Decision of the European Data Protection Supervisor in complaint case 2019-0246 against the Executive Agency for Small and Medium-sized Enterprises

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU, and Regulation (EU) 2018/1725,

Has issued the following Decision:

PART I - Proceedings

On the basis of a complaint received on 5 March 2019 under Article 63(1) of Regulation (EU) 2018/1725 (the Regulation), the European Data Protection Supervisor (EDPS) decided to investigate the handling of the complainant's request to access her personal data in relation to a selection procedure at the Executive Agency for Small and Medium-sized Enterprises (EASME). On 24 July 2019, the EDPS invited EASME to provide comments on the matter. EASME replied by letter dated 2 September 2019.

PART II - Facts and allegations

1. Facts

The complainant, a staff member of EASME, had submitted on 26 October 2018 an application for the position of project adviser (EASME/IV/2018/042) at EASME. On 10 December 2018, the HR services of EASME informed the complainant that her application had been rejected. On 20 December 2018, the complainant asked for a revision of the decision of the Selection Committee, and enquired about her score and the reasons for rejecting her application. EASME informed the complainant on 14 January 2019, that the Selection Committee had confirmed its decision and also provided the total score obtained by the complainant together with the threshold required to be invited to the next stage of the selection procedure. The complainant requested further information on 8 February 2019, asking for a copy of her assessment, her scoring and justification. On 12 February 2019, EASME provided the complainant with information on her points awarded per advantageous criteria as mentioned in the call for expression of interest.

On the same day, the complainant asked for information on the maximum points awarded per criteria and for feedback on the evaluation of her application. On 21 February 2019, EASME provided the complainant with the information on the maximum possible score per criterion.

On 21 February 2019, the complainant requested further explanation on the score given to her application. On 22 February 2019, EASME informed the complainant that '*in order to comply with the secrecy imposed by Article 6 of Annex III of the Staff Regulations*' EASME could not provide further information on the assessment of the complainant's application.

On 22 February 2019, the complainant requested information from EASME concerning the exercise of her right to access her personal data, to verify what data she had the right to access, and the respective record of the selection procedure or reference number of the record of the register of the data protection officer (DPO) of EASME.

EASME provided the complainant with her total score, the threshold required to be invited to the next stage of the selection procedure, the scores that she had received per advantageous criteria as mentioned in the call for expression of interest, the maximum possible score per criterion, and the maximum overall score. In addition, on 7 March 2019, EASME sent the notification to the DPO done under Article 25 of Regulation (EC) No 45/2001. The notification describes the processing operation for selection procedures and the respective privacy statement as applicable to the selection procedure EASME/IV/2018/042 launched on 10 October 2018.

2. Allegations of the complainant

Not satisfied with the replies received from EASME, the complainant submitted a complaint to the EDPS on 5 March 2019, to have access to all personal data processed in relation to her candidature with a view to understand her evaluation. She claimed that she had asked for access to her personal data processed by EASME, but that her request had been refused. The complainant expressed doubts concerning the fairness of the evaluation of applications to the vacant position and asked to have access to her entire file. In particular, she asked to have access to the details of the evaluation of the Selection Committee concerning her application.

3. Comments of the data controller

On 2 September 2019, EASME provided the following comments on the matter of the complaint:

EASME informed the EDPS that they had replied to all of the complainant's requests. EASME confirmed that the complainant's application for the position of project advisor had not been retained for the next stage of the selection procedure. EASME explained that the Selection Committee had confirmed its decision on 14 January 2019.

EASME informed the EDPS that in their view they '*provided all available personal data related to the candidate while respecting the secrecy of the proceedings of the Selection Committee as imposed by Article 6 of Annex III of the Staff Regulations*[1]'. EASME confirmed that the only information containing the complainant's personal data that EASME had refused to grant access to, were the individual scores given by each screener during the screening of the applications. Those individual scores served as basis for the final score that was communicated to the complainant. EASME underlined that the final score for each criterion was the mathematical average of those individual scores.

EASME had refused to grant access to those individual scores 'on the grounds of the duty of secrecy imposed by the above referred Article 6 of Annex III of the Staff Regulations'. In their view, in line with the judgments of the Court of Justice of the European Union (CJEU)[2], the principle of secrecy covers information containing a comparative assessment with other candidates and individual positions taken by the members of the Selection Committee.

EASME therefore considered that individual scores given by each of the screeners were not part of the information that should be communicated to the complainant.

PART III - Legal analysis

1. Admissibility of the complaint

The complaint has been lodged by a candidate to an EASME selection procedure who considers that the processing of personal data relating to her infringes the Regulation. The complaint is therefore admissible under Article 63(1) of the Regulation.

2. Definition of personal data and right to access to personal data in the context of a selection procedure

'Personal data' under Article 2 of the Regulation means 'any information relating to an identified or identifiable natural person'. The use of the expression 'any information' in the definition of the concept 'personal data', reflects the aim of the EU legislature to assign a

[1] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 045 14.6.1962, p. 1385.

[2] Judgment of 11 December 2012, Mata Blanco v Commission (F-65/10) paragraph 106, Judgment of 8 July 2010, Wybranowski v Commission (F-17/08) paragraph 98, Judgment of 11 July 2012, AI v Court of Justice of the European Union (F-85/10) paragraphs 91 and 98.

wide scope to that concept. Personal data are therefore not restricted to information that is sensitive or private, but, as the CJEU highlighted in the Nowak case, 'potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it "relates" to the data subject'.[3] It follows that the assessment criteria used by EASME, the aggregated results per criteria and the reasons for which the complainant was not pre-selected from the database are personal data under Article 2 of the Regulation.

Article 17(1) of the Regulation provides that individuals 'shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data'. Article 17(3) of the Regulation also provides that 'the controller shall provide a copy of the personal data undergoing processing'.

In the case of selection procedures (pre-selection phase, written exams, and interview), considering that 'personal data' include opinions and assessments, data subjects should be given access to their own evaluation results derived from the assessment of the jury regarding all stages of the procedure, i.e. they should be provided with aggregated results.[4]

Aggregated results means that no information regarding the individual marks or assessments attributed by each individual evaluator/jury member involved is given, as held by the EDPS in previous cases[5]. However, the average mark resulting from the aggregation of the individual marks/assessments by all evaluators should be disclosed in a transparent manner. The controller should be able to provide a detailed breakdown of the mark given for each section on which the applicant was assessed, without interfering in any way with the principle of secrecy of selection board proceedings, as set out in Article 6 of Annex III to the Staff Regulations, since the marks given would be overall averages. Marks given by individual members of the board or any information on comparison with other applicants cannot be revealed through a request for access to personal data.

In the case at hand, the EDPS considers that the complainant should be given access to her personal data, namely to the criteria used by EASME, the aggregated results per criteria and the reasons for which she was not pre-selected based on those assessment criteria during the pre-selection phase of the selection procedure.

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[3] See para 40, CJEU's judgment of 20 December 2017, C-434/16. http://curia.europa.eu/juris/document/document.jsf;jsessionid=6CDB4BCA1E798967A0035CF6405FA576?text=&docid=198059&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8313940

[4] EDPS Guidelines on the Rights of Individuals with regard to the Processing of Personal Data: https://edps.europa.eu/sites/edp/files/publication/14-02-25_gl_ds_rights_en.pdf.

[5] See also EDPS cases 2004-0236, 2011-0101 and 2007-0422

3. The secrecy of the selection committee and their individual scores

As to the disclosure to candidates of the details of the individual assessment given by the Selection Committee with regard to them, the EDPS has stressed that '…the data subjects should be provided with aggregated results and informed of the principal reasons on which the application of the restriction of their right of access is based…'[6] (see also point 2.).

The EDPS agrees that EASME should not reveal the scores per criterion given by ***individual*** members of the Selection Committee, in order not to prejudice the secrecy, the impartiality and the independence of the committee. The identity of the individual members of the Selection Committee should also be protected. If a member of the Selection Committee knows that their individual comments can be communicated to the candidates, they may feel an external pressure and will not fulfil their tasks as evaluators with objectivity.

However, the purpose of the individual scores given for each criterion is to record the evaluation by the evaluator of the candidate's performance. As the CJEU highlighted in the Nowak case, they are liable to have an effect on the candidate's rights and interests, in that they may determine or influence the chance of entering the profession aspired to or of obtaining the post sought.[7]

In order to comply with the right of access under Article 17 of the Regulation, EASME should therefore give the complainant the scores as ***a whole*** (i.e. an overall assessment) with respect to each criterion, without that interfering in any way with the principle of the secrecy of the panel's proceedings, as set out in Article 6 of Annex III to the Staff Regulations.

The EDPS highlights that a summary - in an intelligible form - of the sub-score suggestions and the observation notes of the members of the Selection Committee would be sufficient. EASME should ensure that individual members of the committee cannot be identified or be directly or indirectly identifiable by the information given, since that would prejudice the protection of the impartiality and independence of the committee.

4. Alleged violation of Articles 17 of the Regulation - right of access

Article 17 of the Regulation provides that individuals *have the right of access to their personal data, including receiving a* copy of their personal data processed by the controller.

Based on the information provided by the complainant and the controller, the EDPS notes that EASME provided the complainant with her total score, the threshold required to be

[6] https://edps.europa.eu/sites/edp/files/publication/14-02-25_gl_ds_rights_en.pdf, page 13.
[7] Paras 39 and 43, judgment of the CJEU of 20 December 2017, C-434/16.

invited to the next stage of the selection procedure, the scores that she had received per advantageous criteria as mentioned in the call for expression of interest, the maximum possible score per criterion, as well as the maximum overall score. EASME also underlined that the final score per advantageous criteria received by the complainant is the mathematical average of the individual scores given by each screener during the screening the applications.

Considering the definition of personal data and the interpretation of the right of access to personal data of a candidate in the context of a selection procedure as described above, the EDPS finds that EASME has provided access to the personal data of the complainant in line with the Regulation. In particular, EASME has provided access to the aggregated results, i.e. to the complainant's score received per advantageous criteria, and there is thus no further obligation for EASME to give access also to the individual scores given by the evaluators.

PART IV - Conclusion

In view of the above, the EDPS concludes that:

- EASME has not infringed Article 17 of the Regulation as regards the complainant's right of access to her personal data.

Done at Brussels, 3 May 2021

[e-signed]

Wojciech Rafal WIEWIÓROWSKI