

From: European Data Protection Supervisor
To: [REDACTED]
CC: [REDACTED]
Sent at: 03/03/20 19:22:04
Subject: Our ref.: 2019-0214 - D 0521

Dear Sir,

Please find attached a letter and its annex, signed by Mr WIEWIÓROWSKI, for the above mentioned subject.

Kind regards,

EDPS Secretariat



| Tel. (+32) 228 31900 | Fax +32(0)22831950 |

Email edps@edps.europa.eu

European Data Protection Supervisor

Postal address: Rue Wiertz 60, B-1047 Brussels

Office address: Rue Montoyer 30, B-1000 Brussels

 [@EU_EDPS](https://twitter.com/EU_EDPS)  www.edps.europa.eu

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WOJCIECH RAFAŁ WIEWIÓROWSKI
SUPERVISOR

By email only: [REDACTED]

03 MAR 2020

Brussels,

[REDACTED] D(2020) 0521 C 2019-0214

Please use edps@edps.europa.eu for all correspondence

**Subject: Your complaint submitted to the European Data Protection Supervisor
(Case 2019-0214)**

Dear [REDACTED]

We are writing to you with reference to the complaint you submitted to the European Data Protection Supervisor (the EDPS) on 23 February 2019, which concerns the right to erasure.

Please find attached the EDPS decision with regard to the complaint against the European Court of Auditors (ECA) referred to in the subject line (Case 2019-0214).

Both you and ECA may ask for a review by the EDPS of the present Decision within one month of receiving this letter. The request for revision should be lodged with the EDPS in writing and contain new factual elements or legal arguments which so far have not been taken into account by the EDPS.

Both you and ECA may bring an action for annulment against this decision before the Court of Justice of the European Union, within two months¹ from the adoption of the present Decision and according to the conditions laid down in Article 263 TFEU.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI

Cc: [REDACTED], ECA

¹ Please note that any request for revision of the present Decision lodged with the EDPS does not interrupt this deadline.

Data Protection Notice

According to Articles 15 and 16 of Regulation (EU) 2018/1725 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, please be informed that your personal data will be processed by the EDPS, where proportionate and necessary, for the purpose of investigating your complaint. The legal basis for this processing operation is Article 57(1)(e) of Regulation (EU) 2018/1725. The data processed will have been submitted by you, or from other sources during the inquiry of your complaint, and this may include sensitive data. Your data will only be transferred to other EU institutions and bodies or to third parties when it is necessary to ensure the appropriate investigation or follow up of your complaint. Your data will be stored by the EDPS in electronic and paper files for up to ten years (five years for prima facie inadmissible complaints) after the case closure, unless legal proceedings require us to keep them for a longer period. You have the right to access your personal data held by the EDPS and to obtain the rectification thereof, if necessary. Any such request should be addressed to the EDPS at edps@edps.europa.eu. Your data might be transferred to other EU institutions and bodies or to any third parties only where necessary to ensure the appropriate handling of your request. You may also contact the data protection officer of the EDPS (EDPS-DPO@edps.europa.eu), if you have any remarks or complaints regarding the way we process your personal data. You can find the full version of our data protection notice on complaint handling at: https://edps.europa.eu/data-protection/our-role-supervisor/complaints-handling-data-protection-notice_en.



Decision of the European Data Protection Supervisor in complaint case 2019-0214 submitted by [REDACTED] against European Court of Auditors

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU and Regulation (EU) No 2018/1725 ('the Regulation'),

Has issued the following decision:

PART I - Proceedings

On 23 February 2019, [REDACTED] (the complainant), a former staff member of the European Court of Auditors (ECA), submitted a complaint to the European Data Protection Supervisor (EDPS) against ECA, registered under number 2019-0214.

On 14 June 2019, the EDPS requested comments from ECA in relation to this complaint. ECA provided their comments on 12 July 2019. On 8 August 2019, a copy of ECA's reply was sent to the complainant. On 1 September 2019, the complainant provided his comments on ECA's reply.

PART II - The facts

The complainant was employed as an official at ECA during the years 2009-2010. On 13 January 2019, the complainant sent an e-mail to ECA requesting access to his personal data, an electronic copy of his personal data, and, following the receipt of this copy, the complete erasure of all his personal data held by ECA.

On 12 February 2019, the data protection officer (DPO) of ECA confirmed by letter that some personal data of the complainant are stored at ECA. ECA provided a list of the type of personal data processed and a link where the complainant could securely download his personal data. The complainant's request for erasure of his personal data was dismissed since "the retention periods are not yet expired".

Allegations of the complainant

In his complaint of 23 February 2019, the complainant alleged that ECA had infringed his right under Article 19 of the Regulation to have his personal data erased by not granting his request for his personal data to be deleted. The complainant also claimed that the data retention periods are excessive in the sense of Article 4(1)(e) of the Regulation, since some personal data (included in staff notices, audit reporting and ECA-Journal), are kept forever.

Furthermore, the complainant mentioned that ECA infringes Article 4(1)(b), (c) and (e) of the Regulation by not justifying why it needs to keep the complainant's personal file for 120 years after his date of birth. Since he is no longer a staff member of ECA, there is no justification, according to the complainant, for keeping his personal data for staff management purposes. Finally, the complainant indicated that by failing to explain the purpose of this continuous processing of his personal data, and the legal obligations relied upon to determine the retention period, ECA infringed his right to receive information under Article 17 (1)(a) and (d) of the Regulation.

Comments from ECA as data controller

In their letter, ECA indicated that the legal basis for archiving the personal data is ECA's Decision 78-2007 on archive management. According to ECA, this Decision regulates how the archives are managed in order to comply with their numerous legal obligations arising from "the Financial Regulation; the Staff Regulations, decisions taken by the Heads of Administrations of the EU institutions, the data protection Regulation, international audit standards and other applicable legal instruments". ECA noted that in 2009, they established retention periods for various documents and this retention plan mostly follows the same retention periods adopted by the European Commission. ECA further provided explanations on the retention period covering specific types of personal data in the case at hand.¹

The complainant's observations on the comments from the data controller

In his observations, the complainant argued that the internal rules currently used by ECA are not compatible with the right to erasure as set out in Article 19 of the Regulation. He noted that the information provided by ECA only relates to their management of the files, but does not concern the procedure or safeguards allowing the data subject to exercise his rights under the Regulation.

- The complainant further noted that it is "unclear what is the exact purpose for processing specific data", referring to all the information contained in the personal file as an example, which, based on ECA's explanation, is needed for the establishing potential pension rights. The complainant put forward that some of this information is required to achieve that purpose, but not all of it. Therefore, the complainant argued that only the necessary information for establishing pension rights should be kept and the remaining information should be deleted.
- The complainant further declared that, based on the reply from ECA, he could not understand why his personal information contained in the payroll files or medical files should be kept by ECA.
- As regards his personal data contained in audit reports, staff notices and ECA-Journal, the complainant argued that ECA does not comply with the requirements of Article 13 of the Regulation. In particular, the complainant suggested that ECA use anonymisation or pseudonymisation techniques for the purpose of archiving these documents.

In light of the above arguments, the complainant requested that only the information needed for establishing pension rights should be kept by ECA, and the remaining information should be deleted from his personal file. As regards his personal data in the archived documents, he requested these to be anonymised or, at least, pseudonymised.

¹ See below under Part III, section B.

PART III - Legal analysis

Admissibility of the complaint

The complainant is a former staff member of ECA. As such, he may lodge a complaint under Article 68 of the Regulation alleging a breach of the provisions of the Regulation. The complaint is therefore admissible.

A. Terminology clarification

As a preliminary remark, the EDPS would like to distinguish between two different concepts: data retention and archiving.

According to Article 4(1)(e) of the Regulation, personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 13 subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

Data retention is the period during which data are actively used or stored by the controller for the purpose(s) of the initial collection. Once the data retention period is over, data can be kept for archiving purposes (if necessary for public interest, scientific or historical research, or statistical purposes).

In accordance with Article 13 of the Regulation, archiving is subject to appropriate safeguards for the rights and freedoms of data subjects, in particular, in order to ensure respect for the principle of data minimisation.

B. Alleged infringement of Article 4(1)(e) of the Regulation (excessive retention period)

The complainant claims that the data retention periods applied to staff notices, audit reports and ECA-Journal (archiving for an indefinite period), and his personal file ("120 years after the date of birth"), are excessive in the sense of Article 4(1)(e) of the Regulation.

1) Applicable retention periods and alleged purpose (as per category)

The reply by ECA's [REDACTED] to the complainant of 12 February 2019, and ECA's letter of 12 July 2019 to the EDPS, mention different retention periods. Since ECA's reply of 12 July 2019 contain more detailed explanations, we will take this information into consideration. This letter stated the following specific retention periods and justifications:

- **a. Personal file:** Retained for up to 8 years after the extinction of all rights of the person concerned and of any dependants and for at least 120 years after the date of birth of the person concerned. This retention period was established by the decision of the Heads of Administrations and is applied within all EU institutions and PMO. It is necessary for

the establishment of any potential pension rights, which justifies extending this retention policy also to former staff members of ECA.

- **b. Audit reports:** Retained for 5 years after the adoption of the discharge decision for the relevant financial year, and then transferred to the archives. First of all, these reports are records and the historical memory of ECA and are used for follow-up reasons. In addition, since 2010, all official records are electronically signed with a qualified certificate and cannot be modified, failing which their validity is no longer assured.
- **c. Staff notices:** Retained for 5 years after the date of publication, and then transferred to the archives. These are official announcements justified by transparency considerations informing the staff of promotion related decisions.
- **d. ECA-Journal:** Retained permanently. It is an official publication and a record, which is part of ECA's historical activity.'

2) Examination whether excessive (as per category)

- **a. Personal files:** The fact that the 120 years retention period results from a common decision by EU institutions is not a valid justification *per se* for a data retention policy. Under Article 4(1)(e) and (2) of the Regulation, the data controller must objectively be able to demonstrate why the personal data kept are still necessary for the purposes for which they are processed. In their letter of 12 July 2019, ECA explained that the personal file must be kept in order to establish any potential pension rights.

According to the EDPS Guidelines on staff recruitment², “[a]s regards the recruited applicants whose data should be stored in their personal file (Article 26 of the Staff Regulations), the EDPS recommends that a data retention period of **ten years as of the termination of employment or as of the last pension payment** is considered to be reasonable” (emphasis added). Not all personal data need to be kept for so long³.

In the complainant's case, none of these recommended retention periods have elapsed when the complaint was submitted to the EDPS. The complainant was employed with ECA until January 2010 and, according to publically available information (EU Whoiswho), is currently employed by another EU institution. At any rate, no last pension payment has been made.

Therefore, retaining the complainant's personal data contained in his personal file such as “name, address, career history, family composition & status, allocations, etc” does not infringe Articles 4(1)(e) of the Regulation, as long as the data are necessary for the attribution of pension rights.

Regarding the **diplomas and certificates**, the EDPS sees no valid reason to keep these personal data for the attribution of pension rights. Therefore, **we recommend that these two categories of data are deleted**, once the personal file is kept only **for the attribution of pension rights**.

² Section 4(i), see https://edps.europa.eu/sites/edp/files/publication/08-10-10_guidelines_staff_recruitment_en.pdf

³ E.g. disciplinary procedures. As regards medical data, EDPS highlighted in the Guidelines concerning the processing of health data in the workplace that “As a general rule, as concerns conservation of medical data, the EDPS considers that a period of **30 years** can in most cases be considered as the absolute maximum during which data should be kept in this context.”

In this regard, the EDPS believes that ECA is not in breach of Article 4(1)(e) of the Regulation, as long as that diplomas and certificates are deleted once the personal file is kept only for the attribution of pension rights.

- **b. Audit reports:** According to ECA, the complainant's personal data (name, first name, number of weeks spent on the specific audit task/report), as well as being retained for "*follow-up reasons*" and after for archiving (public interest purposes).

For reasons of follow-up to individual audits, beyond the need to verify for financial discharge ("Retained for 5 years after the adoption of the discharge decision for the relevant financial year"), it can be considered relevant to know *who worked for which timespan* on a specific audit task/report, e.g. in the case of allegations of maladministration regarding the conduct of the audit or the publicity of a report. This would, in principle, justify the retention of the complainant's personal data at stake (name, first name, number of weeks spent on the specific audit task/report) for a period longer than the five years (such as the eight years mentioned by the controller) after the adoption of the discharge decision for the relevant financial year.

At the expiry of the retention period, the information is archived and additional security measures are consequently applicable. The risk to data subjects' rights must be weighed against the historical value of the information in a transparent administration.

In this regard, the EDPS believes that ECA is not in breach of Article 4(1)(e) of the Regulation, as long as the reports are only kept in the archives once the period mentioned above have elapsed.

- **c. Staff notices:** The complainant's personal data (name, first name, grade) are retained as "official announcements justified by transparency considerations informing the staff of promotion related decisions". Although the initially identified purpose (██████ reply of 12 February 2019) seems more limited ("offering the staff the possibility to verify if they are on the list"), for transparency reasons, it can indeed be considered relevant for staff to know which staff members were promoted following a particular appraisal exercise.

However, such promotion related information would only seem to be relevant to keep for business purposes for as long as needed as comparator in legal disputes involving promotion related decisions (five years). This information is kept in the archives *for long-term preservation*. The current general practice of keeping personal data in staff notices in archives for long term preservation is not excessive, as long as it observes Articles 4(1)(e) and 13 of the Regulation.

Regarding the retention period applicable to the complainant's personal data contained in staff notices, it should be noted that the complainant's employment with ECA ceased over ten years ago, in January 2010. The period in which this information could be considered relevant for legal disputes involving promotion related decisions has thus elapsed. Therefore, this information should only be kept in the archives.

Nonetheless, for future reference and to promote best practice, the EDPS recommends that the grade not be stated in the staff notices regarding promotions, since the

information is not necessary in the publication. In our view, including this information in the staff notice is not needed for challenging the decision, nor for any other purpose.

- **d. ECA-Journal:** The complainant's personal data (name, first name, start date at ECA, recruitment source, service) are retained permanently ("forever") in ECA-Journal archives as "a record, which is part of ECA's historical activity".

Since ECA-Journal is a publication with the aim of reporting ECA's activities, we understand that the information has historical value. Therefore, its storage in ECA's archives is justified for historical purposes. This archiving does not infringe Articles 4(1)(e) and 13 of the Regulation.

The risk to data subjects' rights must be weighed against the historical value of the information in a transparent administration.

3) *Interim conclusion:*

The long term preservation of the personal data contained in the ECA journals publications for archiving purposes in the public interest and for historical research mentioned above are not considered excessive. Therefore, ECA is not infringing Articles 4(1)(e) and 13 of the Regulation.

C. Alleged infringement of Article 4(1)(b) and (c) of the Regulation

The complainant further claims that ECA infringed the principles of purpose limitation and data minimisation under Article 4(1)(b) and (c) of the Regulation by not justifying why they need to keep the complainant's personal file for 120 years after the date of birth. Since he is no longer a staff member of ECA, there is, according to the complainant, no justification for keeping his personal data for the purpose indicated ("management of staff file").

1) Article 4(1)(b) of the Regulation (purpose limitation)

In accordance with the purpose limitation principle laid down in Article 4(1)(b) of the Regulation personal data shall be "*collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes...*".

In the DPO's reply to the complainant of 12 February 2019, the indicated purpose was indeed "management of staff file" without further explanations as to why such "file management" would be required for individuals who are no longer staff. However, subsequent explanations by ECA (letter of 12 July 2019) refer to the purpose as "the establishment of any potential pension rights"⁴.

This explains why the "management" of staff files is required also for former staff members and does not constitute an infringement of the purpose limitation principle.

⁴ In addition, section C.2.10 of ECA File Classification Plan refers more generally to "all rights of the person concerned".

2) Article 4(1)(c) of the Regulation (data minimisation)

The data minimisation principle laid down in Article 4(1)(c) of the Regulation stipulates that personal data shall be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”.

The complainant’s personal data contained in his personal file are “diplomas, certificates, name, address, career history, family composition & status, allocations, etc”. As noted above⁵, the purpose is “the establishment of any potential pension rights”. Pension rights of ECA staff members are established in line with Articles 77 et al. of the Staff Regulations (SR).⁶ Under the SR, pension rights are calculated with reference to the final basic salary and taking into account other information related to active employment, such as the minimum subsistence figure per year of service.

Against this background and taking into consideration that ECA should only keep the data necessary for the purpose, the EDPS believes that the complainant’s personal data contained in his personal file do not go beyond what is adequate, relevant and necessary for the establishment of actual or potential pension rights. However, as from January 2020 once the personal file is kept only for the attribution of pension rights, the diplomas and certificates should be deleted, in accordance with the data minimisation principle.

Keeping the personal data of the complainant in his personal file for establishing any potential pension rights does therefore not represent an infringement of the data minimisation principle, as long as the diplomas and certificates are deleted once the personal file is kept only for that purpose.

3) **Interim conclusion:** In the case at hand, there is no reason to believe that ECA has infringed the purpose limitation principle under Article 4(1)(b) of the Regulation or the principle of data minimisation in the sense of Article 4(1)(c) of the Regulation, as long as the diplomas and certificates are deleted from the personal file after January 2020.

D. Alleged infringement of Article 17(1)(a) and (d) of the Regulation (right to information)

The complainant further claims that by failing to explain the purpose of the continuous processing of his personal data and the extent of the legal obligations relied upon to determine the retention period, ECA infringed his right to receive information under Article 17(1)(a) and (d) of the Regulation.

Article 17(1)(a) and (d) of the Regulation gives the right to obtain information on the purpose of the processing, as well as “the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period”.

The reply by ECA [REDACTED] of 12 February 2019 to the complainant’s access request under Article 17 of the Regulation, mentioned the purpose(s) pursued by the processing and the applicable data retention period for each category of personal data.

⁵ See Part III B, 1°.

⁶ See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20170101&from=EN>.

As regards “the extent of the legal obligations used to determine the retention period”, it should be noted that Article 17(1)(d) of the Regulation gives the right to obtain information on “*the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period*” (emphasis added). The reply by ECA [REDACTED] of 12 February 2019 referred to the applicable data retention period specifically *for each category* of personal data (i.e. “*the envisaged period for which the personal data will be stored*”). There is thus no requirement under Article 17(1)(d) of the Regulation to provide additional information on “the extent of the legal obligations used to determine the retention period”.

As noted in section B. 1) of this document, in the reply to the complainant of 12 February 2019, the indicated purpose was indeed “management of staff file” without further explanations as to why such “file management” would be required for individuals who are no longer staff. However, later explanations by ECA (letter of 12 July 2019) refer to the purpose as “the establishment of any potential pension rights”, which explains why the “management” of staff files is required for former staff members as well. The fact that the “management of staff file” includes “the establishment of any potential pension rights”, can additionally be inferred from the “Recipients” section of the reply by ECA [REDACTED] of 12 February 2019, which for the personal file refers to “PMO for salary and pension rights calculations and payments”.

Interim conclusion: In the case at hand, there is no reason to believe that ECA has infringed Article 17(1)(a) and (d) of the Regulation.

E. Alleged infringement of Article 19(1)(a) of the Regulation (erasure)

The complainant’s request for erasure of his personal data held by ECA was dismissed since the retention periods for his personal data had not yet expired. In ECA’s view, it was still necessary to process the data in accordance with its retention period policy.

Under Article 19(1)(a) of the Regulation, the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay where the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed.

Under Article 19(3) of the Regulation, the right to erasure “shall not apply to the extent that the processing is necessary (...) for archiving purposes in the public interest (...) in so far as the right (...) is likely to render impossible or to seriously impair the achievements of the objectives of that processing”.

1) Audit reports, staff notices and ECA-Journal

As noted in section B. 2) b), c) and d) above, the long term preservation of personal data contained in audit reports, staff notices and ECA-Journal for archiving purposes in the public interest and for historical research purposes do not infringe Articles 4(1)(e) and 13 of the Regulation.

As regards staff notices, the EDPS recommends that the grade not be stated in the staff notices regarding promotions, since the information is not necessary in the publication.

The complainant only has a right to erasure of his personal data, if these are no longer necessary in relation to the purposes for which they were collected or otherwise processed. In the case at hand, the complainant's personal data are only being processed for archiving purposes in the public interest and for historical purposes.

2) Personal file

As noted above (parts B. 2) a) and C. of this document), the complainant's personal data contained in his personal file are still necessary in relation to the purposes for which they were collected or otherwise processed. Diplomas and certificates should be deleted from the personal file once it is kept only for the future attribution of pension rights.

3) ***Interim conclusion:*** ECA has not infringed Article 19 of the Regulation by its decision of 12 February 2019 to dismiss the complainant's request for erasure of his personal data contained in audit reports, staff notices, ECA journals. As regards the personal file, however, when this is kept only for the future attribution of the pension rights, certificates and diplomas should be deleted.

PART IV - Conclusions

Regarding the personal file, audit reports, staff notices and ECA-Journal and considering all the above, the EDPS concludes that:

- The retention periods and archiving purposes in the public interest and for historical research mentioned above are not excessive. Therefore, ECA is not infringing Articles 4(1)(e) and 13 of the Regulation.
- There is no reason to believe that ECA has infringed the purpose limitation principle under Article 4(1)(b) of the Regulation, or the principle of data minimisation in the sense of Article 4(1)(c) of the Regulation. However, certificates and diplomas should be deleted from the personal file, as from January 2020, when it is kept only for the attribution of pension rights.
- There is no reason to believe that ECA has infringed Article 17(1)(a) and (d) of the Regulation regarding the right to information of the complainant.
- ECA should not include the grade in the staff notices regarding promotions.
- There is no reason to believe that ECA has infringed Article 19 of the Regulation by its decision of 12 February 2019 to dismiss the complainant's request for erasure of his personal data contained in the personal file, staff notices, audit reports and ECA-Journal.

- When processing personal data for archiving purposes in the public interest, ECA must ensure that the necessary technical and organisational measures are put in place to ensure the principle of data minimisation, in accordance with Article 13 of the Regulation.

Done at Brussels,

03 MAR 2020



Wojciech Rafal WIEWIÓROWSKI