



**Decision on a complaint received from [redacted] against the European Agency for Fundamental Rights concerning transfers of personal data**

Brussels, 17 February 2009 (2008-643)

**1. Procedure**

On 29 October 2008, the European Data Protection Supervisor (EDPS) received a letter from [redacted] introducing a complaint against the European Agency for Fundamental Rights (FRA) for alleged illegal transfers of personal data relating to him to a number of recipients within the European institutions and bodies as well as to external recipients that took place in the course of 2007 in the context of an investigation concerning [redacted]

On 19 November 2008, the EDPS sent a letter to the Director of the FRA to request further details on and justification of the transfer of personal data concerning [redacted] to European institutions and bodies and to external recipients.

On 5 January 2009, the EDPS received a letter with answers and supporting documentation from the Director of the FRA. On 9 February 2009, the EDPS received the comments from the complainant on the response from the FRA.

**2. The complaint**

**2.1. The facts**

According to the complainant, the FRA transferred to a number of persons within the European institutions and bodies as well as to external recipients personal information from his personal file as well as the copy of a letter dated 21 June 2007 that he wrote in response to an investigation taking place within the FRA concerning [redacted]

Supporting documents were attached to this letter containing personal information relating to him, which included details of his professional qualifications and professional experience. The letter specifically indicated that the documents and information provided in the response were "personal, private, and confidential" and that they should not be disclosed.

The complainant claims that personal data relating to him were transferred to, at least, the following recipients:

- DG ADMIN
- DG JLS

- IAS
- The Court of Auditors
- The FRA Task Force
- Maître (lawyer)
- (external media consultancy)

## **2.2. Claim of the complainant**

The complainant claims that his response dated 21 June 2007 and personal information from his personal file should not have been communicated to third parties and invites the EDPS to examine if this transmission was in conformity with Regulation (EC) 45/2001.

## **3. Legal issues**

### **3.1. Admissibility**

Article 32.2 of Regulation (EC) 45/2001 provides that 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 Treaty have been infringed as a result of the processing of his or her personal data by a Community institution or body. The complaint introduced by \_\_\_\_\_ relates to the infringement of his personal rights to data protection under Regulation (EC) 45/2001 as a result of the processing of his personal data by the FRA, a Community body set up on 15 February 2007 by the Council Regulation (EC) 168/2007<sup>1</sup>. The complaint introduced by the complainant meets the conditions set forth in Article 32.2 of the Regulation and is therefore admissible.

### **3.2. Scope of the legal analysis**

The collection of personal data by the FRA is not the subject matter of the complaint. Furthermore, the FRA 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 FRA, and the investigation as such, were not legitimate. The EDPS will therefore focus his analysis on the issue of transfers of personal data by the FRA to assess whether the transmission of personal data to third parties is in conformity with the provisions of Regulation (EC) 45/2001.

### **3.3. Lawfulness of transfers of personal data (Articles 7 and 8)**

Regulation (EC) 45/2001 distinguishes between data transfers within or to other Community institutions and bodies, which are subject to the conditions laid down in Article 7 of the Regulation, and data transfers to external recipients which are subject to the rules laid down in Article 8 of the Regulation. The compliance of the data transfers with Articles 7 and 8 of the Regulation is analysed in turn below.

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<sup>1</sup> The FRA was built upon the European Monitoring Centre on Racism and Xenophobia, created by Regulation (EC) 1035/97, with a view to provide the European institutions and the Member States with information, assistance and expertise on fundamental rights.

### 3.3.1. Transfers within or to other Community institutions and bodies (Article 7)

Any transfer of personal data to recipients within or to other Community institutions and bodies must comply with Article 7 of the Regulation (EC) 45/2001. According to Article 7 of the Regulation, "personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient."

According to information provided by the FRA, personal information concerning [redacted] was transferred to recipients (i) within the FRA, i.e. the FRA Task Force, an internal body of the FRA set up by the management board of the FRA to advise and supervise the interim director of the FRA; and (ii) to other Community institutions, i.e. DG Admin, DG JLS, IAS, and the Court of Auditors.

The information provided by the FRA reveals that the data transfers to members of the FRA Task Force were necessary in order for the Task Force to advise and supervise the interim director of the FRA concerning the management of staff.

The FRA indicated that data transfers to the Court of Auditors, IAS and DG Admin were necessary in order to respond to a request from the Court of Auditors to check personal files of staff members for correctness, which investigation raised the issue of

In the case of the Court of Auditors, the data transfer followed a request from the Court itself. In the case of IAS and DG Admin, as it appeared that there were questions on :

[redacted], data transfers were made to IAS and DG Admin to obtain expertise on the interpretation of

The FRA also indicated that data transfers to DG JLS were made in its capacity of "DG de tutelle" of the agency, as it is customary for agencies to keep the "DG de tutelle" informed of its communications with departments of the European Commission.

On the basis of the information provided by the FRA, the EDPS considers that the personal data transfers within or to other Community institutions and bodies as such were necessary for the legitimate performance of tasks covered by the competence of the recipients as required by Article 7 of the Regulation (EC) 45/2001.

### 3.3.2. Transfers to external recipients (Article 8)

With respect to transfers of personal data to recipients other than Community institutions and bodies, subject to Directive 95/46/EC, they must comply with Article 8 of the Regulation (EC) 45/2001. Since the lawyer and the external consultant to whom the data have been communicated in the transfer under analysis are subject to Belgian data protection law adopted for the implementation of Directive 95/46/EC, Article 8 must be respected.

According to Article 8(b) of the Regulation, the transfer may only take place 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.

Concerning the transfer of personal data of [redacted] to a lawyer, the FRA indicated that, following the resignation of [redacted], it sought legal advice from a lawyer in order to handle the resignation and to avoid any potential liability. The data transfer was necessary in order for the lawyer to provide legal advice and to prepare the FRA's defence against a possible legal claim by [redacted]. In doing so, the FRA struck a right balance between the legitimate interest of the FRA to protect against any liability and the legitimate interests of the data subject. The transfer as such is therefore lawful and in compliance with Article 8 of the Regulation.

With respect to the transfer of personal data of the complainant to a media consultancy, it appeared necessary for the FRA to seek the services of a media consultancy following the publication in the press (Kurier) on 5 July 2007 of an article questioning the management of the FRA. The FRA consulted a media consultancy in order to anticipate and to react against a possible reputational damage in the event that the investigation of [redacted] the FRA was escalated to the press. In doing so, the FRA struck a right balance between the legitimate interests of the FRA to protect its reputation and the public image of the EU institutions and the legitimate interests of the data subject. The transfer as such is therefore lawful and in compliance with Article 8 of the Regulation.

### **3.4. Principle of data quality (Article 4.1(c))**

Article 4.1(c) provides that personal data must be "adequate, relevant and not excessive in relation to the purposes for which they were collected and/or further processed". The complainant questions the transmission of his letter of 21 June 2007 as well as supporting documents containing personal information relating to his diploma and professional experience to a number of recipients within the European institutions and bodies and to external recipients in the context of an investigation concerning [redacted].

The principle of data quality notably implies that only adequate, relevant and not excessive data be communicated to the European institutions and bodies as well as to external recipients for the purposes for which they are transferred.

Taking into account the purposes of the transfers within the FRA and to European institutions, as was outlined in section 3.3.1. above, the EDPS considers that the transfers of personal data relating to the complainant within the FRA and to other European institutions, namely the Court of Auditors, IAS, DG Admin and DG JLS, were relevant and proportionate to the purposes for which such data transfers were made.

With respect to data transfers to external recipients, the EDPS considers that the transfer to the lawyer of personal data relating to [redacted], including a copy of his response and supporting evidence provided by him, was justified and proportionate as the lawyer needed access to all the information and evidence relating to the matter in order to analyse any potential liability on the part of the FRA and to prepare a defence in the event of a possible lawsuit. The EDPS further notes that the fact that the lawyer is subject to a duty of confidentiality and to professional secrecy gave sufficient guarantees that the complainant's personal data would be treated confidentially by this external recipient.

Concerning the data transfer to the media consultancy, the EDPS considers that while the transfer of certain information was necessary for the media consultancy to accomplish its task, the transfer of all personal information concerning the complainant (in particular the supporting documentation relating to his diploma and professional experience) was not

necessary in this case. In particular, it seems not relevant, and excessive, to have communicated the supporting documents provided by the complainant, containing a copy of his diploma and details of his professional experience, to the external consultant who was in charge of advising the FRA on its media strategy. This does not seem relevant to the purpose of providing media advice, and is furthermore aggravated by the fact that the data subject had specifically requested that the supporting documentation would be treated confidentially and therefore not disclosed inappropriately.

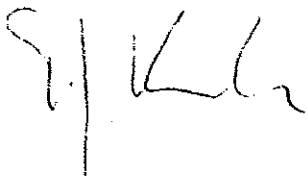
In so far as the principle of data quality also applies to the transfer of personal data to third parties, the FRA should have ensured that only adequate, relevant and non excessive data were transferred.

#### 4. Conclusions

On the basis of the preceding consideration and his powers as laid down in Article 47.1(b) of Regulation (EC) 45/2001, the EDPS concludes that the communication to the media consultancy of certain personal data relating to \_\_\_\_\_ violated Article 4.1(c) of Regulation (EC) 45/2001.

The EDPS invites the FRA to assess any future transfers of personal data in the light of Regulation (EC) 45/2001.

Done at Brussels on 17 February 2009



Peter HUSTINX  
European Data Protection Supervisor