

2. The Facts

The FRA adopted a common policy (hereinafter: the policy) on protecting the dignity of the person and preventing psychological and sexual harassment within the context of the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities No 259/68, a policy which is to be implemented into two different procedures: informal and formal.

The modalities of selection of the confidential counsellors -who will play an essential role in the informal procedure- have already been prior checked by the EDPS (case-file no 2009-857).

Implementing modalities and role of each stakeholder in the informal procedure are addressed in the FRA Executive Board (EB) Decision No 2009/02 on this policy. Articles 1(d) and 12(a) of the Staff Regulations prohibit any discrimination based on sex and call officials to refrain from any form of harassment (see also Articles 11, 54 and 81 of the conditions of Employment of Other Servants of the European Communities).

Individuals who feel they are the victim of psychological or sexual harassment may request for assistance by contacting the confidential counsellor of their choice or the Human

Resources Manager via phone call or e-mail. With the consent of the alleged victim, the counsellor plays the role of mediator and, if necessary, calls upon further actors to reach an informal agreement between the parties. In case of failure of conciliation, the alleged victim may engage in a formal procedure.

Potential data subjects are each and every person working at the FRA, regardless of grade or contract of employment (trainees and every person working under a contract under national law included). Individuals who feel they are victim of a psychological harassment or sexual harassment and submit a request for assistance, individuals who have been accused of such a conduct, witnesses and other stakeholders may be involved in cases of presumed harassment handled in the framework of an informal procedure.

Personal data likely to be **collected, retained and processed** are the data provided by the data subjects, e.g. identification (name, date of birth, address, and phone number), administrative and career data (grade, functions, responsibilities) and data about the conduct of individuals as well as stages of a possible mediation procedure. These data are contained in the opening form (reference number, date of first contact, date of first meeting, channel used for first contact, type of issue, identification of both parties, data of transfer *[routing]* to the Coordinator in the HRP), in the case files or documents collected to properly administer the case (statements and communications of the alleged victims, of the alleged harasser, of witnesses or other third parties) as well as in the closure of complaint form (closing date, contacts with other departments, reason given for complaint, action undertaken).

Confidential counsellors take **personal notes** during consultations and are bound by professional secrecy. Personal notes are not to be transmitted nor shared. In addition, any action taken by the counsellor in the informal procedure may only be carried out with the prior agreement of the victim and must remain within the framework of his/her mandate. The FRA however provides no information as to whether the explicit consent of the person consulting is required as regard the note-taking.

In principle, **FRA's intention is not to collect sensitive data** as described under Article 10(1) of Regulation (EC) No 45/2001 (the Regulation). However, the processing of sensitive data, in particular data related to sex life and/or health of both the alleged victim and the alleged harasser cannot be excluded if they are inherently linked with the harassment.

During the informal procedure, **confidentiality** is guaranteed. The FRA however provides no information on the form of this guarantee, for example by means of a declaration of confidentiality signed by the confidential counsellor.

Under the informal procedure, the HRP Department **stores the opening and closing forms in a central archive for five years** from the start date of the informal procedure. If the alleged victim does not consent to the alleged harasser being informed of the informal procedure, any data relating to that person will be erased and no element allowing the person to be identified will be kept by the Coordinator in the HRP or the confidential counsellor. In addition, the confidential counsellor will not keep any personal data together with any documents beyond the time needed to informally deal with the case and accomplish his/her tasks.

After the elapse of the abovementioned storage periods, further **data needed for statistical purposes** are extracted by means of the Statistical Anonymous Fiche (including information on the type of issue, the requests, the sex, unit and department, contract type and function group of the alleged victim and harasser as well as if they have the same nationality, their age and the actions taken by the counsellor); the remaining personal data are destroyed.

Data are stored primarily as **paper files**, but also as **electronic documents** in cases of e-mails sent to the dedicated functional mailbox.

The **recipients or categories of recipient** to whom the data might be disclosed are the Coordinator in the HRP (i.e. the person who assists the confidential counsellors), the confidential counsellors, the Director in the event of recurrent cases, and/or third parties (medical advisors/psychologist for instance).

Any transfer occurs only **with the prior consent** of the person who provided the data and will be restricted to the information necessary for the competent entities to carry out their tasks.

As concerns **procedures to grant rights to data subject**, the persons involved in the procedure command:

- A right to access data. Data subjects may request access to the data they transmitted, in the opening and closing forms for the case relating to them. To obtain access, they must send an e-mail to the specific functional mailbox or contact the Coordinator in HRP (i.e. the person who coordinates the network of the confidential counsellors).

- A right to rectify data. Data subjects have a right to rectification of the factual data by for example providing documents as evidence to the file. The data subject's right only covers objective and factual data, and not assessments of those involved in, and responsible for conducting the procedure.

- A right to block and to erase data. Data subjects have the right to block one's own data at any time. Data may also be erased if the processing of data is unlawful. Data blocking and erasure will be possible for as long as the case is not closed, knowing that, under the informal procedure, the case should be closed within a period of one to three months in general.

In all the above-mentioned cases, data subjects must send an e-mail to the specific functional mailbox with their request or contact the HRP or the confidential counsellor dealing with the case. Only the Coordinator in the HRP will have access to this functional mailbox.

Data subjects can at any time have recourse to the EDPS, in particular to ask him to verify the data and inform them whether the data they could not access to were dealt with correctly and, if not, whether the necessary corrections were made.

Information of concerned persons occur in two forms:

On one hand, the EB Decision 2009/02 laying down the rules for preventing psychological or sexual harassment contains a **general provision** on compliance with the data protection legislation of both the formal and informal procedures. In addition, a specific privacy statement will be published to all staff and be put in the FRA Intranet. It contains information on the controller of the processing operation, the purpose, the legal basis, the data processed, the recipients, the retention period, the right to be informed and the derogations to this right, the right of data subjects, the origin of the data and the security measures taken. Staff may approach the HRP for information on policy and procedures and in order to contact the confidential counsellors.

On the other hand, data subjects will be **individually provided with the information** on their rights by the confidential counsellor after having requested his/her assistance, in particular with information on the existing procedures.

Certain restrictions to the rights of information and access of the **alleged harasser** are possible in cases where the alleged victim has not given his/her prior consent. Data not disclosed to the alleged harasser will be returned to the alleged victim. On the contrary, transmission of information without prior consent may be undertaken only in exceptional cases, i.e. when necessary to ensure the protection of the alleged parties.

To guarantee the **security of confidential data**, [...].

3. Legal Aspects

3.1. Prior Checking

Applicability of the Regulation. Regulation 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 a body of the EU (former "community body") insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of former "Community law" (Article 3 of the Regulation, in the light of the Lisbon Treaty).

First, the processing operations put in place in the frame of the fight against harassment entail the collection and further processing of personal data as defined under Article 2(a) of the Regulation. Indeed, certain personal data of the individuals involved are collected and further processed. The notes taken by confidential counsellors include for example personal data from the alleged victim, the alleged harasser and/or third parties. Second, as described in the notification, the personal data collected undergo "manual processing" operations where personal data are likely to form part of a filing system, as stated under Article 3(2) of the Regulation. The notes taken by the counsellors are collected during an "informal" procedure; this informal procedure is nevertheless institutionalised and personal data are structured and accessible following specific criteria, and therefore also form part of a filing system.

Finally, the processing is carried out by the FRA, in the framework of activities of a body from the European Union (former "Community law"-Article 3(1) of the Regulation).

The Regulation is therefore applicable to such data processing operations.

Grounds for Prior Checking. Article 27(1) of the Regulation subjects to prior checking by the EDPS *"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. This list includes, under paragraph (b), operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency or conduct. The notes of the counsellors within the informal procedure contain information about the conduct of the data subjects (for example of the alleged harasser). Therefore, the data processing operations fall within Article 27(2)(b) and must be prior checked by the EDPS. In addition, paragraph (a) subjects to prior check processing operations of data related to health: such data being

potentially included in the notes of the confidential counsellor, Article 27(2)(a) applies in a complementary way.

Prior Checking. Processing operations under prior check analysis include operations likely to be carried out within the informal procedure by the counsellors. Processing operations within the formal procedure falling into the scope of administrative inquiry and disciplinary procedures will therefore not be addressed in this Opinion. The EDPS however notices that processing operations as regard these inquiries and procedures has not been notified yet for prior checking; the EDPS recommends the FRA to notify him these processing pursuant to the letter on *Guidelines on administrative inquiries and disciplinary proceedings*. 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. Any recommendations made by the EDPS must be fully taken into account.

Notification and Due Date for the EDPS Opinion. The Notification was received on 24 September 2010. The two months period was suspended for 29 days to obtain further information from FRA. The Opinion must therefore be adopted no later than 24 December 2010.

3.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. 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 or in the legitimate exercise of official authority vested in the institutions or bodies. The establishment of informal procedures is one of the crucial elements put in place by the FRA to combat psychological and sexual harassment in the Agency. Fight against harassment is a task carried out in the public interest based on Article 12(a) of the Staff Regulations. These Articles and the FRA Executive Board Decision 2009/02 concerning the policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment provide the legal basis for the processing operations at stake and seem therefore to meet the conditions of Article 5(a) of the Regulation.

3.3. Processing of Special Categories of Data

Article 10(1) of the Regulation 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.

The notification specifies that FRA's intention is not to collect special categories of data in the informal procedure. However processing of data concerning health or sex life cannot be excluded. Article 10(2)(b) states that the prohibition may also be lifted if the processing is 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 authorized by the Treaties or other legal instruments adopted thereof. The legal basis described here above (Article 12(a) of the Staff Regulations) shows that the Agency has the obligation to fight against harassment and to guarantee a work environment free of any form of psychological or sexual harassment.

Processing of sensitive data relevant for the case at stake and proportionate to the purposes may therefore be justified on this basis.

3.4. Data Quality

Adequacy, Relevance and Proportionality. According to Article 4(1)(c) of Regulation (EC) No 45/2001 "*personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*".

Concerning the informal procedure, the EDPS first distinguishes two types of data. Data qualified as "hard" or "objective", collected by means of the forms (administrative and identification data in opening and closing forms), and the data qualified as "soft" or "subjective" collected by means of the personal notes of the confidential counsellors (allegation and declaration based upon the subjective perceptions of data subjects). This distinction will also play a role in the exercise of the right of rectification of the data subject (see point 3.7 on rights of access and rectification below).

The collection of soft data does not follow systematic rules as it is not possible to determine *a priori* the type of data collected. This does not mean that their collection may be random. They must be adequate, relevant and not excessive in relation to the fight against harassment and sexual harassment. This analysis must be conducted on a case by case basis by the counsellors.

The purpose of the collection of hard data through the opening and closing forms is the management of the historical records and most importantly the identification of recurrent and multiple cases (to be brought to the attention of the Director). The necessity and the relevance of the data collected through those forms should be carefully evaluated at the time of their collection, and then re-evaluated in a few years time in relation to the purposes above mentioned.

For both soft and hard data, the EDPS regrets the fact that the principle of Article 4(1)(c) is underlined nowhere in the FRA EB Decision No 2009/02. Entities involved in the informal procedure should be explicitly reminded that the collection of any data must be adequate, relevant and not excessive in relation with the purposes of the collection, and these principles quoted in the Specific privacy statement.

The EDPS also recalls the need to ensure the anonymous nature of the statistical data. Indeed, the ability of identifying the alleged victim and/or third persons involved in the procedure might arise in the present case, the FRA being a particularly small institution. The necessity of collecting each single data for statistical purposes should be proved by FRA, as well as the absence of risk of data subjects' identifiability. The EDPS therefore invites the FRA to reevaluate its Statistical Anonymous Fiche so as to comply with the mentioned fundamental elements, and inform the EDPS the criteria/methodology followed to reach the conclusion in this regard.

Article 4(1)(d) provides that personal data must be accurate and, where necessary, kept up to date. As for the informal procedure, the requirement of accuracy cannot appertain to the facts brought by the alleged victim or harasser (so called "soft data") - part of the notes is based on the subjective perception of the data subject - but to the fact that these specific facts have been brought by the data subject. In this regard, the right of access and rectification of the data subject enable individuals to control whether the data held about them reflect the facts they wanted to transmit and, in that sense are accurate (see also point 3.7 on the right to

rectification below). The EDPS welcomes the fact that both rights are enshrined in the Point "Right of data subjects" of the FRA specific privacy statement, the right to rectify depending explicitly on the nature of the data concerned, "soft" or "hard".

Fairness and Lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects, which is further addressed in Section 3.8.

3.5. 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, data related to the informal procedure are stored in the HRP for a period of five years (from the start of the procedure)¹. In addition, confidential counsellors will not keep any personal data together with any documents beyond the time needed to informally deal with the case and accomplish his/her tasks. The EDPS welcomes the retention periods adopted by the FRA and considers them as compatible with Article 4(1)(e). As for the data retention period of confidential counsellors however, the EDPS recommends to set beforehand precisely and numerically the time counsellors are allowed to keep the data, in particular after the accomplishment of the task. In addition, the FRA should ensure that the data stored for a longer period (statistical purpose) are kept in anonymous form only, following Article 4(1)(e) (see point 3.4 on data quality above).

3.6. Transfers of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules applicable to transfers to Community (EU) institutions or bodies (based on Article 7) apply in this case. Article 7(1) establishes that data shall only be transferred if the data are *"necessary for the legitimate performance of the tasks covered by the competence of the recipient"*.

As for the transfer of data to the Coordinator in the HRP², it should be limited to the data necessary for the legitimate performance of his/her tasks of administrative support i.e. only the hard data included in the opening and closing forms. The EDPS thus admits the involvement of a person in the HRP, provided that, in order to legitimately perform his/her tasks as foreseen in Article 7(1) and avoid any abusive disclosure of data, he/she has no access to the personal notes of the counsellors and his/her independence toward the Department is guaranteed.

¹ If an alleged harasser was never informed of an informal procedure opened concerning him/her, no personal data of this person shall be retained by the confidential counsellors or the HRP.

² The EDPS considers that the HRP Department may also be the recipient of the data processed. Indeed, due to the sensitive nature of the informal procedure, the counsellors' network is in charge of the core activity of the procedure whereas the HRP Department is playing a role of administrative support. The Coordinator in the HRP may therefore be considered as the recipient when receiving information from the confidential counsellors' network.

As for the transfer of data to any third person -to the Coordinator in the HRP, to the Director in the event of recurrent cases or to medical advisors/psychologists-, the FRA should evaluate on a case by case basis the necessity of the data to be transferred. The EDPS welcomes the fact that the point "Recipients of the data" of the FRA Specific privacy statement reminds the principle laid down in Article 7(1) and requires the consent of the alleged victim for any transfer. Moreover, the principle of accuracy of the data exposed in point 3(4) on data quality above should all the more be taken into account: additional information might indeed be necessary to enable the recipient to assess/understand the personal notes of the counsellors.

The FRA must finally ensure that the recipients process the personal data only for the purposes for which they were transmitted, in compliance with Article 7(3) of the Regulation.

3.7. 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 of 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. Both rights are partly guaranteed in the processing operations under analysis through the possibility for individuals to send an e-mail to a specific functional mailbox. However, neither the right of access nor the right of rectification are observed regarding the personal notes of the confidential counsellors. Moreover the right of access should not be limited to the data transmitted by the data subject.

The EDPS is aware that there is, by principle, a limitation to the right of access and rectification of the data subject foreseen in Article 20 of the Regulation "*The Community institutions and bodies may restrict the application of (...) Articles 13 to 17*". However, as an exception to a general rule, this limitation must be interpreted restrictively and applied on a case by case basis, never automatically and if necessary, after the consultation of the DPO. Accordingly, the general rule regarding files and personal notes within the informal procedure should be the rights of access and rectification to all persons concerned. The FRA should therefore recognize these rights with regard to personal notes as described above.

As for the right of access, the general rule applicable is the access to any personal data concerning persons involved. However, pursuant to the exception of Article 20(1)(c), alleged harassers may have their right restricted if necessary to safeguard the protection of the data subject or of the rights and freedoms of others. Access is subject to their having been informed by the confidential counsellor, with the agreement of the alleged victim, of the existence of an informal procedure against them. The EDPS welcomes the commitment of the Specific privacy statement to this restriction. Furthermore, Article 20(1)(c) may in certain cases also be applied to protect the rights of other persons concerned, especially of witnesses. The EDPS however reminds the FRA that this limitation should only be applied when strictly necessary to protect the rights and freedoms of others.

As for the right of rectification, if inaccurate hard data should be rectified following Article 14, the notion of inaccurate soft data, as explained above, refers to the fact that specific statements have been made by the data subject. In the case of soft data, the data subject may also ask to add his/her opinion to the file to ensure the completeness of the file in accordance with Article 14. The EDPS welcomes the fact that the FRA distinguished objective/hard data and subjective/soft data when granting the right of rectification as described above.

The FRA must in any event take into account and comply with Article 20(3): *"If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor"*. As regards the right of information, this provision must be read in conjunction with Articles 11, 12 and 20 of the Regulation.

Article 20(4) must also be taken into account: *"If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made."* The right of indirect access will come into play when, for instance, the data subject has been informed of the existence of the processing operation, or is aware of it, but has a restricted right of access under Article 20.

Finally, article 20(5) provides that: *"Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect"*. It may therefore be necessary for the FRA to defer provision of information in order to protect the victim.

The EDPS observes that the rights of access and of rectification are respected towards the alleged victim and harasser. The EDPS nevertheless recommends that these rights should also be fully guaranteed for witnesses and other stakeholders involved in the informal procedure.

Finally, the EDPS recommends the FRA to specify the duration needed for blocking or erasing personal data, duration which differs from the timeframe necessary to treat a case within the informal procedure.

3.8. 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 that individuals, as data subjects, are entitled to.

As stated in the facts, in order to comply with this obligation in the case under analysis, information is provided in two stages.

First, the EB Decision No 2009/02 contains a general provision on compliance with the data protection legislation of both the formal and informal procedures. In addition, the FRA drafted a Specific privacy statement, including all information necessary to comply with Articles 11 and 12 of the Regulation, which will be distributed to all staff and be published on the FRA Intranet. The EDPS considers this as a good practice. However, the EDPS wants to underline that witnesses and other stakeholders should receive similar general information. The privacy statement is to be adapted accordingly.

Second, data subjects will be individually provided with information on their rights by the confidential counsellor after having requested his/her assistance. The EDPS recalls anew that specific information is also to be given to witnesses and other stakeholders.

Article 20(c) of the Regulation, discussed above (see point 3.7 on the rights of access and rectification), provides for certain restrictions to the right of information of alleged harassers in the cases where alleged victims do not give their prior consent.

Article 20(5) may also be applied in specific circumstances: *"Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect."*

Articles 11 and 12 of the Regulation are therefore respected.

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 that the considerations in this Opinion are fully taken into account. In particular, the FRA must:

- In a few years time, re-evaluate the necessity and the relevance of the data collected through the opening and closing forms in relation to the purposes for which they are collected;
- Remind entities involved in the informal procedure that the collection of any data must be adequate, relevant and not excessive in relation with the purposes of the collection;
- Prove the necessity of collecting single data for statistical purposes and inform the EDPS of the results of each probation; Reevaluate the Statistical Anonymous Fiche so as to comply with the principles of anonymisation;
- Set beforehand precisely and numerically the time confidential counsellors can keep personal data;
- Ensure that the Coordinator in the HRP has no access to the personal notes and his/her independence in the Department is guaranteed;
- Ensure that the recipients process the personal data only for the purposes for which they were transmitted in compliance with Article 7(3) of the Regulation;
- Specify the right of access and of rectification to the personal notes taken by the confidential counsellor as recommended;
- Specify that the right of access is not limited to the data provided by the data subject;
- Grant explicitly the rights of access and rectification to witnesses and others involved;
- Specify the duration necessary for blocking or erasing data;
- Give similar general and specific information to witnesses and others involved;

- Adapt the FRA Specific privacy statement to reflect the provisions made in this Opinion.

Done at Brussels, 21December 2010

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

[signed]