

## **Opinion on the notification concerning the administrative inquiries and disciplinary proceedings within the Translation Centre (“the TC”)**

Brussels, 6 July 2012 (Case 2011-0916)

### **1. Procedure**

On 23 April 2010, the EDPS adopted Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European institutions and bodies. On 10 October 2011, the Centre’s Data Protection Officer (“the DPO”) sent a notification to the EDPS regarding the administrative inquiries and disciplinary proceedings pursuant to Article 27(3) of Regulation 45/2001 (“the Regulation”).

The TC’s DPO stated in her letter that implementing rules relating to administrative and disciplinary inquiries would be adopted by the TC’s Management Board. On 25 May 2012, the EDPS therefore requested that the preliminary draft of those rules be sent to it so that it might make recommendations should that prove necessary. On 2 July 2012, the DPO sent a document adopted on 22 June 2012 entitled “Administrative rules on file handling and on the processing of personal data in the context of the Translation Centre’s Administrative Inquiries and Disciplinary Proceedings” (“the administrative rules”).

In its analysis, the EDPS highlights the practices which do not appear to comply with its Guidelines and makes related recommendations to the TC.

### **2. Prior checking**

The notification refers to only Article 27(2)(a) of the Regulation as the legal basis of the prior check in question. The administrative inquiries and disciplinary proceedings may in fact concern data relating to suspected offences, offences, criminal convictions or security measures within the meaning of Article 27(2)(a) of the Regulation. The processing operations in the present case are also intended to evaluate personal aspects relating to the data subject including his or her conduct, as provided for in Article 27(2)(b). It is for this reason that the prior checking of processing operations has two legal bases. The EDPS recommends that the TC add the second legal basis for such prior checking – Article 27(2)(b) of the Regulation – to the notification.

### **3. Lawfulness of the processing**

The EDPS points out that the objective of the implementing rules is not only to supplement the procedures in the field of administrative inquiries and disciplinary proceedings set out in Annex IX to the Staff Regulations of Officials, but also to provide further details of the processing conducted within that context.

In the present case, the document of 22 June 2012 does not describe any specific procedure and does not elaborate on the rules laid down in Annex IX to the Staff Regulations of Officials. The document makes reference only to the various data protection principles applied in the field of administrative inquiries and disciplinary proceedings. The EDPS thus regrets that the TC adopted the document before consulting it. Accordingly, the EDPS recommends that the TC evaluate whether, in the light of Article 30 of Annex IX to the Staff Regulations of Officials, the adoption of implementing rules is necessary. The TC shall inform the EDPS of the result of that evaluation.

#### **4. Processing of special categories of data**

The EDPS notes that the TC has produced a statement which is signed by the investigating officials in charge of disciplinary proceedings. That statement mentions that the processing of data provided for in Article 10(1) of the Regulation is prohibited, save where one of the exceptions laid down in Article 10(2) or (4) applies.

The EDPS recommends that that statement likewise be used in the case of investigating officials in charge of an administrative inquiry, and that it also make reference to the exceptional case provided for in Article 10(5) of the Regulation.

#### **5. Data quality**

##### ***Adequacy, relevance and proportionality***

In accordance with the Guidelines, the TC must add to Article 2 of its administrative rules that the principles of necessity and proportionality must also be applied to the reports on administrative inquiries and disciplinary proceedings as well as to the Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations).

#### **6. Conservation of data**

With regard to data from administrative inquiries without a disciplinary follow-up, the EDPS recommends that the TC adopt a conservation period which is reasonable and necessary having regard to the purposes for which the data were collected pursuant to Article 4(1)(e) [of the Regulation] and to the possibility of an action being brought. That period shall be stated in the information note. In this regard, the EDPS invites the TC to use similar prior check opinions as guidance, in particular its Opinion of 22 June 2011 (Case 2010-0752).

#### **7. Transfer of data**

##### **Internal transfers of data within the TC and between the TC and other EU institutions or bodies (Article 7)**

The EDPS notes that the TC has produced a statement to be signed by all internal recipients in the context of disciplinary proceedings in accordance with Article 7(3) of the Regulation. The EDPS recommends that that statement also be sent to all internal recipients in the context of an administrative inquiry.

##### **External transfers (Article 8)**

In the case of transfers to national authorities, the EDPS recommends that the TC adopt specific guidance and establish a justified and documented procedure on the basis of the EDPS Guidelines. More specifically, where the recipients are subject to Directive 95/46/EC, the criterion of necessity must be taken into account pursuant to Article 8 of the Regulation:

- where the data are transferred at the request of a national authority, that authority must establish the “necessity”;
- where the data are transferred at the sole initiative of the TC, it is for the TC to establish the “necessity” of the transfer in a reasoned decision.

## 8. Rights of access and rectification

### Right of access

As highlighted in the Guidelines, in the course of an administrative and disciplinary inquiry, data subjects are granted unrestricted access to the documents in their disciplinary file, as well as to the copies of the final decisions stored in their personal file. However, that access may be limited in the course of disciplinary proceedings if the application of restrictions under Article 20 of the Regulation is justified.

Article 6(1) of the administrative rules provides only for the restriction of the right of access pursuant to Article 20(1)(c) of the Regulation. That restriction is not the only one. It is for this reason that the EDPS recommends that the TC add to Article 6(1) of its administrative rules that the right of access may be restricted, should this prove necessary, in the light of Article 20 of the Regulation.

In addition to the people who are the subject of the inquiry, the other people involved in an administrative and disciplinary inquiry, such as whistleblowers, informants and witnesses, also have a right of access to their data. In this regard, the EDPS recommends that the TC state in Article 6(1) of its administrative rules that any restriction on the right of access of data subjects must be applied strictly – and on a case-by-case basis – in the light of the necessity of such a restriction, and that restriction must be balanced against the right of defence. In particular, the TC must add that:

- in the case of **whistleblowers, informants or witnesses**, any restriction to the right of access of these persons should be in line with Article 20 of the Regulation;
- the identity of whistleblowers should be kept confidential in as much as this would not contravene national rules regarding judicial proceedings.

### Right of rectification

The TC must indicate in Article 6(2) of the administrative rules the various means of guaranteeing the right of rectification in the context of an administrative and disciplinary inquiry. It must, for example, mention that data subjects are allowed to add their comments and to include a recourse or appeal decision in their file (complete file). Where applicable, data subjects may also ask that the disciplinary decision be replaced or removed from the file.

In addition, the EDPS observes that Article 6(2) of its administrative rules states that the right of rectification may be restricted pursuant to Article 20(1)(c) of the Regulation. As in the case of the right of access, the right of rectification may be restricted for reasons other than to guarantee the protection of the data subject or of the rights and freedoms of others. The EDPS therefore recommends that the TC mention in Article 6(2) of its administrative rules that the right of rectification may be restricted, should this prove necessary, in the light of Article 20 of the Regulation.

In the event of the restriction of the right of access or rectification, the controller must inform the data subject of the principal reasons for the application of that restriction and of his or her

right to have recourse to the EDPS in accordance with Article 20(3) [of the Regulation]. Any decision for deferral to that provision must be taken strictly on a case-by-case basis.

## **9. Information to be given to the data subject**

The EDPS notes that the TC has incorporated the majority of the elements mentioned in Articles 11 and 12 of the Regulation into the information note.

However, the information note makes no reference to Articles 13 and 14 of the Regulation. The EDPS therefore recommends that the TC include in the note the necessary information in relation to those rights.

In addition, the TC shall state in the information note the conservation period applicable to data from administrative inquiries without a disciplinary follow-up.

## **Conclusion**

The processing proposed does not appear to entail any infringement of the provisions of Regulation 45/2001, provided that account is taken of the observations made above. This means, in particular, that the TC should:

- add to the notification the second legal basis for prior checking, namely Article 27(2)(b) of the Regulation;
- evaluate whether, in the light of Article 30 of Annex IX to the Staff Regulations of Officials, the adoption of implementing rules is necessary. The TC shall inform the EDPS of the result of that evaluation;
- also send the statement (paragraph 4) to the investigating offices in charge of an administrative inquiry, and make reference in that statement to the exceptional case provided for in Article 10(5) of the Regulation;
- add to Article 2 of its administrative rules that the principles of necessity and proportionality must also be applied to the reports on administrative inquiries and disciplinary proceedings as well as to the Disciplinary Board reports;
- adopt a conservation period in cases in which an inquiry is closed without a disciplinary follow-up and state that period in the information note;
- also send the statement relating to Article 7(3) to all internal recipients in the course of an administrative inquiry;
- adopt, in the case of external transfers, specific guidance and establish a justified and documented procedure, taking into account the criterion of necessity pursuant to Article 8 of the Regulation;
- add to Article 6(1) of its administrative rules that the right of access may be restricted, should this prove necessary, in the light of Article 20 of the Regulation;
- mention in Article 6(1) of its administrative rules that any restriction on the right of access of whistleblowers, informants and witnesses must be applied strictly in the light

of the necessity of such a restriction, and that restriction must be balanced against the right of defence;

- state in Article 6(2) of its administrative rules the various means of guaranteeing the right of rectification in the context of an administrative and disciplinary inquiry;
- mention in Article 6(2) of its administrative rules that the right of rectification may be restricted, should this prove necessary, in the light of Article 20 of the Regulation;
- add to the information note the recommendations made in paragraph 9 of this Opinion.

Done at Brussels, 6 July 2012

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor