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Subject: **EDPS prior-check Opinion on *"administrative inquiries and disciplinary proceedings"* at the European Global Navigation Satellite Systems Agency (case 2016-0262).**

Dear Mr Dorides,

We have analysed your notification sent on 9 March 2016 for prior-checking under Articles 27(2)(a) and 27(2)(b) of Regulation 45/2001 (the Regulation) in the context of the administrative inquiries and disciplinary proceedings at the European Global Navigation Satellite Systems Agency (GSA).

Under Article 27(4) of the Regulation, the deadline of two months for the EDPS to issue his Opinion applies. The EDPS should therefore issue his Opinion no later than the 14 June2016[1].

On 23 April 2010, the EDPS issued Guidelines on the processing of personal data in administrative inquiries and disciplinary proceedings by the EU institutions and bodies (the EDPS Guidelines)[2]**.** On this basis, the EDPS will identify and examine the agency's practices which do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing GSA with relevant recommendations.

[1] The procedure was suspended under Article 27(4) of the Regulation on 10 March 2016 for further information. GSA replied on 6 April 2016. The draft was sent for comments to the DPO on 2nd June 2016 and comments were provided on 10 June 2016.
[2] These Guidelines are currently revised.

1) Lawfulness of administrative inquiries

The lawfulness of a processing must be justified on the basis of one of the five legal grounds under Article 5 of the Regulation.

Processing operations for administrative inquiries and disciplinary proceedings can in principle considered to be lawful under Article 5(a) of the Regulation.

Article 5 (a) of the Regulation requires two elements: the processing must be based on the Treaties or on an EU legal instrument and it must be necessary for the performance of GSA carried out in the public interest based on the Treaties. As to the element of necessity, the two processing operations related to the administrative inquiries and disciplinary proceedings are obviously carried out in the public interest by GSA, contributing to the management of resources and sound functioning of the agency[3].

As to the legal basis, Article 86 of the Staff Regulations and their Annex IX set forth the legal basis of the disciplinary proceedings, but they do not provide a sufficiently detailed legal basis for the conduct of administrative inquiries. Therefore the EDPS recommends to adopt a legally binding decision, policy or implementing rules regarding administrative inquiries. This specific legal instrument should define the purpose of an administrative inquiry, establish the different stages of the procedure to be followed and set out detailed rules and principles to be respected in the context of an inquiry and a disciplinary proceeding. A specific legal instrument will set out the process of an inquiry with legal certainty, safeguards and clarity in the interest of GSA. It should also enable those implicated in the inquiry to have the necessary information about their rights and how to exercise them. This legal instrument could then serve as a specific legal basis for administrative inquiries, which is missing so far.

Following the comments provided by the agency's DPO, the Commission is planning to adopt implementing rules on administrative inquiries and disciplinary proceedings. GSA would like to wait until the adoption of these rules and apply them by analogy in light of Article 110(2) of the Staff Regulations[4].

Recommendation:
GSA should adopt the Commission's implementing rules by analogy as soon as they are adopted.

In the meantime, in case GSA needs to launch an administrative inquiry, the EDPS should be consulted before any personal data are processed for the inquiry.

2) Necessity and proportionality when collecting data

In light of Article 4(1)(c) of the Regulation[5], investigators should apply rigorously the principles of necessity and proportionality when choosing the means of inquiry. The principle of data minimisation should be applied for all means and steps of the investigation.

[3] See also recital 27 of the Regulation.
[4] "*Implementing rules adopted by the Commission to give effect to these Staff Regulations...shall apply by analogy to the agencies*".
[5] *"Personal data must be adequate and not excessive in relation to the purposes for which they are collected and/or further processed"*.

Investigators should limit the collection of personal information to what is directly relevant and necessary to the purpose of the inquiry and of the disciplinary proceeding. They should also retain the information only for as long as it is necessary to fulfil that purpose. In other words, investigators should collect only the personal data they really need, and they should keep it only for as long as they need it.

GSA should consult its DPO in this regard and take into consideration their DPO's practical guidance and advice.

There are some more and less intrusive means of collecting data in the context of an inquiry or a disciplinary proceeding.

For example, the *hearing* of the person under investigation and of witnesses and victim is usually a proportionate option, as it is the least intrusive and the most transparent means to conduct an inquiry and establish the alleged facts relevant to the inquiry.

When collecting *paper information*, investigators should consider blanking out irrelevant or excessive information to the inquiry.

If *electronic information* related to the person under investigation is necessary and relevant evidence to the inquiry, the IT service should be in charge of implementing the technical aspects of the collection on instructions of the investigators. The number of authorised IT officers in charge should be strictly limited (need-to-know principle). The investigators' request should be specific so that the IT service will extract only specific and relevant information.

If GSA considers that information on *internet connections* and on the *use of e-mail or the telephone* are necessary in the context of an inquiry, the investigators should establish a list of the *traffic data* they request to be collected; if such information is necessary to be processed for telecommunications budget and traffic management (i.e an inquiry related to telephone traffic data of a staff member[6]) it can be kept for a maximum retention period of 6 months after collection or even a longer period in order to safeguard an on-going investigation, or to establish or defend a right in a legal claim pending before a court[7]**.** This should be specified by referring to the closure of the investigation, i.e. 6 months after closure.

Recommendation:
GSA should ensure that the data protection rules on the use of different means for collecting potential evidence for the investigation are reflected in a Manual including specific guidance, which could be included in the specific legal instrument mentioned above (i.e. general policy/decision/implementing rules).

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6 Practical experience has proved that it is difficult to make a distinction between traffic data relating to private use and traffic data relating to professional use. The fact that a particular phone call is designated by the author as private is not *per se* a guarantee that it cannot be relevant for the investigations. The institution's policy should explicitly empower the investigators to collect traffic data without distinction between those marked as professional and those marked as private and the same standards should apply to both types of use.

7 Article 20(1)(a) of the Regulation may be applicable, if the storage of traffic data constitutes a necessary measure to safeguard *"the prevention, investigation, detection and prosecution of criminal offences".* Such provision should be subject to a strict interpretation.

3) Retention periods

Personal data must not be kept longer than necessary for the purpose for which they are collected or further processed in accordance with Article 4(1)(e) of the Regulation[8].

The EDPS is currently revising his existing Guidelines and has re-considered the issue of retention periods in light of three possible scenarios:

***i) Pre-inquiry file or inquiry file without follow up*:** When GSA makes a preliminary assessment of the information collected (this can include interviews of individuals) and the case is dismissed. In such cases, GSA should immediately erase all information collected, no later than one month after the decision has been taken that no inquiry will be launched. In this case, the staff member may request that a copy of this decision be added to the personal file; however, the default course of action should be erasure[9].

ii) Inquiry file: When GSA launches an inquiry and adopts a decision requiring follow-up, the agency should adopt a necessary and proportionate retention period with regard to the nature of the inquiry and possibly further processing (i.e. taking into account the time limit for legal recourse available to the affected individuals). Normally a 2-year-period from closure of the investigation may be considered as a necessary retention period. A 5-year-period seems to be excessive to the above purposes.

iii) Disciplinary file (in cases where GSA is in charge of the disciplinary proceeding): GSA may carry out a disciplinary proceeding with the assistance of internal and/or external investigators. If all possible legal paths have been exhausted, a maximum 5-year-retention period, after the adoption of the final Decision, would normally be an appropriate retention period. If GSA needs to keep the disciplinary data, longer than this period, it should provide justified reasons for the specific case. Keeping disciplinary data for 20 years seems to be no longer necessary and excessive to the above purposes.

Recommendation:
GSA should make a distinction of different retention periods according to the above possible scenarios and update the notification.

4) Information to be given to the affected individuals

The general privacy notice prepared by GSA is a first important step, but it is not sufficient. Personal data must be processed fairly[10]. In order to guarantee fairness and transparency about the information processed regarding a specific inquiry, affected individuals should be informed about it. GSA should therefore provide them with a *specific privacy notice* as soon as it is practically possible, for example before starting the interview of the person. In principle, GSA should inform them of the opening and closing of the administrative inquiry related to them. This concerns the formal opening of an inquiry as well as the following stage, when the available information will for example be transferred to a Disciplinary Board

[8] Article 4(1)(e) of the Regulation: *"personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed"*.

[9] See EDPS Guidelines, p. 5

[10] See Article 4(1)(a) of the Regulation.

appointed by GSA. They should also be informed about the hearing and its outcome (charges or not).

Content of the general and specific privacy notice:

In light of Articles 11(1)(e) and 12(1)(e) of the Regulation, GSA should provide some explanations as to the meaning of the right of rectification in the context of an administrative inquiry and a disciplinary proceeding; it means that GSA should allow affected individuals to add their comments to their file related to the inquiry and include additional testimonies, or other relevant documents (i.e. a legal recourse or appeal decision). Under Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation, GSA should indicate clearly the distinction of three different scenarios and their retention periods.

Recommendations:
GSA should explain in the privacy notice the meaning of the right of rectification in the context of an administrative inquiry and of a disciplinary proceeding and indicate the applicable retention periods.

Reminder:
GSA should inform all affected individuals, via a specific privacy notice, about the opening, the different steps and the closing of a specific inquiry or a disciplinary proceeding

5) Possible limitations to the rights of information, access and rectification of the affected individuals:

When GSA informs all affected individuals about the specific processing of their personal data, it should also inform them about any possible limitations to their rights of information, access and rectification.

For example, **informing** the person under investigation about the inquiry or the disciplinary proceeding at an early stage may be detrimental to the investigation. In these cases, GSA might need to restrict the information to the person under investigation to ensure that the inquiry or disciplinary proceeding is not jeopardised[11].

The **right of access** of a person under investigation to the identity of a witness may be restricted in order to protect the witness' rights and freedoms. Furthermore, it should be noted that the right of access refers to the personal data of the *requesting* person - for example, it is possible that the final decision does in the end not include personal data of a witness or a whistleblower; it would thus be out of scope for a request for access from that person. GSA should however inform the person under investigation or a requesting person of the principal reasons on which the application of the restriction is based as well as of their right to have recourse to the EDPS[12]. In some specific circumstances, it might be also necessary to defer the provision of such information so that the investigation process will not be harmed[13].

[11] See Article 20 of the Regulation regarding the exemptions and restrictions.
[12] See Article 20(3).
[13] See Article 20(5).

In this context, the **right of rectification** refers not only to factual inaccuracies; for disagreements about the assessments made, adding second opinions, review procedures etc. are the appropriate course of action[14].

GSA makes reference in the privacy notice to the possible application of Article 20 of the Regulation. The EDPS invites GSA to take note of the above examples of limitations and highlights that in cases where GSA decides to apply a restriction of information, access, rectification etc. under Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4)[15], such decision should be taken strictly on a case by case basis. In all circumstances, GSA should be able to provide evidence demonstrating detailed reasons for taking such decision (i.e. motivated decision). These reasons should prove that they cause actual harm to the informal procedure or undermine the rights and freedoms of the others and they should be documented before the decision to apply any restriction or deferral is taken[16].

***Reminder*:**
GSA should take note of the above examples of right limitations and ensure that, in case of a restriction of a right, the decision to restrict such right is appropriately documented.

The EDPS expects GSA to provide information on what is planned regarding the implementing rules as a legal basis of administrative inquiries and to receive an updated version of the notification and of the privacy notice **within a period of three months**, to demonstrate that GSA has implemented the above recommendations in this aspect.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: Mr Olivier LAMBINET, Head of Administration
Ms Triinu VOLMER, Data Protection Officer

[14] To give an example: "this is not the statement I made in my hearing" as opposed to "this is an incorrect inference from the statement I made in my hearing" - for the latter case, review procedures are the appropriate way of remedying any issues.
[15] under Article 20(5) of the Regulation.
[16] This is the kind of documentation the EDPS requests when investigating complaints relating to the application of Article 20.