

From: [REDACTED]
Sent: 29 May 2012 19:36
To: European Data Protection Supervisor
Subject: Request for documents, Regulation 1049/2001, External Audits of EC Research DGs
Attachments: INTOSAI 2010 July Pluto Publication.pdf

Dear Madam/Sir,

This message kindly requests the provision of copies of documents in the possession of your Unit, as provided for by Regulation 1049/200.

Most, if not all, of the requested documents are concerned with the **external financial audits** and the associated *personal data processing*, which the European Commission Directorate-Generals have been carrying out during the last 6 years. For the purposes of the present requests, the Directorates-General in question are DG RTD, DG INFSO, DG MOVE, DG SANCO and DG MARE.

1. Prior notification checking, articles 25 and 27 of Regulation 45/2001

I refer to the prior notifications the *Research DGs* submitted to the European Commission Data Protection Officer – *ECDPO* pursuant to the provisions of Article 25 of Regulation 45/2001 – *the Regulation*, namely DPO-3338, DPO-3398, DPO-3420, DPO-3431, and DPO 3455, and the financial audits of FP6 *contractors* and FP7 *beneficiaries*. According to all those notifications, “*This processing has been submitted to the EDPS who concluded that Article 27 is not applicable.*”

The request R1 herein concern documents in the possession of your Organisation concerning those *prior checks*.

2. Power to take statements and *personal data processing*

It appears that during the financial audits the External Audit Unit of DG INFSO – *the EAU* has been conducting, on several occasions, if not in every single audit, the *EAU* officials have requested to conduct interviews of *researchers* whom the audited entity charged to the audited R&D project(s). During those interviews, the *EUA* officials asked information about the personal role of the interviewee in the audited R&D project(s), and recorded the questions and the answers. Typically, the *EUA* officials drew up the “*meeting minutes*” and subsequently handed a copy of the “*meeting minutes*” to the interviewee for his/her comments and confirmation. In turn, the interviewee provided his/her comments to the “*meeting minutes*”, often in the form of an edited version of the “*meeting minutes*”, which was considered as the final version of the “*meeting minutes*”.

This type of interview appears to be like the “*taking of statements*” within the meaning of Article 19 of Regulation 1/2003. Since it concerns an individual person, it also constitutes *personal data processing*.

3. Legal basis of DPO-3338

3.1 Commission's Financial Regulation

DPO-3338 relies **exclusively** on the provisions of the Commission's Financial Regulation as their legal basis. More specifically, under section "8. *Legal basis/Lawfulness*" of DPO-3338, the lawfulness is justified on articles 170 FR, 60.4 FR and 47(4) IR.

The following observations are made regarding the reliance on the Financial Regulation:

- Article 170 FR: This article is concerned with actions the Commission funds in non-EU countries like Europeaid projects and not R&D *Grants* (e.g. FP6 *contracts*). **It is irrelevant for R&D project audits, which fall under the *Grants* provisions of the Financial Regulation.**
- Article 60.4 FR: This Article is contained in Title III, Chapter 3, section 2, of the Financial Regulation which is concerned with the internal organisation of the Commission and not R&D projects external audits. **It is irrelevant for R&D project audits, which fall under the aforementioned *Grants* provisions.**
- Article 47.4 IR: The entire article lays down rules for implementing article 60.4 FR. Therefore it does not apply to external audits of R&D projects. Other articles of the IR (e.g. Article 164) lay down provisions for R&D *Grants*.

The following remarks are made regarding the provisions of *the Regulation* and what DPO-3338 sets forth in "*The processing operations on personal data carried out in the context of external audits and controls are necessary and lawful under three articles of the Regulation (EC) 45/2001:*"

- "*article 5(a)*": There is nothing in the Treaties or in related Regulations about personal data collection at R&D projects audits
- "*article 5(b)*": There is no provision in a Regulation expressly providing for the collection of personal data at R&D projects audits. As a matter of contrast, OLAF is duly empowered by Regulation 2185/96 to collect copies of documents at inspections, so OLAF is properly empowered to collect copies of time sheets.
- "*article 20(1)*": Article 20(1) is about exemptions of the rights of *data subjects*. It does not even apply to article 5 of *the Regulation* whose aim is to establish the legality of the data processing. To say the least, relying on article 20(1) to establish compliance with *the Regulation* and *necessity* of the *data processing* is far from convincing. After all, R&D project external financial audits have nothing to do with the provisions of paragraphs 1.a, 1.b and 1.c of article 20 of *the Regulation*.

3.2 Observations on Commission's Financial Regulation and DPO-3338 legal basis

The Financial Regulation in Articles 30(3) and 95(1) expressly provides for compliance with Regulation 45/2001 when *personal data* are processed.

The Commission Regulation (EC) No 2342/2002 laying down the implementation rules for Regulation 1605/2002 does not contain any provision regarding the collection of *personal data* at the audits of FP6 *contractors*.

The Implementing Rules provide in Article 43a entitled "*Information on transfers of personal data for audit purposes*" the transfer of data already in the possession of the Commission to OLAF or the Court of Auditors. Article 49 includes also provisions for processing of *personal data*.

Regarding the Financial Regulation, the inescapable conclusion is that the EU Legislature expressly provided for *personal data processing* when it intended to duly empower the Commission.

Where the Financial Regulation is silent about *personal data processing* it must be held that the EU Legislation has not empowered the Commission to process personal data at audits.

The above reasoning is supported by findings of the General Court. More specifically, in Case F 46/09, *V*, supported by *European Data Protection Supervisor v European Parliament*, in its Judgment of 5 July 2011 the General Court held (my emphasis)

113 However, it has been held that restrictions may be imposed on fundamental rights provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected (Case C 404/92 *P X v Commission*, paragraph 18). In that regard, **Article 8(2) of the ECHR must be taken as a reference point. Under that provision, interference by a public authority with private life may be justified provided that (i) it is 'in accordance with the law', (ii) it pursues one or more of the – exhaustively listed – objectives and (iii) it is 'necessary' in order to achieve that (those) objective(s).**

128 As a preliminary point, it should be recalled that Article 1 of Regulation No 45/2001 expressly provides that, in accordance with that regulation, the institutions and bodies of the European Union are to protect the fundamental rights and freedoms of natural persons. Consequently, **the provisions of that regulation cannot be interpreted as conferring legitimacy on an interference with the right to respect for private life as guaranteed by Article 8 of the ECHR** (see *Österreichischer Rundfunk and Others*, paragraph 91).

4. DG INFSO PLUTO

You will find attached a publication of several Commission officials in the International Journal of Government Auditing – July 2010 entitled “Alleged Fraud Involving Millions of Euros: Why Didn’t We Notice?”. The entire July 2010 issue may be downloaded from www.intosai.org/uploads/ijgajul10en.pdf.

The following sections provide remarks on the publication in relation to the data processing operations and compliance with *the Regulation*. The text of the publication is given in blue colour italic font (my emphasis).

Why Could This Fraud Be Addressed Now?

- An innovative ***data-mining*** and risk-assessment approach for audit preparations was designed.

According to Wikipedia, data-mining is the process that results in the discovery of new patterns in large data sets. In other words, data-mining seeks to establish hidden links and correlations between large data sets. By its very nature, data-mining relies on linkages between different data sets. Therefore, it is very likely that the Pluto data-mining is covered by Article 27(2)c (i.e. prior check) of *the Regulation*.

- A new intelligence tool (PLUTO, see box) was developed to analyze anomalies in large volumes of structured data. PLUTO is an intelligence database storing all information about the 15,000 beneficiaries and 5,000 research projects funded by DG INFSO. PLUTO allows the relationships between the various entities it contains (beneficiaries, projects, persons, telephones, and addresses) to be analyzed visually. This analysis identifies risky areas in the contractual environment, facilitating auditing and investigative work. **While auditors and investigators still need to demonstrate the fraud, PLUTO makes their task easier by locating the possible areas to look for fraud.** PLUTO is based on the commercially available software iBase from i2 Inc

PLUTO is an information system. The extent to which DG INFSO auditors are properly mandated and empowered to carry out activities aiming at detecting fraud remains to be established.

- Operational data from DG INFSO's contractual and financial systems, dating back 10 years and comprising 500 gigabytes of information, were downloaded and indexed, allowing keyword search (names, amounts, and dates). This information was used in audit preparation and during the fieldwork.

PLUTO contains personal data going back to 2001. It is manifestly evident that PLUTO performs *personal data processing* and on a very large scale. It appears that there is a change of purpose of the *personal data*, so article 6 of *the Regulation* becomes applicable.

PLUTO may contain personal data for tens of thousands of researchers. There is information about 15,000 beneficiaries in PLUTO. The description of the technical work of an R&D project, usually Annex I of the R&D contract, contains typically *personal data* for at least 20 researchers in the form of a short CV. This approximation means that PLUTO contains personal data for about 100,000 researchers. It means that PLUTO has a very large set of *personal data*. The Commission obtained the *personal data* not from the researchers, but from the *beneficiaries*, i.e. a *third party* within the meaning of *the Regulation*. It is very likely, if not virtually certain, that DG INFSO has not complied with Article 12(1) of *the Regulation*.

- All past audit reports and documentation on the suspicious companies and projects were retrieved and analyzed.

To the extent that past audit reports contains *personal data*, PLUTO performs additional *personal data processing*.

- A complete inventory of people, companies, and projects under suspicion was drawn up.

This involves *personal data processing*. DG INFOS's (not OLAF's) drawing up lists of suspicious persons out of personal data obtained from the DG INFSO contractual and financial systems may well be an infringement of Article 4.1.b of Regulation 45/2001, among other infringements.

Building on this information, a large number of targeted audits were launched, incrementally building on available information.

This strongly suggests that DG INFSO used on a huge scale *personal data* for purposes other than those intended for.

Lessons Learned for Ongoing Audits and Investigations

While this approach was applied for the first time in a specific fraud case, the lessons learned have now been integrated into our respective daily activities. The following sections describe some of the key elements that have been adopted.

This is another admission of DG INFSO of using *personal data* for other purposes. There is even the question to what extent DG INFSO is duly empowered to conduct audits aiming at detecting fraud. This is the very task of OLAF.

Preparation for Fieldwork

Information is extracted from DG INFSO's contract management systems, and EU project officers are interviewed about the entity's performance. Unexpected changes in the project's objectives are highlighted. Documents submitted by the entity are assessed for indications of misrepresentation or anomalies (in names, signatures, authenticity, authors, or dates). Previous and related audit reports on the entity are analyzed.

This is processing of *personal data*. Keeping minutes of interviews about the entities' performance is virtually certain that it entails *personal data processing* concerning some members of staff of the audited entity.

Information is collected from company registries: shareholders, directors, related entities, contact references, and accounting data. Information is cross-checked with open sources (such as Google, company Web sites, Wayback Machine, phonebooks, and Google Maps) and internal sources.

Information about the entity's key staff is collected from open sources (such as LinkedIn, PIPL, 123People, and Yasni) and cross-checked with the data provided by the entity.

According to the Judgment of 18/12/2008 of the case C-73/07, collection of personal data from public Internet sources is to be interpreted as *personal data processing*. There appears there is no prior notification about it, so the legality is very questionable.

During Fieldwork

- *consult documents other than traditional ones (such as general ledgers, bank accounts, employment registers, and tax declarations);*

To the extent that it entails recording or *personal data* this is *personal data processing*.

Essential documents—authenticated by the entity where relevant—are safeguarded as part of the audit documentation.

The practice of DG INFSO is to collect copies of documents containing personal data (e.g. timesheets). Again, this is *personal data processing*.

5. Requests for documents

As provided in Regulation 1049/2001, I hereby kindly request that your Unit provide me with copies of the documents detailed below:

A. Prior notification checking, articles 25 and 27 of Regulation 45/2001

R1. Documents in the possession of your Organisation concerning the *prior checks* of the DPO-3338 of DG INFSO, DPO-3398 of DG RTD, and DPO-3420 of DG MOVE. This specifically includes, but is not limited to, the documents the relevant *Controllers* and the ECDPO have submitted to your Organisation.

B. Power to take statements and *personal data processing*

R2. Documents, if any, in the possession of your Organisation concerning the compliance with Regulation 45/2001 of the DG INFSO practices at field audits to ask questions and record answers of *the researchers*, in which answer the researchers provide *personal data*.

R3. Documents, if any, in the possession of your Organisation concerning the compliance with fundamental human rights (e.g. the right not to incriminate oneself) of the DG INFSO practices at field audits to ask questions and record answers of *the researchers*, in which answer the researchers provide *personal data*.

C. Legal basis of DPO-3338

R4. Leaving aside the documents requested under R1 above, documents, if any, concerning an analysis of the legal basis of DPO-3338, beyond a mere reference to the provisions of the Commission's Financial Regulation.

D. DG INFSO Pluto

R5. Documents, if any, in the possession of your Organisation concerning the compliance of the DG INFSO Pluto with the provisions of Regulation 45/2001. This specifically includes, but is not limited to, the following topics:

R5(1). Documents, if any, in which Pluto is expressly linked with the *personal data processing* described in DPO-3338 of DG INFSO

R5(2). Documents, if any, the ECDPO and the DG INFSO *Data Processing Coordinator* (as defined in the Commission's Decision 2008/597/EC of 3/6/2008) have drawn up or communicated to your Organisation

I remain at your disposal for any additional information or clarification your Organisation may find useful in clarifying the documents requested herein.

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: 04 June 2012 18:01
To: European Data Protection Supervisor
Subject: EDPS ref D(2012)1136 C 2012-0457
Attachments: DGR to EDPS 2012 06 04 Attachement 2.pdf; DGR to ECDPO INVESTIGATION 2012 05 23.pdf

Dear Ms. Louveaux,

Thank you very much for your letter dated 4 June 2012, the contents of which are fully noted. The quick response of the EDPS is greatly appreciated.

You will find below further information and considerations concerning the *personal data processing* of the Research DGs. The EDPS may find interesting section 6 "The political dimension" herein.

1. EDPS does not have in its possession not even a single document requested on 29/5/2012; no need for a confirmatory application

Specifically under the R2, R3, R4 and R5 requests, I kindly requested (under the provisions of Regulation 1049/2001) from the EDPS the documents concerning the (i) the power to take statements at Research DG's external audits and the resulting *personal data processing*, (ii) the legal basis of DPO-3338 and (iii) documents about the DG INFSO Pluto information system and its compliance with Regulation 45/2001. The EDPS letter states in the third paragraph "*As the EDPS does not have the documents you request*". I have therefore interpreted this point, together with the contents of the entire letter, as a confirmation that the EDPS does not have in its possession any of the requested documents in my email dated 29 May 2012.

Given that (i) in its reply the EDPS did not request additional clarifications from me, as provided for by article 6(2) of Regulation 1049/2001 and confirmed by the General Court in its Judgment of 22 May 2012 the Case T-300/10 *Internationaler Hilfsfonds eV v European Commission* (paragraph 84), (ii) the EDPS did not refuse me access to documents but instead advised me that no such documents are in its possession and (iii) I have the utmost confidence that the EDPS diligently fulfilled its obligations for the requested documents, it is my opinion that a confirmatory application will be devoid of any meaningful purpose.

2. Materially incorrect factual information in DPO-3338, DPO-3398 and DPO-3240 about EPDS prior checks

According to the prior notifications of the European Commission Data Protection officer – *the ECDPO*, under number (i) DPO-3338 of DG INFSO, (ii) DPO-3398 of DG RTD, and (iii) DPO-3420 of DG MOVE all of which concern and the financial external audits of FP6 contractors and FP7 beneficiaries, *“This processing has been submitted to the EDPS who concluded that Article 27 is not applicable”*. The letter makes it abundantly clear that the EPDS does not have in its possession any document at all from the European Commission regarding those prior notifications. Yet the very contents of those three DPO’s state: *“This processing has been submitted to the EDPS who concluded that Article 27 is not applicable”*. The inescapable conclusion is that *it is a materially incorrect statement*.

In conjunction to my points about the legal basis of DPO 3338, the materially incorrect statement is, at first analysis, very disturbing.

3. Industrial scale of external audits of the Research DGs

During the last 5 years, DG INFSO, DG RTD and DG MOVE have been conducting external audits of FP6 contractors and FP7 beneficiaries in an industrial scale. The European Commission’s Annual Activity Reports for 2010 are found at the link http://ec.europa.eu/atwork/synthesis/aar/index_en.htm. The following excerpts are highly noteworthy:

DG MOVE Annual Activity Report 2010, section “3.1.1.5.2 Audits”:

page 31: 323 external audits of FP6 *contractors*

page 36: 25 external audits of FP7 *beneficiaries*

DG RTD Annual Activity Report 2010:

page 39, table entitled “Table 3.7 Indicators for the Sixth Framework Programme”: 1,080 closed audits and 179 “*achieved*” in 2010

page 43, table entitled “Table 3.8 Indicators for the Seventh Framework Programme” 185 FP7 closed audits and 180 “*achieved*” in 2010

DG INFSO Annual Activity Report 2010

page 35, table entitled “Output indicators: indicators of coverage FP6”, 470 external audits achieved in the period 2007 – 2010

Those three DGs carried out approximately 1,800 external audits of FP6 contractors and FP7 beneficiaries in the period 2006 – 2010.

To the extent that those three DGs have been conducting *personal data processing* as indicated in the aforementioned prior notifications (collection of time-sheets and salaries are specifically referred to in the notifications), and given that 1,800 external audits took place prior to the notifications (1 February 2011 is the first one), this suggests massive violations of Regulation 45/2001. Furthermore, as the external audits take place at a Member State, it is very likely that infringements of the National Data Protection Laws were committed as well.

4. My request for investigation to the European Commission Data Protection Officer

By way of an email dated 2 May 2012 addressed to the ECDPO, I kindly requested that the ECDPO carry out an investigation as provided for as provided for in articles 4.5 and 13 of the Commission's Decision 2008/597/EC of 3/6/2008. The subject of the investigation is the alleged breaches of Regulation 45/2001 DG RTD has been committing in its external financial audits of FP6 *contractors* and FP7 *beneficiaries*. The "Additional Legal Analysis" presented in my email dated 23 May 2012 further elaborates on the legal basis of DPO-3338.

5. Infringements of article 10(1), *personal data concerning health*

It is also highly interesting for the EDPS to consider the particular issue of the *personal data processing* of the *researchers* time-sheets, which is referred to in all DPOs in question. The Commission's "*Guide to Financial Issues relating to*

FP7 Indirect Actions, Version 16/01/2012" found at

ftp://ftp.cordis.europa.eu/pub/fp7/docs/financialguide_en.pdf gives on page 57 a recommended format of time-sheets. You will find attached for your convenience page 57 of the Guide. There is a specific entry for recording the hours classified as *illness*. The Commissions regularly collects such time-sheets from external audits. It is clear that the Commission has been recommending to all FP7 beneficiaries practices it has explicitly refrained itself, as it clear from DPO-3286. In other words, the Research DGs have been blatantly infringing article 10(1) of the Regulation about "*data concerning health*".

For instance, DPO-3338 makes it clear that time-sheets are "processed" at external audits. So the notification DPO-3338 alone, read together with the Guide, allows one to wonder whether DG INFSO and DG RTD are committing infringements of article 10(1) in an industrial scale.

You will find attached the email correspondence I have had with the ECDPO concerning this matter.

6. The political dimension

The EDPS attention is drawn to the highly contradictory treatment of the the *personal data processing* between (i) the Commission's processing of *researchers* personal data (in the order of 100,000 individuals just for DG INFSO) and (ii) the European travelers to US and the release to the US Government of personal data for the purposes of identifying individuals who may pose high risks to the security and safety of the US. The European Parliament and the Commission secured several safeguards from the US Government. So at the highest political level, the European Institutions have observed the spirit and the letter of the fundamental principles of human rights regarding *privacy*.

When it came to the European *researchers*, it appears that DG INFSO created a policy-style information system, and all Research DGs committed massive infringements of the National Data Protection Laws and Regulation 45/2001.

One wanders what inferences the general public may draw from this apparently inconsistent treatment of *data subjects*.

7. Further actions

I intend to lodge a complaint to the EDPS at a later stage about infringements of my rights as a *data subject* that the Commission committed in an external audit of (i) an FP6 *contractor* in the second half of 2009 (ii) a FP7 *beneficiary* in April 2011. The Commission had further infringed the aforementioned rights in the framework of suspending an FP7 R&D project. The complaint will be lodged after I have collected sufficient evidence from the Commission (via written requests for information and explanations) to establish beyond doubt the alleged infringements.

One may regard the information brought to the attention of the EDPS in this exchange of correspondence as sufficient for the EPDS to consider the conduct of an inquiry as provided in article 46(b) "*on his own initiative*". It is pointed out that a most of the questionable practices of the Research DGs are found in publicly available documents. Then there is also the DG INFSO Pluto information system, which is extremely disturbing from several aspects, not least the grave infringements of Regulation 45/2001.

It is hereby kindly requested that in the event the EDPS initiates some sort of inquires with the Commission as a result of the correspondence, my name is kept confidential from the Commission. The primary reasons are (i) not to interfere with the collection of the aforementioned evidence, and (ii) not to influence the inquiry I have requested to the ECDPO.

I remain at your disposal for any additional information of clarification the EDPS may find useful.

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

On Mon, Jun 4, 2012 at 12:06 PM, European Data Protection Supervisor <EDPS@edps.europa.eu> wrote:
Dear Sir,

Please find attached a scanned version of a letter sent to you by regular mail today.

Best regards,

EDPS Secretariat
European Data Protection Supervisor
Contrôleur Européen de la protection des données
Postal address : rue Wiertz 60, Brussels B-1047
Office address: rue Montoyer 63, Brussels
[+32-2-283.19.06](tel:+3222831906) (direct phone)
[+32-2-283.19.50](tel:+3222831950) (fax)
www.edps.europa.eu



From: [REDACTED]
Sent: 17 December 2012 09:00
To: European Data Protection Supervisor
Subject: Request for documents
Attachments: negotiation_en.doc; GfA_FETOpen_2011-2013_STREP_V1.2_en.pdf

Dear Sir,

The present email is a request for documents held by the EDPS in connection with his analysis and supervision of personal data processing by the European Commission, in particular (a) the Seventh Framework Programme - FP7 of Research and Technological Development, and (b) OLAF.

1. FP7 call for proposals

In the context of FP7 calls for proposals, DG RTD publishes applicant's guides. One example is (attached)

- Collaborative Projects
- Small and medium-scale focused research projects (STREP)
- FP7-ICT-2011-C
- FET-Open Scheme

In page 58, the following are stated (emphasis added):

2.2 Individual participants

For each participant in the proposed project, provide a brief description of the legal entity, the main tasks they have been attributed, and the previous experience relevant to those tasks. **Provide also a short profile of the individuals who will be undertaking the work.**

In the applicant's view this explicitly requests the submission of *personal data* in the proposals. The Commission is acting as a Public Authority in publishing calls for proposals and evaluating them. Article 13(3) of Regulation (EC) 1906/2006 provides for (emphasis added):

The Commission shall adopt and publish rules governing the procedure for the submission of proposals, as well as the related evaluation, selection and award procedures and *publish guides for applicants* including guidelines for evaluators.

According to the applicant's research, the prior notification DG RTD about FP7 calls for proposals is DPO-978. "Short profiles of individuals" or "short CVs" or their equivalents are not found in that prior notification.

In the applicant's view, the *applicants guides* are administrative measures within the meaning of article 28(1) of Regulation (EC) 45/2001.

2. FP7 negotiations

The FP7 negotiations guidance documents are found in the link http://ec.europa.eu/research/participants/portal/page/fp7_documentation. Page 27 of the document *Template for Description of Work* (attached) reads (emphasis added):

B 2.2 Beneficiaries

This section should be based on section 2.2 of part B of the proposal but possibly in a reduced format, if requested by the project officer [.....]

For each beneficiary provide [....]:

a short profile of the personnel who will be undertaking the work

In the applicant's view this explicitly requests the submission of *personal data* in the negotiation process. Ultimately, such personal data are found in annex I of the FP7 grant agreement.

According to the applicant's research, for DG RTD the relevant prior notification is/was DPO-2382 "Back-office notification: processing of data submitted by proposal Applicants and reviewers Experts in the context of Framework Programmes and other Programmes and Initiatives, managed by the Research General Directorate (DG RTD)". For DG INFSO it is DPO-1260 "DG INFSO Back Office notification re: Processing of personal data submitted by proposal Applicants and reviewers/evaluators in the context of Framework Programmes and Other Programmes and Initiatives, managed by the General Directorate Information Society & Media (DG INFSO)".

"Short profiles of individuals" or "short CVs" or their equivalents are not found in that prior notification. Up to the conclusion of the grant agreement, the Commission has been acting as a Public Authority.

In the applicant's view, the "instruction contained in the "Template for Description of Work" are administrative measures within the meaning of article 28(1) of Regulation (EC) 45/2001.

3. OLAF checks of Research and Technological Development - RTD participants

The order of the President of the General Court dated 15/10/2010, Case T-435/09 R, *GL2006 Europe Ltd v European Commission* reads:

[....]

2 Between 2000 and 2006, Directorate-General (DG) for the Information Society and Media of the Commission concluded 12 contracts with the applicant under the Fifth and Sixth Framework Programmes for Research and Technological Development (the I-Way, J-WeB, Care-Paths, Cocoon, SecurE-Justice, Qualeg, Lensis, E-Pharm Up, Liric, Grace, Clinic and E2SP projects)

[.....]

6. From 8 to 12 December 2008, *OLAF carried out a check at the applicant's premises*. After obtaining the applicant's comments, OLAF drew up a final audit report, dated 25 March 2009 ('the final report') which concluded that all claims by the applicant from the Commission for amounts in respect of the 12 projects audited in connection with the programmes concerned should be rejected.

[....]

FP6 contracts contain in Annex I personal data in much the same way and extent as in Annex I of the FP7 grant agreements. It is virtually certain that OLAF's inspection of GL 2006 Europe entailed personal data processing.

4. Request for documents drafted by the EDPS

The applicant kindly requests that the EDPS provide him with the following documents the EDPS has drafted:

- 1. Documents analysing the compliance of the FP7 calls for proposals with Regulation (EC) No 45/2001
- 2. Documents about the FP7 calls for proposals being administrative measures of article 28(1) of Regulation (EC) No 45/2001
- 3. Documents analysing the compliance of the FP7 negotiations with Regulation (EC) No 45/2001
- 4. Documents about the FP7 negotiations being administrative measures of article 28(1) of Regulation (EC) No 45/2001

- 5. Documents analysing the Commission's measures towards FP6 contractors and FP7 beneficiaries in the framework of (a) on-the-spot checks, (b) external administrative investigations and (c) external financial audits, in relation to the personal data protection Union law
- 6. Documents analysing the Commission's personal data processing in FP6 contracts and FP7 grant agreements in view of the fact that the FP6 contract and the FP7 grant agreement are private law contracts
- 7. Documents analysing the personal data processing in the context of OLAF's external investigations of entities whose legal relationship with the Commission is solely governed by private law contracts

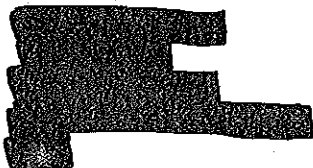
5. Request for documents drawn up by the European Commission and subsequently dispatched to the EDPS

The applicant kindly requests that the EDPS provide him with the following documents the Commission dispatched to the EDPS:

- 8. Documents notifying the EDPS about the personal data processing in the context of FP7 calls for proposals and their evaluation
- 9. Documents notifying the EDPS about the personal data processing in the context of FP7 negotiations aiming at the conclusion of a grant agreement
- 10. Documents notifying the EDPS about the personal data processing contained in Annex I of concluded FP7 grant agreements
- 11 Documents about compliance with article 28(1) of Regulation No 45/2001 of the Commission's measures in FP7 proposal submission and evaluation
- 12 Documents notifying the EDPS about the personal data processing in the context of the Commission's (a) on-the-spot checks, (b) external administrative investigations and (c) external financial audits of FP6 contractors and FP7 beneficiaries
- 13. Documents OLAF has drawn up notifying the EDPS about the personal data processing in the context of OLAF's *external investigations* of entities whose legal relationship with the Commission is solely governed by private law contracts

I am at your disposal for any clarification the EDPS may find useful.

Yours sincerely,



From: [REDACTED]
Sent: 25 January 2013 08:53
To: European Data Protection Supervisor
Subject: Ref. 2012-1073 D-0059, clarifications
Attachments: FP7 Sample Negotiation Guides Annotated.pdf; FP7 Samples with personal data 20120112.pdf

Dear Sir,

Thank you for email, the contents of which are fully noted.

In the following paragraphs, the applicant sets out to *precisely* define the requested documents. It is done by means of further clarifying each single request.

In addition, the vast extent of the underlying personal data processing by the Research DG's lends support to an expectation that, for some cases, the EDPS may have drawn up documents. Events triggering the drafting of such documents may be enquiries and even complaints of natural and legal persons. For instance, it is noted that French Authorities have written to the EDPS about the Commission's practices in requesting personal data, such as salaries.

A. PRELIMINARY REMARKS

Concerning the *European Commission* itself and its Research DGs, it is noted from the outset that the applicant has analysed in depth *all* relevant EDPS opinions and article 27 prior checks *until early 2012*. Particular attention was attached to the data processing operations of the DG Research (DG RTD), DG INFSO/CONNECTS, DG MOVE, and OLAF. The Data Protection Officer register of article 25 prior notifications was extensively analysed.

The applicant is fully aware that the article 25 prior notices of all Research DGs concerning the external financial audits (e.g. DPO-3398, DP-3338) have two intentional and wilful false statements. Those are (a) *no subcontractors are used*, and (b) the statement "*This processing has been submitted to the EDPS who concluded that Article 27 is not applicable*". On top of that, until late 2010 the Research DGs have carried out over 1,300 external financial audits, that is, the prior notifications were filed.

The DG RTD DPO-978, as it stood until the middle of year 2012, for *proposal submission* (not the experts assisting the Commission in evaluations) did *not* list CV as a data field. The same applies to DPO-2382 and DPO-1260 regarding the universal practice of the Research DGs of expressly requesting the inclusion of short CVs (referred to as *profiles*) in Annex I of the FP6 contracts and FP7 grant agreements.

B. Extent of data processing by the Research DGs

B1. Measures adopted by the Research DGs

B.1.1 Sample proposals and grant agreements

In mid-January 2013 the applicant spent about than 10 minutes and carried out a Google search for FP7 proposals and signed agreements. He was able to locate four (4) after spending 10 minutes. An attachment to this message contains excerpts from those four documents. It is absolutely evident those four documents contain personal data from scores of individuals.

The applicant has no reason to doubt about the authenticity of those four documents. Should the EDPS find it useful, the applicant would be glad to write to the coordinators in order to seek their written confirmation that the attached excerpts are indeed the copies of the documents held by the Commission.

B.1.2 . FP7 Negotiations Guidance Notes and FP7 Guide for Applicants

The attached file contains excerpts from the FP7 Negotiations Guidance Notes and the FP7-ICT-2007-1 Guide for Applicants. The applicant has highlighted the document parts laying down the specific instructions of the Research DGs, which are solely addressed to FP7 participants, to include in their proposals/Annex I personal data.

B.1.3. concluding comments

There is absolutely no doubt that DG RTD has expressly requested FP7 applicants/beneficiaries to submit personal data to DG RTD. In other words, DG RTD has caused third parties (i.e. coordinators) to transfer within DG RTD personal data. DG RTD recorded the personal data to EPSS and later used the personal data (collected from third parties) to evaluate FP7 proposals. Article 12.1 of Regulation (EC) No 45/2001 is most certainly applicable.

Following the conclusion of negotiations with successful consortia, DG RTD dispatched Annex I to the coordinator, and also explicitly instructed the coordinator to transmit Annex I to all consortium members. The Annex I in question may contain different personal data in relation to proposal part B (description of work). FP7 applicants many have dropped and new FP7 beneficiaries may have entered during the agreement negotiations. In this instance, DG RTD discloses personal data to the coordinator. For a second time article 12.1 of Regulation (EC) No 45/2001 is most certainly applicable.

B.2. DG RTD "discoveries" about Regulation No (EC) 45/2001

Part of form A2.6, which the coordinator submits to a Research DG, reads:

As co-ordinator on behalf of all proposers I take note of the following statement:

All personal data (such as names, addresses, CVs, etc.) will be processed in accordance with Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (Official Journal L 8, 12.01.2001). Such data will be processed solely in connection with the assessment of the project by the Commission department responsible for FP7. On request, proposers may obtain access to their personal data and correct or complete them. Any questions relating to the processing of these data can be addressed to the project officer. Proposers may lodge a complaint against the processing of their personal data with the European Data Protection Supervisor at any time.

Regulation (EC) 45/2001 applies to the Institutions only. Authorities and Agencies like EFSA, EMA and ECHA and the JRC, as part of the Commission, are also subject to it. FP7 beneficiaries are subject to the personal data protection legislation of the Member States. In view of those observations, it has to be concluded that the above A2.6 content has the sole purpose to simply reassure the consortium that DG RTD will comply with the Regulation.

That Regulation applies to all activities of an Institution (recitals 7 and 14). DG RTD has simply no room for discretion. Therefore, the above statement does no more than stating the obvious. DG RTD has not stated in the form A2.6 that it has an absolute obligation to observe the Treaties, the secondary legislation and the case law of the EU Courts. Such a stronger statement, by definition, would automatically include Regulation (EC) No 45/2001.

According to that form, FP7 participants (i.e. legal persons) may access personal data, which they do not possess in the first place. Proposers (i.e. legal persons) may address questions on personal data to the project officer. In other words, entities not having personal data will "bother" an official who, most likely, does not have the slightest clue about personal data protection. The next sentence in the form informs proposers (i.e. legal persons) that they may lodge a complaint to the EDPS. Obviously, it has slipped DG RTD's attention that only data subjects are entitled to lodge complaints with the EDPS.

All that begs the question why DG RTD felt necessary to include a manifestly absurd statement in form A2.6. This practice most certainly casts serious doubts about compliance of the Research DGs with Regulation (EC) No 45/2001.

B3. Extent of personal data processing

In total, the FP6 and FP7 total funding is in the order of 70 billion Euro. It represents approximately over 50% of the Union's centrally managed expenditure. The Court of Auditors annual reports devote several pages to the spending of the Research DGs. The total cost accrued to all FP6 and FP7 *participants*, of which approximately 50% to 70% is reimbursed, is over 100 billion Euro. In other words, the sums are staggering.

Typically, the success ratio of submitted proposals is 1/5 to 1/10. A conservative estimation of the total costs of all FP6 and FP7 submitted proposals is 500 billion Euro. Labour costs are at least 70% of the total costs, that is, 350 billion Euro. Assuming a total yearly cost of a researcher of 150,000 Euro, project duration of 3 years, it yields that the number of persons in all those proposals is over 750,000. An individual researcher will likely appear in several proposals over a 12-year period. Assuming a dividing factor of 10, we arrive at a ballpark figure of **75,000 individual researches**. This is again a staggering figure.

According to the Annual Reports of the Research DGs, 50% of all FP6 expenditure, thus costs also, was covered by external financial audits. The corresponding target of FP7 expenditure is also 50%. The total costs of the audited FP6 contracts and FP7 grant agreements will reach approximately 100 billion Euro. More than 70% of the total costs is personnel costs. Assuming a researcher is employed for 3 years, 50% of his/her time spent in the subsidised projects, a yearly researcher cost 150,000 Euro, the external financial audits entail personal data processing in the order of 300,000 "individuals". Given the 12-year span of FP6 and FP7, a dividing factor of four (4) is assumed to arrive at the figure of **75,000 individual researchers**. Again, this is a staggering figure.

It is worth pointing out that the cumulative number of officials employed by the European Commission is in the order of 30,000. There are several tens of article 25 prior notifications regarding personal data operations the Commission carries out for its own staff (e.g. time-sheets). There is no reasonable explanation why the Research DGs have been so late in filing the prior notifications about the external financial audits.

C. EDPS MANDATE

C.1 Relevant provisions

The applicant notes that according to Regulation (EC) No 45/2001:

46.2. With respect to the processing of personal data, the European Data Protection Supervisor shall be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies.

46.3 The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, and for advising Community institutions and

bodies and data subjects on all matters concerning the processing of personal data. To these ends he or she shall fulfil the duties provided for in Article 46 and exercise the powers granted in Article 47.

47 The European Data Protection Supervisor shall [.....]

- (b) conduct inquiries either on his or her own initiative or on the basis of a complaint, and inform the data subjects of the outcome within a reasonable period;
- (c) monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body with the exception of the Court of Justice of the European Communities acting in its judicial capacity;
- (d) advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data;

47.1. The European Data Protection Supervisor may [...]:

- (b) refer the matter to the controller in the event of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, make proposals for remedying that breach and for improving the protection of the data subjects;
- (d) warn or admonish the controller;
- (f) impose a temporary or definitive ban on processing;
- (g) refer the matter to the Community institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission;
- (h) refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty;

C.2 EU Courts case law

The applicant refers to the Case C-204/07 P, *C.A.S. SpA v Commission of the European Communities*, in particular paragraphs 93 to 99, and 104 to 106.

In the applicant's view, the significance of what the Court has held is that when the EU legislature has expressly empowered and tasked an Institution to perform a set of monitoring and overseeing activities, that Institution has very little, if any at all, discretion in *cherry-picking* what to monitor/oversee and to what extent.

D. ADDITIONAL INFORMATION ON REQUESTS

The requested documents concern exclusively the European Commission and not Agencies such the ERCEA.

The following sections clarify each single request, aiming at making them *sufficiently precise*. For the sake of clarity, the numbering of sections below has an one-to-one correspondence with the numbering of the initial application.

D.1. Documents analysing the compliance of the FP7 calls for proposals with Regulation (EC) No 45/2001

The vast majority of the FP7 grants are awarded via competitive calls for proposals. The Research DGs are Public Authorities. Regulation (EC) 1906/2006 lays down the Union law governing those calls.

The applicant's research of the EDPS public website discloses that there are no EDPS drawn up documents concerning the FP7 calls for proposals organised by the Research DGs. The requested documents at issue, if they exist, will have to be internal EDPS documents.

D.2. Documents about the FP7 calls for proposals being administrative measures of article 28(1) of Regulation (EC) No 45/2001

In the applicant's humble opinion, a FP7 call for proposal is an administrative measure of article 28(1). In view of the evidence provided herein about the personal data processing, it cannot be argued that the FP7 calls for proposals, especially considered in their entirety, are *not an administrative measure*. Calls for proposals with costs totaling 100 billion Euro, concerning about 50% of the centrally managed Union budget, are *necessarily administrative measures*.

The applicant's research of the EDPS public website discloses that there are no EDPS drawn up documents concerning the FP7 calls for proposals organised by the Research DGs and their features as *administrative measures*. The requested documents at issue, if they exist, will have to be internal EDPS documents.

D.3. Documents analysing the compliance of the FP7 negotiations with Regulation (EC) No 45/2001

The applicant refers to the following section found in page 23 of the FP7 Negotiation Guidance Notes, version 10/9/2007 (attached).

B 2.2 Beneficiaries

This section should be based on section 2.2 of part B of the proposal but possibly in a reduced format, if requested by the project Officer. Upon request of the Commission you may be asked to include a full description in an Appendix to your Annex I.

For each beneficiary provide a brief description of the organisation (including names of key persons to be involved), the main tasks attributed to them in the project, and the previous experience relevant to those tasks. *Provide also a short profile of the personnel who will be undertaking the work.* If the *named key persons do not in fact take part in the work*, or are substituted by other persons without the knowledge of the Commission, this could be seen as beneficiaries not fulfilling their obligations towards the technical quality of the work. This could lead to a more in-depth review of the project.

The above requirement entails personal data processing. The applicant's research of the EDPS public website discloses that there are no EDPS drawn up documents concerning the FP7 Grant Agreement negotiations of the Research DGs. The requested documents at issue, if they exist, will have to be internal EDPS documents.

D.4. Documents about the FP7 negotiations being administrative measures of article 28(1) of Regulation (EC) No 45/2001

At the negotiation stage, the Research DGs act as *Public Authorities*. For the aforementioned reasons, in the applicant's opinion, the negotiations are administrative measures, since the Research DGs drew up a *negotiations guidance note*.

The applicant's research of the EDPS public website discloses that there are no EDPS drawn up documents concerning the FP7 grant agreement negotiations of the Research DGs and their features as administrative measures. The requested documents at issue, if they exist, will have to be internal EDPS documents.

D.5. Documents analysing the Commission's measures towards FP6 contractors and FP7 beneficiaries in the framework of (a) on-the-spot checks, (b) external administrative investigations and (c) external financial audits, in relation to the personal data protection Union law

On-the-spot checks (by OLAF) are provided for in FP7 Annex II article 22.8 and FP6 contract Annex II article 29.6

External administrative investigations are conducted by OLAF as provided for by Regulations No 1073/99, 2185/96, 2988/95 and the Sectoral Rules. They also include on-the-spot checks for infringements of *Community law* (not contractual provisions of private law contracts).

External financial audits of FP6 contractors and FP7 beneficiaries are provided for in FP7 Annex II article 22.8 and FP6 contract Annex II article 29.6, as contractual provisions of *private law contracts*.

The applicant's research of the EDPS public website discloses that there are *no* EDPS drawn up documents concerning

- OLAF on-the-spot checks pursuant to contractual provisions of FP6 contracts and FP7 grant agreements, i.e. *private law contracts*,
- OLAF external investigations *not* concerning infringements of *Community law*,
- External financial audits of the Research DGs (e.g. DPO-3398),

The requested documents at issue, if they exist, will have to be internal EDPS documents

D.6. Documents analysing the Commission's personal data processing in FP6 contracts and FP7 grant agreements in view of the fact that the FP6 contract and the FP7 grant agreement are private law contracts

In the case 2009-390 "Response to a consultation from EFSA's DPO under Article 46(d) of Regulation (EC) No 45/2001", the EDPS found:

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

FP6 contracts and FP7 grant agreements are solely *private law contracts*. The applicant's research discloses that there is no provision of Community law imposing an explicit obligation to FP6 contractors and FP7 beneficiaries.

The article 25 prior notifications of the Research DGs about external financial audits (e.g. DPO-3398) cite entirely inoperative provisions of the Financial Regulations. It is extremely puzzling why the Research DGs do not even cite articles of the Financial Regulation and the Implementing Rules concerning *grants*. Instead, those prior notifications solely rely on provisions applying to the *internal* administrative steps of an Institution. In conjunction with the aforementioned two false statements, the only possible conclusion is that the underlying data processing operations are outright illegal. The aforementioned EDPS opinion about EFSA dispels any lingering doubts.

The applicant's research of the EDPS public website discloses that there are no EDPS drawn up documents concerning the implications for lawful personal data processing in the context of FP6 contracts and FP7 grant agreements. The requested documents at issue, if they exist, will have to be internal EDPS documents

D.7. Documents analysing the personal data processing in the context of OLAF's external investigations of entities whose legal relationship with the Commission is solely governed by private law contracts

The applicant has analysed all EDPS opinions of prior checks (in English) of OLAF's data processing operators up to 3/2/2012 (up to case 2011-1127 *et al*), which are over 450 pages. The term "contract" is

found in 47 instances. None of those instances has any connection of any sort with FP6 contracts or FP7 grant agreements.

In the EPDS opinion on the OLAF cases 2007-47, 2007-48, 2007-49, 2007-50, 2007-72, in section 3.2. *Lawfulness of the processing*, it is stated:

[...] Regulation (EC) 1073/1999, Article 9 of Regulation No 2988/95 and Articles 2 and 6 of Regulation 2185/96 :

- Article 18 and 20 of Regulation (EC) No 2321/2002 of the European Parliament and of the Council of 16 December 2002 concerning the rules for the participation of undertakings, research centres and universities in, and for the dissemination of research results for, the implementation of the European Community Sixth Framework Programme (2002-2006).

Article 18.3 of Regulation (EC) No 2321/2002 provides for:

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 above provision has nothing to do with OLAF on-the-spot checks, since it empowers third parties (authorised representatives) to carry out audits. Besides, an *audit* is different from an *on-the-spot check* and an *administrative investigation*.

Article 20 of Regulation (EC) No 2321/2002 provides for:

The Commission shall ensure that, when indirect actions are implemented, the financial interests of the Community are protected by effective checks and by deterrent measures and, if irregularities are detected, by penalties which are effective, proportionate and dissuasive, in accordance with Council Regulations (EC, Euratom) No 2988/95 and (Euratom, EC) No 2185/96 (1), and with Regulation (EC) No 1073/1999 of the European Parliament and of the Council.

In the applicant's view, the above provision *does not* authorise on-the-spot checks. If merely stipulates that if irregularities are detected, penalties are to be applied. In the light of the *foreseeability* principle, it cannot be accepted that this particular provision may be interpreted as OLAF's empowerment to carry out on-the-spot checks. If that were the intention of the EU legislature, very different wording would have been used.

Neither Regulation (EC) No 1906/2006 nor Decision (EC) No 1982/2006 are cited in those EDPS opinions.

Notwithstanding the above, it is *not* obvious that OLAF is empowered to investigate economic operators bound with the Research DGs solely by *private law contracts*. One fundamental reason is that OLAF is empowered to investigate infringements of *Community law* and not contractual provisions.

The applicant's research of the EDPS public website discloses that there are no EDPS drawn up documents concerning the above particular matters. The requested documents at issue, if they exist, will have to be internal EDPS documents

D.8. Documents notifying the EDPS about the personal data processing in the context of FP7 calls for proposals and their evaluation

Such documents may be informal consultations about whether article 28.1 is applicable, the Privacy Statements and so on. They may concern the DPO-978 operations.

The applicant's research indicates that there is no reference of such Commissions' documents to be found in the EDPS public website and the documents therein. The applicant is totally in the dark whether such Commission documents are held by the EDPS.

D.9. Documents notifying the EDPS about the personal data processing in the context of FP7 negotiations aiming at the conclusion of a grant agreement

Such documents may be informal consultations about whether article 28.1 is applicable, the Privacy Statements and so on. They may concern the DPO-1260 and DPO-2382 operations.

The applicant's research indicates that there is no reference of such Commissions' documents to be found in the EDPS public website and the documents therein. The applicant is totally in the dark whether such Commission documents are held by the EDPS.

D.10. Documents notifying the EDPS about the personal data processing contained in Annex I of concluded FP7 grant agreements

Once in force, the FP7 grant agreement is *a private law contract*.

As it has been established above, the FP7 grant agreement contains personal data of tens of data subjects. According to the Annex II article 22.4:

In order to carry out these audits, the beneficiaries shall ensure that the Commission's services and any external body(ies) authorised by it have on-the-spot access at all reasonable times, notably to the beneficiary's offices, to its computer data, to its accounting data and to all the information needed to carry out those audits, **including information on individual salaries of persons involved in the project**. They shall ensure that the information is readily available on the spot at the moment of the audit and, if so requested, that data be handed over in an appropriate form.

This is undoubtedly *personal data processing*. It imposes a contractual obligation to the FP7 *beneficiary* to infringe the national personal data protection legislation, in particular the provision(s) transposing into national law article 7 of the Directive 95/46/EC. In particular, the *legal obligation* of article 5.c of that Directive cannot be interpreted as a *contractual obligation*, as contracting parties are free to conclude agreements. The U.K. and Irish data protection legislation expressly exclude *contractual obligations* from the controller's *legal obligations*.

The other most peculiar feature is FP7 grant agreement Annex II article 13, which imposes on the Research DGs the *contractual obligation*, over and above Regulation (EC) No 45/2001 as a matter of *Community law*, to observe the very same Regulation. By virtue of concluding a FP7 grant agreement, and since the Research DGs have not obtained the data subject consent, a Research DG has simultaneously infringed the said Regulation and also article II.13 at the very moment the agreement comes into force. **It defies logic why the Research DGs have come up with such arrangements.**

It is pointed out that the article II.13 absurd provision is found in the FP7 grant agreement model, the contractual instrument with which the Research DGs will at the end of FP7 have disbursed 50 billion Euro. All this having gone unnoticed would be quite extraordinary.

The applicant's research indicates that there is no reference of such Commissions' documents to be found in the EDPS public website and the documents therein. The applicant is totally in the dark whether such Commission documents are held by the EDPS.

D.11. Documents about compliance with article 28(1) of Regulation No 45/2001 of the Commission's measures in FP7 proposal submission and evaluation

As analysed above, FP7 calls for proposals must be considered as administrative measures.

The applicant's research indicates that there is no reference of such Commissions' documents to be found in the EDPS public website and the documents therein. The applicant is totally in the dark whether such Commission documents are held by the EDPS.

D.12. Documents notifying the EDPS about the personal data processing in the context of the Commission's (a) on-the-spot checks, (b) external administrative investigations and (c) external financial audits of FP6 contractors and FP7 beneficiaries

The applicant's research indicates that there is no reference of such Commissions' documents to be found in the EDPS public website and the documents therein. The applicant is totally in the dark whether such Commission documents are held by the EDPS.

D.13. Documents OLAF has drawn up notifying the EDPS about the personal data processing in the context of OLAF's external investigations of entities whose legal relationship with the Commission is solely governed by private law contracts

The applicant refers to the OLAF Annual Report of year 2011, chapter "5.1 EDPS: 2011 inspection of OLAF", which reads:

The inspection team randomly selected 15 investigations (five internal and 10 external) to examine from a list of cases that OLAF had provided. For each investigation selected, the team checked compliance with data protection requirements related to information on the data subject and transfers of personal data. The EDPS found that compliance was higher for internal than for external investigations, and made several recommendations for improving compliance in external investigations

In the context of that inspection, and the sample of 10 external investigation cases, OLAF may have provided to the EDPS documents about external investigations of FP6 contractors and FP7 beneficiaries.

From the order (paragraph 6) of 15/10/2010 dismissing the interim measures in pending case T-435/09 R, *GL2006 Europe v European Commission* and the Judgment (paragraph 14) of the joined cases T-428/07 and T-455/07, *CEVA v European Commission*, it is evident that OLAF has indeed carried out on-the-spot checks of the Commission's aforesaid counter-parties.

According to applicant, it is far from certain that OLAF may legally process personal data of the Commission's contractual counter-parties, regardless of the type of the investigation. The aforementioned EDPS opinion about EFAS is fully applicable to OLAF's external investigations of FP6 contractors and FP7 beneficiaries.

The more the doubts about the legal basis of OLAF's personal data processing, the more likely appears to be that OLAF may have drafted relevant documents and provided copies to the EDPS.

The applicant's research indicates that there is no reference of such Commissions' documents to be found in the EDPS public website and the documents therein. The applicant is totally in the dark whether such Commission documents are held by the EDPS.

E. Concluding remarks

The applicant has narrowed the scope of the application to the personal data processing operations of the European Commission, in particular the Research DGs and OLAF. Agencies are to be left out.

The above analysis has highlighted:

- The vast extent of personal data processing by the Research DGs

- The “concealment” of the vast extent of that processing regarding FP6 and FP7 proposal submission and contract negotiations. It amounts to a grave infringement of article 25 and most probably of article 27
- The “discoveries” by DG RTD that have enabled the Research DGS to “confer” on legal persons rights on personal data
- The justified concerns about the legality of OLAF’s personal data processing operations in the context of administrative investigations of FP6 contractors and FP7 beneficiaries.
- The two wilful and intentional false statements in the prior notifications covering the external financial audits (e.g. DPO-3338 and DPO-3398) make the whole matter gravely serious.

It is inexplicable that all those grave breaches of Regulation (EC) no 45/2001 have been committed in spite of the personal liabilities of article 49. Presumably, the officials of the Research DGs must have had the utmost confidence in that they will *never* be held to account for their own personal acts. The only possible explanation is that the top-level management of the *Commission Services* had expressly approved all those grave breaches of EU law. The applicant has the utmost confidence that the Commissioners would never have approved such acts. All this begs the question what particular interests the *Commission Services* were serving with those grave breaches of rights enshrined in Regulation (EC) No 45/2001. It is exceedingly difficult to argue that the *Commission Services* were looking after the *public* interest, because grave breaches of EU law never serve the *public* interest.

It will be rather unexpected if the EDPS has not drafted a few paragraphs about some of the above matters.

I remain at your disposal to further clarify my requests.

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Attachments

1. Extracts from the FP7 Negotiation Guidance Notes, annotated
2. Four (4) FP7 proposals and grant agreements found in the public Internet, sample pages with personal data, annotated

On 15 January 2013 15:52, European Data Protection Supervisor <EDPS@edps.europa.eu> wrote:
Dear Mr [REDACTED]

On 17 December 2012, the EDPS received your request under Regulation (EC) No 1049/2001 for public access to documents drafted by the EDPS and submitted to the EDPS by the European Commission concerning the Seventh Framework Programme - FP7 of Research and Technological Development and OLAF's external investigations of entities whose legal relationship with the Commission is solely governed by private law contracts. On 18 December 2012, we sent you an acknowledged of receipt and informed you that the request was registered with case number 2012-1073.

At the outset, we wish to inform you that the notifications (DPO-978, DPO-2382 and DPO-1260) you refer to in your request are posted on the European Commission's website and included in the Register of Notifications on the processing of personal data sent by Controllers to the European Commission's Data Protection Officer on the basis of Art. 25(1) of Regulation (EC) 45/2001. You may be aware that these notifications are not submitted to the EDPS. In accordance with Art. 27(1) of Regulation (EC) No 45/2001 only processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes are subject to prior checking by the EDPS. Therefore, if you need specific information concerning these notifications you should turn to the Commission, e.g. by requesting access to documents through an on-line request form available at:
<https://ec.europa.eu/transparency/regdoc/fmb/formulaire.cfm?cl=en>.

The EDPS keeps a public register of all processing operations notified to the EDPS under Article 27(1) of Regulation (EC) No 45/2001. This register can be found on our website at: <http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/Register>. It contains all notifications for prior checking submitted by the controllers (EU institutions and bodies) and EDPS opinions analysing the compliance of data processing operations with Regulation (EC) No 45/2001. A filter allows to easily identify cases that are of interest for the person consulting the register.

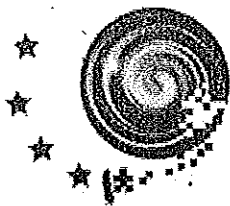
The register shows that the EDPS has been notified by ERCEA on four data processing operations relating to FP7 (see EDPS case files 2011-0661, 2011-0738, 2011-0845, 2012-0831). The EDPS has also been notified by OLAF for data processing operations carried out by OLAF in the context of different external investigations (see EDPS case files 2007-0047, 2007-0048, 2007-0049, 2007-0050, 2007-0072 and 2011-1130).

We would like to invite you to consult our register and see whether you can find the documents you requested relating to notifications the EDPS received under Article 27(1) of Regulation (EC) No 45/2001. If the documents in the register do not satisfy your request, we would like to ask you, in accordance with Article 6(2) of Regulation (EC) No 1049/2001, to use the register to further specify your request.

With regard to your request of access to documents on the FP7 which relate to administrative measures submitted to the EDPS in accordance with Art. 28(1) of Regulation (EC) No 45/2001, we hereby inform you that we have not identified any such documents held by the EDPS.


We are available for further clarifications if you have any further questions.

Yours sincerely,



EDPS Secretariat



Tel. +32 2 283 19 00 | Fax +32 2 283 19 50

 edps@edps.europa.eu

European Data Protection Supervisor

Postal address: Rue Wiertz 60, B-1047 Brussels

Office address: Rue Montoyer 30, B-1000 Brussels

 [@EU_EDPS](https://twitter.com/EU_EDPS)  www.edps.europa.eu

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From: [REDACTED]
Sent: 17 February 2013 13:55
To: European Data Protection Supervisor
Subject: EDPS ref. 2012-1073 D-327, incomplete release of documents held by the EDPS

Dear Sir,

Thank you for your reply and the release of the attached documents.

I. Analysis of the EDPS reply

I feel it is necessary for me to examine in depth the EDPS position set out in the main reply (and the attached documents) before considering whether it is appropriate to submit further observations to the EDPS regarding the underlying issues.

II Incomplete search for EDPS documents

It appears that the EDPS Unit(s) that undertook to search for the requested documents failed to identify all relevant documents. This is elaborated below.

The document found at the link

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/10082/html.bookmark> is the Decision of the European Ombudsman closing his inquiry into complaint 3264/2008/(WP)GG against the European Commission. Paragraph 18 reads:

18. In his decision, the EDPS took the view that contacting Company X's Internal Audit Department formed part of the Commission's activities to protect the EU's financial interests. In this context, he referred to Article II.29 ('Controls and audits') of the General Conditions that form part of the model contract under the Sixth Framework Programme (the "FP6 model contract"). The EDPS further held that the communication with Company X's Internal Audit Department necessarily included the exchange of certain personal data concerning the complainant's wife. He noted that the Commission thus had to strike a balance between the protection of the EU's financial interests and the legitimate interests of the data subject concerned. In the EDPS' view, the Commission had struck the right balance in that case. The EDPS further considered that forwarding the two contracts between Company Y and the complainant's wife to Company X's Internal Audit Department was relevant and not excessive in relation to the purpose for which this transfer of personal data was made. However, as regards the transfer of the minutes of the interview that the auditors had carried out with the complainant's wife, the EDPS considered that the Commission had

"insufficiently ascertained" that this transfer of personal data "was not excessive". The EDPS concluded, therefore, that this transfer constituted a breach of data protection rules.

Given that that EDPS investigation concerned *FP6 contracts*, it is *manifestly evident* that the EDPS carried out an investigation, which is highly relevant to the following particular requests for documents.

- *D.5. Documents analysing the Commission's measures towards **FP6 contractors** and FP7 beneficiaries in the framework of (a) on-the-spot checks, (b) external administrative investigations and (c) external financial audits, in relation to the personal data protection Union law [.....] External financial audits of the Research DGs (e.g. DPO-3398),*
- *D.6. Documents analysing the Commission's personal data processing in **FP6 contracts** and FP7 grant agreements in view of the fact that the FP6 contract and the FP7 grant agreement are private law contracts*
- *D.12. Documents notifying the EDPS about the personal data processing in the context of the Commission's (a) on-the-spot checks, (b) external administrative investigations and (c) external financial audits of **FP6 contractors** and FP7 beneficiaries.*

In its investigation and prior to reaching any conclusions, which presumably was completed prior to February 2011 (the Ombudsman Decision is dated 9/2/2011), the EDPS must have considered, among other issues, the following:

1. The prior notification of DG INFSO pursuant to article 25 of Regulation (EC) No 45/2001 DPO-3338 was registered in the Commission's public register on 2/2/2011, that is, more than 30 months **after** the field audit at the offices of the *FP6 contractor "Y"*
2. The consequences for *lawful personal data processing* in the absence of a prior notification, since a *prior notification* is an essential procedural safeguard of Regulation (EC) No 45/2001 and not a mere formality that may be overlooked at will
3. The legal basis of the FP6 contract, which is a *private law contract*
4. The criteria laid down in article 5 of Regulation (EC) No 45/2001, which in the absence of an express consent of the data subject are virtually impossible to satisfy for a *private law contract*.
5. The collection of documents with personal data from the *FP6 contractor "Y"*, since the Ombudsman Decision reads: "5. Still according to the note for the file dated 25 June 2008, Mr R. asked for a list of the contracts concerned by this issue. **The external audit unit of DG INFSO promised to send this information, together with the underlying employment contracts.**"
6. That the DG INFSO officials who carried out the field audit were subject to the national laws while they were at the offices of *FP6 contractor "Y"*.
7. That article 49 of Regulation (EC) No 45/2001 has provisions acting as a deterrent for unlawful personal data processing by officials. This is incompatible with any culture of tolerance for infringements of Regulation (EC) No 45/2001. Since the Institutions have a zero-tolerance policy for fraud by recipients of Union funds, it cannot be accepted that an Institution may be allowed to effectively adopt an unwritten policy of tolerating deliberate infringements of Regulation (EC) No 45/2001.

III. Request to release documents

In view of all the foregoing, it is hereby respectfully requested that the EDPS:

1. Release all documents pertaining to the *EDPS investigation* referred to in the Ombudsman Decision 3264/2008/(WP)GG. The parts of the documents enabling the identification of the natural and legal persons are to be expunged.
2. Release all documents (drawn up by the EDPS and the European Commission) with respect to the references found in DPO-3338 and DPO-3398 "***This processing has been submitted to the EDPS who concluded that Article 27 is not applicable***".

Yours sincerely,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On 15 February 2013 15:26, European Data Protection Supervisor <EDPS@edps.europa.eu> wrote:
Dear Mr [REDACTED],

Further to your email of 25 January 2013 providing clarifications to your request for access to documents submitted on 17 December 2012, we have identified in our records additional documents that may be relevant to some but not all of your specific requests.

1. You may find useful and relevant to your request the EDPS Policy paper entitled "The EDPS and EU Research and Technological Development" that is posted on our website at:
<http://www.edps.europa.eu/EDPSWEB/edps/EDPS/Publications/Papers>

This document describes the possible roles the EDPS could play for research and development (RTD) projects in the context of FP7 and presents the selection criteria for the projects that qualify for EDPS action and the ways in which the EDPS could contribute to these projects. One of EDPS' contributions to EU RTD is that of an opinion in relation to individual RTD projects aimed at providing an expert view on the data protection aspects of a given project.

Following this policy document the EDPS has adopted an opinion concerning a research project named Turbine (TrUsted Revocable Biometric IdeNtitiEs). This opinion can be found on the EDPS website

at: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-02-01_FP7_EN.pdf

2. You may also find useful to consult the EDPS Policy paper on Consultations in the field of Supervision and Enforcement that is available on our website at:
<http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/Papers#PolicyP>

The policy paper was adopted on 23 November 2012 and is based on our practice developed so far in the field of consultation in supervision and enforcement. In this document the EDPS

emphasizes, among others, that data protection rules should be taken into account when administrative measures are drawn up (which relate to the processing of personal data) and advises data controllers to consult their DPO from the outset. It is highlighted that consultations may be referred to the EDPS thereafter in cases of complexity or when related to matters affecting all staff, or posing appreciable risks to the rights and freedoms of the data subjects.

3. We have identified a consultation case concerning data processing by the European Commission in the frame of projects/contracts/grants award procedures. It relates to an inquiry submitted to the EDPS by the French Data Protection Authority (CNIL) concerning proportionality of data collected by the European Commission in contracts/grants award procedures. You can find in attachments the inquiry of CNIL and relevant documents drafted and received by the EDPS in this case. (*See Documents 1-6 in attachment*)

4. With regard to OLAF external investigations and related EDPS analysis, we have identified two other documents, apart from our prior check opinions, which may have relevance to your request. They relate to the measures implemented by OLAF following our recommendations in prior check cases 2007-0047, 2007-0048, 2007-0049, 2007-0050, 2007-0072. These follow up measures were subject to an inspection carried out by the EDPS in July 2011 and the outcomes of this inspection can be found in the EDPS inspection report and the minutes of the inspection. (*See Documents 7-8 in attachment*)

Please note that some parts of the report and the minutes are blanked out. Public disclosure of the parts that have been blanked out would in our view undermine the protection of the interests laid down in Article 4(1)(a), first indent, Article 4(1)(b) and Article 4(2), third indent of Regulation (EC) No 1049/2001.

More specifically, some of the parts that have been blanked out contain information about the security measures adopted by OLAF. Disclosure of such information would reveal certain characteristics of the security system adopted by OLAF (physical and digital) and would pose a real threat to the security of OLAF (including the security of the personal data handled by OLAF).

Furthermore, other parts that have been blanked out contain sometimes very sensitive information provided by OLAF case handlers during meetings held between the EDPS and OLAF in the particular context of the EDPS inspection. This information has been provided to the EDPS in an atmosphere of trust which was needed to collect detailed and reliable evidence from OLAF. Disclosure of such information would undermine this atmosphere of trust and the effectiveness and purpose of the (future) inspections and investigations, as laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001.

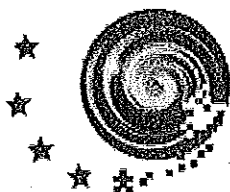
Moreover, some parts that have been blanked out in the minutes contain personal information (the identity) of OLAF case handlers. The disclosure of such information alone and in connection with specific OLAF investigations cannot be revealed as such disclosure would undermine the protection of privacy and integrity of the individuals in question, as laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001.

5. Finally, it seems from your correspondence that you have identified certain data processing activities by the European Commission which in your view constitute an infringement of the data protection law. We would invite you in first instance to contact the DPO of the Commission in order to address the issues raised.

Independently, if you believe that your rights as a data subject have been infringed as a result of the processing of your personal data by the Commission, you can submit a complaint to the EDPS by filling in the complaint submission form that can be found at <http://www.edps.europa.eu/EDPSWEB/edps/cache/off/Supervision/Complaints>


We are available for further clarifications if you have any further questions.

Kind regards,



EDPS Secretariat

Tel. +32 2 283 19 00 | Fax +32 2 283 19 50

 edps@edps.europa.eu

European Data Protection Supervisor

Postal address: Rue Wiertz 60, B-1047 Brussels

Office address: Rue Montoyer 30, B-1000 Brussels

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From: [REDACTED]
Sent: 11 March 2013 11:20
To: European Data Protection Supervisor
Subject: EDPS ref. 2012-1073 D-518, further clarifications

Dear Madam/Sir,

I refer to the matter in subject and the EDPS preliminary reply by email dated 8/3/2013. This is to reflect on the EDPS preliminary reply.

1. Documents relating to the prior notification of DG RTD DPO-3398

The prior notification DPO-3398 states "This processing has been submitted to the EDPS who concluded that Article 27 is not applicable". Unless the wording of this statement is deliberately incorrect, the only logical interpretation is that:

1. the Commission Data Protection Officer, most likely in or about April 2011 and after the registration of DPO-3398 in April 2011 by the data controller in the Commission's register of prior notifications, contacted in writing the EDPS and submitted to the EDPS the prior notification DPO-3398 for an article 27 prior check;
2. the EDPS concluded in writing that DPO-3398 is not subject of a prior check.

Identical statements about an EDPS non-prior check are found in DPO-3334, DPO-3338, and DPO-3420, all of which concern the external financial audits of the Research DGs. From the EDPS preliminary reply, it is not evident whether the opinion "*because the processing operations concerned belong to the type of processing operations covered by the EDPS Opinions adopted in cases 2007-0370 (Audits) and 2009-0565 (Ex post controls)*" is the opinion of the EDPS, the Commission's or both. Should the EDPS has reached that conclusion, then it is expected that the EDPS would have dispatched such an opinion in writing to the Commission Data Protection Officer.

In case a document(s) was drawn up by the EDPS stating the relevance of cases 2007-0370 and 2009-0565 to DPO-3398 and that DPO-3398 was not subject of a prior check on account of two two prior checks, that particular EDPS document is subject to the present requests for documents.

2. Ombudaman Decision 3264/2008/(WP)GG

For the avoidance of any doubt, I would like to clarify that my request concerns both documents drawn up by the EDPS and also the Commission.

Yours faithfully,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On 8 March 2013 17:31, European Data Protection Supervisor <EDPS@edps.europa.eu> wrote:
Dear Mr [REDACTED]

In your email submitted on 17 February 2013 you clarified further your request for access to documents and requested more specifically:

- "all documents (drawn up by the EDPS and the European Commission) with respect to the references found in DPO-3338 and DPO-3398", and
- "all documents pertaining to the *EDPS investigation* referred to in the Ombudsman Decision 3264/2008/(WP)GG".

As far as the first point is concerned, please be informed that these notifications have not been submitted to the EDPS for prior checking because the processing operations concerned belong to the type of processing operations covered by the EDPS Opinions adopted in cases 2007-0370 (Audits) and 2009-0565 (Ex post controls) and for which the EDPS concluded that *the processing operations do not fall under the scope of Article 27 of the Regulation*. For more information concerning these notifications, please contact the European Commission. The EDPS Opinions in cases 2007-0370 and 2009-0565 can be found in the register of all processing operations notified to the EDPS under Article 27(1) of Regulation (EC) No 45/2001 that is available on our website:
<http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/Register>.

As far as the second point is concerned, as the documents in question have been submitted to the EDPS by the European Commission, we have consulted the Commission in accordance with Article 4 (4) of Regulation (EC) No 1049/2001. We have been informed that, due to the complexity of the case, the Commission needs more time to reply.

As a consequence, please be informed that you will receive a reply to your request for access to "all documents pertaining to the *EDPS investigation* referred to in the Ombudsman Decision 3264/2008/(WP)GG" once we have received and considered the Commission's response, but in principle no later than on 3 April 2013.

Sincerely,



EDPS Secretariat

Tel. +32 2 283 19 00 | Fax +32 2 283 19 50

 edps@edps.europa.eu

European Data Protection Supervisor

Postal address: Rue Wiertz 60, B-1047 Brussels

Office address: Rue Montoyer 30, B-1040 Brussels

 [@EU_EDPS](https://twitter.com/EU_EDPS)  www.edps.europa.eu

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From: [REDACTED]
Sent: 03 June 2013 09:15
To: [REDACTED]
Cc: [REDACTED] European Data Protection Supervisor;
Subject: Request for documents, Regulation No 1049/2001
Attachments: DPO_3338.pdf

Dear Sir,

Pursuant to Regulation No 1049/2001 and the Commission Decision 2001/937/EC, an application for the release of documents is hereby kindly submitted.

The requested documents concern (i) the Horizon 2020 proposals and (ii) the external financial audits of DG INFSO. When a *document* is requested, it should be understood as the main document and all annexes and appendices thereto, if any.

I. COM(2011) 809 final, 2011/0401 (COD)

Proposal for a Regulation of the European Parliament and the Council *establishing Horizon 2020 - The Framework Programme for Research and Innovation (2014-2020)*

Full copies of the following documents are requested:

- Request item #1. The documents of the inter-services consultations, if any.
- Request item #2. The *final draft* of the proposed legislative instrument, as drawn up by the lead service and submitted to the Legal Services.
- Request item #3. The *note(s)* of the *lead service* requesting the opinion of the Legal Services about the *final draft* of the preceding request, including all documents dispatched as annexes to the *note(s)*.
- Request item #4. The opinion of the Legal Services dispatched to the lead service, which was drafted in response to the aforesaid *note(s)*.
- Request item #5. The mandatory favourable opinion of the Legal Services, which forms an integral part of the formal adoption by the Commission of the proposal by the relevant Directorate-General (probably DG Research and Innovation).

II. COM(2011) 809 final, 2011/0401 (COD)

Proposal for a Regulation of the European Parliament and the Council laying down the rules for the participation and dissemination in 'Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020)

Full copies of the following documents are requested:

- Request item #6. The documents of the inter-services consultations, if any.
- Request item #7. The *final draft* of the proposed legislative instrument, as drawn up by the lead service and submitted to the Legal Services.
- Request item #8. The *note(s)* of the *lead service* requesting the opinion of the Legal Services about the *final draft* of the preceding request, including all documents dispatched as annexes to the *note(s)*.
- Request item #9. The opinion of the Legal Services dispatched to the lead service, which was drafted in response to the aforesaid *note(s)*.
- Request item #10. The mandatory favourable opinion of the Legal Services, which forms an integral part of the formal adoption by the Commission of the proposal by the relevant Directorate-General (probably DG Research and Innovation).
- Request item #11. The document(s) the lead service or the Legal Services, as the case may be, submitted to the Data Protection Officer pursuant to article 28(2) of Regulation No 45/2001 ('the DPO consultations'). This request specifically includes all cover notes accompanying the document(s).
- Request item #12. The document(s) the Data Protection Officer drew up in response to the 'the DPO consultations'.

III. Data Protection Status Report

- Request item #13. All Data Protection Status Reports drawn up by the Data Protection Officer pursuant to article 4(2) of Commission Decision 937/2008.

IV. Prior notification DPO 3338, section 2 *Description*

I refer to the article 25 of Regulation No 45/2001 prior notification DPO 3338, which is located at the public register of the Data Protection Officer, <http://ec.europa.eu/dpo-register/details.htm?id=26851>, (attached).

Full copies of the following documents are requested:

- Request item #14: The document indicated by the link <http://www.cc.cec/budg/dgb/interdgd/doc/epc/lib/legalframework/doc080926expostdefinitionandfaqfr.pdf>. The link itself appears in section 2 *Description* of the DPO 3398. In case the link is "broken", the *data controller* will certainly be able to identify the document.

Part of section 2 *Description* reads:

Specific IT tools used in the context of performing an external financial audit are described below:

** A specific tool allowing the exchange of lists of projects (for an auditee) between DGs, supporting life-cycle management of individual audit and extrapolation cases and containing a summary of the audit conclusions. ...*

** A specific tool to facilitate searching and visualisation of information about participants in grants and contracts. This is used by auditors in the selection, preparation and performance of audits*

Please provide me with copies of the following:

- Request item #15: The document(s) with the *user requirements and application specifications* of the *specific IT tool for the exchange of lists of projects* (first IT tool)
- Request item #16: The document(s) describing how the information, data and records stored at the *different* databases of the Research family DGs is to be searched and extracted in order to *allow exchange of lists of projects*. Such documents will probably describe database-specific topics. The request concerns the first IT tool.
- Request item #17: The user manual(s) with the *user requirements and application specifications* of the *specific IT tool for the exchange of lists of projects* (first IT tool)
- Request item #18: The document(s) with the *user requirements and application specifications* of the *specific IT tool for the exchange of lists of projects* (first IT tool)
- Request item #19: The document(s) describing how the information, data and records stored at the *different* databases of the Research family DGs is to be searched and extracted in order to *visualise information about participants in grants and contracts allow exchange of lists of projects*. Such documents will probably describe database-specific topics. The request concerns the second IT tool.
- Request item #20: The user manual(s) with the *user requirements and application specifications* of the “*visualization IT Tool*” (second IT tool)

V. Prior notification DPO 3338, section 3 *Subcontractors*

The very wording (i.e. emptiness) can only be interpreted as a statement that DG INFSO/DG CONNECT has not been using subcontractors, which is manifestly wrong. In view of the disciplinary liabilities of article 49 of Regulation No 45/2001, this statement is extremely puzzling.

Please provide me with copies of the following:

- Request item #21: The document(s) with which the DPO 3338 *data controller* requested from his superiors the approval to insert the highly inaccurate statement about “*no use of subcontractors*” in DPO 3338.
- Request item #22: The document(s) with which DG INFSO senior officials approved the insertion into DPO 3338 of the highly inaccurate statement about “*no use of subcontractors*”.

VI. Prior notification DPO 3338, section 8 *Legal basis / Lawfulness*

Part of that section reads:

The possibility for the EC to carry out checks and financial controls is foreseen in the model grant agreement or contract signed between the EC and the beneficiary/contractor as required by the

Financial Regulation ("FR") applicable to the General Budget of the European Communities (art. 170, 60.4), and its Implementing Rules ("IR") (art. 47.4)

The above provisions refer to Regulation No 1605/2002 and Commission Regulation No 2342/2002, both as amended. The stipulations of 170FR, 60.4FR and 47.4IR have absolutely nothing to do with the execution of research grants or audits thereof. In other words, the stipulations are wholly irrelevant. In view of the disciplinary liabilities of article 49 of Regulation No 45/2001, this statement is extremely puzzling.

Please provide me with copies of the following:

- Request item #23: The document(s) the DPO 3338 *data controller* drew up somehow justifying reliance on 170FR, 60.4FR and 47.4IR for the lawfulness of the DPO 3338 processing operations. The scope of the request is wide, in the sense that the term "justifying" is to be understood as meaning even preliminary opinions of the *data controller*.
- Request item #24: The document(s) DG INFSO officials, other the DPO 3338 *data controller*, drew up somehow justifying reliance on 170FR, 60.4FR and 47.4IR for the lawfulness of the DPO 3338 processing operations. The scope of the request is wide, in the sense that the term "justifying" is to be understood as meaning even "preliminary" opinions.
- Request item #25: The document(s), if any, DG INFSO dispatched to the *Data Protection Officer* or the Legal Services seeking their assistance, advice or opinion on the lawfulness of DPO 3338 and the compliance of the external financial audits of DG INFSO with Regulation No 45/2001.
- Request item #26: The document(s), if any, DG INFSO dispatched to the *Data Protection Officer* or the Legal Services seeking their advice or opinion on the lawfulness of the *field audits* (by definition carried out outside the European Commission premises) with the personal data protection laws of the Member States.
- Request item #27: The document(s), if any, the *Data Protection Officer* or the Legal Services drew up in response to the above two requests #25 and #26.

VII. Opinion of the EDPS about DPO 3338

DPO 3338 states twice:

This processing has been submitted to the EDPS who concluded that Article 27 is not applicable.

Please provide me with copies of the following:

- Request item #28: The document(s) with which the DPO 3338 *data controller* lodged a request with the Data Protection Officer in order the Officer to consult with the EDPS about DPO 3338.
- Request item #29: The cover letter (or similar in case of an email) with which the Data Protection Officer submitted DPO 3338 to the EDPS for considerations/consultations.
- Request item #30: The EDPS letter(s) dispatched to the Commission services with his opinion concluding that *article 27 is not applicable*.

VIII. Prior notifications covering DG INFSO external financial audits prior to 1/2/2011

According to a very recent letter DG CONNECT dispatched to a FP6 contractor, namely Ares(2013)1560303 - 31/05/2013, prior to 1/2/2012 *other prior notifications* covered the DG INFSO external financial audits.

Please provide me with copies of the following:

- Request item #31: All successive versions of every single *prior notification* covering the external financial audits of DG INFSO prior to 1/2/2011, as they were entered in the *public electronic register* of article 4(4) of Commission Decision 2008/597/EC of 3/6/2008, including all annexes thereto.
- Request item #32: All successive versions of every single *prior notification* covering the external financial audits of DG INFSO prior to 1/2/2011, as they were entered in the *online notification system* of article 11 of Commission Decision 2008/597/EC of 3/6/2008, including all annexes thereto.
- Request item #33: The document(s) which the DPO 3338 *data controller* sets out some kind of an explanation why the aforesaid *other prior notifications* were not “sufficient” and there was a need for a *new* prior notification, i.e. DPO 3338.
- Request item #34: The document(s) which the DPO 3338 *data controller* informed his superiors about (i) the aforesaid *other prior notifications* not being “sufficient” and (ii) the need for a *new* prior notification, i.e. DPO 3338.

Regarding request no 33 and 34 above, the following considerations are highly relevant.

On the one hand, in the period 2008-February 2011, the legal framework concerning external financial audits of the Research family DGs did not change (the FR and IR did not undergo any changes, and in so far personal data processing is concerned, the FP7 rules of participation were the same) and the FP6/FP7 contractual audit provisions were the same.

On the other, the *Schecke ruling*, cases C-92/09 and C-93/09, of 9/11/2010 is a legal landmark for the personal data protection. However, the Research family DGs appear not to have noticed it at all so far. In fact, when comparing (i) the fundamental premise of the DG Research family DGs audits and their personal data processing with (ii) the *Schecke ruling*, it becomes immediately obvious that they are diametrically opposed. It is thus nearly certain that the *Schecke ruling* did not influence at all the drafting and registration DPO 3338. Those considerations strengthen the justified expectations that there must be documents to be released for requests no 33 and 34.

IX. Case law and overriding public interest

A. Requests 14 to 34

Those requests directly concern the compliance of the DG INFSO external financial audits with Union and *national laws* on personal data protection, that is to say, a *fundamental right*. There are fully justified doubts about the compliance of the external financial audits with those laws. The mere fact that DPO 3338 has

concealed the use of subcontracts, which have been performing about 80% of all such audits, casts a very dark cloud of doubts about the legality of the DG INFSO audits.

Therefore, full release is the only way DG INFSO will be able to dispel those doubts. Any partial or total refusal to release even a single document will make those serious doubts a certainty.

B. National laws

There are serious doubts about the lawfulness of the external financial audits with respect to the national personal data protection laws. This is the case regardless of who carries out the audit, since in all cases within the premises of an auditee the national laws apply.

Contrary to the DG INFSO field audits, in other areas Union law expressly authorises the conduct of on-the-spot inspections by Commission officials. Competition investigations pursuant to Regulation No 1/2003 is a prime example. In on-the-spot checks of OLAF, its staff must essentially observe national law. Regulations 2185/96 and 2988/95 have several express provisions about compliance with the national personal data protection laws.

It is also worth recalling that national law applies even in Commission buildings. Health and safety legislation of Belgium applies to DG INFSO buildings in Brussels. The nuclear installations of the JRC must, and do indeed, comply with applicable national legislation.

It is easy to realise the applicability of national laws in the DG INFSO field audits by considering two extreme cases to make the point. Consider the hypothetical case where a Commission official causes by negligence some sort of bodily harm to an employee of an auditee (e.g. spills very hot tea in the face of an employee by accident, for instance as the official walks by the desk of an employee and momentarily loses his balance). Another case may a faulty PC charger of a Commission official (the official has been recklessly negligent about it) that causes the electrocution of an employee or a cleaner. In such a case, it would be bizarre to say that the Commission official enjoys immunity. Even in official missions, when driving officials must observe the traffic laws. All this shows that national laws apply at the field audit.

C. COM(2011) 809 final, 2011/0401 (COD)

The provisions of article 25 *Annual productive hours* are as follows: (emphasis added):

- 1. Eligible personnel costs shall only cover the actual hours worked by the persons directly carrying out work under the action. The evidence regarding the actual hours worked shall be provided by the participant, normally through a time recording system.*
- 2. For persons working exclusively for the action, no time recording is required. In such cases, the participant shall sign a declaration confirming that the person concerned has worked exclusively for the action.*

3. *The grant agreement shall contain the minimum requirements for the time recording system as well as the number of annual productive hours to be used for the calculation of the hourly personnel rates*

By definition, time recording is *personal data processing*. If anything, DPO 3338 proves it. FP6 contracts and FP7 grant agreements are *private law contracts*. This is exactly what the European Court of Auditors mentions in paragraph 45 of its opinion 1/2006,

OJ C 203/1, 25/8/2006. The Commission has always maintained before the EU Courts that in FP5, FP6, and FP7 contracts it does not rely on its prerogatives as a public authority (T-252/10, *Cross Czech v European Commission*, paragraph 38).

Therefore, article 25 *Annual productive hours*, if enacted, will essentially be a provision imposing by way of a private law contract to the Horizon 2020 participants to undertake personal data processing. However, this 'imposition' will be via a contractual provision and not Union law. Yet, the U.K. Data Protection Act 1998, as amended, expressly excludes a contractual provision as a legal obligation of the data controller, which makes the processing lawful. Needless to say, that article 25 will certainly and automatically infringe Regulation No 45/2001, since none of the conditions of article 5 of Regulation No 45/2001 will be satisfied.

The above considerations strongly suggested that article 25 will automatically result in breaches of Regulation No 45/2001 and the national data protection legislation.

What makes the whole matter very worrisome is that it appears that the Commission has not consulted the EDPS about COM(2011) 809 final, which is most likely an outright infringement of Regulation No 45/2001.

In view of the above, the *overriding public interest* case for the requested documents #6 to #12 is plainly obvious and beyond any doubt.

D. Overriding public interest

The foregoing sections have set out several fundamental reasons justifying the extremely serious doubts about the lawfulness of the DG INFSO audit practices and field audits, and its compliance with Union and national law. In conjunction with the "extraordinary pedigree and character" of DPO 3338, it is not too much to say that there is at least 90% probability that the DG INFSO external financial audits are marred by serious infringements of Union and national law.

At the core of the argument about the aforesaid doubts is the important general interest to have public confidence:

- In the lawful and sound functioning of the external financial audits of DG INFSO - and those of the other Research family DGs - , and that at its highest level, the Commission services do not attempt to conceal deliberately unlawful audit policies and practices.
- That article 25 of COM(2011) 809 final will not result in breaches of Regulation No 45/2001 and the national data protection legislation.

Therefore, full release is the only way the Commission services will be able to dispel those doubts. Once more, any partial or total refusal to release even a single document will make those serious doubts a certainty.

I am at your disposal for any clarification the Commission services may find useful.

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Notice to:

1. [REDACTED], Chair, Committee on Civil Liberties, Justice and Home Affairs, European Parliament
2. European Data Protection Supervisor
3. Privacy International

Attachment

Prior notification DPO 3338

From: [REDACTED]
Sent: 25 June 2013 13:26
To: European Data Protection Supervisor
Subject: access to information request - Former DG INFSO external financial audits, Ombudsman Decision in case 3264/2008/(WP)GG

Follow Up Flag: Follow up
Flag Status: Flagged

Dear European Data Protection Supervisor,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:

A. EDPS INVESTIGATION REFERRED TO THE OMBUDSMAN COMPLAINT 3264/2008/(WP)GG

I refer to the European Ombudsman investigation into the complaint 3264/2008/(WP)GG. It is apparent from the Ombudsman's published Decision that the matter was also investigated by the EDPS. In particular, paragraphs 15 to 18 of the Decision read:

15. On 4 December 2008, the EDPS asked the Commission for more detailed information concerning the matter and for its views on this complaint.

16. On the basis of the information thus received, the EDPS dealt with this complaint in a decision adopted on 9 March 2009. A copy of this decision was submitted to the Ombudsman by the complainant during the course of the present inquiry.

17. According to the summary of the facts set out in this decision, the Commission's auditors had, on the basis of the information gathered during the audit, defined as an "audit hypothesis that [the complainant] intervened in the name of Company X to maintain the contract flow from the Commission to Company Y 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 EDPS further stated that DG INFSO had "contacted the Internal Audit Department of Company X in order to validate the audit hypothesis".

18. In his decision, the EDPS took the view that contacting Company X's Internal Audit Department formed part of the Commission's activities to protect the EU's financial interests. In this context, he referred to Article II.29 ('Controls and audits') of the General Conditions that form part of the model contract under the Sixth Framework Programme (the "FP6 model contract"). The EDPS further held that the communication with Company X's Internal Audit Department necessarily included the exchange of certain personal

data concerning the complainant's wife. He noted that the Commission thus had to strike a balance between the protection of the EU's financial interests and the legitimate interests of the data subject concerned. In the EDPS' view, the Commission had struck the right balance in that case. The EDPS further considered that forwarding the two contracts between Company Y and the complainant's wife to Company X's Internal Audit Department was relevant and not excessive in relation to the purpose for which this transfer of personal data was made. However, as regards the transfer of the minutes of the interview that the auditors had carried out with the complainant's wife, the EDPS considered that the Commission had "insufficiently ascertained" that this transfer of personal data "was not excessive". The EDPS concluded, therefore, that this transfer constituted a breach of data protection rules.

The EDPS specific investigation referred to in the Ombudsman Decision 3264/2008/(WP)GG will henceforth be referred to as the 'EDPS investigation'.

This section of the application concerns the following documents:

1. The EDPS analysis about the lawfulness of the personal data processing by DG INFSO pursuant to the contractual provisions on external financial audits, i.e. article II.29 of the FP6 model contract.
2. In view of the fact that the very first prior notification concerning the external financial audits of the former DG INSO DPO-3338 was recorded in the register of article 26 of Regulation No 45/2001 in early 2011, the EDPS documents analysing how the personal data processing of the DG INFSO external financial audits (not the particular 'EDPS' investigation) was compliant with articles (5), (7), 12(1), 23, 25, 27 and 28(1) of Regulation No 45/2001. At the time of the 'EDPS investigation' DG INFSO had conducted over 100 external financial audits, which were discussed at the DG INFSO Annual Activity Reports.
3. The EDPS documents analysing the compliance of the DG INFSO external financial audits with the provisions of articles (5), (7), 12(1), and 25 of Regulation No 45/2001 with respect to the particular external financial audit, i.e. that of the 'EDPS investigation'.
4. The EDPS documents analysing whether or not at external financial audits of DG INFSO (nearly always conducted on the territory of a Member State), either the DG INFSO staff or its external contractors/auditors as the case may be, are, in addition to Union law, subject to the national personal data protection legislation.
5. Referring to the 'EDPS investigation', the DG INFSO drafted documents on which the EDPS relied on to verify the compliance of DG INFSO with article 12(1) of Regulation No 45/2001.
6. The EDPS documents analysing the lawfulness of personal data

processing operations by Institutions pursuant to contractual provisions. Such documents may also concern consultations and prior checks of other Institutions.

B. DG INFSO PRIOR NOTIFICATION DPO-3338 VERSION 1

The full text of the prior notification DG INFSO DPO-3338.1 is given as Annex to this application. It is stated therein (henceforth the 'non-prior check'):

'This processing has been submitted to the EDPS who concluded that Article 27 is not applicable'

This section of the application concerns the following documents:

7. The documents the European Commission Data Protection Coordinator sent to the EDPS, on the basis of which the EDPS concluded that DPO-3338.1 was not subject to an EDPS article 27 prior check.

8. In view of the fact that the EDPS public website does NOT contain any document at all about informal consultations for DPO-3338.1, the internal EDPS documents on the basis of which EDPS concluded that DPO-3338.1 was not subject to an EDPS article 27 prior check.

9. Given that it is highly probable that citizens-applicants, pursuant to article 42 of the Charter of the Fundamental Rights of the EU, have requested EDPS drafted documents about the DPO-3338.1 'non-prior check', the EDPS drafted document(s) informing the citizens-applicants about those documents. All parts of such documents are to be released, except the parts disclosing the identity of the citizens-applicants. The dates and EDPS document reference numbers are to be released.

C. EDPS COMMUNICATIONS AND MEETINGS WITH THE FORMER DG INFSO

Officials of the former DG INFSO have made presentations to the European Court of Auditors and the European Ombudsman about their techniques, practices and operational measures in the framework of the external financial audits of DG INFSO. It is therefore likely that similar presentations may have taken place at the EDPS premises. Furthermore, it is certain that the EDPS has had correspondence with DG INFSO about matters pertaining to the latter's external financial audits.

This section of the application concerns the following documents:

10. Any presentation the former DG INFSO gave to the EDPS about matters relating to the DG INFSO external financial audits, including other related documents drafted by the Commission services, and delivered to the EDPS on the occasion of the presentation or thereafter.

11. EDPS drafted documents requesting DG INFSO with clarifications and further information about its external financial audits. This request concerns also individual and specific complaints lodged

with the EDPS by data subjects about DG INFSO external financial audits. All parts of such documents are to be released, except the parts disclosing the identity of the complainants and third parties, regardless being natural or legal persons.

Yours faithfully,

***** ANNEX: DPO-3338.1 *****

DPO-3338.1 DG INFSO External Audit and Control

Directorate-General: Communications Networks, Content and Technology

Controller: DEZEURE Freddy

Publication: 2011-02-02

Processing

1. Name of the processing

DG INFSO External Audit and Control

2. Description

The processing operations performed by most DGs are described in the procedure guide of ex-post control which is the result of a sampling methodology of financial transactions.

http://www.cc.cec/budg/dgb/interdg/_doc/epc/lib/legalframework/doc_080926_expostdefinitionandfaq_fr.pdf

http://www.cc.cec/budg/dgb/interdg/epc/library_en.html

Research family DGs are using specific IT tools in the context of performing an external financial audit which are described below:

- A specific tool allowing the exchange of lists of projects (for an auditee) between DGs, supporting life-cycle management of individual audit and extrapolation cases and containing a summary of the audit conclusions. No personal data are processed except contact information of Commission staff and auditees.
- A specific tool to facilitate searching and visualisation of information about participants in grants and contracts. This is used by auditors in the selection, preparation and performance of audits. The tool uses information on participants in grants and contracts, taken from IT tools for programme management (front-office notified to the DPO under n° DPO-978 and back-office n° DPO-1260). This information includes details of organisation names, registration numbers, address, audit results, EWS status, phone, fax, email, names of authorised signatories and contact persons, project reference, acronym, funding, budget.

This processing has been submitted to the EDPS who concluded that Article 27 is not applicable.

3. Sub-Contractors

—

4. Automated / Manual operations

n/a

Beneficiary/contractor undertakes to provide any detailed

information, including information in electronic format, requested by the Commission or by any other outside body authorised by the Commission in order to check that the action and the provisions of the agreement/service contract are being properly implemented.

5. Storage

Data are stored in computer systems and/or physical archives accessible only to duly authorized staff (management of IT and physical access rights with respect to the need to know principle).

6. Comments

n/a

Purpose & legal basis

7. Purposes

Checks and financial controls of grant agreements or service contracts aim at verifying beneficiary's or contractor's or subcontractors' or third parties' compliance with the all contractual provisions (including financial provisions), in view of checking that the action and the provisions of the grant agreement or contract are being properly implemented and in view of assessing the legality and regularity of the transaction underlying the implementation of the Community budget.

8. Legal basis / Lawfulness

The possibility for the EC to carry out checks and financial controls is foreseen in the model grant agreement or contract signed between the EC and the beneficiary/contractor as required by the Financial Regulation ("FR") applicable to the General Budget of the European Communities (art. 170, 60.4), and its Implementing Rules ("IR") (art. 47.4):

- Art. 170 FR: Each financing agreement or grant agreement or grant decision must expressly provide for the Commission and the Court of Auditors to have the power of audit, on the basis of documents and on the spot, over all contractors and subcontractors who have received Community funds
- Art. 60.4 FR: The authorizing officer by delegation shall put in place, in compliance with the minimum standards adopted by each institution and having due regard to the risks associated with the management environment and the nature of the actions financed, the organizational structure and the internal management and control procedures suited to the performance of his/her duties, including where appropriate ex post verifications. Before an operation is authorized, the operational and financial aspects shall be verified by members of staff other than the one who initiated the operation. The initiation and the ex ante and ex post verification of an operation shall be separate functions
- Art. 47.4 IR: The ex post verifications on documents and, where appropriate, on the spot shall check that operations financed by the budget are correctly implemented and in particular that the criteria referred to in paragraph 3 are complied with. These verifications may be organized on a sample basis using risk analysis

The processing operations on personal data carried out in the context of external audits and controls are necessary and lawful under three articles of the Regulation (EC) 45/2001:

- article 5 (a): processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof...
- article 5 (b): processing is necessary for compliance with a legal obligation to which the controller is subject
- article 20.1.b): necessary measure to safeguard:
 - (a) the prevention, investigation, detection and prosecution of criminal offences;
 - (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;
 - (c) the protection of the data subject or of the rights and freedoms of others;

This processing has been submitted to the EDPS who concluded that Article 27 is not applicable.

Data subjects / fields

9. Data subjects

Contractors and sub-contractors

Beneficiaries of grants

Staff

Experts

10. Data fields

All necessary data to efficiently conduct a control such as:

- Name,
- Function,
- Grade,
- Activities and expertises,
- Professional address,
- Timesheets,
- Salary,
- Accounts,
- Cost accounting,
- Missions,
- Information coming from local IT system used to declare costs as eligible,
- Supporting documents linked to travel costs,
- Minutes from mission and other similar data depending of the nature of the action.

No data which fall under article 10.

See point 17)

Rights of D.S.

11. Information

The Privacy Statement attached is available with the Commission's letter initiating the audit or control process

==> could you please personalize the attached model Privacy statement attachments:

- 2011-01 INFSO SSPS (clean).doc

12. Procedure to grant rights

Functional mailbox to get information and mailbox of the EDPS to lodge a complaint (see Privacy statement).

13. Retention

Each external audits and controls Controller is responsible of archiving the documents related to these operations. Data are stored until 10 years after the final payment on condition that no contentious occurred; in this case, data will be kept until the end the last possible legal procedure.

14. Time limit

The Commission services will respond within 15 working days to any request and if this is considered justified the relevant correction or deletion will be performed within one calendar month.

15. Historical purposes

n/a

Recipients

16. Recipients

Collected personal data could be submitted to Commission services in charge of external audits and controls, without prejudice to a possible transmission to the bodies in charge of a monitoring or inspection task in accordance with Community law (OLAF, Court of Auditor, Ombudsman, EDPS, IDOC, Internal Audit Service of the Commission).
See point 20)

17. Transfer

n/a

This is a request for access to information under Article 15 of the TFEU and, where applicable, Regulation 1049/2001 which has been sent via the AsktheEU.org website.

Please kindly use this email address for all replies to this request: [REDACTED]

If edps@edps.europa.eu is the wrong address for information requests to European Data Protection Supervisor, please tell the AsktheEU.org team on email team@asktheEU.org

This message and all replies from European Data Protection Supervisor will be published on the AsktheEU.org website. For more information see our dedicated page for EU public officials at <http://www.asktheeu.org/en/help/officers>

From: [REDACTED]
Sent: 04 June 2013 20:07
To: European Data Protection Supervisor
Subject: Request for documents

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Sir,

I refer to the provisions of article 42 '*Right of access to documents*' of the Charter of the Fundamental Rights of the European Union. Pursuant to those provisions, an application to receive copies of the following EDPS drafted documents is hereby kindly requested.

Request number 1

The *internal* documents directly concerned with the *monitoring* by the EDPS of the compliance with article 16(1) TFEU and Regulation No 45/2001 of the Commission's *proposals* for Regulations of the European Parliament and the Council, and which the Commission has published from 1/1/2001 to 31/12/2012.

An example of such a *proposal* is the *proposal for a Regulation of the European Parliament and the Council laying down the rules for the participation and dissemination in 'Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020)*, COM(2011) 809 final, 2011/0401 (COD). My research of the EDPS public website discloses that for that particular proposal the EDPS has not published an kind of opinion.

Request number 2

Any documents the EDPS has dispatched to the European Commission Data Protection Officer, or the Commission services, concerning the apparent failure of the Officer to draw up the *yearly Data Protection Status Report* set forth in article 4(2) of Commission decision 2008/597/EC.

Request number 3

Any documents the EDPS has received by the European Commission Data Protection pursuant to the provision of aforesaid article 4(2) 'The DPO shall help the Controller to assess the risk of the processing operations under his responsibility and *monitor implementation of the Regulation in the Commission*' concerned with that *monitoring* function.

Request number 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*.

Request number 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.

Request number 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'.

Request number 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.

Requests number 8, Ombudsman case 3264/2008/(WP)GG

I refer to the Ombudsman case 3264/2008/(WP)GG that expressly refers to an EDPS conclusion about the personal data processing. The complaint to the Ombudsman concerned, inter alia, the wife of the complainant who worked at the time in company Y (*the wife*). According to the Ombudsman report, the EDPS found that DG INFSO lawfully transferred to company X *some* personal data of *the wife* it obtained from the external financial audit of company Y, but transferring the whole interview record of *the wife* was not necessary.

The EDPS' findings appears quite astonishing, since the DG INFSO audit must have been carried out pursuant to article 29 of annex II of the FP6 contract, that is to say, a private law contract. DG INFSO must have infringed several articles of Regulation No 45/2001, including 4, 5, 7, 12(1) and 28(1). Furthermore, my research discloses that in 2008 there was no article 25 prior notification concerning the DG INFSO external financial audits.

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

- 8.1: The EDPS document(s) analysing the lawfulness of the personal data processing in the case in question.
- 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.

I am at your disposal for any additional information that may be required.

Yours sincerely,