



## **European Data Protection Supervisor's prior checking Opinion on the whistleblowing procedure of the European Fisheries Control Agency (EFCA), Case 2015-0569**

Brussels, 29 September 2015

### **1. Proceedings**

On 8 July 2015, the European Data Protection Supervisor ("EDPS") received a notification for prior checking from the Data Protection Officer ("DPO") of the European Fisheries Control Agency ("EFCA") regarding their whistleblowing procedure.

According to Article 27(4) of Regulation 45/2001 (the "Regulation") this Opinion must be delivered within a period of two months, not counting suspensions for requests for further information<sup>1</sup>, in other words before 6 October 2015.

### **2. The facts**

The **purpose** of this procedure is to enable the reporting of fraud, corruption or other serious professional wrongdoing in EFCA. This requires establishing reporting channels for whistleblowers, to manage and follow-up reports, and to ensure protection and adequate remedies for whistleblowers. Article 22a, 22b and 22c of the Staff Regulations, as well as the Conditions of Employment of Other Servants of the European Union provide the rules on whistleblowing. EFCA has drafted guidelines on their internal procedure.<sup>2</sup>

The **personal information processed** is contained in the report submitted by the whistleblower and any subsequent document drawn up in response to that initial report. These documents may contain names, contact details and data relating to the conduct, action or inaction of the accused person(s).

Information to the data subjects will be provided through a specific **privacy statement** published on the EFCA intranet. Furthermore, all individuals affected by a particular whistleblowing procedure will be directly provided with the privacy statement as soon as practically possible. Deferral of information will be decided on a case by case basis. Both the privacy statement and the notification state that the identity of the whistleblower should be kept confidential in as much as this would not contravene national rules regarding judicial procedures.

The notification states that the categories of recipients to whom personal information will be **disclosed** are the Human Resources Section, the Head of Unit concerned, the Head of Unit Resources, the Legal Officer, the Executive Director and Ethics Correspondents. Furthermore, it may happen that EFCA will transfer personal information to competent national authorities such as a national Court where there is an infringement of national law. If the information is

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<sup>1</sup> The case was suspended for information from 29 July 2015 to 24 August 2015 and for comments of the DPO from 24 September 2015 to 25 September 2015. The EDPS shall thus render its Opinion before 6 October 2015.

<sup>2</sup> Draft Decision No 15-X-X of the administrative board of the European Fisheries Control Agency on the Guidelines on whistleblowing in the European Fisheries Control Agency.

transferred at the request of a national authority, it must establish the 'necessity' for the transfer. If information is transferred on the initiative of EFCA, EFCA must establish the 'necessity' for the transfer in a reasoned decision.

The **retention period** for files which do not lead to the opening of an inquiry ('non-case') will be kept for a period of 2 years from the date EFCA decides to close the file without follow up. Files on the basis of which an administrative inquiry or disciplinary procedure are opened should be kept in line with the retention periods foreseen for those files.<sup>3</sup>

Regarding **security measures** [...]

### **3. Legal analysis**

#### **3.1. Prior checking**

The processing of personal data is performed by a European Union Agency. Furthermore, the processing is partly done through automatic means. Therefore, the Regulation is applicable.

This processing activity is subject to prior checking since it presents specific risks. Indeed, EFCA will process information on suspected offences and carry out an evaluation of the accused persons' conduct.<sup>4</sup>

#### **3.2. Data quality and special categories of data**

According to Article 4(1)(c) of the Regulation, personal information must be adequate, relevant and non-excessive in relation to the purposes for which they are collected and/or further processed. They must also be accurate and where necessary, kept up to date (Article 4(1)(d)).

There is a possibility that EFCA, perhaps involuntarily, receives information that is of no interest/relevance to the investigation, also concerning special categories of data (see Article 10(1) of the Regulation). In this regard, the EDPS recalls that the data must be necessary to comply with the performance obligations set out in Article 22(a), (b) and (c) of the Staff Regulations (see Article 10(2)(b)).

Pursuant to these principles of data quality, data and in particular special categories of data that clearly are not relevant for the purposes of investigating fraud, corruption or other serious wrongdoings through the whistleblowing procedure, should not be further processed and should be erased. This requires carrying out a first check of the report as soon as possible. Investigators handling the files should be aware of this. In order to achieve this, **EFCA should therefore ensure that staff members are aware of the data quality requirements.**

#### **3.3. Transfer of data**

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<sup>3</sup> See EDPS opinion of 3 September 2014 on the notification for prior checking from the European Fisheries Control Agency regarding the "administrative inquiries and disciplinary proceedings", case 2014-0628.

<sup>4</sup> Article 27 of the Regulation subjects to prior checking by the EDPS processing activities likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks including under point (a) the processing of data related to suspected offences and under point (b) processing intended to evaluate personal aspects relating to the data subject, including his or her conduct.

In accordance with Article 7(1) of the Regulation, EFCA is required to verify both that the recipients are competent and that the personal information is necessary for the performance of the related tasks.

EFCA has mentioned a number of categories of recipients to whom personal information might be disclosed; the Human Resources Section, the Head of Unit concerned, the Head of Unit Resources, the Legal Officer, the Executive Director and Ethics Correspondents. Since the personal information transferred could indirectly lead to the identification of suspected persons, the EDPS reminds EFCA to verify on a case by case basis whether personal information to be transferred is necessary for the legitimate performance of tasks covered by the competence of the recipient.

### **3.4. Data retention**

As a general principle, personal data must not be kept in a form which permits identification of data subjects for longer than is necessary for the purposes for which the data are collected and/or further processed (Article 4(1)(e)).

In this case, the conservation period is two years from the date when EFCA decides to close the file without follow up. The Opinion of WP Article 29<sup>5</sup> mentions, however, that personal data should be deleted promptly and usually within two months of completion of the investigation of the facts alleged in the report. In this regard, a retention period of two years for files that are closed without follow up seems excessive and the EDPS invites EFCA **to re-evaluate the data retention period or provide further justification on the necessity to retain data found irrelevant for two years.**

### **3.5. Confidentiality**

The EDPS welcomes the fact that EFCA will protect the identity of whistleblowers. In this regard, the EDPS stresses that preserving the confidentiality of all parties involved; whistleblowers, the accused persons and the third parties, are of utmost importance.

The reason why the accused person should be protected in the same manner as the whistleblower is because of the risk of stigmatisation and victimisation of that person within the organisation to which he/she belongs. The person will be exposed to such risks even before he/she is aware that he/she has been incriminated and the alleged facts have been investigated to determine whether or not they are substantiated. In this regard, **EFCA should add information on the protection of the accused person to the draft guidelines.**

### **3.6. Security measures**

[...]

## **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of the Regulation providing that the recommendations contained in this Opinion are fully taken into account. To summarise, EFCA should:

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<sup>5</sup> See Article 29 Working Party Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting controls, auditing matters, fight against bribery, banking and financial crime, WP 117, page 12, recommending two months from the closure of the investigation; available here: [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf).

- Ensure that staff members handling information on potential fraud and other serious wrongdoings are aware of the data quality requirements (point 3.2.);
- Re-evaluate the data retention period or provide further justification on the necessity to retain data for two years regarding files where the accusations are found irrelevant (point 3.4.);
- Make clear in the draft guidelines that the identity of the accused persons also should be protected (point 3.5.);
- [...]

Please inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Done at Brussels, 29 September 2015

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