EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION 6/2025 ON THE PROPOSED AMENDMENTS TO THE EUROPEAN CENTRAL BANK'S LEGAL FRAMEWORK FOR REPORTING, INVESTIGATION, AND DISCIPLINARY FOLLOW-UP ON DATA PROTECTION PROVISIONS, AND THE APPLICATION OF THE RIGHT TO INFORMATION AND THE DUTY OF CONFIDENTIALITY PURSUANT TO ARTICLE 16(1)(d) OF THE REGULATION

(Case 2025-0024)

Executive Summary

EU institutions may initiate an administrative inquiry or a disciplinary proceeding in cases where a staff member is suspected for potential misconduct or fraud affecting the EU's interests, whether through intentional or negligent bad faith. It is essential to have robust data protection safeguards in place to protect the rights and freedoms of all individuals involved. A key principle in these proceedings is the preservation of the right to information, ensuring that individuals are aware of their data protection rights and how to exercise them.

However, the right to data protection is not absolute and may be subject to lawful and necessary restrictions in exceptional cases. This consultation examines how the duty of confidentiality under Article 16(5) (d) of the Regulation applies in such procedures and assesses potential limitations on the right to information during the preliminary investigation phase. The analysis seeks to balance transparency and confidentiality while upholding individuals' rights and ensuring regulatory compliance.

EUROPEAN DATA PROTECTION SUPERVISOR

Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 30 - B-1000 Brussels
E-mail: edps@edps.europa.eu
Website: edps.europa.eu
Tel.: 32 2-283 19 00 - Fax: 32 2-283 19 50

Table of Contents

1 INTRODUCTION

1. This Supervisory Opinion relates to the proposed amendments to the European Central Bank's ('ECB') legal framework for reporting, investigation, and disciplinary follow-up on data protection provisions, and assesses the application of the exception to provide information based on the duty to remain confidential under Article 16(5)(d) of Regulation (EU) 2018/1725 where personal data have not been obtained from the data subject.

2. The European Data Protection Supervisor ('EDPS') issues this Supervisory Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725)[1] ('the Regulation').

2 BACKGROUND INFORMATION

3. On 20 December 2024, the ECB formally consulted the EDPS on: i) the proposed draft amendments to its legal framework for reporting, investigation, and disciplinary follow-up and the data protection provisions contained, and ii) the right to information where personal data have not been obtained from the data subject and the exception of confidentiality under Article 16(5)(d) of Regulation (EU) 2018/1725, specifically in the case where the 'preliminary phase' of an investigation under Chapter IV, Article 13 of Annex XI of the EU Staff Rules has been finalized and the decision has been taken not to proceed to an administrative inquiry.

3 LEGAL AND TECHNICAL ASSESSMENT

3.1 Purpose and scope of Supervisory Opinion

4. The present opinion aims at providing recommendations to ensure compliance of the amendments of the ECB's legal framework for reporting, investigation and disciplinary follow-up in relation to any data protection matters with the Regulation. It also focuses on analysing the application of the duty of confidentiality under Article 16 (5) (d) of the Regulation and the potential limitation of the right to information in the preliminary investigation phase.

5. This opinion draws on the EDPS Guidelines on processing personal information in administrative inquiries and disciplinary proceedings which were issued on 18

[1] Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

November 2016 ("the Guidelines")[2] as well on the EDPS "Guidance on Article 25 of the new Regulation and internal rules" of December 2018.[3]

3.2 Restriction of Data Subject Rights

6. The EDPS welcomes the fact that Article 6 (2) of Annex XI of the ECB Staff Rules provide for restrictions on the application of data subject rights, only when they are based on internal rules, which provide a clear legal basis thereto. The EDPS underlines that data subject rights should be scrupulously respected and can be restricted only in exceptional circumstances and when appropriate safeguards are in place[4], in accordance with Article 25 (1) of the Regulation. The EDPS notes that a reference to the ECB's internal rules on data subject rights restrictions, as well as the specified conditions for applying the restrictions, is missing from Article 6 (2) of Annex XI of the ECB Staff Rules.

7. **Recommendation 1:** The EDPS **deems necessary** that the ECB add a provision under Article 6(2) of Annex XI of the ECB Staff Rules to specify the conditions under which restrictions can apply in accordance with Article 25 (1) of the Regulation and include a reference to the ECB's internal rules on data subject rights restrictions. Any restriction must be a necessary and proportional measure, taken strictly on a case-by-case basis, and the reasons of the decision should be documented.

3.3 Retention period

8. Article 4(1)(e) of the Regulation underlines the storage limitation principle under which personal data must not be kept longer than necessary for the purpose for which they are collected or further processed. The EDPS notes that Annex XI of the ECB Staff Rules does not define retention periods for the personal data processed.

9. **Recommendation 2:** The EDPS **deems necessary** that the ECB adopt specific retention periods for the personal data kept in the pre-inquiry, in the inquiry and in the disciplinary files[5], depending on the outcome of each case.

10. When setting out retention periods, careful consideration should be given to the data subject's legitimate interests and avoid leaving unnecessary traces of personal data which might raise implications in their working environment or have negative consequences in their professional career. Specifically, when a preliminary assessment results in the case being closed without any further inquiries, it is recommended that any pre-inquiry information should not be included in the alleged staff member's personal file. The EDPS notes that Annex XI of the ECB Staff Rules

[2] https://www.edps.europa.eu/sites/default/files/publication/16-11-18_guidelines_administrative_inquiries_en.pdf.
[3] https://www.edps.europa.eu/sites/default/files/publication/18-12-20_guidance_on_article_25_en.pdf.
[4] See Section 4 of EDPS Guidance on Article 25 of the new Regulation and internal rules, December 2018.
[5] Section 11 para. 53 of EDPS Guidelines on processing personal information in administrative inquiries and disciplinary proceedings, 18 November 2016, https://www.edps.europa.eu/sites/default/files/publication/16-11-18_guidelines_administrative_inquiries_en.pdf.

does not specify a retention period of the pre-inquiry file, including a maximum duration and the possibility of earlier deletion.

11. **Recommendation 3:** The EDPS **deems necessary** that the ECB define the retention period for the personal data kept in the pre-inquiry file, which should not exceed two years from the date of the pre-investigation decision. Additionally, the ECB should establish clear criteria to define the erasure of personal data before the expiration of the retention period[6], when justified and deemed necessary.

3.4 Special categories of personal data

12. Personal data related to a suspicion of wrongdoing or misconduct is by nature considered as processing of sensitive data.[7] In the context of the reporting, investigation and disciplinary process, personal data *revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life*[8] might be collected and processed, such as sickness related information, political affiliations, religious beliefs. Processing of such special categories of personal data is in principle prohibited, unless the conditions under Article 10(2) of the Regulation are met. The EDPS outlines in the Guidelines one possible option for the processing of special categories of personal data in the context of an inquiry, which is the necessity to comply with the obligations and rights of ECB in the field of employment law, insofar as it is authorised by EU law[9]. In such cases, establishing a specific legal basis for the inquiry is a prerequisite for the processing of special categories of personal data. The EDPS notes that no such specific legal basis and no enhanced protection and stricter rules for the processing of such data can be found in Annex XI of the ECB Staff Rules.

13. **Recommendation 4:** The EDPS **deems necessary** that the ECB includes in Annex XI of the ECB Staff Rules a provision relating to the processing of special categories of data which will set out the conditions to allow for their lawful processing. The ECB should additionally assess and specify the appropriate legal basis for the processing, in accordance with Article 10(2) of the Regulation.

3.5 Involvement of the DPO

14. Article 20 (2) of Annex XI of the ECB Staff Rules details the role of the DPO and their involvement in the pre-investigative process. The decision on the investigative methods, the categories of personal data to be processed, the safeguards to be applied, and the need for a balancing test rests with the ECB's Director of Internal

[6] General EDPS comments on retention periods, Third revision of the Common Retention List of the European Commission (Case number 2022-0659), https://www.edps.europa.eu/system/files/2023-06/23-06-05_third_revision_common_retetion_list_european_commission_en.pdf.
[7] EDPS Guidelines on processing personal information in administrative inquiries and disciplinary proceedings, 18 November 2016, para 27, https://www.edps.europa.eu/sites/default/files/publication/16-11-18_guidelines_administrative_inquiries_en.pdf.
[8] Article 10(1) of the Regulation.
[9] Section 6 paragraph 29 EDPS Guidelines on processing personal information in administrative inquiries and disciplinary proceedings, 18 November 2016, https://www.edps.europa.eu/sites/default/files/publication/16-11-18_guidelines_administrative_inquiries_en.pdf.

Audit, in consultation with the Data Protection Officer. Nevertheless, the EDPS would like to recall that the involvement of the DPO should not merely be limited to the pre-investigation phase. The DPO should actively be involved in the overall investigation procedure, and provide advice and guidance in any matter affecting the data protection rights and freedoms of the data subject.

15. **Recommendation 5:** The EDPS therefore **recommends** that a clarification be added in this regard in Article 20 of Annex XI of the ECB Staff Rules, to underline the active presence of the DPO in any matter related to the processing of personal data throughout the whole investigation process, in accordance with Article 44(1) of the Regulation.

3.6 Assessment of the right to information and the duty to remain confidential under Article 16(5) (d) of the Regulation

3.6.1. The right to information

16. EUIs process personal data that they receive either directly or indirectly from data subjects, in order to pursue their legitimate activities. As specified in Article 16 of the Regulation, data subjects generally have the right to be informed when their personal data that has not been obtained from them is processed. Therefore, EUIs have a duty to inform data subjects when they process their personal data, within a reasonable timeframe, which is typically within one month of the data being collected, or if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject; or if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.[10]

17. All data subjects implicated in an inquiry or disciplinary proceeding should be informed about how their personal data will be processed in that regard. This transparency requirement can be met by publishing a privacy notice that is easily accessible, visible and includes all data protection relevant information for reporting, investigation and disciplinary proceedings.

18. **Recommendation 6:** The EDPS **deems necessary** that the ECB ensure compliance with the right to be informed by issuing a data protection notice that generally covers the processing of personal data during the reporting, investigation and disciplinary process. Such data protection notice should include all elements stated in Article 16 of the Regulation, refer to any restrictions which might be applicable, and should be published on the ECB website or intranet[11].

19. It is important to distinguish between *general* information to be provided (Recommendation 6 above), and *specific* information to be shared with the concerned

[10] Art 16 (3) (a), (b), (c) of the Regulation.
[11] See Paragraph 56 of EDPS Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects rights, https://www.edps.europa.eu/sites/default/files/publication/20-06-24_edps_guidance_on_article_25_of_the_new_regulation_and_internal_rules_en.pdf.

data subjects, who are the subjects in an inquiry, investigation or disciplinary action. These data subjects should be notified as soon as possible that they are part of the process, and should be given the relevant privacy notice. Specifically, information should be provided at the formal initiation of an inquiry, any subsequent stages, and upon its conclusion[12].

3.6.2. Exceptions to the right to information

20. The Regulation provides for certain exceptions to the obligation to inform data subjects about the processing taking place, for example, when the obligation to inform the data subject would seriously impair the achievement of the objectives of an investigation and compromise it[13], or where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union law, including a statutory obligation of secrecy.[14]

21. The preliminary phase of an investigation by the ECB is the initial stage where the focus is to gather information and determine whether the main investigation should be launched. The investigators collect the information, review the evidence and strike to identify the issue, with the goal to establish reasonable grounds to proceed with the main investigation and decide whether it is the necessary course of action.

22. The question that the ECB has raised and seeks advice on in this consultation is whether, during the preliminary phase of a specific investigation, which results in the closure of the case without launching an administrative inquiry, the concerned individual should be informed within 30 days pursuant to art. 16 of the Regulation, or if the exception of confidentiality under Article 16(5)(d) of the Regulation applies in cases where the ECB Staff Rules, as adopted by the Governing Council, establish such an obligation of secrecy, provided that a general privacy notice is published.

3.6.3. Exception under Article 16(5) (d)

23. Article 16 (5)(d) of the Regulation allows for an exception to the obligation to provide information to the individual where the personal data have not been obtained directly from them, where the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union law, including a statutory obligation of secrecy.

[12] Section 9 paragraph 40 EDPS Guidelines on processing personal information in administrative inquiries and disciplinary proceedings, 18 November 2016, https://www.edps.europa.eu/sites/default/files/publication/16-11-18_guidelines_administrative_inquiries_en.pdf.
[13] Article 16(5) (b) of the Regulation.
[14] Article 16(5) (d) of the Regulation.

24. Therefore, it has to be assessed in the context of this specific consultation request received by the ECB, under what circumstances Article 16 (5) (d) of the Regulation could be invoked by the ECB.[15]

3.6.4. "Remain confidential"

25. Article 17 of the EU Staff Regulations sets out a duty of confidentiality for EU staff[16], covering any information they acquire in the exercise of their duties, including personal data, internal documents, and communications. Confidentiality is a broad concept in the context of EU law, and refers to the protection of all types of sensitive information from unauthorized access or disclosure. It is a statutory obligation, which every EU staff must follow, and respect, and is essential to ensure the proper functioning, trust, and integrity of the EUIs' operations. Confidentiality constitutes a fundamental duty, reason why it applies not only during the term of employment, but also upon the termination of the employment relationship.

26. The duty of confidentiality also applies in the context of reporting, investigations, and disciplinary proceedings, to ensure that the data protection rights of all individuals involved are protected. Any personal data relating to a staff member, the alleged victims, informants, or witnesses must remain confidential, be processed only on a need to know basis, and not be disclosed to any unauthorized parties. Maintaining the confidentiality of such information is crucial, as it upholds individuals' rights to report wrongdoing and trust that their employer will protect their privacy.

3.6.5. "Obligation of professional secrecy"

27. Professional secrecy is primarily grounded in the protection of confidentiality within specific professional relationships, such as those between lawyers and their clients, doctors and patients, or other professionals bound by similar duties, such as tax, healthcare, social work, law, and human resources[17]. For instance, Article 16(5) (d) would be applicable in case of lawyers or medical practitioners who are not allowed to disclose information obtained when practicing their profession[18].

28. However, the exact scope of the professional secrecy obligation remains unclear, particularly regarding whether it should be confined to specific professions (e.g. lawyers, doctors) as outlined in national laws (i.e. Art 458 of Belgian criminal law[19])

[15] There is lack of specific legal guidance on this issue, as neither the EDPS nor the Court of Justice has issued any Opinion or Guidance on this specific provision.
[16] Article 17 (1) of EU Staff Regulation, "An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public".
[17] See ICO, Are there any exceptions, https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/the-right-to-be-informed/are-there-any-exceptions/.
[18] Section 4 Exemptions of Article 14, The EU General Data Protection Regulation, A Commentary, Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford.
[19] Article 458 Belgian Criminal Code, "Doctors, surgeons, health officers, pharmacists, midwives and all other persons who, by virtue of their state or profession, have knowledge of secrets entrusted to them and disclose them outside the case that they are called upon to testify in court [or before a parliamentary committee of inquiry] and outside the case where they are required by law to disclose those secrets, shall be punished with imprisonment of eight days to six months and a fine of one hundred [euro] to five hundred [euro]".

or, whether it should be broader, encompassing situations that may give rise to professional secrecy, such as for investigators in alleged misconduct in the workplace. National laws have established this special protection for professional secrecy in cases where they deem the confidentiality of entrusted information to be of greater social importance than other values and interests[20].

29. Under Article 339 of the Treaty on the Functioning of the EU ("TFEU"), all EU officials and staff members ("EU staff") are legally bound by the duty of confidentiality and must not disclose information that is covered by the obligation of professional secrecy[21].

30. While both professional secrecy and confidentiality aim at protecting sensitive information within the EUIs and seem to overlap, they are distinct notions. In contrast to confidentiality, which is a general principle applying to various forms of sensitive information, professional secrecy, as enshrined in Art 339 TFEU, is tied to specific obligations imposed on EU staff, and prohibits the disclosure of certain types of information, such as internal deliberations, negotiations, and personal data. Some examples are the duty of professional secrecy imposed to the Data Protection Officer of the EUIs[22], or the EDPS staff[23] in the performance of their duties.

31. While the EU law provides a framework, there is not a single, comprehensive Union legal act governing professional secrecy across all sectors. National laws provide more guidance on the subject. For instance, each EU Member state has its own regulations regarding the duty of confidentiality in professions like law (e.g. Article 43a (2) of the German Bundesrechtsanwaltordnung), healthcare (e.g. Article 458 of Belgian Criminal Code), and accounting. These national laws may also provide for specific exceptions or limitations to professional secrecy, often in cases of suspected criminal activity or threats to public safety.

3.6.6. "regulated by Union law and statutory obligation of secrecy"

32. The EDPS notes that for the obligation of professional secrecy to be applicable, it must be "regulated by Union law, including a statutory obligation of secrecy". *The duty of professional secrecy must be explicitly 'recognised' in 'Union law', which encompasses EU primary laws* (i.e. EU Treaties), *general principles of EU law, EU secondary laws*(regulations, directives, decisions, recommendations and opinions)[24] *and the case law of the Court of Justice of the EU. It might also encompass internal rules of the EUIs as long as they meet the requirements to be considered 'Union law' under*

[20] Professional secrecy section p. 4, sharing confidential research data vs duty of discretion and professional secrecy, KU Leuven Legal Department, February 2023, https://research.kuleuven.be/en/integrity ethics/ethics/committees/smec/documenten-1/documents-guidance/sharing-confidential-research-data-english.pdf.
[21] Article 339 TFEU, (ex Article 287 TEC),"The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components".
[22] Article 44 (5) of the Regulation.
[23] Article 56 of the Regulation.
[24] Types of EU law, European Commission, https://commission.europa.eu/law/law-making-process/types-eu-law_en.

Recital 23 of the Regulation[25]. In short, it needs a legal framework within Union law to be upheld, and must be grounded either in primary or in secondary law.

33. The term "statutory" suggests that the secrecy obligation is not discretionary, but rather a binding legal requirement. In other words, the requirement for professional secrecy cannot be merely set out in internal administrative rules of an Institution, but rather be included in a binding EU legal instrument, such as a legal act, regulation, or directive. To summarize, the duty of professional secrecy requires the following key elements: a) explicit grounding in Union Law, and b) establishment through legislation passed by a legislative body or through binding rules under Union law.

34. A key question at this stage is whether a confidentiality and professional secrecy provision in the ECB Staff Rules can be applied to justify the application of Article 16(5)(d), allowing the Institution to refrain from informing the concerned individual upon the closure of the case after the pre-investigation phase, when no further action is taken.

35. The ECB Staff Rules, adopted by the Governing Council, are grounded on the Statute of the European System of Central Banks and of the European Central Bank ("ECB Statute")[26], which is incorporated into EU law through the TFEU. As they are binding rules established under Union law, they fulfil both key conditions outlined in paragraph 33 above. As such, the ECB Staff Rules constitute a legal framework established by Union Law.

36. However, this element alone is not sufficient to conclude that a professional secrecy duty outlined in the ECB Staff Rules can trigger the application of Article 16(5) (d) of the Regulation and in this way override the individual's right to information. A generalized reliance on staff confidentiality provisions, without a thorough, case-by-case assessment on the data subject's rights and the justification for the need of maintaining confidentiality, would undermine data subjects' rights and violate the principle of proportionality.

37. The right to data protection is not an absolute right and must be balanced against other fundamental rights[27]. Regulation (EU) 2016/679, the General Data Protection Regulation ("GDPR"), gives specific attention to the duty of professional secrecy, and sets out in Article 90 and Recital 164 specific rules to be adopted by Member States to specify the powers of the Supervisory Authorities in relation to the preservation of the professional secrecy obligations, and to strike the right balance with the right to the protection of personal data.

---

[25] Transfers based on derogations for specific situations, EDPS, International Transfers, https://www.edps.europa.eu/data-protection/data-protection/reference-library/international-transfers_en.

[26] Article 21 of the Decision of the European Central Bank, 19 February 2004, https://www.ecb.europa.eu/pub/pdf/other/ecbinstitutionalprovisions2011en.pdf.

[27] See Recital 4 GDPR.

38. The obligation of confidentiality and professional secrecy is particularly crucial in reporting, investigations and disciplinary actions, to safeguard the rights of other parties involved and ensure their integrity and proper conduct. Any information transferred from the alleged victims, informants, or witnesses, must be protected as confidential, respect their own data protection rights and mostly, their rights to report any matters on wrongdoing, such as for harassment[28], fraud[29], whistle-blowing[30]. If those third parties are not encouraged to participate in the process or have the fear they might be revealed, the reporting, investigative or disciplinary proceedings won't perform in a proper manner and will violate their own field-specific rules.

39. The investigators shall not disclose any detail with regard to any confidential information which has come to their knowledge during the conduct of the inquiry. There have been cases, such as in OLAF investigations, that the EDPS has outlined the legal obligation of the EUIs to ensure that both the confidentiality of investigations and the legitimate interests of the individuals involved are upheld [31]. On the other hand, the right to be informed is a fundamental right, enabling transparency and individuals to exercise control over their data protection rights. Any attempt to override this right would require a robust justification and compelling ground. A balancing test should be conducted to weigh the data subject's right to information against the need to protect the integrity and confidentiality of the pre-investigation and the rights of third parties.

40. In the specific context of the pre-investigation phase, which leads to the closure of the case rather than an administrative inquiry, the EDPS considers it disproportionate to justify prioritizing the professional secrecy of the investigators over the individual's right to data protection in general, without a concrete, case-by-case assessment. Therefore, the conditions of the exception under Art. 16 (5) (d) would not be met.

41. **Recommendation 7:** The EDPS **deems necessary** the ECB explore alternative solutions within the Regulation and not apply Article 16 (5) (d), if it deems necessary to withhold information from the concerned individual while preserving the confidentiality of the investigation process.

3.6.7. Exception of serious impairment of objectives Article 16 (5) (b)

42. The EDPS would suggest that the ECB consider an alternative legal ground provided in the Regulation for not informing the concerned individual after the closure of the

[28] EDPS Anti-harassment procedures, https://www.edps.europa.eu/data-protection/data-protection/reference-library/anti-harassment-procedures_en.
[29] EDPS Anti-fraud procedures, https://www.edps.europa.eu/data-protection/data-protection/reference-library/anti-fraud-procedures_en.
[30] EDPS Whistleblowing, https://www.edps.europa.eu/data-protection/data-protection/reference-library/whistleblowing_en.
[31] Paragraph 16, EDPS opinion on the interpretation of Article 3(13) of the regulation in the context of the information provided to data subjects pursuant to articles 15(1)(d) and 16(1)(e) of the regulation and restrictions Under article 25 of the regulation (case 2021-0786), 17 December 2017, https://www.edps.europa.eu/system/files/2022-01/21-12-17_edps_opinion_article_313_en.pdf.

pre-investigation phase, namely the exception to data subjects' right to information provided in Article 16 (5) (b) of the Regulation. This exception applies when "*the provision of such information proves impossible or would involve a disproportionate effort*, [...] *or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing*". In other words, it is applicable in cases where disclosing the information would undermine the effectiveness of the processing, such as when it could compromise an investigation, harm the safety of individuals, or impede the intended outcomes of the processing activities.

43. To be able to invoke this exception, the ECB must demonstrate that providing the information outlined in Article 16 (5) (b) alone would nullify the objectives of the processing[32]. It is important to highlight that Article 29 Working Party specified that the data protection principles in Article 5 of the GDPR must be met to rely on Article 14 (5)(b) of the said Regulation and that in all of the circumstances, the processing of the personal data must be fair and that have a legal basis[33].

44. A relevant example of this exception being applied is by the Commission in the context of an informal procedure concerning allegations of psychological or sexual harassment, where it was determined that informing the alleged harasser would seriously undermine the objectives of processing[34]. As a result, the Commission invoked Article 16(5) (b) to preserve confidentiality[35]. It is significant to mention that the WP 29 Guidelines give great importance to the transparency principle[36], and underlines that the exceptions to the right of information in the case of indirect collection should be narrowly interpreted and applied. While the indirect collection of personal data poses difficulties to transparency, controllers should strive to find solutions and provide information to the individuals about the processing[37].

45. **Recommendation 8:** The EDPS **deems necessary** that, if the ECB wishes to rely on the exception of Article 16 (5) (b) of the Regulation, it should justify and document the reasons for its application, demonstrating that the conditions of this provision are met, in each and every individual case. Additionally, the ECB should ensure transparency, by making the all relevant information about the processing of personal data during the reporting, investigation and disciplinary process publicly available through a privacy notice on the Institution's website, without directly providing it to the concerned individual.

[32] WP29 Transparency Guidelines, p31.
[33] WP29 Transparency Guidelines, p31.
[34] Recital 15, Commission Decision (EU) 2024/1043 of April 2024, laying down internal rules concerning the restriction of certain data subjects' rights in the context of processing of personal data by the Chief Confidential Counsellor and the confidential counsellors in the performance of the tasks relating to the prevention of and fight against psychological and sexual harassment.
[35] Idem No 34.
[36] WP29 Transparency Guidelines, p28.
[37] Exemptions of Article 14 The EU General Data Protection Regulation, A Commentary, Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, p447.

3.6.8. Restrictions of data subject's rights

46. It is important to distinguish the two notions of restriction of data subjects' rights under Article 25 of the Regulation, and of the exceptions to the right to be informed under Article 16 of the Regulation. When the exceptions of Article 16 (5) of the Regulation apply, there is no need to apply the restrictions to the right to information[38], and vice versa.

47. If the conditions for applying Article 16(5) (b) cannot be met in the individual case, the ECB should consider restricting the right to information in accordance with Article 25 of the Regulation in order not to inform the concerned individual about the processing of their personal data after the closure of the pre-investigation phase. To be lawful, the restriction must be provided in a legislative measure, respect the essence of the fundamental rights and freedoms at issue, be a necessary and proportionate measure in a democratic society and meet one of the grounds set out in Article 25 (1) of the Regulation[39]. The connection between the intended restrictions and the objective being pursued should be clearly outlined and substantiated in the relevant legislative measure.

48. In the specific case of the conclusion of the pre-investigation phase, for the right to information to be restricted, the controller must establish a link with one of the legal grounds outlined in Article 25 (1) of the Regulation. The restriction of the right to information may, for instance, be necessary to prevent jeopardizing the success of the investigation, either:

    -a) in accordance with Article 25 (1) (b) of the Regulation, which covers the "prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties including the safeguarding against and the prevention of threats to public security". This ground is relevant for investigations which concern a criminal offence, anti-money laundering cases, activities of forensic laboratories etc. However, in line with the case law of the Court of Justice of the EU, the omitted information must be provided once it is no longer deemed to jeopardize the investigation being carried out[40]. This implies that a specific, tailored data protection notice should be promptly issued to the data subject, outlining their various rights.

    - Or, b) in accordance with Article 25 (1) (f) of the Regulation, which covers the "prevention, investigation, detection and prosecution of breaches of ethics for regulated professions". This ground includes breaches of ethics for professions such as lawyers, medical doctors, and is not in principle related with criminal offences.

[38] Recital 15 of 2024/1043 COMMISSION DECISION (EU) 2024/1043 laying down internal rules concerning the restriction of certain data subjects' rights in the context of processing of personal data by the Chief Confidential Counsellor and the confidential counsellors in the performance of the tasks relating to the prevention of and fight against psychological and sexual harassment, 9 April 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401043.
[39] See for the GDPR, Section 2, EDPB Guidelines 10/2020 on restrictions under Article 23 GDPR, October 2021.
[40] Opinion 1/15 of the CJEU (Grand Chamber) on the Draft PNR Agreement between Canada and the European Union, 26 July 2017, ECLI:EU:C:2017:592.

49. It is crucial to emphasize that this restriction must be in compliance with the principle of fairness and applies solely to information provided proactively to the concerned individual, not to general data protection notices that include information about potential restrictions of information for a specific period[41]. In this regard, the Article 29 Working Party has stated that "transparency requires data controllers to provide adequate upfront information to data subjects about their rights and any particular caveats to those rights which the controller may seek to rely on so that the data subject is not taken by surprise at a purported restriction of a particular right when the later attempts to exercise it against the controller"[42].

50. **Recommendation 9:** In light of the above analysis, the EDPS **deems necessary** that, if the ECB intends to rely on any of the exceptions of Article 25 of the Regulation, it should provide a justification and documentation for the reasons for its application, and ensure that the conditions of this provision should be fulfilled, such as, performing a necessity and proportionality test, finding the right ground for the restriction, and adopt legal acts or internal rules, following the requirements of Article 25 (2) of the Regulation.

4 CONCLUSIONS

51. In light of the above, the EDPS has outlined several critical steps to support the ECB in ensuring compliance with the Regulation concerning the processing of personal data during the reporting, investigations and disciplinary proceedings. The EDPS **deems necessary** that the ECB:

52. Specify the conditions under which restrictions can apply in accordance with Article 25 of the Regulation and include a reference to the ECB's internal rules on data subject rights' restrictions (Recommendation 1).

53. Adopt proportionate retention periods for the personal information kept in the pre-inquiry, in the inquiry and in the disciplinary files (Recommendation 2).

54. Specifically, for the pre-inquiry information, define the criteria for the maximum retention period which should not exceed two years and the erasure where appropriate (Recommendation 3).

55. Include a provision on special categories of data, specifying the legal basis and listing the conditions to allow for their lawful processing (Recommendation 4).

[41] Paragraph 10, EDPS Guidance on Article 25 of the new Regulation and internal rules, December 2021, https://www.edps.europa.eu/sites/default/files/publication/18-12-20_guidance_on_article_25_en.pdf.
[42] Paragraph 68, WP29 Transparency Guidelines, p33.

56. Include a privacy notice in the EUI's website devoted on the topic of reporting, investigations and disciplinary proceedings (Recommendation 6).

57. Consider alternative solutions within the Regulation and avoid applying Article 16 (5) (d), if withholding information from the concerned individual is necessary to preserve the investigation's confidentiality (Recommendation 7).

58. Assess and document the reasons for applying the exception to the right to information of Article 16 (5) (b) of the Regulation, and ensure that all conditions of this provision are met. (Recommendation 8).

59. Assess and document the reasons for applying the restriction to the right to information of Article 25 of the Regulation, and ensure that all conditions of the provision are met. (Recommendation 9).

The EDPS **recommends** that the ECB:

60. Clarify the active presence of the DPO in the overall investigation process, in any matter related to the processing of personal data (Recommendation 5).

In light of the accountability principle, the EDPS expects ECB to implement the above recommendations accordingly and has decided to **close the case**.

Done at Brussels