
Decision n°: 2013/01

SUBJECT : Decision on conduct of administrative inquiries and disciplinary procedures

THE EXECUTIVE BOARD OF THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS,

Having regard to the Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing the European Union Agency for Fundamental Rights (hereafter "the Agency") and in particular Article 24 thereof,

Having regard to the Staff Regulations of officials of the European Communities (hereafter 'Staff Regulations') and the Conditions of employment of other servants of those Communities (hereafter 'CEOS) as laid down by Council Regulation (EEC, EURATOM, ECSC) No 259/68, and the amendments thereto, and in particular Articles 86 and Annex IX to the Staff regulations and Article 49, 50 and 119 of the CEOS.

Having regard to the Commission Decision C (2005) 5304 of 16 December 2005 concerning the guidelines on staff policy in the European regulatory Agencies,

After consultation of the Staff Committee on 07 February 2012 and in agreement with the European Commission pursuant to Article 110 of the Staff Regulations,

WHEREAS:

1. The implementing provision governing the conduct of administrative inquiries should be adopted.
2. The implementing provisions for disciplinary procedures should be adopted.
3. A preventive approach to and transparency in disciplinary matters should be ensured.
4. Under Article 22 of Staff Regulations, the formalities laid down for disciplinary matters must also be observed in the case of a procedure concerning the pecuniary liability of a staff member.
5. A staff member carrying out an investigation procedure may not be involved in the assessment of the outcome of such procedures in order to guarantee the independence of the persons carrying out the assessment.
6. The Agency should apply the principle of Regulation (EC) No 45/2001 to the processing of personal data relating to agency staff.

HAS DECIDED AS FOLLOWS:

Section I: Implementing rules on administrative inquiries

Article 1: Administrative inquiries

1. For the purpose of these implementing rules 'administrative inquiries' shall mean all actions taken by the Investigation Panel to establish the facts and, where necessary, to determine whether there has been a failure to comply with the obligations incumbent on the Agency's staff members.

Article 2: Opening of administrative inquiries

1. An administrative inquiry shall be opened at the request of the Director. The Director shall define the purpose and scope of the inquiry.
2. Before opening the inquiry, the Director shall consult the European Anti-Fraud Office (OLAF) to ascertain that the Office is not undertaking an investigation into the same facts for its own purposes and does not intend to do so. As long as OLAF is conducting an investigation within the meaning of Regulation 1073/99, no administrative inquiry shall be opened regarding the same facts.

Article 3: Establishment of an Investigation Panel for administrative inquiries

1. The Director appoints the Investigation Panel, which may be either permanent or specific to the circumstances of a particular administrative inquiry, and designates a person of the Investigation Panel as responsible for the inquiry. The designated person shall determine responsibilities on the basis of particular facts and circumstances, and, if appropriate, the individual responsibility of the staff members concerned by the disciplinary procedure.
2. The Investigation Panel may consist of one to three members that may be chosen from among temporary agents whose function group and grade is at least equal to that of the staff member who is the subject of the investigation. At least one of them shall have proven experience on the subject of inquiry. The panel may also consist of external expert with corresponding position and adequate experience on the subject of the inquiry. The external member may be a staff member or former staff member of another EU institution, body or agency or an expert from the Member States.

3. Each member of the Investigation Panel shall sign a written declaration that he/she does not have any interest which may conflict with the staff member subject to the investigation or the issues under investigation.
4. The Investigation Panel shall report to the Director.
5. A member of the Investigation Panel may not sit on a Disciplinary Board.

Article 4: Functions and powers of the Investigation Panel

1. The Investigation Panel may be asked and shall carry out inquiries to ascertain certain facts, in particular under Articles 24 and 90 of the Staff Regulations.
2. The Investigation Panel shall exercise its powers of administrative inquiry independently. In the exercise of those powers, the Panel shall neither seek nor receive instructions. The Panel shall have the power to obtain documents, summon any person subject to the Staff Regulations to provide information and carry out on-the-spot investigations.
The Investigation Panel shall only collect necessary, proportionate and relevant data to the purpose of the investigation and the reports shall only contain such necessary, proportionate and relevant data.
3. Administrative inquiries shall be carried out thoroughly and include all aggravating and extenuating circumstances; they shall last for a period appropriate to the circumstances and complexity of the case.
4. The Investigation Panel may receive assistance from FRA staff members. In case the Investigation Panel asks for information or performs a hearing, FRA staff members shall cooperate with the Panel. Obstructions or false testimony in the framework of an administrative inquiry could lead to opening a subsequent inquiry or the procedure set out in Article 3 of Annex IX to the Staff Regulations. No FRA staff member shall be obliged to give evidence against him/herself.

Article 5: Conduct of administrative inquiries

1. As soon as an administrative inquiry suggests that a staff member may be subject to an Investigation, that person shall be kept informed provided that information does not hinder the inquiry. In any case, conclusions referring to a staff member by name may not be drawn at the end of the inquiry unless he/she has had the opportunity to express an opinion on all the facts which relate to him/her. The conclusions shall record that opinion.

EB DECISION

PAGE 4/13

2. All staff members involved in an administrative inquiry should be informed of the existence of the administrative inquiry, its opening and closing where appropriate as well as potential extensions unless the Director considers that disclosing this information would hinder the inquiry.

The record of the hearing shall be forwarded to the staff member concerned by registered letter with acknowledgement of receipt, for signature. The staff member concerned then forwards the signed letter and/or his/her comments and remarks within 15 calendar days of receipt.

Where absolute secrecy is required by the aims of the investigative procedures which are the responsibility of a national judicial authority, the obligation to invite the staff member to express an opinion may be deferred by the Director. In that eventuality, no disciplinary procedure may be opened until the staff member concerned has been able to express an opinion.

3. The Investigation Panel shall submit a report on the inquiry to the Director. This report shall set out the facts and circumstances in question; it shall establish whether the rules and procedures applicable to the situation have been respected and shall determine any individual responsibility, having regard to aggravating or extenuating circumstances. Copies of all relevant documents and records of interviews shall be attached to the report.
4. The Director shall inform the staff member concerned of the conclusion of the inquiry together with the conclusions of the inquiry report and, on request, communicate all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties.
5. If, following an administrative inquiry, no charge is brought against a staff member against whom allegations have been made; the administrative inquiry concerning that person shall be closed with no further action by decision of the Director, who shall so inform the staff member concerned in writing. The staff member may request that the decision be placed in his/her personal file. The decision shall only be inserted in the personal file of the staff member should he/she requests so.
6. The closure of the administrative inquiry shall not prevent its reopening if new facts come to light.
7. In case an investigation has been conducted by OLAF, the Director may, after receiving its inquiry report, if appropriate, either ask OLAF to supplement the report or decide to open an administrative inquiry himself or immediately open a disciplinary procedure or indeed close the file without any disciplinary consequences.

**Section II: Implementing rules on disciplinary proceedings***Article 6: Disciplinary Proceedings*

1. The present implementing rules are without prejudice to the provisions on disciplinary proceedings in Annex IX of the Staff Regulations.
2. The Director shall be responsible for disciplinary proceedings and co-ordinate any preventative measure needed.
3. All documents related to the disciplinary procedure shall be stored in a disciplinary file. The staff member concerned shall have the right to obtain his/her complete individual disciplinary file.
4. Only copies of the final decisions taken in the disciplinary proceedings will be kept in the personal file of the staff member concerned, taking into account the provisions of Article 27 of Annex IX to the Staff Regulations concerning the request of deletion of such data. The retention period of the decision in the personal file will be 18 months.

Article 7: Chairperson and members of the Disciplinary Board

1. The Disciplinary Board shall be set up following the provisions laid down in Article 5 and Article 6 of Annex IX of the Staff Regulations as well as Article 119 of the CEOS.
2. The Chairperson of the Disciplinary Board, its members and their alternates shall be appointed for a maximum period of three years, which may be renewed.
3. There should be at least one external member on the Disciplinary Board.
4. The Chairperson may be a staff member of the Agency or a former staff member of a European Institution or Agency.
5. The FRA will make use of the Inter-agencies Disciplinary Board lists for the appointments of the members of the Disciplinary Board.

6. The Disciplinary Board shall only collect necessary and proportionate data to the purpose of the investigation and the reports shall only contain necessary and proportionate data.

Article 8: Disciplinary proceeding and Hearing

1. A staff member heard pursuant to Article 3 of Annex IX to the Staff regulations shall receive a record of the hearing by registered letter with acknowledgement of receipt, for signature. She/he shall sign the record of the hearing or make comments and/or remarks within 15 calendar days from receipt of the record. Failure to do so within the period shall, except in cases of force majeure, result in the record being considered approved.
2. If the member of the Disciplinary Board has to conduct interviews with certain persons following the hearing referred to in Article 3 of Annex IX to the Staff Regulations, the staff member concerned shall receive a copy of the signed records of those interviews provided that the facts mentioned there have a direct bearing on the preliminary allegations made against him/her.
3. Article 4, Article 13(3) and Article 16 (1) of Annex IX to the Staff Regulations allow staff members involved in disciplinary proceedings to be represented or assisted by a person of their choice. A person of their choice may assist a staff member at any interviews or preliminary hearings or hearings provided for under Article 3 of Annex IX to the Staff Regulations.

Article 9: Representation of the Director before the Disciplinary Board

1. The representation of the Director before the Disciplinary Board, pursuant to Article 16(2) of Annex IX to the Staff Regulations shall be undertaken by the Head of Human Resources and Planning Department or another staff member so nominated by the Director.
2. Where an administrative inquiry has already been held into a case before referring it to the Disciplinary Board, the members of the Investigation Panel who conducted that inquiry may not represent the Director before the Disciplinary Board but may, if appropriate, be called by it as witness.

*Article 10: Training*

Staff members appointed as members of the Disciplinary Board and their alternates shall, as soon as possible after their appointment, receive specific training to allow them to efficiently take part in the work of the Disciplinary Board.

Article 11: Prevention and Publicity

1. Guidance setting out the rights and obligations of staff members, the rules of conduct they are required to follow and the consequences which violations of those obligations may engender and examples of faults shall be regularly updated and made accessible to all staff.
2. The decisions on disciplinary matters taken by the Director or a summary of those decisions shall be published once a year. The names of the staff members and any other information which could identify them shall be omitted.

Article 12: Appeals

Title VII, Article 90-91a of the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities sets out the matters pertaining the appeal process open to any staff member of the Agency.

Article 13: Entry into force

This decision shall enter into force on the day following its adoption.

Done in Vienna, on

22 May 2013

Maija Sakslin

Chairperson of the Executive Board

Annex: Declaration on the processing of personal data in administrative inquiries and disciplinary proceedings (Specific Privacy Statement)

Personal data collected as part of administrative inquiries and disciplinary proceedings are dealt in accordance with the Regulation 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 (Regulation (EC) No 45/2001 of the European Parliament and the Council of 18 December 2000,¹

The information required by the Regulation is summarised below.

Data controller

The Director

Lawfulness of the processing operation

Staff Regulations of officials of the European Communities (hereafter 'Staff Regulations') and the Conditions of employment of other servants of those Communities (hereafter 'CEOS) as laid down by Council Regulation (EEC, EURATOM, ECSC) No 259/68, and the amendments thereto, and in particular Articles 86 and Annex IX to the Staff regulations and Article 49, 50 and 119 of the CEOS.

Processing of special categories of data

The Director shall ensure that the members of the Investigation Panel and the Disciplinary Board are made aware that the processing of any sensitive data is strictly authorised by any of the exceptions provided in Article 10 (2), (4) or (5) of Regulation 45/2001.

¹ http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32001R0045&model=guicheti

Data quality

Article 4(1) (c) of Regulation 45/2001 sets out a number of requirements regarding the quality of personal data. The article stipulates that 'personal data must be adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed'.

Administrative investigation files and disciplinary files are likely to contain data relating to offences, criminal convictions or security measures. Processing of such data is subject to authorisation in accordance with Article 10(5) of Regulation 45/2001. The decisions implementing Article 86 of the Staff Regulations and, by analogy, Article 49 to 51 and 119 and of the CEOS shall be regarded as an authorisation to process data.

Adequacy, relevance and proportionality

The Investigation Panel shall be instructed that it shall only collect necessary and proportionate data for the purpose of the investigation. These instructions shall also be applicable to the Disciplinary Board (Article IX to the Staff regulations).

The Data Controller shall ensure that the Investigation Panel and the Disciplinary Board are made aware of the restrictive rules which apply to the processing of special categories of data (racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and data concerning health or sex life) and avoid the inclusion of these data unless of the circumstances foreseen in Article 10(2) of Regulation 45/2001 are present in the particular case under investigation.

Accuracy, up-to datedness and completeness

All staff members involved shall receive a copy of the conclusions of the investigation, and, on request, of all documents directly linked to the allegations made, subjects to the protection of the legitimate interests of third parties. These documents shall be inserted in the disciplinary file of staff member for completeness. Any subsequent amendments or corrections (such as a Court Decision) shall also be inserted to the file.

The record of the hearing shall be forwarded to the staff member concerned by registered letter with acknowledgement of receipt, for signature. The staff member concerned then forwards the signed letter and/or his/her comments and remarks within 15 calendar days of receipt. This method can also contribute to ensuring that the data are accurate and kept up to date.

Conservation of data

Personal files

The personal file of a staff member shall contain all documents concerning his/her administrative status and all reports to his/her ability, efficiency and conduct, and also any comments by the staff member on such documents (Article 26 of the Staff Regulations). Only copies of the disciplinary decisions will be kept in the personal file of the staff member concerned. The retention period is 18 months.

In cases where the Director imposes no charges on the staff members concerned there shall be no traces of its decision in the personal file unless the staff member requests so.

Administrative investigation files

Administrative investigation files will be kept for 18 months.

Disciplinary files

Disciplinary files shall be retained for a period appropriate to the circumstances and the complexity of case as well as taking into account the time limit for appeal and the principle evoked in Article 4 (1) (e) of Regulation 45/2001. As a general rule, the retention period is 18 months.

Should the case proceed into the court, retention period of the administrative investigation files or disciplinary files shall be extended.

Appropriate measures shall be taken to assure all parties of secure personal data handling. Disciplinary files and administrative investigation files shall be kept in a locked filing cabinet of the Human Resources and Planning Department allowing to access solely to authorised individuals.

In all the above-mentioned files the retention period of 18 months is the minimum retention period and 20 years is the maximum.

Traffic data

Traffic data is any data relating to a communication by means of telecommunications network and terminal equipment.

In Principle such data shall be erased or made anonymous upon termination of call or connection under Article 37 (1) of Regulation 45/2001. However there can be 2 exceptions:

- Traffic data can be stored if necessary during specific administrative investigation or specific disciplinary proceedings under a strict interpretation of Article 20 (1) (a) of Regulation 45/2001 and
- Where traffic data are processed for telecommunications budget and traffic management purposes (Article 37 (2) of Regulation 45/2001), they can be kept for a maximum conservation period of 6 months or even a longer period, in the context of an administrative inquiry or disciplinary investigation.

Electronic storage of personal data

Member(s) of the Investigation Panel or ICT staff member requested by the Investigation Panel, have access to electronic personal folders located on the hard drive or local storage media and access to CT applications that store personal data.

Transfer of data

Internal transfer

All recipients shall be reminded of their obligation not to use the data received for other purposes than the one they were transmitted.

External transfer

It may happen that data are transferred to the competent national authorities such as a national Court where there is an infringement of national law. In such instances personal data may be transferred to recipients subjects to the national law adopted for the implementation of Directive 95/46/EC only if 'the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority'.

If data are transferred at the request of a national authority, it must therefore establish the 'necessity' for the transfer. If, on the other hand, data are transferred on the sole initiative of the Agency it will be for the latter to establish the 'necessity' for the transfer in a reasoned decision.

Right of access and rectification

Right of access

The staff member concerned in a disciplinary investigation shall have the right to obtain his/her complete disciplinary file and take copies of all documents relevant to the proceedings, including exonerating evidence.

To exercise the right of access the data subject shall contact in writing either the data controller or Chairperson of the Disciplinary Board at their office email address. However in the course of a disciplinary procedure, the right of access of staff members involved may be restricted within limits of the possible exceptions set out in Article 20 of Regulation 45/2001. These exceptions shall be strictly applied in the light of necessity and they shall be balanced in relation to the right of defence:

- In case of whistleblowers, informants or witnesses, any restriction to the right of access of these persons shall be in line with Article 20 of Regulation 45/2001;
- The identity of the whistleblowers shall be kept confidential in as much as this would not contravene national rules regarding judicial proceedings.

Right of rectification

Article 14 of the Regulation 45/2001 provides the data subject with *“the right to rectify inaccurate or incomplete data.”*

To exercise the right of rectification, the data subject shall contact in writing the data controller at his office email address.

Should a restriction to the right of access or rectification be imposed, the staff member shall be informed of the principle reasons for the application if the restriction and the right to have recourse for indirect access.

In the context of an ‘evaluation of conduct’ it is difficult to establish whether data are accurate or not and this right can be lifted under the exemptions of Article 20 of Regulation 45/2001. Nevertheless, some means of guaranteeing rectification shall be to allow staff members involved to add their comments and to include recourse or appeal decision in their files in order to ensure completeness of their disciplinary files.

Information to data subjects

- The Director shall inform all staff members involved of the existence of an administrative or disciplinary inquiry, its opening and closing where appropriate, the hearing and its outcome.
- Moreover, the Director shall provide all staff members involved with an information privacy policy note including general and specific information on the procedure of an administrative or disciplinary inquiry in compliance with Article 11 and 12 of Regulation 45/2011.

Restriction to the right to information

The right to information can be restricted in certain cases in the light of Article 20 (1) (a-e) of Regulation 45/2001. However the Director shall inform the staff members

EB DECISION

PAGE 13/13

involved of the principle reasons on which the application of the restriction is based as well as of his/her right to have recourse to the EDPS under Article 20 (3) of Regulation 45/2001. Any decision for any deferral to this provision shall be taken strictly on case by case basis.

Confidential of electronic communications

The Data Protection Officer (DPO) shall be consulted in advance whenever the members of the Investigation Team intend to access electronic or hard copy files or telecommunications data. If the processing of the data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership or the processing data concerning health or sex life are necessary for the purposes of the inquiry, the Investigation Team shall also consult the DPO in advance.

Interference in communications

Any interference in this shall be carefully carried out taking into account of the new EU legal framework concerning the new right to data protection and the reinforced protection of fundamental rights.

Interception of communications

The DPO will carry out further reflexion in this issue with specific attention to the legal basis of the tapping of a voice communication and to the possibility of doing this without a judicial warrant or authorisation.