

[REDACTED]

From: [REDACTED]
Sent: 27 June 2013 10:16
To: European Data Protection Supervisor
Cc: [REDACTED]

Subject: Request for documents, ref. 2013-0596 D-1360, [REDACTED]

Attachments: 13-06-26 Letter [REDACTED] 2005-0156 D-1360.pdf; attachment 6_EDPS_INFISO_13.05.09 case 2008-0622 anonymised.pdf; attachment 5_EDPS decision case 2008-0622_anonymised.pdf

Dear Sir,

Thank you very much for the release of the documents applied for and the detailed initial reply of the EDPS.

A confirmatory application is respectfully submitted as set out below.

[REDACTED]

[REDACTED]

I. Initial request #4

'The internal EDPS documents with which the EDPS has analysed the lawfulness of personal data processing by an Institution or body pursuant solely to contractual provisions.'

The initial reply informed me that the sole relevant EDPS case is 286-2004, *freelance translators of the Court of Justice*. However, in the case 390-2009 of EFSA the EDPS opinion reads "The EDPS however wants to underline that the requirement stated in Article 6 of the Covenant would, if implemented, lead to a breach of the Regulation. In particular, the processing of data in view of fulfilling this contractual requirement would not have any legal basis under Article 5 of the Regulation".

It is therefore evident that there is a second EDPS document about the very substance of the request #4.

By definition, an 'internal' document refers to a document not dispatched to third parties. The EDSP initial reply is not absolutely categorical that the EDPS has not drawn up internal documents, not even an internal email.

The subject-matter of the request is not a trivial or obscure one. Half of the Union's directly managed expenditure is disbursed to beneficiaries pursuant to private law contracts, with the FP6 and FP7 programmes being the prime examples. This highlights the fundamental importance of contracts in directly managed Union expenditure. However, failing to obtain the express consent of the data subject, personal data processing pursuant to private law contracts is outright unlawful.

The EDPS, the very Union Body charged with safeguarding data subject rights, must have drawn up internal documents falling under the scope of request #4. [REDACTED]

II. Initial request #5

'The internal EDPS documents with which the EDPS has analysed the lawfulness of personal data processing of external financial audits of the Research family DGs. There are at least five prior notifications for such processing, namely DPO-3334, DPO-3338, DPO-3398, DPO-3420 and DPO-3455 concerned with the personal data processing of those audits.'

The EDPS reply is silent about whether or not the EDPS has drawn up *internal* documents. That those five prior notifications were not submitted to the EDPS for an article 27 *prior check* does by no way mean that the EDPS has not drawn up *internal* documents.

The EDPS reply implicitly states that the EDPS has not drawn up documents simply because the Commission services did not consult the EDPS, not even informally. However, citizens may have expressly drawn the attention of the EDPS to the manifestly false statement that subcontractors had not been conducting external financial audits for the Research family DGs. [REDACTED]

III. Initial request #6

'The internal EDPS documents with which the EDPS (a) has assessed the truthfulness of the statement found in DPO-3334, DPO-3338, DPO-3398, DPO-3420 and DPO-3455 'This processing has been submitted to the EDPS who concluded that Article 27 is not applicable', and (b) has contacted the Commission services to 'discuss the issue'.

As argued above, the failure of the Commission services to notify the EDPS about those prior notifications does not imply that no EDPS internal documents were drawn up. It is very likely that natural or legal persons formally notified the EDPS about those notifications, *alerting the EDPS about the false statement 'This processing has been submitted to the EDPS who concluded that Article 27 is not applicable'*. [REDACTED]

While such an issue is beyond article 42 of the *Charter of Fundamental Rights of the EU*, nevertheless, should the EDPS had not drawn up even a single *internal document*, in spite of an express alert, [REDACTED]

IV. Initial request #7

'The internal EDPS documents, or documents dispatched to the Commission services, with which the EDPS made some kind of enquires with the Commission services about which particular prior notification(s) of article 25 of Regulation 45/2001 were covering the external financial audits of the Research family DGs. It is noted that the provisions of article 25 are essential procedural steps, infringement of which renders the personal data processing unlawful, even if all other provisions are fulfilled'.

The EDPS has not expressly stated that it does not hold document falling under the scope of the request. Instead, he has referred me to his answer of request #6. However, the request is not framed in terms of DPO-3334, DPO-3338, DPO-3398, DPO-3420, and DPO-3455. The very first of those prior notifications was filed on 2/2/2011, i.e. DPO-3338. This gives rise to the question as to which prior notification(s) were covering the external financial audits prior to 2/2/2011. If an applicant poses such questions, then the EDPS has had a statutory duty to immediately request information from the Commission services. Regulation No 45/2001 has conferred on the EDPS wide-ranging powers, including the power to ban the operations in order to protect the data subject rights.

Again, should the EDPS had not drawn up any documents falling under the scope of request #7, [REDACTED]

V. Initial request #8.2 and #8.3

'An application to receive copies of the following EDPS drafted documents is hereby kindly requested:

8.2: The documents the Commission services dispatched to the EDPS as the article 25 prior notifications covering the DG INFSO external financial audit in question.

8.3: In the wake of the EDPS 'investigation of the complaint', the recommendations, if any, of the EDPS to the Commission services regarding the personal data processing of the external financial audits of the Research family DGs.'

Request #8.2

The initial reply has not expressly stated that the EDPS does not hold the DG INFSO applicable prior notification. One would reasonably expect that in investigating the complaint, the EDPS would have checked the prior notification covering the particular audit of DG INFSO. Since at the material time DG INFSO had not filed any prior notification about its external financial audits, [REDACTED]

Request #8.3

The initial reply has not expressly stated that the EDPS has not drawn up any document, other than the Decision. In the absence of a prior notification about the DG INFSO external financial audit, it is inconceivable that the EDPS did not make a recommendation to DG INFSO. [REDACTED]

VI [REDACTED]

The EDPS kindly released its Decisions dated 9 March and 13 May 2009, Case 622-2008. The observations in the following paragraphs are not directly concerned with the application for EDPS held documents *per se*. They should be interpreted as indirectly arguing for an overriding public interest for a diligent and thorough search of documents falling under the scope of the confirmatory application.

The European Court of Auditors has stated in its opinion 1/2006

45. Since the beginning of the European RTD framework programmes, the Community *has used private law contracts (or grant agreements) to establish a legal relationship between participants in an indirect action and the Commission*

As the EDPS himself has stated, personal data processing pursuant to a private law contract without the express consent of the data subjects is unlawful.

In early 2009 there have been several Judgments of the EU Courts, in which the Courts held that in FP4 & FP6 contracts, the relationship between the parties is merely contractual.

Case T-74/05, International Institute for the Urban Environment, v Commission of the European Communities, order 3/4/2006

37. *In this respect, it should be pointed out first of all that, if the Commission, in concluding the contracts, pursued an objective of general interest, that is, Community participation in the financing of research projects on technological development, the fact nevertheless remains that the framework of which the contested letter forms part is purely contractual.*

Case T-179/06, Commission v Burie Onderzoek in Advies, Judgment of 24/9/2008

118 *En effet, les institutions communautaires sont soumises à des obligations relevant du principe général de bonne administration à l'égard des administrés exclusivement dans le cadre de l'exercice de leurs responsabilités administratives. En revanche, dans le cas d'espèce, la relation entre les parties est clairement de nature contractuelle. La défenderesse ne saurait donc reprocher à la Commission que des violations de stipulations contractuelles ou des violations du droit applicable au contrat, à savoir la loi néerlandaise.*

as in its Decision it has stated in section .

'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 was in conformity with the

In the Case T-198/03, Bank Austria Creditanstalt AG v Commission of the European Communities, the Court of First Instance held in its Judgment of 30 May 2006.

29 *The sphere of information covered by the obligation of professional secrecy extends beyond business secrets of undertakings (Opinion of Advocate General Lenz in Case 53/85 AKZO Chemie v Commission, [1986] ECR 1965, at 1977). A distinction should be drawn, in this respect, between the protection that must be afforded to information covered by the obligation of professional secrecy in relation to persons, undertakings or associations of undertakings having a right to be heard in the context of proceedings applying the competition rules, and that which should be afforded to such information in relation to the general public. The obligation on officials and other servants of the institutions not to disclose information in their possession covered by the obligation of professional secrecy, laid down in Article 287 EC and implemented, in the field of competition rules applicable to undertakings, by Article 20(2) of Regulation No 17, is mitigated in regard to persons on whom*

Article 19(2) confers the right to be heard. The Commission may communicate to such persons certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation. However, that power does not apply to business secrets, which are afforded very special protection (see, to that effect, *AKZO Chemie v Commission*, paragraphs 26 to 28). Conversely, information covered by the obligation of professional secrecy cannot be disclosed to the general public, irrespective of whether business secrets or other confidential information are involved.

Article 4(1)(b) of Regulation No 1049/2001 provides for a *mandatory refusal* of releasing to the public parts of documents directly relating to personal data. Moreover, article 8(2) of Regulation No 45/2001 provides that personal data may be transferred to a recipient – private sector entity – only ‘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’. Regarding article 8(2), two decisive factors are: (i) personal data are to be transferred at the request of the recipient and *not* at the pleasure of an Institution, (ii) the data subject’s legitimate interests are not prejudiced. In the case 622-2008 the legitimate interests of Mrs. were indeed adversely affected by the disclosure to the Internal Audit Department of Mrs. personal data.

[REDACTED]

[REDACTED]

Reading together the last sentence of paragraph 29 of the above Judgment and the aforementioned article 4(1)(b) and article 8(2), the only possible interpretation is that the personal data of Mrs. DG INFSO transferred to a third party took place in contravention of article 339 TFEU.

[REDACTED]

[REDACTED]

Given that article 5 is not satisfied, article 7(1) was infringed upon, since personal data were unlawfully transferred from the field audit to the DG INFSO Brussels offices. Without the consent of the data subject, the transfer was not lawful. [REDACTED]

[REDACTED]

Article 8(b) expressly limits transfers of personal data from an Institution to a recipient solely *at the request of the recipient*. It does not provide at all transfer of personal data to a private sector entity at the initiation of an Institution. Any transfer of Mrs. personal data to private sector entities, other than her employer-auditee, is a grave breach of article 8(b) [REDACTED]

[REDACTED]

It is virtually certain that when DG INFSO staff interviewed Mrs., they failed to provide her with the information stipulated in article 11(1). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The mere failure of the DG INFSO data controller (most probably the DPO-3338 data controller) to have filed a prior notification of article 25 of Regulation automatically means that he is liable for disciplinary action. The matter is far worse in the light of the numerous other breaches of that Regulation set out herein.

[REDACTED]

Article 29(1) of the FP6 model contract stipulates:

The Commission may, at any time during the contract and up to five years after the end of the project, arrange for audits to be carried out, either by outside scientific or technological reviewers or auditors, or by the Commission departments themselves including OLAF. Such audits may cover scientific, financial, technological and other aspects (such as accounting and management principles) relating to the proper execution of the project and the contract. Any such audit shall be carried out on a confidential basis. Any amounts due to the Commission as a result of the findings of any such audit may be the subject of a recovery as mentioned in Article II.31.

It means that the Commission has undertaken towards the auditee the contractual obligation for an unconditional respect of the confidentiality of any information that comes into its knowledge as a result of an external financial audit. Divulging any information obtained from an auditee to a third party not pursuant to Union law, regardless of what that third party may be, is a breach of contract. DG INFSO was entitled to divulge information to Authorities, but certainly not to private sector entities like the Internal Audit Department of, which was a legal person totally distinct from the auditee.

[REDACTED]

[REDACTED]

In section 3.3.1 of the Decision dated 9/3/2009, the EDPS stated:

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.

However, the external financial audits are provided by article 18(3) of Regulation No2321/2002, which stipulates:

3. The Commission, or any representative authorised by it, shall have the right to carry out scientific, technological and financial audits on the participants, in order to ensure that the indirect action is being or has been performed under the conditions claimed and in accordance with the terms of the contract.

The contract shall specify the conditions under which the participants may object to a technological audit of the use and dissemination of the knowledge being carried out by certain authorised representatives of the Commission.

External contractors have carried out about 80% of all external financial audits of DG INFSO, as well as of the Research family DGs. [REDACTED]

[REDACTED]

[REDACTED] Article 20 essentially refers to OLAF's external investigations. In such investigations the OLAF has the right to transfer personal data to National

Authorities pursuant to article 8 of Regulation No 2985/96, but not to private sector entities. Nevertheless, hinting at OLAF's investigations opened a widow for uttering excuses of transferring personal data at the initiation of the Commission to private sector recipients.

[REDACTED]

VII. EDPS recommendations

[REDACTED]

Section 3.4 of the EDPS Decision dated 9/3/2009 reads:

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

The EDSP has merely invited the Commission services to assess whether data subjects were to be 'better informed'. [REDACTED]

[REDACTED]

The EDPS concluded in section 4 of his Decision dated 9/3/2009:

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 of the minutes of the interview held with Mrs. in the context of an external audit performed by the Commission on was in breach of Article 4(I)(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

[REDACTED]

[REDACTED]

VIII. [REDACTED]

It is worth recalling that the Courts of the Union examine on their own motion matters of public policy, even in the absence of pleas in law by the litigants. Compliance with the time-limits for bringing an action before the Court is an example.

[REDACTED]

[REDACTED]

IX. Conclusion

[REDACTED]

X. Confirmatory application

A confirmatory application is respectfully hereby submitted for the requests #4 to #8 inclusive.

Yours sincerely,

[REDACTED]

Copies to

1. European Ombudsman
2. Mr. [REDACTED], Chairman, Civil Liberties, Justice and Home Affairs, European Parliament
3. Ms. [REDACTED], Vice-Chair, Civil Liberties, Justice and Home Affairs, European Parliament
4. Mr. [REDACTED], Member, Civil Liberties, Justice and Home Affairs, European Parliament
5. Personal Data Protection Authority of Greece
6. Privacy International
7. Statewatch
8. European Commission, Director-General, Legal Services
9. European Commission Data Protection Officer
10. Head of R.4 Unit, DG CNET

Attachments

1. EDPS initial reply to application for documents dated 26/6/2013
2. Released, anonymised EDPS Decision in case 662/2008
3. Released, anonymised EDPS "Confirmatory" Decision in case 662/2008

----- Forwarded message -----

From: **European Data Protection Supervisor** <EDPS@edps.europa.eu>

Date: 26 June 2013 17:40

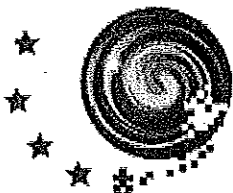
Subject: Our Ref: 2013-0596 D-1360 Your request for access to documents of 4 June 2013

To: [REDACTED]

Dear Mr [REDACTED]


Please find attached a scanned version of a letter together with 6 annexes.

Yours sincerely,



EDPS Secretariat


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