



Decision of the European Data Protection Supervisor in the complaint submitted by [REDACTED] against the European Investment Bank (EIB), (case 2019-0073)

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU and Regulation (EC) 45/2001 ('the Regulation')¹

Has issued the following decision:

PART I

Proceedings

On 21 January 2019, the EDPS received a complaint under Article 68 of Regulation (EU) 2018/1725² from [REDACTED] ('the complainant') against EIB.

On 10 April 2019, the EDPS addressed a letter to the controller (EIB) requesting them to provide comments on the allegations made by the complainant and to provide certain information.

EIB provided their comments and observations on 22 May 2019.

On 7 June 2019, the EDPS sent the response of the controller to the complainant and requested him to comment. The complainant provided his comments on 15 June 2019.

PART II

The facts

The complainant, the [REDACTED] at EIB, alleges that on 7 December 2018, he requested EIB Personnel Unit to grant him access to his personal data in the context of a "Dignity at Work" complaint³ submitted by a staff member (X) against him.

¹ OJ L 8 of 12.01.2001. On 11 December 2018, Regulation (EU) 2018/1725 entered into force: Regulation (EU) 2018/1725 of the European Parliament and of 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of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, has repealed Regulation (EC) 45/2001 and Decision No 1247/2002/EC, OJ C 288 of 31.08.2017. Nevertheless, case 2019-0073 has been examined in the light of Regulation (EC) 45/2001, which was applicable when the facts occurred and when the complaint was submitted.

² OJ L 295, 21.11.2018.

³ i.e. a harassment complaint.

The complaint was declared inadmissible concerning the complainant and no Dignity at Work procedure was initiated against him. However, the complaint targeted two other staff members and is still ongoing as regards them.

The complainant stressed that he repeatedly requested EIB to consult the DPO. EIB replied to him on 18 January 2019, refusing to grant him access to his personal data.

In particular, he requested access to the following personal information relating to him:

- i) the sections in the harassment complaint where X had written about [the complainant],
- ii) a letter to the EIB President in which X is said to have written similar allegations, and which was sent in copy to EIB's Personnel Unit and became part of [the complainant's] personal file; and
- iii) e-mails and notes, which colleagues in EIB's Personnel Unit, Legal Service and President's Office have exchanged concerning [the complainant].

The complainant enclosed the reply of the Personnel Unit in his complaint of 21 January 2019.

In their reply of 18 January 2019, the Personnel Unit stated that *"... access may be refused to the whole or part of the case if this access undermines the rights and freedoms of others...granting you access to [X's] complaint and to other elements of the case file including e-mails, would undermine the latter's own rights and freedoms"*. It was also stated that *"...given that it was decided not to open a Dignity at Work procedure against you, the interest of the confidentiality of the procedure does not need to be balanced against your rights of defence"*. In addition, it was indicated that, *"such a restriction to your right of access will of course be reconsidered once the Dignity at Work procedure is concluded"*.

The complainant has subsequently requested access to his personal data from the EIB's Personnel Unit several times since his first request on 7 December 2018; the last request was submitted on 6 June 2019.

On 7 June 2019, the EIB Personnel Unit replied the following: *" ... As mentioned previously, access to the document will be assessed again at the end of the procedures. As the procedure is still ongoing we will unfortunately not be able to share the document with you this evening"*.

Copies of the emails of 6 and 7 June 2019 were sent to the EDPS on 15 June 2019, when the complainant was invited to make comments on the controller's reply to the EDPS request for comments of 10 April 2019.

1. Allegations of the complainant

The complainant alleges that since there was no "Dignity at Work" procedure pending against him, the EIB's Personnel Unit should have granted him access to his personal data as requested on 7 December 2018.

He believes that the EIB Personnel Unit did not explain how the disclosure of his personal data could have prejudiced the ongoing "Dignity at Work" procedure against his two other colleagues.

He alleges that the EIB Personnel Unit conducts the “Dignity at Work” procedures in a way that exposes persons under investigation to a “high reputational and health risk” and in breach of the EIB’s Staff Regulations and the Code of Conduct. The complainant claims that the Director General of Personnel has acknowledged this problem; the “Dignity at Work” policy is hence under revision, so that in the future, before a formal procedure is launched, some prima facie evidence for alleged harassment is obtained.

The complainant requests the EDPS to order the EIB Personnel Unit to grant him access to his personal data, remind them that they should consult the EIB’s DPO on data protection matters, and that review their policy and procedure in order to ensure respect of data subjects’ rights.

EIB’s arguments for not disclosing to the complainant his personal data:

- the complaint against the complainant and the two other staff members was set out in one single document; the facts described in the complaint are closely related, which means that the name of the complainant may appear in the description of the facts concerning the two other staff members, and
- allowing the complainant to have access to his personal data, contained in the complaint and in other elements of the file, would interfere with the protection of the rights of X who lodged the “Dignity at Work” complaint.

2. Comments of the data controller

The EIB confirmed the facts of the case as described above.

The EIB referred to the EDPS Guidelines on the rights of the individuals with regard to the processing of personal data⁴ and stated the following reasons for not disclosing the complainant’s personal data:

- the complaint against the complainant and the two other staff members was set out in one single document; the facts described in the complaint are closely related, which means that the name of the complainant may appear in the description of the facts concerning the two other staff members, and
- allowing the complainant to have access to his personal data, contained in the complaint and in other elements of the file, would interfere with the protection of the rights of X who lodged the “Dignity at Work” complaint.

Furthermore, as EIB explained in the email of 18 January 2019 sent to the complainant, X - who submitted the Dignity at Work complaint - has the right of having their complaint treated in a strictly confidential manner, without disclosure of the complaint and/or of any other elements to persons who are not parties to the ongoing procedure.

In EIB’s view, the duty of confidentiality in relation to Dignity at Work procedure is justified by the delicate nature of the matter, by the need to ensure the protection of witnesses from any undue interference or pressure on them, and by the need to avoid any risk of retaliation against the person who submitted the complaint. Since this procedure is still ongoing and since the complainant is not a party to it, EIB has decided that the complainant could not be given access to the sections of the complaint or the elements of the file that contained his

⁴ https://edps.europa.eu/sites/edp/files/publication/14-02-25_gl_ds_rights_en.pdf

personal data. Moreover, when X initially lodged the complaint, they requested whistleblowing protection.

The EIB stated that they have restricted the complainant's rights to have access to his personal data *"in full compliance with Article 20(1)(c) of Regulation (EC) 45/2001, which provides that a restriction [to have access to his/her personal data] constitutes a necessary measure to safeguard [...] c) the protection of the data subject or of the rights and freedoms of others"*. The complainant was informed, *"in accordance with [EU] law, of the principal reasons on which the application of the restriction is based"* (Article 20(3) of the Regulation).

With regard to EIB's reply to the complainant on 18 January 2019, where they stated that *"...given that it was decided not to open a Dignity at Work procedure against you, the interest of the confidentiality of the procedure does not need to be balanced against your rights of defence"*, EIB explained that since the harassment complaint against the complainant had been declared inadmissible, the complainant did not have to defend himself, which in turn meant that EIB did not need to protect his rights of defence in the Dignity at Work procedure. The EIB also pointed out that in their email of 18 January 2019 to the complainant, they stated that *"such a restriction to your right of access will of course be reconsidered once the Dignity at Work procedure is concluded."*

PART III

Legal Analysis

1. Admissibility of the complaint

The complaint is lodged by a staff member of EIB and concerns alleged breaches of the Regulation governing the processing of personal data by European Union institutions and bodies (EUIs). The complaint is therefore admissible under Article 68 of Regulation (EU) 2018/1725.

2. Alleged violation of Article 13 of the Regulation - right of access

The complainant's access request to his personal data was submitted on 7 December 2018, two days before Regulation (EU) 2018/1725 entered into force. This means that the complainant's request should be considered under Article 13 of Regulation (EC) 45/2001 and any potential restrictions to his right of access should be considered under Article 20 of that Regulation.

Interpretation of Articles 13 and 20 of the Regulation

It must be recalled, first, that Article 13 of the Regulation provides that *"the data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller ... communication in an intelligible form of the data undergoing processing..."*. It follows from that provision, which allows the complainant to access his personal data *"at any time"*, that the complainant has a continuous and permanent right of access to those data⁵.

⁵ See paras 46 and 69 of Case T-903/16, Judgement of the General Court of 14 February 2019, RE v European Commission:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=DB84EE967FEE96E9236FAFBB572547D6?text=&docid=210763&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1482463>

Secondly, while Article 20(1) of the Regulation provides for exemptions and restrictions to the right of the complainant to access his personal data, that provision specifies that EIB cannot restrict the application of Article 13 of the Regulation except “where such restriction constitutes a necessary measure”. It follows that the exemptions and restrictions laid down in Article 20(1) of the Regulation are applicable only in the period during which they remain necessary⁶. The question which arises in the case at hand, is whether EIB’s decision to restrict the complainant’s right of access was and is still a necessary measure in light of the fact that “Dignity for Work” procedure is non-existing as far as he is concerned.

In light of its case law, the European Court of Justice has favoured an interpretation of EU law conducive to a high level of protection of personal data. It has notably taken into account the fact that, in the context of the processing of personal data, the factual and legal situation of the data subject is, by its nature, liable to change over time, since the mere passage of time is capable of rendering the processing of data, which was initially lawful, unnecessary or even unlawful.

It follows that, under the Regulation, a data subject, may, at any time, make a new request for access to personal data to which access had previously been only partially given or refused. Such a request requires the controller concerned to examine whether the earlier refusal of access remains justified⁷.

Application of Articles 13 and 20 in the case at hand

In this particular case, the complainant requested to have access to his personal data, (points i-iii), as described above. The harassment complaint against him was declared inadmissible, which means that all personal data that EIB had collected in order to establish the facts, turned out to be unnecessary and the case against him was closed. This was one additional reason for the EIB to re-consider the complainant’s request and grant him access to his personal data as he had requested.

EIB argued that they were obliged to restrict his right of access because the harassment complaint by X against the complainant and the two other staff members was submitted in one single document. It is understandable that retrieving only the complainant’s personal data, can be delicate and very burdensome. However, EIB should have applied the data minimisation principle under Article 4(1)(c) of the Regulation, and provided the complainant with the relevant and necessary information that concerned him in light of his specific request (points i-iii above).

Furthermore, EIB stated that they applied the restriction under Article 20(1)(c) of the Regulation in order to ensure confidentiality of X and of the witnesses to protect them from any possible pressure and retaliation. Such a restriction could indeed have been a necessary and proportionate measure, had EIB actually launched a “Dignity at Work” procedure against the complainant and had it still been ongoing.

The EIB points out that the facts of the complaint submitted by X against the two other staff members were closely related to the complainant. Nevertheless, the procedure against the two other staff members cannot be linked to the complainant or to his personal data, as the complaint against him was declared inadmissible and no Dignity at Work procedure against him was ever launched. The statement of the EIB in their email of 18 January 2019 that “such

⁶ Idem, para 47.

⁷ Idem, para 50.

a restriction to your right of access will of course be reconsidered once the Dignity at Work procedure is concluded”, is therefore irrelevant to the complainant’s request and does not correspond to his case.

It follows that the application of the restriction under Article 20(1)(c) of the Regulation was an unnecessary and disproportionate measure.

Did the processing give rise to any risks to the complainant’s rights and freedoms?

The argument put forward by EIB that *”given that the complaint against the complainant had been declared inadmissible, the complainant did not have to defend himself, which in turn meant that EIB did not need to protect his rights of defence in the Dignity at Work procedure”* cannot be sustained. It is contradictory to EIB’s decision to apply the restriction under Article 20(1)(c) of the Regulation, which was based on the position that the complainant’s right of access should be restricted because there is an ongoing procedure and they must protect the rights and freedoms of the parties involved. However, based on the statement above, EIB clearly recognises that there is no ongoing procedure against the complainant

The EDPS reminds EIB that the right of the complainant to have access to his personal data is a continuous and permanent right, unless a necessary restriction is applicable, which was not the case here as explained above. After the complaint against him had been declared inadmissible, the complainant’s factual and legal situation changed and the EIB was thus obliged to examine whether their refusal of access remained justified.

The EDPS highlights that EIB as an EUI should be leading by example when it comes to protecting fundamental rights, such as the right to data protection. The Regulation requires controllers to focus on the risks to the rights and freedom to the individuals, i.e. processing of personal data, which could lead to physical, material or non-material damage to them. For instance, in this particular case, since the harassment complaint against the complainant was declared inadmissible, the EIB should have performed an objective assessment to evaluate the likelihood and severity of the risks of the processing of the complainant’s data (facts, allegations, exchange of correspondence from other parties etc.) to his rights and freedoms (reputation, health) balanced with the rights and freedoms of X.

In light of the above, the EDPS concludes that EIB had no legal basis to restrict the complainant’s access to his personal data under Article 20(1)(c) of the Regulation, since the complaint against him was declared inadmissible and since no “Dignity at Work” procedure was ever launched against him. The ongoing procedure against the other two staff members should not be linked to the complainant since there is no procedure as far as he is concerned. EIB should therefore take all reasonable steps to ensure that the complainant’s right of access to his personal data is granted and satisfied in line with Article 13 of the Regulation.

PART IV

Conclusions

The EDPS concludes that:

- there has been a violation of Article 13 of the Regulation and an erroneous application of Article 20(1)(c) of the Regulation by EIB.

EIB, in collaboration with their DPO, should ensure that

- the complainant is given access to his personal data as requested,
- similar access requests are carefully examined and potential restrictions are applied in accordance with the applicable rules.

Wojciech Rafał Wiewiórowski

Done at Brussels, 26 July 2019