



***Ex-post* controls of administrative situation of Accredited Parliamentary Assistants (Confluence)**

Prior Checking Opinion
Case 2016-1060

Confluence is a system of exchange of information aimed at increasing efficiency in carrying out *ex-post* controls about the Accredited Parliamentary Assistants (APAs) for which the administration of the European Parliament has suspicions they may infringe statutory rules or their contractual obligations, i.e. preliminary checks aimed at determining whether the launch of an administrative enquiry is justified. Lawfulness of the processing should be strengthened through a revision of the Parliament's provisions governing disciplinary proceedings and administrative investigations. Individual information of APAs should also be ensured in due course.

Brussels, 13 February 2017

1) The Facts¹

DG PERS of the European Parliament (EP) wishes to increase the efficiency of the exchange of relevant information to check whether Accredited Parliamentary Assistants (APAs)² comply with the rules or contractual obligations stemming from their employment contracts. While the EP formally employs APAs (their contract being signed with the EP), they work under the sole authority of the Members of the European Parliament (MEPs), making it more difficult for the administration to exercise over APAs its traditional mission of control of compliance with staff obligations (presence, leaves, missions, etc.). The most significant examples of infringements of contractual obligations by APAs include non- residence in one of the places of work of the EP (mainly Brussels but also Strasbourg and Luxembourg) or absence of declaration of outside activity. In addition, the important turnover of APAs in the course of a legislature requires setting up efficient controls to detect possible infringements and allow the administration to take the appropriate steps (opening of an administrative enquiry or alert OLAF for the most serious infringements affecting the financial interests of the EU).

Confluence is a collaborative electronic space allowing the exchange of information between several units of DG PERS. The specific purpose of Confluence is to carry out *ex-post* controls of the administrative situation of APAs for which the administration suspects possible infringements of statutory rules or contractual obligations. The overall goal of Confluence is to allow compliance with the legal obligation to respect sound financial management through a more efficient detection of irregularities as regards APAs.

Information regarding the administrative situation of APAs will be shared on Confluence for cross-checking purposes between various units of DG PERS, i.e.:

- Directorate A (HR Development), Contract Staff and Accredited Parliamentary Assistants Recruitment Unit and Staff Management and Careers Unit, and;
- Directorate B (Administrative Management), Units: "Individual entitlements and payroll", "Missions", "Pensions and social insurance" and "Relations with personnel".

Access to Confluence will be strictly limited to one or two identified representatives of the DG PERS Units involved.

The categories of data to be exchanged and cross-checked within Confluence regarding APAs include: name, missions declarations, place of residence and registration in Belgium (delivery of the special identity card), leave and absences, recruitment dates, information about entitlements and allowances, date and place of medical services, as well as requests to engage in an outside activity or hold public office.

When the administration will have a suspicion of infringement about a specific APA, one of the authorized units of DG PERS will create a file within Confluence. Confluence will allow an authorized user to request from other units relevant information to crosscheck the necessary information (supporting documents, explanations, data collected from EP system). To feed

¹ The description of the facts follows from the notification and information gathered during a meeting with the DPO of the European Parliament and Director of Directorate B of DG PERS.

² Article 5a of the Conditions of Employment of Other Servants of the European Union (CEOS) provides for the definition of an APA: '(...) persons chosen by one or more Members to provide direct assistance, in the premises of the Parliament at one of its three places of work, to the member or Members in the exercise of their functions as Members of the European Parliament, under their direction and authority and in a relationship of mutual trust (...)'.
..

Confluence, information can be retrieved, upon request of an authorized user and on a case-by-case basis, from the following systems: Streamline (time and leave management), Mission management application (MISS), AssMal (only to collect the place and date of medical services, and no other information). Confluence is an autonomous system, i.e. it is not connected to any other IT applications, databases or systems.

Confluence includes the following main tabs:

- “Description of issue” which can concern one or more areas, such as leave, missions, place of residence status (e.g. “doubt as to the actual residence in Brussels”)
- “Impacted Units”
- “Date of last action” (e.g. “The Relations with personnel unit confirms that the APA has not requested a special ID card and has no valid address in Belgium”)
- “Actions to be taken” (e.g. “contact the APA and follow-up residence issue”)

Confluence can also be described as a tool assisting DG PERS in the follow-up of its actions and tasks in the course of *ex-post* controls.

2) Legal analysis

This prior checking Opinion³ under Article 27 of Regulation (EC) 45/2001⁴ (the Regulation) will focus on those aspects which raise issues of compliance with the Regulation or otherwise merit further analysis. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

a) Lawfulness of the processing

Personal data may be processed only if it is based on one of the lawful ground listed in Article 5 of the Regulation. In addition, when sensitive data are processed, such processing should also comply with Article 10 of the Regulation.

According to the notification, the lawfulness for Confluence is Article 5 (a) of the Regulation providing that personal data may be processed if the 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 or in the legitimate exercise of official authority vested in the Community institution or body*”.

In particular, the **legal basis** of the processing would derive from:

- Articles 30, 31, 32 and 66 of the Financial Regulation (the “FR”);
- Articles 18, 19, 49 and 52 of the Rules of Application (the “RAP”);
- Articles 4, 5, 6 (2), 7 and 8 of the OLAF Regulation;
- Article 5a of the Conditions of Employment of other servants of the European Union (the “CEOS”);
- Articles 1 and 2 of General Implementing Provisions Governing Disciplinary Proceedings and Administrative investigations of 18 May 2004 (the “Disciplinary Provisions”);
- Article 5 of Internal Rules on the Implementation of the European Parliament’s Budget - Bureau decision of 16 June 2014.

³ According to Article 27(4) of the Regulation, the EDPS has to provide his Opinion within two months of receiving the notification, not counting suspensions. The notification was received on 18/11/2016. [suspended on 06/12/2016 and unsuspended on 22/12/2016, further suspended on 01/02/2017 and unsuspended on 13/02/2017]. The EDPS shall thus render his Opinion by 15/02/2017.

⁴ OJ L 8, 12.1.2001, p. 1.

In particular, Article 5a of the CEOS describes the peculiarity of APAs' contracts compared to other staff members. It provides that “*accredited parliamentary assistants means persons chosen by one or more Members and engaged by way of direct contract by the European Parliament to provide direct assistance, in the premises of the European Parliament at one of its three places of work⁵, to the Member or Members in the exercise of their functions as Members of the European Parliament, under their direction and authority and in a relationship of mutual trust deriving from the freedom of choice referred to in Article 21 of Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament.*”

Thus, although APAs are hired by contract by the EP, the usual hierarchical control of compliance with contractual obligations of staff members is not done by the EP administration. As a result, major irregularities, notably regarding the stated obligation for APAs to accomplish their tasks “*in the premises of the European Parliament at one of its three places of work*” are more difficult to detect by the administration. The peculiarity of the situation of APAs, combined with the important turnover of APAs, can justify the **necessity** to set up adequate *ad hoc* control procedures such as Confluence to ensure compliance with Article 5a of the CEOS.

It is also indisputable that Confluence, by helping detect potential frauds and irregularities, contributes to ensure compliance with the principle of sound financial management (chapter 7 of the Financial Regulation) and the principle of internal control of budget implementation (Article 32 of FR). While Article 66 (5) of the FR provides for the obligation to set up *ex ante* controls, following paragraph (6) refers to the possibility for authorizing officers by delegation to establish *ex post* controls, providing that “such controls may be organized on a sample basis according to risk”. It must, however, be noticed that such provisions do not address specifically *ex post* controls in individual cases raising suspicions. Besides, Article 5 of the Internal Rules on the Implementation of the European Parliament’s Budget - Bureau decision of 16 June 2014 foresees the implementation of *ex ante* controls only, and does not address the procedure for *ex post* controls.

Since Confluence is described as a preliminary check aimed at determining whether the launch of an administrative enquiry or disciplinary proceeding is justified, the exchange of information within this application can be compared with a **administrative pre-enquiry**. According to the EDPS Guidelines on processing personal information in administrative enquiries and disciplinary proceedings of 18 November 2016, each institution shall distinguish the pre-enquiry file from the enquiry file and disciplinary file⁶. The lawfulness of the processing must primarily be assessed in the light of the Disciplinary Provisions. The Provisions explicitly refer to disciplinary proceedings (Article 1) and Administrative investigations (Article 2). However, they do not contain any specific legally binding provision framing the conduct of pre-enquiries.

In addition, Confluence also involves the processing of **sensitive data**. As explained by the EDPS in the above Guidelines, personal information related to a suspicion of misconduct is by nature sensitive information (Art. 10 (5)). Besides, the processing of information relating to health-related data is not excluded, since Confluence will also allow exchange of information regarding the date and place of medical services. The processing of sensitive data in the context of an enquiry may be necessary in order to comply with the obligations and rights of an institution in the field of employment law insofar as it is authorized by EU law (Article 10 (2)

⁵ We underline.

⁶ EDPS Guidelines on processing personal information in administrative enquiries and disciplinary proceedings of 18 November 2016, p. 15

(b) of the Regulation 45/2001⁷. However, in this case the adoption of legally binding rules is a pre-condition for the processing of personal information.

In view of the above, the EP should review its Disciplinary Provisions in order to include specific and foreseeable rules regarding the conduct of pre-enquiries. Such a modification is necessary to strengthen the lawfulness of any pre-enquiry procedure of the type of Confluence. This modification is also essential to comply with the obligation to rely on legally binding rules authorizing the processing of sensitive data. The revision of the Disciplinary Provisions should be done taking into account the EDPS Guidelines on processing personal information in administrative enquiries and disciplinary proceedings.

1. The EP **should review** its Disciplinary Provisions in order to provide specific and foreseeable rules for the conduct of pre-enquiries.

b) Information to be given to APAs

Personal information must be processed fairly, and specific obligations of information of the affected individuals should be complied with taking into account Article 11 of the Regulation.

According to the notification, information of APAs is carried out through:

- A legal notice published in streamline;
- A Declaration on data protection on the EP's website ("Privacy Statement");
- A disclaimer in Confluence;
- Possible reference to be introduced in the contract with the APA.

First, the disclaimer in Confluence is destined to inform authorized **users of Confluence** about the risks and duties in managing the personal information processed in the application. It is therefore irrelevant to the obligation of transparency with respect to APAs. The same applies to the legal notice published in Streamline, which relates to general information concerning the purposes of the processing operations managed by Streamline. It does not address the issue of transparency with regard to APAs who are the subject of a pre-enquiry.

2. The EP should delete references to the "legal notice published in Streamline" and "disclaimer in Confluence" from section 7 of the notification.

As for the information of the APAs, two layers of information should be highlighted.

b.1. General Information: data protection notice

The general **Privacy Statement** published on the APAs' intranet section is a necessary step to inform all APAs about the potential processing of their personal data for pre-enquiry purposes. The information displayed complies formally with the requirements of Articles 11 and 12 of the Regulation. However, in light of future transparency obligations⁸, the Privacy Statement

⁷ *Idem*, p. 10

⁸ Article 12 of the General Data Protection Regulation : "*The controller shall take appropriate measures to provide any information ... relating to processing to the data subject in a concise, transparent, intelligible and*

should be improved to be more intelligible, using clear and plain language (e.g.: displaying the purpose of the processing first, referring to APAs instead of “data subjects”).

Besides, the EDPS also recommends including a specific reference to such administrative controls in the work contract of APAs in order to increase the transparency of such *ex-post* controls in case of suspicion of infringement to rules and contractual obligations. A link to the general Privacy Statement should be included in the new work contracts. For APAs already under work contracts, the EP should send the Privacy Statement to the mailing list of APAs.

Taken altogether (information available on APAs’ intranet, in future work contracts and information by email), these measures can also achieve a preventive role.

3. The EP should include a specific reference to administrative controls made through Confluence in any future work contracts of APAs and include a link to the Privacy Statement in the said contracts.
4. The EP should inform all APAs already under contract about the new processing made through Confluence and provide them with the Privacy Statement, before starting using Confluence
5. As a suggested improvement, the Privacy Statement could be improved in order to be more intelligible and reinforce fraud prevention.

b.2. Specific information of APAs affected by controls through Confluence

If general information of APAs is important to comply with the principle of fairness of processing, it is not sufficient. In order to guarantee fairness and transparency about the information processed on Confluence in general, APAs should be informed about it when data are processed on Confluence on their administrative situation. DG PERS should therefore provide them with the Privacy Statement as soon as it is practically possible, for example, when an authorized user sends a request for supporting documents or explanations to the APA or before starting an interview with the APA if applicable. The APAs should also be informed about the possible consequences of not providing the requested supporting documents/information/explanations (such as the opening of an administrative enquiry or disciplinary proceeding) in compliance with Article 11(1)(d).

In cases where the *ex-post* control leads to waive the suspicion of infringement, the APA should be also been made aware of the fact that his/her administrative situation was the object of a pre-enquiry and its outcome.

In cases where the *ex-post* control leads to confirm a suspicion of infringement and if the APA has not yet been made aware of it, the information of the APAs should logically be ensured in compliance with the Disciplinary Provisions taking into account the EDPS Guidelines on processing personal information in administrative enquiries and disciplinary proceedings. Restrictions to the obligation of information may apply, in exceptional situations, according to Article 20(1) (a) of the Regulation⁹.

easily accessible form, using clear and plain language ...”. This obligation is reflected in Article 14.1 of COM Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC

⁹ EDPS Guidelines on processing personal information in administrative enquiries and disciplinary proceedings: “In cases where your institution decides to apply a restriction of information, access, rectification etc. under

6. The EP should **inform individually** the APAs who are the subject of a pre-enquiry through Confluence and provide them again with the Privacy Statement. Information should be provided as soon as it is practically possible, for example, when an authorized user sends a request for supporting documents or explanations to the APA or before starting an interview with the APA if applicable.

The Privacy Statement should specify the possible consequences of not providing the requested supporting documents/ information/explanations in compliance with Article 11(1)(d).

In cases where the *ex-post* control leads to the waive of the suspicion of infringement, the APA should also be informed about the control.

In cases where the suspicion of infringement is confirmed, and if the APA has not yet been informed, he/she should be informed in compliance with the Disciplinary Provisions.

3) Recommendations and suggestions for improvement

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that all recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

For the following **major recommendations**, the EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion:

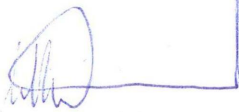
- Review the Disciplinary Provisions, in order to include clear and transparent provisions on pre-enquiry that can be applicable to such a structured exchange of information as Confluence, but also to other pre-enquiries procedures. The Disciplinary Provisions should be amended taking into account the EDPS Guidelines on processing personal information in administrative inquiries and disciplinary proceedings of 18 November 2016.
- Delete references to the “legal notice published in Streamline” and “disclaimer in Confluence” from section 7 of the notification, as they are non-relevant to the issue of transparency toward APAs.
- Include a specific reference to administrative controls carried out on Confluence in the work contract of APAs.
- Send, via email, the Privacy Statement to APAs already under contract in order to inform them about the processing Confluence.
- Inform individually the APAs who are the subject of a pre-enquiry through Confluence. Information should be provided as soon as it is practically possible, for example, when

Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4), such decision should be taken strictly on a case by case basis. In both cases your institution 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 investigation or they undermine the rights and interests of your institution and they should be documented before the decision to apply any restriction or deferral is taken. The documented reasons should be made available to the EDPS if requested in the context of a supervision and enforcement action.”

an authorized user sends a request for supporting documents or explanations to the APA or before starting an interview with the APA if applicable. The Privacy Statement should specify the possible consequences of not providing the requested supporting documents/ information/explanations in compliance with Article 11(1)(d).

Recommendation No. 5 in the opinion is a suggested improvement that will not be followed up.

Done at Brussels, 13 February 2017



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