



EUROPEAN DATA
PROTECTION SUPERVISOR

Decision on complaint received from Mrs. [redacted] against the Commission

(case 2008-622)

1. Procedure

On 21 October 2008, the European Data Protection Supervisor (hereinafter: 'EDPS') received a complaint lodged by [redacted] and [redacted] on behalf of [redacted] (hereinafter: 'Mrs. [redacted]'), on an alleged illegitimate transfer of personal data to a third party in the context of an external audit performed by the Commission.

By letter of 31 October 2008, the EDPS informed [redacted] and [redacted] that the EDPS could not treat the complaint according to the regular complaint procedure since [redacted] was a legal entity and not a natural person. In the same letter, the EDPS pointed out that the person to whom the transferred data related could try to lodge a complaint with the EDPS.

On 23 November 2008, the EDPS received an e-mail from the person concerned, Mrs. [redacted], in which she indicated that the complaint submitted by [redacted] and [redacted] on 21 October 2008, must be seen as a complaint on her behalf. On 1 December 2008, the EDPS received a written authorisation which formally confirmed this.

On 4 December 2008, the EDPS sent a letter to [redacted], Head of Unit within DG INFSO and responsible for external audits, requesting to be informed about the matter in greater detail and to obtain his views on the issue in light of Regulation (EC) No 45/2001.

On 11 February 2009, the EDPS received an answer from [redacted] by letter dated 29 January 2009.

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2. The complaint

2.1. The facts

was an independent scientific and management consultancy, which specialised in the administrative, scientific and marketing support for international, co-operative R&D projects.¹ Mrs. was working as a consultant for

Within the 6th Framework Programme of the European Community for research, technological development and demonstration activities (hereinafter: 'FP6'), was coordinating several projects for the European Community. In some of these projects another company, acted as a partner. In one project acted as coordinator, while was a partner.

In the context of the FP6 the Commission has the competence to perform external audits in order to ensure the proper execution of the projects and the contracts. After making a risk assessment, the Commission decided to subject to such an audit. One element which was taken into account in the assessment was that during negotiations on a new project (in the context of FP7) DG INFSO had felt pressure from, in the person of Mr. who is the husband of Mrs. to include as a 100% funded partner.

In the context of the on-the-spot audit performed on from 2008 to 2008 by the Commission, s business premises were visited and four employees, amongst whom Mrs. , were interviewed.

On the basis of the information gathered, the Commission auditors defined as an audit hypothesis that Mr. intervened in the name of to maintain the contract flow from the Commission to at a 100% funding rate in exchange of payments for a fictitious contract in the name of his wife, thereby prejudicing the financial interests of the Community.

The Commission explained in its letter of 29 January 2009 that the elements gathered during the audit were not sufficient to assess the reality of the work carried out by Mrs. and to assess the indication of a potential conflict of interest in the name of. Before taking any further steps towards transmitting the file to anti-fraud authorities, the Commission auditors therefore tried to validate the audit hypothesis in two ways. First, by prompting in the audit contradictory procedure to provide elements which could lift the suspicion of a conflict of interest and/or the existence of a fictitious contract. And second, by assessing the potential conflict of interest in the name of on a confidential basis with the Internal Audit Department of.

In the context of the second procedure, on 25 June 2008, after a first conversation by phone, the Commission transmitted to the Internal Audit Department of the minutes of the interview the auditors had with Mrs. during the audit field work as well as two one page contracts between and Mrs.

2.2. Claim of the complainant

The complainant alleges that the transfer by the Commission of the minutes of the interview and her contract with to the Internal Audit Department of was illegal. The complaint contains no specific reference to provisions of Regulation (EC) No 45/2001. In her

¹ On 30 December 2008, the Court of Konstanz has declared the bankruptcy of IMC.

e-mail of 23 November 2008 the complainant informed the EDPS that she wishes to be informed about the legal basis of the transfer of the information.

Upon request of the complainant the complaint was dealt with confidentially.

3. Legal issues

3.1. Admissibility of the complaint

In accordance with Article 41 and Article 46(a) of Regulation (EC) No 45/2001 the EDPS is competent to hear and investigate complaints.

On the basis of Article 32(2) Regulation (EC) No 45/2001 every data subject may lodge a complaint with the EDPS if he or she considers that his or her rights under Article 286 of the EC Treaty have been infringed as a result of the processing of his or her personal data by a Community institution or body.

The complainant in the current case is a natural person who complains about the transfer by the Commission to a third party of information relating to her. This constitutes the processing of personal data by a Community institution to which Regulation (EC) No 45/2001 applies. She alleges that the transfer lacks a proper legal basis, which could be contrary to the requirements for legitimate data processing as laid down in Regulation (EC) No 45/2001.

For these reasons, the complaint is admissible.

3.2. Scope of legal analysis

The collection of personal data by the Commission is not the subject matter of the complaint. Furthermore, the Commission has a certain margin of discretion in the legitimate exercise of official authority vested in it. On the basis of the information provided, the EDPS does not have any reason to believe that the collection of the complainant's personal data by the Commission, and the audit as such, were not legitimate. The EDPS will therefore focus his analysis on the issue of the transfer of personal data by the Commission to assess whether the transmission of personal data to the Internal Audit Department of [redacted] was in conformity with the provisions of Regulation (EC) 45/2001.

3.3. Lawfulness of the transfer of personal data

3.3.1. Transfer to external recipients (Article 8 of Regulation (EC) No 45/2001)

The Commission indicated in its letter of 29 January 2009 that it contacted the Internal Audit Department of [redacted] in order to validate the audit hypothesis that Mr. [redacted] intervened in the name of [redacted] to maintain the contract flow from the Commission to [redacted] at a 100% funding rate in exchange of payments for a fictitious contract in the name of his wife, thereby prejudicing the financial interests of the Community.

Since the Internal Audit Department of [redacted] is a recipient, other than Community institutions and bodies, which is subject to Directive 95/46/EC, the transfer of the personal data was subject to the rules laid down in Article 8 of Regulation (EC) No 45/2001. This Article states that personal data may only be transferred if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

Contacting the Internal Audit Department of [redacted] formed part of the Commission's activities to ensure the protection of the Community's financial interests. The legal basis for performing the external audits is Article 20 ('Protection of the financial interests of the Community') of Regulation (EC) No 2321/2002 concerning the rules for participation relating to the FP6. More detailed rules are provided for in Article II.29 of the General Conditions which were approved by the Commission on 23 October 2003 and which constitute an Annex of the FP6 model contract.²

The communication with the Internal Audit Department of [redacted] necessarily included the exchange of certain personal information about the complainant. It would have been impossible to discuss the matter without mentioning at least the name of the complainant and certain professional information relating to her.

The Commission had to strike a balance between the protection of the financial interests of the Community and the legitimate interests of the data subject when transferring personal data to the Internal Audit Department of [redacted]. The EDPS takes the view that the Commission struck the right balance.

The Commission is granted the power to perform external audits precisely to control whether there are no irregularities in the spending of Community money by contractors. As a participant in projects funded by the Community the complainant knew she could be subjected to such an audit. In those circumstances, the complainant normally has no legitimate interest in keeping her name or certain professional details secret from the Commission or other recipients who are legitimately involved. The complainant has not provided the EDPS with indications of particular circumstances which might have justified such secrecy after all.

The transfer as such is therefore lawful and in compliance with Article 8 of the Regulation.

3.3.2. Principle of data quality (Article 4(1)(c) of Regulation (EC) No 45/2001)

Article 4(1)(c) of Regulation (EC) No 45/2001 states that data must be 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed'.

As said, the communication with the Internal Audit Department of [redacted] necessarily included the exchange of certain professional information about the complainant. The Commission contacted the Internal Audit Department of [redacted] in order to validate the audit hypothesis that Mr. [redacted] intervened in the name of [redacted] to maintain the contract flow from the Commission to [redacted] at a 100% funding rate in exchange of payments for a fictitious contract in the name of his wife, thereby prejudicing the financial interests of the Community. Since the question relates to the fictitiousness of the contracts of the complainant, the transfer of the two contracts of the complainant with [redacted] was relevant and proportionate. It must be noted that the contracts are one page contracts containing a limited amount of information about the complainant. It must furthermore be taken into account that [redacted], as coordinator and partner in several projects which involved [redacted] must already have been familiar with professional details about the complainant.

² Commission Decision C(2003)3834 of 23 October 2003.

The EDPS therefore concludes that the transfer of the two contracts of the complainant with [redacted] was relevant and not excessive in relation to the purpose for which the transfer was made.

The situation is different with regard to the transfer of the minutes of the interview which was held with the complainant during the performance of the external audit at [redacted]. These minutes contain information about the complainant in relation to her work for [redacted] in a more detailed manner and some of the information has a more private character. The EDPS is not convinced that the transfer of the minutes was actually necessary for the purpose for which the Internal Audit Department of [redacted] was contacted. The EDPS takes the view that by providing the audit hypothesis, some general information about the complainant and her contracts with [redacted], the Internal Audit Department had enough information to conduct an investigation into the matter.

The EDPS therefore concludes that the Commission insufficiently ascertained that the transfer of the minutes to the Internal Audit Department of [redacted] was not excessive as required by Article 4(1)(c) of Regulation (EC) No 45/2001.

The fact that the information was sent to the Internal Audit Department of [redacted] under a confidentiality clause has no bearing on this finding.

3.4. The requirement of fair processing

As a general remark, the EDPS would like to point at the requirement laid down in Article 4(1)(a) of Regulation (EC) No 45/2001 that personal data are processed fairly. Fair processing implies that the data subject is kept properly informed about the processing of his or her data. A more specific elaboration of this transparency requirement can be found in Articles 11 and 12 of Regulation (EC) No 45/2001. Article 20 of Regulation (EC) No 45/2001 allows for the restriction of the transparency requirement on several grounds.

The EDPS notes that the complainant felt she was not sufficiently informed about the transfer of information relating to her to the Internal Audit Department of [redacted]. Although on the basis of a general privacy statement, the complainant could have been aware of the processing of certain personal data in the context of the external auditing process, including the transfer to other contractors (such as [redacted]), it seems that the Commission, even in general terms, could have been more explicit.

The EDPS therefore invites the Commission to assess whether participants in projects, such as the complainant, could be better informed in advance about the transfer of personal data to other contractors in the context of the audit procedure. Also if the Commission takes the view that the transparency of the procedure should be limited for one of the reasons listed in Article 20 of Regulation (EC) No 45/2001, such information should be communicated to such participants.

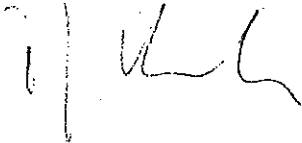
4. Conclusion

On the basis of the foregoing and his powers as laid down in Article 47(1)(b) of Regulation (EC) No 45/2001, the EDPS concludes that the transfer by the Commission to the Internal Audit Department of [redacted] of the minutes of the interview held with Mrs. [redacted] in the context of an external audit performed by the Commission on [redacted] was in breach of Article 4(1)(c) of Regulation (EC) No 45/2001.

The EDPS invites the Commission to assess any further transfers of personal data in the context of external audits to recipients, other than Community institutions and bodies, which are subject to Directive 95/46/EC in light of Regulation (EC) No 45/2001.

The EDPS furthermore invites the Commission to assess how data subjects involved in Framework Programmes for research, technological development and demonstration activities can be better informed about the possible transfer of personal data to other contractors in the context of the audit procedure.

Done in Brussels, on 9 March 2009

A handwritten signature in dark ink, appearing to read 'P. Hustinx', is written over a faint horizontal line.

Peter HUSTINX

European Data Protection Supervisor