



Opinion on the notification for prior checking received from the Data Protection Officer of the European Commission concerning the establishment of individual output indicators

Brussels, 23 September 2011 (Case 2011-0368)

1. Procedure

By e-mail dated 18 April 2011, the Data Protection Officer (DPO) of the European Commission sent the European Data Protection Supervisor (EDPS) a notification concerning the establishment of individual output indicators at the Office for the Administration and Payment of Individual Entitlements (PMO). The notification was accompanied by a number of documents, including:

- Commission Decision C(2008)3026 of 18 June 2008 on general implementing provisions for Article 43 of the Staff Regulations as amended by Commission Decision C(2010)2957 of 6 May 2010;
- example of a note for the attention of the staff of sector XXXX concerning the individual output indicator as part of the appraisal process;
- point 7 of the notification concerning output indicators;
- example of the specific declaration of confidentiality – Notification on output indicators;
- example of the declaration concerning respect for confidentiality.

A request for further information was made on 25 May 2011. A reply was given on 28 July 2011. On 3 August 2011, a draft EDPS opinion was sent to the DPO for comments. These were received on 6 September 2011.

2. Facts

This Opinion is based on the description of the facts as communicated to the EDPS by the DPO.

The purpose of the processing in question is to enable establishment of individual output indicators which will contribute in part to the annual appraisal of certain members of staff at the PMO.

The data are encoded and stored in information systems. Each month, the data needed to produce individual reports are extracted from the information systems for processing by the Business Intelligence Unit of the PMO¹ which is responsible for reporting at the PMO.

¹ Part of the Audit and Reporting section of Unit PMO.8 since 1 July 2011.

The common data collected are:

- the date of processing,
- the [PMO] administrator's login (automated processing) or name (manual processing).

Depending on the occupation [of the members of staff], the following data may be collected:

- number of tasks completed;
- number of applications for the reimbursement of experts' costs settled;
- number of applications for the reimbursement of medical expenses/invoices assessed;
- number of reimbursements of medical expenses audited;
- number of health insurance invoices processed;
- number of health insurance documents scanned;
- number of transactions encoded for the administration of individual entitlements;
- number of files processed in the administration of transfers IN;
- number of files processed in the administration of transfers OUT;
- number of files processed in the administration of severance grants;
- number of files processed in the administration of unemployment benefit;
- number of files processed in the administration of pensions;
- number of e-mails received (functional mailbox) per domain and processed by the employee (PMO Contact);
- number of calls received (I-call platform) per domain and processed by the employee (PMO Contact);
- total volume of e-mails and calls per employee (PMO Contact).

The controller is the European Commission, represented by the Director of the PMO.

The data subjects are certain administrators in the PMO, namely missions administrators, administrators of experts' costs, administrators of individual entitlements, administrators of transfers in, administrators of transfers out, administrators of severance grants, administrators of unemployment benefit, pension administrators, PMO Contact staff, claims assessors and auditors for health insurance, and the staff employed in digitisation and who are responsible for paying health insurance invoices.

With regard to the right of access and the right to rectification, the declaration of confidentiality states that data subjects may request access to their data by contacting the controller and, in the event of a dispute, may request that data are checked and rectified. Depending on what additional information there is, data subjects may ask their Head of Unit for access to their output data at any time.

As regards the provision of information, a note for the attention of staff on the individual output indicator as part of the appraisal process plus a specific declaration of confidentiality regarding the notification of output indicators have been published on the PMO Intranet page entitled 'Protection of personal data'.

The retention period for personal data is for one year following the appraisal process for the purposes of comparing two appraisals.

The data are encoded and stored in information systems. (...)

The data needed to produce reports are extracted from the information systems for processing by the Business Intelligence Unit of the PMO. This is a copy of the database stored using Business Object.

(...)

The data recipients are the line managers of the data subject in their role as appraiser, countersigning officer and appeal assessor, plus the Business Intelligence Unit and 'any other person designated by means of delegation'.

Moreover, in the event of a dispute, the data may be sent to the Legal Service of the Commission, the European Ombudsman, the EDPS and the Civil Service Tribunal.

3. Legal aspects

3.1. Prior checking

The notification represents the processing of personal data within the meaning of Regulation (EC) No 45/2001. The data processing operation is carried out by a European Union institution and is carried out in the exercise of activities all or part of which fall within the scope of European Union law (Article 3(1)). It involves the collection, organisation, storage, retrieval, use, etc. of personal data (Article 2(b)) as part of the appraisal of certain members of staff. Such activities constitute partly automatic and partly manual processing (Article 3(2)). Therefore, the processing falls within the scope of Regulation (EC) No 45/2001.

The establishment of individual output indicators is clearly intended to evaluate personal aspects relating to the data subject, namely the performance of certain administrators in the PMO. The corresponding data processing operation is therefore subject to prior checking pursuant to Article 27(2)(b) of Regulation (EC) No 45/2001.

The DPO's notification was received on 18 April 2011. Pursuant to Article 27(4) of Regulation (EC) No 45/2001, this Opinion must be delivered within two months of that date. The procedure was suspended for 98 days while awaiting information from the relevant department. The EDPS must therefore deliver his opinion by 26 September 2011 at the latest (25 September being a Sunday).

3.2. Legal basis and lawfulness of the processing

Article 5 of Regulation (EC) No 45/2001 lays down criteria to ensure the lawfulness of processing of personal data. Under Article 5(a), processing must be necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instruments adopted on the basis thereof or else in the legitimate exercise of official authority vested in the European Union institution. Processing for the performance of tasks carried out in the public interest by the European Union institutions includes the processing of data necessary for the management and functioning of those institutions (Recital 27).

The processing in question takes as its basis the regulations governing the institution's relations with its staff, in particular Articles 43 and 100 of the Staff Regulations, Articles 15(2) and 87 of the Conditions of Employment of Other Servants of the European Union, the Commission Decision on general implementing provisions for Article 43 of the Staff Regulations, and the notes from the [PMO] Director to staff on the individual output indicator as part of the appraisal process.

The establishment of individual output indicators is considered necessary for the quantitative evaluation of the performance of certain members of staff at the PMO. In any event, the output indicators should contribute only in a non-exhaustive manner to the annual appraisal of certain administrators who must also have the right of access and the right to check and rectify data, as provided for in the example of the note from the Director (see point 3.5).

The EDPS notes that the processing does not have any specific legal basis. Given the specific risks, namely its influence on assessments of the performance of data subjects, the EDPS strongly recommends that the Commission **adopts a decision** on the processing of data carried out during the establishment of individual output indicators, which should describe that processing and its influence on the performance assessments. Moreover, that document should provide adequate guarantees to allow data subjects to rectify inaccurate data and to justify certain figures.

3.3. Data quality

In accordance with Articles 4(1)(a), (c) and (d) of Regulation (EC) No 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed, and be accurate.

Lawfulness has already been addressed (see point 3.2); accuracy and fairness must be examined from the perspective of the rights of the data subjects and the information given to them (see points 3.6 and 3.7 respectively).

With regard to proportionality, the data collected and processed in that respect (the identifier, the date and number of cases – see above) seem to be adequate, relevant and proportionate in relation to the establishment of individual output indicators.

3.3. Data retention

Pursuant to Article 4(1)(b) of Regulation (EC) No 45/2001, personal data may 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 processed subsequently, provided that the subsequent processing is compatible with the initial purposes.

In the light of the grounds put forward by the Commission, the EDPS considers that the storage period of one year following the appraisal process is in accordance with the Regulation.

3.4. Transfer of data

The EDPS notes that personal data processed in this context may be sent to line managers, the Business Intelligence Unit of the PMO², and ‘any other person designated on a need-to-know basis by means of delegation’. Moreover, in the event of a dispute, the data may be sent to the Legal Service of the Commission, the European Ombudsman, the EDPS and the Civil Service Tribunal.

Transfers to specified persons at the PMO may be regarded as necessary for establishing and using individual output indicators, whereas the aforementioned interinstitutional transfers [may be regarded as necessary] for the purposes of performing the specific task of supervision. Therefore, they are in accordance with Article 7 of Regulation (EC) No 45/2001, provided that all recipients process the data only for the purposes for which they were transmitted.

As regards transfers to ‘any other person designated on a need-to-know basis by means of delegation’, the EDPS notes that this includes any other person who, at the request of the controller, should have access to those data. Given that those recipients may be responsible to the Commission or another European institution, and also third parties, the EDPS requests that the Commission examines them on a case-by-case basis to ensure that Articles 7, 8 and 9 of the Regulation are observed.

3.5. Rights of data subjects

Articles 13 to 19 of Regulation (EC) No 45/2001 lay down certain rights of data subjects, including the right to access data on request, the right to rectify inaccurate or incomplete data and the right not to be subject to an automated decision.

The EDPS notes that data subjects may request access to and rectification of data by contacting the controller, and may request access to output data by simple request to their immediate superior.

The EDPS draws attention to the controller’s duty to guarantee the effective exercise of data subjects’ rights, in particular with regard to data generated automatically. In that regard, the EDPS recommends in particular that consideration be given to establishing a procedure whereby data subjects are able to contest the accuracy of data produced automatically before they are used for the appraisal.

3.6. Information for data subjects

The declaration of specific confidentiality on the PMO Intranet page contains most of the information laid down in Article 12 of Regulation (EC) No 45/2001. To complete that declaration, the EDPS recommends the addition of information on the origin of the data and the reason for processing automatically generated data.

(...)

4. Conclusion

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that the Commission should:

² Regarded as a sub-contractor, despite its direct hierarchical link with the controller.

- adopt a specific legal basis for the establishment of individual output indicators at the PMO, describing the processing operation carried out and its impact on performance assessments and providing adequate guarantees for the administrators concerned enabling them to rectify inaccurate data and/or justify certain figures;
- refrain from using individual indicators of productivity as the sole tool in the annual appraisal of the member of staff concerned, but ensure that other means of evaluation are used that take into account the point of view of the data subject;
- take measures to ensure that the administrators concerned can effectively exercise their rights of access and rectification;
- adopt appropriate guarantees in respect of data generated automatically to ensure that the data subjects' legitimate interests are taken into account, in particular by allowing them to provide justification for certain figures;
- amend the specific declaration of confidentiality in accordance with point 3.6 of this Opinion.

Done at Brussels, 23 September 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor