

**From:** European Data Protection Supervisor  
**To:** [REDACTED]  
**Sent at:** 18/01/21 13:46:45  
**Subject:** Our ref.: 2020-0342 - D(2021) 0093

Dear Sir,

Please find attached the EDPS Decision in attachment.

Kind regards,

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**EDPS Secretariat**



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**European Data Protection Supervisor**

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## Decision of the European Data Protection Supervisor in complaint case 2020-0342 submitted by [REDACTED] against the Single Resolution Board

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 20 March 2020, the EDPS received a complaint under Article 63(1) of Regulation (EU) 2018/1725 (the Regulation) from [REDACTED] against [REDACTED], the Single Resolution Board (SRB) regarding a request for erasure of his personal data submitted on 8 March 2020.

On 3 and 8 April 2020, the complainant submitted further allegations regarding unauthorised access to and disclosure of his personal data<sup>1</sup>.

The EDPS examined this complaint pursuant to Article 57(1)(e) of the Regulation and invited observations by the SRB on the allegations brought forward by letter dated 14 April 2020, attaching the complaint and its annexes.

On 17 April 2020, the Data Protection Officer (DPO) provided preliminary remarks on the allegations, and on 25 May 2020, the SRB replied to the letter of 14 April 2020. The EDPS invited the complainant to comment on the reply on 29 May 2020. The complainant replied on 31 July 2020.

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<sup>1</sup> Email 3 April 2020, 10:00: „Die unbefugte Person war zu dem [REDACTED] [REDACTED], der nachweislich unmittelbar nach dem unbefugten Zugriff negativ ueber meine Bewerbung entschieden hat, wodurch mir erheblicher materieller und immaterieller Schaden verursacht worden ist.“ Courtesy translation: „The unauthorised person was at the time of [REDACTED] [REDACTED], which according to evidence immediately after this unauthorised access decided negatively about my application, which caused me considerable material and immaterial damage“. Email 8 April 2020: „Bzgl. meiner ergaenzenden Mitteilungen der potenziellen Verletzung meiner personenbezogenen Kontaktdaten - zu Ihrer umfassenderen Informationen - vom vergangenen Freitag: Da es sich bei Angriffen und unbefugten Zugriffen (mittels meiner im Personalsystem jener Behoerden gespeicherten personenbezogenen Kontaktdaten) uebers oeffentliche Internet der Natur nach um Vergehen handelt, deren Urheber technisch nur mit besonderem Aufwand zu ermitteln (und die bei Taetern gerade deshalb besonders beliebt) sind, werde ich mich zunaechst mit den beiden Anbietern (o2 und LinkedIn) besprechen ob der technischen Moeglichkeiten den Urheber (IP-Adresse?) dieser Angriffe und unberechtigten Zugriffe zu identifizieren. Sobald ich hier weitere belastbare Beweise erhalten habe, werde ich Ihnen diese weiterleiten und mich mit Ihnen in Verbindung setzen bzgl. weiteren Vorgehens diesbzgl. Bis dahin bitte ich Sie, das noch nicht als offiziellen Teil meiner Beschwerde zu bearbeiten.“ (emphasis added).

On 6 August 2020, the EDPS invited the SRB to provide observations on the complainant's input of 31 July 2020.

The DPO of the SRB replied on 17 September 2020,<sup>2</sup> and on 8 October 2020, the EDPS invited the complainant's comments on the SRB's input.<sup>3</sup> The complainant provided his comments on 4 November 2020.

## **PART II - The facts**

### *Allegations of the complainant (summary in light of above correspondence)*

According to the complainant, he has worked for the SRB from [REDACTED]. The complainant claims that after initial contact with the DPO of the SRB on 29 September 2019, he was granted access to his personal data on 28 February 2020. He then submitted a request for erasure of his personal data on 8 March 2020 and sent a reminder by email on 20 March 2020 with the DPO in copy.

With his complaint dated 20 March 2020, the complainant alleges that his request for erasure, in particular personal data related to appraisals, is justified by the following considerations:

- The personal data are no longer necessary for the purpose for which they were initially collected or otherwise processed;
- The complainant has revoked any consent given to their processing under Article 5(1)(d) or 10(2) of the Regulation;
- He has objected to their processing under Article 23 of the Regulation and there are no overriding compelling legitimate grounds for the processing;
- His personal data were processed unlawfully;
- The erasure of his personal data is necessary to fulfil a legal obligation of the controller.

According to the complainant, the SRB informed him on 28 February 2020, about their intention to store all the complainant's personal data until at least 120 years after his birth. The complainant interprets this as an infringement of his

- right to erasure ("right to be forgotten") under Article 19 of the Regulation;
- right to the restriction of processing under Article 20 of the Regulation;
- right to object under Article 23 of the Regulation.

In his additional input dated 3 April 2020, 31 July 2020 and 4 November 2020, the complainant

- alleges that the above infringements are aggravated by
  - the fact the SRB continues to refuse erasure of his personal data, to which he confirms having received access on 28 February 2020<sup>4</sup>;

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<sup>2</sup> By the same email, the DPO informed the EDPS of [REDACTED]. Following this information, the EDPS invited both the SRB and the complainant to provide clarifications on any potential overlap. Following the parties' clarifications, the EDPS decided not to suspend the investigation of the complaint.

<sup>4</sup> „Am 8. März 2020 habe ich in Wahrnehmung meiner bürgerlichen Grundrechte nach EU DSGVO beim zuständigen Datenkontroller, unter Einbeziehung (Kopiesetzung) der DPO, die Löschung meiner (vom Datenkontroller mir am 28. Feb 2020 in Kopie gesandten) personenbezogenen Daten beantragt...“ (emphasis added). Courtesy translation: „On 8 March 2020 I demanded in the exercise of my civil fundamental rights under the EU GDPR, whilst putting the DPO in copy, to delete my personal data which have been sent to me by the data controller in electronic copy on 28 February 2019...“.

- a lack of information by the SRB that the complainant can file a complaint to the EDPS;
- the refusal of the SRB to include the complainant's performance appraisals since [REDACTED] at the European Banking Authority (EBA) in his Sysper file<sup>5</sup>;
- alleged unauthorised access and disclosure of his personal data, which, according to the complainant, illustrates the urgency of having his personal data erased<sup>6</sup>.
- notes that [REDACTED] and that, by his resigning from the service without entitlement to pension (before mandatory 10 years), his wife and children (if existing) would not enjoy any financial payments from the SRB;
- mentions that by email to the SRB of 25 July 2020, he explicitly communicated that he will not exercise his right to direct data portability ("*despite me having repetitively in writing permanently waived my right on data portability*") and therefore requested the erasure of those personal data.

*Comments of the data controller (summary in light of above correspondence)*

The SRB replied on 25 May 2020, essentially noting that

- they must store and archive personal data contained in personal files, such as the complainant's, based on a legal obligation in the sense of Article 5(1)(b) of the Regulation under Articles 11, 26, 81 and 127 of the Staff Regulations and Conditions of Employment of Others Servants of the European Union<sup>7</sup>;
- only necessary personal data are stored within the personal file, in line with the provisions of the Staff Regulations;
- the SRB applies by analogy the retention period for the entire personal file of 120 years after the staff member's birth date following the Common Commission level retention list of the European Commission files – SEC(2012)713;
- in accordance with the Staff Regulations, the SRB is not allowed to delete any documents from this particular (or any other) personal file.

### **PART III - Legal analysis**

Under Article 19(1) 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 and the controller shall have the obligation to erase personal data without undue delay *inter alia* where one of the following grounds applies:

- the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- the data subject withdraws consent on which the processing is based according to point (d) of Article 5(1), or point (a) of Article 10(2), and where there is no other legal ground for the processing;

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<sup>5</sup> According to Annex 2 of the complainant's input dated 31 July 2020, "*data which if stored in sysper would have had to be taken into account by the SRB in its decisions about my promotion, in the absence of any lawful appraisal by the SRB until this date*".

<sup>6</sup> „*Fuer diejenigen meiner personenbezogenen, im EU Personalsystem sysper gespeicherten Daten, fuer die automatisch und fuer mich einsehbar Zugriffsprotokolle aufgezeichnet werden (zB meine personenbezogenen Daten enthalten in meinen Beurteilungen) koennen die unbefugten Zugriffe (am 12. Juni 2019) und potentiell unbefugte Verbreitung sowie die dadurch gg. mich verursachten Schaeden nachgewiesen werden. Aufgrund dieser besonderen Situation, erachte ich die unverzuegliche Loeschung dieser personenbezogenen Daten zur Waehrung meiner Grundrechte und Grundfreiheiten als besonders dringend.*“ (emphasis added).

<sup>7</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01962R0031-20140501&from=EN>.

- the data subject objects to the processing pursuant to Article 23(1) and there are no overriding legitimate grounds for the processing;
- the personal data have been unlawfully processed;
- the personal data have to be erased for compliance with a legal obligation to which the controller is subject.

However, under Article 19(3)(b) of the Regulation, *“Paragraphs 1 and 2 shall not apply to the extent that processing is necessary... for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller”*.

*a) Legal obligation of the SRB under Article 19(3)(b) of the Regulation*

The SRB argues that, as data controller, they are obliged to store and archive personal data contained in the complainant’s personal file under Articles 10(5)<sup>8</sup>, 11, 26, 81 and 127 of the Staff Regulations (SR) and Conditions of Employment of Others Servants of the European Union. The complainant has undisputedly been employed by the SRB from November 2017 until September 2019.

Article 26 SR essentially regulates the content of the personal file. It states in particular the following: *“The personal file of an official shall contain: (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct; (b) any comments by the official on such documents. ... There shall be only one personal file for each official. An official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them. The personal file shall be confidential and may be consulted only in the offices of the administration or on a secure electronic medium...”* (emphasis added).

Article 26 SR thus clearly presupposes the existence of all the documents in the personal file for each employee, even after the employee has left the service.

The SRB alleges in its letter of 25 May 2020, that only personal data as deemed necessary according to Article 26 SR are stored. The complainant’s input of 4 November 2020 refers in this context to *“residential address, postal address, office address, phone number, email address, place of origin, places of past and current employment, names of past and current employers, any information related to my family members and dependents”*. In his email of 3 April 2020, he additionally refers to appraisal reports of 2017 and 2018.

Against this background, in his input dated 4 November 2020, the complainant argues that it is (no longer) necessary for the SRB to hold on to this kind of information following his departure from SRB’s services in [REDACTED]:

- *“Firstly, resigning from the service ... without entitlement to pension (before mandatory 10 years), my wife and children (if existing) would not enjoy any financial payments from the SRB. Secondly, [REDACTED].”*;
- *“contrary to the data controller’s claim, EU institutions, agencies and bodies do not “archive” “all personal data relating to a former staff member” “for at least 120 years after birth” of the concerned person, in particular not in the case of resignation of temporary staff without pension or other financial entitlements (and without entitled*

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<sup>8</sup> Input by SRB’s DPO of 16 September 2020.

*family) after exiting the Union service. The EP, as the EU legislator for Regulation (EU) 2018/1725, erases resigned staff's personal data after 10 years at the latest, and in case of staff without financial entitlements (my case) upon request (my case) earlier”;*

- He has waived his right to data portability<sup>9</sup>.

The SRB refers to the Common Commission level retention list of the European Commission files regarding the need to store and archive personal data contained in personal files. The Common Commission level retention list of the European Commission files in its second updated version (SEC(2019)900)<sup>10</sup> determines the “Administrative Retention Period” (ARP) as follows: “...*The ARP begins to run from the time when the file is closed. The ARP concerns the file as a whole. It may be shorter for personal data contained in the file, as indicated in the personal data protection records and privacy statements related to the activities, issues or procedures. When a file contains supporting documents concerning contractual or financial obligations in the sense of the Financial Regulation, the ARP needs to be 10 years*”.

The 10-year period has not elapsed in the case at hand, as the complainant only left the services of the SRB in [REDACTED].

Furthermore, it would seem that the complainant’s personal file is not closed yet:

According to the complainant’s own input (4 November 2020), he regards the SRB’s alleged intention “*to destroy all my personal data*” in October 2019 (as according to the complainant announced by the SRB in emails dated 1 and 2 October 2019) as *aggravating* factor in the complaint at hand<sup>11</sup>.

The complainant argues in this context that he required copies of his personal data requested on [REDACTED] (i.e. at the end of his employment with the SRB) “*for the exercise, establishment and defence of legal claims*”.

In addition, in his input dated 4 November 2020, the complainant notes “*the data controller has subsequently repetitively refused my requests for access to my personal data, claiming it had been destroyed or lost, knowing that I require it for the establishment, exercise and defence of legal claims.*”

In the light of the above, the complainant cannot conclusively argue that it is (no longer) necessary for the SRB to hold on to his personal data, in particular as he claims to have needed access to it in the past “*for the establishment, exercise and defence of legal claims*”.

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<sup>9</sup> As confirmed by the input of the SRB’s DPO of 16 September 2020, noting that on 25 July 2020, the complainant wrote to the Human Resources Unit of the SRB that “*Regarding my personal data of which you have sent me a copy on 28 Feb 2020, I am not exercising my right to portability and do not request you to transmit it directly to another Union institution, agency or body, releasing you from the obligation to store it, and in accordance with my rights under EU Reg 2018/1725 request you to erase these (sent to me in copy on 28 Feb 2020) personal data of mine without delay.*”

<sup>10</sup> See [https://ec.europa.eu/info/sites/info/files/sec-2019-900\\_en.pdf](https://ec.europa.eu/info/sites/info/files/sec-2019-900_en.pdf).

<sup>11</sup> “*These infringements of my fundamental data rights, specifically my right to erasure of my personal data, are even more further aggravated by the circumstances that the data controller had previously threatened to destroy all my personal data... Concretely, after my resignation and last day in the office (without any access to any of my personal data since employment in [REDACTED] stored at the SRB) ..., the data controller threatened to destroy all my personal data within effectively 8 h from its response, knowing that it was clearly unattainable for me to retrieve copies (which I had requested, annexed my email to SRB 30 Sep 2019) of my personal data myself by then...*”.



dd. the data subject has objected to processing pursuant to Article 23(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.

aa) According to the complainant's input dated 4 November 2020, he has "*contested the accuracy, including the completeness*" of his personal data held by the SRB. According to the complainant, the SRB "*refused ...to rectify inaccurate data, more specifically refused to complete incomplete data in my sysper HR data file (more concretely, refused to include my performance appraisals since [REDACTED] as servant of the Union (at another Agency, the [REDACTED]) in my sysper HR file*". In his submission of 31 July 2020 (annex 2), the complainant claims that these constitute "*data which if stored in sysper would have had to be taken into account by the SRB in its decisions about my promotion, in the absence of any lawful appraisal by the SRB until this date*"<sup>13</sup>. The complainant alleges in his input dated 31 July 2020 that the infringements of his rights are aggravated by the refusal of the SRB to include the complainant's performance appraisals since [REDACTED] at [REDACTED] in his Sysper file.

The SRB's DPO in the submission of 17 September 2020, noted that the appraisals, which the complainant received at his previous employer, could not be uploaded to Sysper, because they were carried out outside that system, but that they remain an integral part of his personal file and that the complainant had been repeatedly informed of these circumstances. The complainant has not contested this.

Against this background, there is no reason to assume that the personal data held by the SRB in the complainant's personal file are incomplete or in any other way inaccurate.

bb) Under Article 5(1)(b) of the Regulation, processing shall be lawful if it is necessary for compliance with a legal obligation to which the controller is subject. As noted above (section a)), in the light of Article 26 SR, the SRB is under a legal obligation to keep the content of the complainant's personal file. In addition, in the case at hand, the complainant does not oppose, but much rather *requests* the erasure of his personal data.

cc) As noted above (section a)), in the light of Article 26 SR, the SRB continues to be under a legal obligation to keep the content of the complainant's personal file. Against the background of the complainant's past employment with the SRB, the retention of the complainant's personal data by the SRB are thus still necessary for the purpose they were initially collected.

dd) The complainant has no right to object under Article 23(1) of the Regulation, see above section b).

***Interim conclusion:*** The complainant has thus no ground in the sense of Article 20(1) of the Regulation to obtain from the SRB a restriction of the processing of his personal data.

#### **PART IV - Conclusion**

In the light of Article 26 SR, the SRB is under a legal obligation in the sense of Article 19(3)(b) of the Regulation to keep the content of the complainant's personal file.

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<sup>13</sup> The complainant has been informed by email of 4 August 2020 that according to Article 57(1) (d) of the Regulation, the EDPS has the task to, upon request, provide information to any data subject concerning *the exercise of their rights under this Regulation*.



The complainant consequently has no right to obtain from the SRB as controller the erasure of personal data concerning him under Article 19(1) of the Regulation or to object under Article 23(1) of the Regulation to their processing. The complainant also has no right under Article 20(1) of the Regulation to obtain from the SRB the restriction of the processing of his personal data.

The attention of the SRB is drawn to the Common Commission level retention list of the European Commission files in its second updated version (SEC(2019)900)<sup>14</sup> as well as the EDPS Guidelines concerning the processing operations in the field of staff recruitment<sup>15</sup>. Whilst not applicable in the case of the complainant, who has been working for the SRB until [REDACTED], these recommend a retention period for personal data stored in personal files under Article 26 of the Staff Regulations of ten years as of the termination of employment or as of the last pension payment as reasonable.

Done at Brussels, 18 January 2021

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI

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<sup>14</sup> See [https://ec.europa.eu/info/sites/info/files/sec-2019-900\\_en.pdf](https://ec.europa.eu/info/sites/info/files/sec-2019-900_en.pdf).

<sup>15</sup> See [https://edps.europa.eu/sites/edp/files/publication/08-10-10\\_guidelines\\_staff\\_recruitment\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/08-10-10_guidelines_staff_recruitment_en.pdf).