



Prior Checking Opinion

"Activities of the Equal Opportunities Office at the General Secretariat of the Council of the European Union"
Case 2016-0123

The Equal Opportunities Office, in the context of its actions promoting work-life balance and non-discrimination, takes the initiative of producing videos, posters and other materials on the workplace experiences of persons affected by disabilities. In the course of such an activity, processing of personal information, including sensitive health data, takes place. This processing is based on the consent of the persons featured in these materials. When relying on consent in the workplace, it has to be ensured that this consent is free and informed.

Brussels, 17 June 2016

1. Proceedings

On 3rd February 2016, the European Data Protection Supervisor (the EDPS) received a notification for prior checking under Article 27 of Regulation 45/2001 (the Regulation) from the Data Protection Officer (the DPO) of the Council of the European Union (the Council). The notification concerns processing operations carried out by the **Equal Opportunities Office** of the General Secretariat of the Council.

The EDPS requested further information on the processing operations by e-mail to the DPO of 16 February and of 26 February 2016, to which the DPO replied respectively by e-mail of 25 February and of 8 March 2016. From the aforesaid correspondence it appears that processing of personal data (the production of a video by the Equal Opportunities Office of the General Secretariat of the Council on experiences of people with disabilities working in the EU institutions) already started in December 2015.

In view of the above, the EDPS considers that this is an **ex post** notification. This means that the 2 months deadline foreseen under Article 27(4) of the Regulation does not apply to this case. This case has been dealt with on a best-effort basis.

2. The facts

Purpose and persons concerned

The Equal Opportunities Office produces videos, posters and other materials with the aim of raising awareness on equal opportunities issues. The persons concerned by the processing activities performed by the Equal Opportunities Office are staff members with disabilities who volunteer for sharing their workplace experiences contributing to the production of such materials.

The Equal Opportunities Office of the Directorate-General A, Human Resources and Personnel Administration, of the General Secretariat of the Council (GSC) is the Office supported by the **Joint Committee on Equal Opportunities (COPEC) established by Decision No. 115/2011 of 22 July 2011 of the GSC.**

Since 2007 the GSC has a comprehensive **Equal Opportunities Policy** (formalized among others under the **Staff Note No. 208/07 of the GSC of 22 August 2011**) based on the requirements of the Staff Regulations relating to the principles of non-discrimination and equality between men and women and laying down that “COPEC works in conjunction with the Equal Opportunities Officer.” The Equal Opportunities Officer is responsible for the **development, implementation and monitoring of the policy of the GSC on equal opportunities.** The Office works with services across Directorate-General Administration, carrying out actions related to gender equality, disability, work-life balance and non-discrimination.

Legal basis

The legal basis of the processing referred to by the Equal Opportunities Office consists of:

- Article 2 and 3(2) of the Treaty on the European Union (TEU); Articles 8, 10 and 19 of Treaty on the Functioning of the European Union (TFEU);
- Article 1d of the Staff Regulations of Officials of the European Union;
- Article 240(2) of TFEU and Article 23 of the Rules of Procedure of the Council;

- Article 235(4) of the TFEU and Article 13 of the Rules of Procedure of the Council;
- Decision No. 115/2011 of the GSC, establishing the Joint Committee on Equal Opportunities (COPEC);
- Staff Note No. 208/07 of the GSC of 22 August 2011.

As concerns the grounds for lawfulness, the notification refers to Article 5(a) and (d) of the Regulation.

The Equal Opportunities Office of the Council requests the **express consent in writing** of the persons wishing to participate in the activities of the Office (namely, the production and publication of videos on experiences of people with disabilities working in the EU institutions) via a “consent form” to be signed by the data subject for the use of pictures and videos.

Procedure and data processed

In the context of the joint event to mark the European Day of Persons with Disabilities in **December 2015**, the Equal Opportunities Office produced a video on experiences of people with disabilities working in the Institutions. The Equal Opportunities Office is planning the production of a new video of the same kind for December 2016.

Recipients having access to the following data

The Equal Opportunities Officer and staff of the Equal Opportunities Office: lists of people who participate in activities organized by the Equal Opportunities Office, in some cases with a disability, including information on which kind of disability; photos and videos of people who take part in these activities, such as conferences, interviews and sketches; contact data of new officials/officials who are candidates in the mobility procedure and who disclose a disability.

Staff of the GSC: articles and posters/videos on experiences of people with disabilities working in the Institutions distributed within the GSC via the Intranet; the list of the members of the ‘Equal Opportunities Network’ is also published on the Intranet.

Staff of other EU institutions and, as the case may be, the public in general: posters/videos shared with other European Institutions for joint events and/or meetings.

Rights of access and rectification

Procedures to grant rights of data subjects are foreseen under Council Decision 2004/644/EC, Section 5¹.

In case of request for the exercise of data subjects’ rights, an acknowledgement of receipt is sent by the Equal Opportunities Office within five working days and the reply is sent no later than 15 working days from the date of receipt of that request. The Equal Opportunities Office may, however, send a duly justified ‘holding reply’. The deadline for the effective correction, blocking or deletion of personal data by the Equal Opportunities Office is 10 working days from the date the final decision is taken on the respective request.

Right of information

Data subjects are informed about the processing via a data protection notice (“*Protection of personal data. Information to data subjects. Activities of the Equal Opportunities Office*”)

¹ Council Decision 2004/644/EC of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council 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.

Retention policy

Photos, posters and videos of staff members who participate in activities organised by the Equal Opportunities Office are destroyed as soon as they are no longer necessary.

As a rule, personal data of persons participating in these activities are kept for four years.

The Equal Opportunities Office put forward that this retention period is justified by the fact that the equal opportunities policy is implemented on the basis of a multi-annual strategy: equal opportunities actions are planned for a period of four years. The retention of data for a period of four years is therefore necessary in order to monitor the results of projects for which they need to keep a record.

Storage and security measures

Electronic files are password-protected. Sensitive data are not stored on shared drive. For hard copy data: cupboards are locked, offices are fitted with safety locks.

Staff members with access to the files of the Equal Opportunities Office are required to sign a confidentiality clause stating in particular that they are subject to an obligation of professional secrecy equivalent to that of a health professional.

3. Legal analysis

3.1 Prior checking

The processing of personal data under analysis is carried out by an EU institution, the Council. Furthermore, the processing is partially automated (information stored in drives). The Regulation is therefore applicable.

The processing operation involves the processing of data relating to health, relating to volunteering staff members. Due to the sensitive nature of the personal data processed, the processing is likely to present specific risks to the rights and freedoms of the participants to the activities of the Equal Opportunities Office and it is therefore subject to prior checking by the EDPS².

3.2 Legal basis

In order to be lawful, the processing of personal data must fall under at least one of the possibilities in Article 5 of the Regulation. Point (a) of that Article refers to processing necessary for the performance of a task in the public interest. The processing of sensitive personal data, such as those relating to health, is subject to additional rules. We recall that Article 10(1) of the Regulation prohibits the processing of personal data revealing data concerning health unless at least one of the exceptions under Article 10(2) or (3) applies.

Concerning personal data which are *not* included in the list of special categories of data under Article 10 of the Regulation, we consider that Article 5(a) of the Regulation can provide the basis for the lawfulness of the notified processing operations relating to general activities of the Equal Opportunities Office.

Under Article 5(a), a two-step test needs to be carried out to assess: (1) whether either the Treaties or other legal instruments based on them foresee a **public interest task** on the basis

² Article 27(2) of the Regulation contains a list of processing operations that are likely to present risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, including, at point (a), processing of data relating to health.

of which the data processing takes place (*legal basis*); (2) whether the processing operations are indeed necessary for the performance of that task.

Article 1d of the Staff Regulations of Officials of the European Union, under general terms, states that “in the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of an ethnic minority, property, birth, *disability*, age, or sexual orientation shall be prohibited” and instructs EU institutions to *determine measures and actions* to promote equal opportunities.

This general instruction is detailed in Staff Note No. 208/07 of the GSC of 22 August 2011, signed by the Secretary General of the Council on 22 July 2011, laying down the mission of the Equal Opportunities Office working in cooperation with the Joint Committee on Equal Opportunities: contributing to the implementation of an equal opportunities policy (more inclusive work environment) within the GSC.

The production of videos, posters and other materials on the workplace experiences of persons affected by disabilities, as a means for the awareness-raising campaign (also directed to *staff of other EU institutions*), can be considered as necessary for the performance of the aforesaid 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(a) can thus be used as the ground for lawfulness as regards the activities of the Equal Opportunities Office in general. On the other hand, the participation of individual staff members in e.g. video productions is to be based on consent (Article 5(d)), also taking into account Article 10 of the Regulation.

As concerns the processing of special categories of data, such as health data, Article 10 of the Regulation has to be taken into account as well. Article 10(2)(a) provides that the prohibition of the processing of personal data concerning health may be lifted if the data subject has given his or her **consent** to the processing of those data (except where the internal rules of the EU institution provide that this prohibition cannot be lifted by the data subject giving his or her consent).

The EDPS considers that in this case the consent of the data subject wishing to participate in the activities of the Equal Opportunities Office is indeed an **essential condition** and, subject to the conditions and limits described in this Opinion, can be relied upon by the Equal Opportunities Office.

The staff member’s consent, particularly in relation to the processing of sensitive data, must be a “freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed” (Article 2, letter (h), of the Regulation). This means that the processing operations to which persons consent should be specifically described.³

The consent form used by the Equal Opportunities Office to collect the data subject’s consent specifies the following:

- the “subject of the video”;

³ See Opinion 15/2011 of the Article 29 Working Party on the definition of consent, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf

- that the Office requires authorization “for using of video images” and;
- the purpose: “to illustrate or promote the activities or projects, past, present or future, of the Equal Opportunities Office”.

The consent form also mentions that the Equal Opportunities Office requires authorization “without restriction”. Such wording seems too vague and broad (a ‘blanket’ authorization) and it is contrary to the conditions for data subject’s consent foreseen in Article 2, letter (h) of the Regulation. **The EDPS recommends deleting the words “without restriction” from the consent form.**

The Equal Opportunities Office should add in the consent form that **in case the staff member decides not to give his or her consent, this will not be detrimental to him or her or prejudice any of his or her right or interest at the workplace.**

In addition, in case the staff member decides to give his or her consent, he or she should have the right to withdraw it **at any time**. This should also be added to the data protection notice (see point 3.5 below).

3.3 Procedures for the exercise of data subjects’ rights

Staff members may exercise their rights of access, rectification, blocking, erasure, to object, by contacting the person designated to be in charge of the processing operation. A **functional e-mail address** should be included in the consent form and in the data protection notice (“Protection of personal data. Information to data subjects. Activities of the Equal Opportunities Office”) for the exercise of the data subjects’ rights, as well as (as specified in the “consent form”) for the withdrawal of consent by the data subject at any time.

3.4 Information to be provided to the data subjects

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to guarantee a fair and transparent processing of their personal data. In the present case, the data are collected directly from the data subject and therefore only Article 11 is applicable. The data protection notice refers both articles and should therefore be modified accordingly.

It is essential that this data protection notice is **handed over to the staff members prior to their participation** in the activities of the Equal Opportunities Office.

The Equal Opportunities Office should **also publish the updated data protection notice on the Council's intranet.**

In the light of Article 11(1)(d) of the Regulation, the Equal Opportunities Office should indicate in the data protection notice that **whether data subject decide to give his or her consent or not, this would not have any detrimental consequences to him or her** (see point 3.2).

3.5 Security

Article 22 of the Regulation obliges the controller to *“implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected”* and to perform risk management (risk assessment and treatment). The risk assessment will allow defining security measures which should in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

The EDPS has issued guidance on the approach to take for the implementation of Article 22 of the Regulation.⁴

The notification provided a description of some security controls implemented by the Council. The Council should provide documentary evidence of the controls implemented and of the information security risk management process from which they result. The security measures could for example be defined in a security policy of general application or in a more specific instrument related to the activities of the Equal Opportunities Office.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation, provided that the following considerations are taken into account. In particular the Equal Opportunities Office should:

- **delete in the consent form the words “without restriction”** (point 3.2); ensure that freely given informed and specific consent is **always** given to persons concerned **prior** to their participation in the activities of the Equal Opportunities Office related to the production of videos on experiences of people with disabilities working in the EU institutions or otherwise involving processing of their sensitive data (*for instance*, for the organisation of conferences, and the production of posters and audio-visual materials in general);
- add in the consent form and in the data protection notice that **the staff members' decision to give or not their consent will not be detrimental to them** or prejudice any of their rights or interests at work;
- in addition, in case staff members decide to give his or her consent, they should have the right to withdraw it **“at any time”**. Both the consent form and the data protection notice should include this clarification;
- specify in the notification, in the data protection notice, and in the consent form the **functional e-mail address** to be used for the exercise of the data subject rights and for the withdrawal of consent at any time (point 3.3);
- ensure that the data protection notice is published on the institution's intranet and handed over, together with the consent form, to staff members **prior** to their participation in the activities of the Equal Opportunities Office (point 3.4);
- provide documentary evidence of the security controls applied and the information security risk management process from which they result (point 3.5);

In the context of the follow-up procedure, please send to the EDPS a revised version of the notification; of the data protection notice, including the version to be published on the intranet; and of the consent form. Please also provide a copy of the security policy, within a

⁴ See the EDPS Guidance “Security Measures for Personal Data Processing - Article 22 of Regulation 45/2001”, of 21 March 2016, available at: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-03-21_Guidance_ISRМ_EN.pdf

period of 3 months, to demonstrate that the Equal Opportunities Office has implemented the above EDPS recommendations.

Done at Brussels, 17 June 2016



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