

Decision of the European Ombudsman of 9 November 2020 on internal rules to restrict certain data subject rights in the processing of personal data

Document - 09/11/2020

THE EUROPEAN OMBUDSMAN,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons 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 (1) , and in particular Article 25 thereof,

Having consulted the European Data Protection Supervisor,

Whereas:

(1)

The European Ombudsman is empowered to conduct administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings, in accordance with the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (2) ('Staff Regulations'), and with the Decision of the European Ombudsman of 4 November 2004 adopting implementing provisions regarding the conduct of administrative inquiries and disciplinary proceedings. If required, it also notifies cases to OLAF.

(2)

The staff members of the European Ombudsman are under an obligation to report potentially illegal activities, including fraud and corruption, which are detrimental to the interests of the Union. Staff members are also obliged to report conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union. This is regulated by the Decision of the European Ombudsman on internal rules concerning whistleblowing of 20 February 2015.



(3)

The European Ombudsman has put in place a policy to prevent and deal effectively with actual or potential cases of psychological or sexual harassment in the workplace, as provided for in its Decision of 18 December 2017. The Decision establishes an informal procedure whereby the alleged victim of the harassment can contact the European Ombudsman's 'ethics correspondents' and/or the Conciliation Committee.

(4)

The European Ombudsman can also conduct investigations into potential breaches of security rules for European Union classified information ('EUCI').

(5)

The European Ombudsman is subject to both internal and external audits concerning its activities.

(6)

In the context of such administrative inquiries, audits and investigations, the European Ombudsman cooperates with other Union institutions, bodies, offices and agencies.

(7)

The European Ombudsman can cooperate with third countries' national authorities and international organisations, either at their request or on its own initiative.

(8)

The European Ombudsman can also cooperate with EU Member States' public authorities, either at their request or on its own initiative.

(9)

The European Ombudsman conducts inquiries into alleged instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. In this context, the European Ombudsman might need to preserve the confidentiality of personal data contained in documents obtained from the parties and during the inquiries. The European Ombudsman might also need to protect the rights and freedoms of the complainants as well as those of other persons involved.

(10)



To fulfil its tasks, the European Ombudsman collects and processes information and several categories of personal data, including identification data of natural persons, contact information, professional roles and tasks, information on private and professional conduct and performance, and financial data. The European Ombudsman acts as data controller.

(11)

Under Regulation (EU) 2018/1725 ('the Regulation'), the European Ombudsman is therefore obliged to provide information to data subjects on those processing activities and to respect their rights as data subjects.

(12)

The European Ombudsman might be required to reconcile those rights with the objectives of administrative inquiries, audits, investigations and court proceedings. It might also be required to balance a data subject's rights against the fundamental rights and freedoms of other data subjects. To that end, Article 25 of the Regulation gives the European Ombudsman the possibility to restrict, under strict conditions, the application of Articles 14 to 22, 35 and 36 of the Regulation, as well as its Article 4 in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20. Unless restrictions are provided for in a legal act adopted on the basis of the Treaties, it is necessary to adopt internal rules under which the European Ombudsman is entitled to restrict those rights.

(13)

The European Ombudsman might, for instance, need to restrict the information it provides to a data subject about the processing of his or her personal data during the preliminary assessment phase of an administrative inquiry or during the inquiry itself, prior to a possible dismissal of case or at the pre-disciplinary stage. In certain circumstances, providing such information might seriously affect the European Ombudsman's capacity to conduct the inquiry in an effective way, whenever, for example, there is a risk that the person concerned might destroy evidence or interfere with potential witnesses before they are interviewed. The European Ombudsman might also need to protect the rights and freedoms of witnesses as well as those of other persons involved.

(14)

It might be necessary to protect the anonymity of a witness or whistleblower who has asked not to be identified. In such a case, the European Ombudsman might decide to restrict access to the identity, statements and other personal data of such persons, in order to protect their rights and freedoms.

(15)



It might be necessary to protect confidential information concerning a staff member who has contacted the European Ombudsman's ethics correspondents and/or the Conciliation Committee in the context of a harassment procedure. In such cases, the European Ombudsman might need to restrict access to the identity, statements and other personal data of the alleged victim, the alleged harasser and other persons involved, in order to protect the rights and freedoms of all concerned.

(16)

The European Ombudsman might, for instance, need to restrict the information it provides to a data subject mentioned in a complaint or inquiry documents about the processing of his or her personal data during the investigation into alleged maladministration in an EU institution, body, office or agency. Providing such information might seriously affect the European Ombudsman's capacity to conduct the inquiry in an effective way, whenever, for example, there is a risk that the person concerned might jeopardise the inquiry. The European Ombudsman might also need to protect the rights and freedoms of the complainant as well as those of other persons involved.

(17)

The European Ombudsman should apply restrictions only when they respect the essence of fundamental rights and freedoms, are strictly necessary and are a proportionate measure in a democratic society. The European Ombudsman should give reasons explaining the justification for those restrictions.

(18)

In application of the principle of accountability, the European Ombudsman should keep a record of its application of restrictions.

(19)

When processing personal data exchanged with other organisations in the context of its tasks, the European Ombudsman and those organisations should consult each other on potential grounds for imposing restrictions and the necessity and proportionality of those restrictions, unless this would jeopardise the activities of the European Ombudsman.

(20)

Article 25(6) of the Regulation obliges the controller to inform data subjects of the principal reasons on which the application of the restriction is based and of their right to lodge a complaint with the European Data Protection Supervisor (EDPS).

(21)



Pursuant to Article 25(8) of the Regulation, the European Ombudsman is entitled to defer, omit or deny the provision of information on the reasons for the application of a restriction to the data subject if this would in any way cancel the effect of the restriction. The European Ombudsman should assess on a case-by-case basis whether the communication of the restriction would cancel its effect.

(22)

The European Ombudsman should lift the restriction as soon as the conditions that justify the restriction no longer apply, and assess those conditions on a regular basis.

(23)

To guarantee utmost protection of the rights and freedoms of data subjects and in accordance with Article 44(1) of the Regulation, the DPO should be consulted in due time of any restrictions that may be applied and verify their compliance with this Decision.

(24)

Articles 16(5) and 17(4) of the Regulation provide for exceptions to data subjects' right to information and right of access. If these exceptions apply, the European Ombudsman does not need to apply a restriction under this Decision,

HAS DECIDED AS FOLLOWS:

Article 1 - Subject matter and scope

1. This Decision lays down rules relating to the conditions under which the European Ombudsman may restrict the application of Articles 4, 14 to 22, 35 and 36, pursuant to Article 25 of the Regulation.

2. The European Ombudsman's Office, as the controller, is represented by the European Ombudsman.

Article 2 - Restrictions

1. The European Ombudsman may restrict the application of Articles 14 to 22, 35 and 36, and Article 4 thereof in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20:

(a)

pursuant to Article 25(1)(b), (c), (f), (g) and (h) of the Regulation, when conducting



administrative inquiries, pre-disciplinary, disciplinary or suspension proceedings under Article 86 and Annex IX of the Staff Regulations and the Decision of the European Ombudsman of 4 November 2004 on the conduct of administrative inquiries and disciplinary proceedings, and when notifying cases to OLAF;

(b)

pursuant to Article 25(1)(h) of the Regulation, when ensuring that staff members of the European Ombudsman may report facts confidentially where they believe there are serious irregularities, as set out in the Decision of the European Ombudsman of 20 February 2015 on internal rules concerning whistleblowing;

(c)

pursuant to Article 25(1)(h) of the Regulation, when ensuring that staff members of the European Ombudsman are able to report to ethics correspondents and/or the Conciliation Committee in the context of a harassment procedure, as defined by the Decision of the European Ombudsman on a Policy for the prevention of and protection against harassment in the Ombudsman's Office;

(d)

pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when conducting internal audits in relation to activities or departments of the European Ombudsman;

(e)

pursuant to Article 25(1)(c), (d), (g) and (h) of the Regulation, when providing or receiving assistance to or from other Union institutions, bodies, offices and agencies or cooperating with them in the context of activities under points (a) to (d) of this paragraph and pursuant to relevant service level agreements, memoranda of understanding and cooperation agreements;

(f)

pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when providing or receiving assistance to or from third countries national authorities and international organisations or cooperating with such authorities and organisations, either at their request or on its own initiative;

(g)

pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when providing or receiving assistance and cooperation to and from EU Member States' public authorities, either at their request or on its own initiative;



(h)

pursuant to Article 25(1)(e) of the Regulation, when processing personal data in documents obtained by the parties or interveners in the context of proceedings before the Court of Justice of the European Union;

(i)

Pursuant to Article 25(1)(h) of the Regulation, when conducting inquiries into alleged instances of maladministration in the activities of the EU institutions, bodies, offices and agencies, in accordance with Article 228 of the Treaty on the Functioning of the European Union and the Ombudsman's Statute and Implementing Provisions.

2. Any restriction shall respect the essence of fundamental rights and freedoms and be necessary and proportionate in a democratic society.

3. A necessity and proportionality test shall be carried out on a case-by-case basis before restrictions are applied. Restrictions shall be limited to what is strictly necessary to achieve their objective.

4. For accountability purposes, the European Ombudsman shall draw up a record describing the reasons for restrictions that are applied, which grounds among those listed in paragraph 1 apply and the outcome of the necessity and proportionality test. Those records shall be part of a register, which shall be made available on request to the EDPS. The European Ombudsman shall prepare periodic reports on the application of Article 25 of the Regulation.

5. When processing personal data received from other organisations in the context of its tasks, the European Ombudsman shall consult those organisations on potential grounds for imposing restrictions and the necessity and proportionality of the restrictions concerned, unless this would jeopardise the activities of the European Ombudsman.

Article 3 - Risks to the rights and freedoms of data subjects

1. Assessments of the risks to the rights and freedoms of data subjects of imposing restrictions and details of the period of application of those restrictions shall be registered in the record of processing activities maintained by the European Ombudsman under Article 31 of the Regulation. They shall also be recorded in any data protection impact assessments regarding those restrictions conducted under Article 39 of the Regulation.

2. Whenever the European Ombudsman assesses the necessity and proportionality of a restriction it shall consider the potential risks to the rights and freedoms of the data subject.



Article 4 - Safeguards and storage periods

1. The European Ombudsman shall implement safeguards to prevent abuse and unlawful access or transfer of the personal data in respect of which restrictions apply or could be applied. Such safeguards shall include technical and organisational measures and be detailed as necessary in European Ombudsman's internal decisions, procedures and implementing rules. The safeguards shall include:

(a)

a clear definition of roles, responsibilities and procedural steps;

(b)

if appropriate, a secure electronic environment which prevents unlawful and accidental access or transfer of electronic data to unauthorised persons;

(c)

if appropriate, secure storage and processing of paper-based documents;

(d)

due monitoring of restrictions and a periodic review of their application.

The reviews referred to in point (d) shall be conducted at least every six months.

2. Restrictions shall be lifted as soon as the circumstances that justify them no longer apply.

3. The personal data shall be retained in accordance with the applicable retention rules of the European Ombudsman, to be defined in the data protection records maintained under Article 31 of the Regulation. At the end of the retention period, the personal data shall be deleted, anonymised or transferred to archives in accordance with Article 13 of the Regulation.

Article 5 - Involvement of the Data Protection Officer

1. The European Ombudsman's DPO shall be informed without undue delay whenever data subject rights are restricted in accordance with this Decision. He or she shall be given access to the associated records and any documents concerning the factual or legal context.

2. The European Ombudsman's DPO may request a review of the application of a restriction. The European Ombudsman shall inform its DPO in writing of the outcome of the review.

3. The European Ombudsman shall document the involvement of the DPO in the application of



restrictions, including what information is shared with him or her.

Article 6 - Information to data subjects on restrictions of their rights

1. The European Ombudsman shall include a section in the data protection notices published on its website providing general information to data subjects on the potential for restriction of data subjects' rights pursuant to Article 2(1). The information shall cover which rights may be restricted, the grounds on which restrictions may be applied and their potential duration.

2. The European Ombudsman shall inform data subjects individually, in writing and without undue delay of ongoing or future restrictions of their rights. The European Ombudsman shall inform the data subject of the principal reasons on which the application of the restriction is based, of their right to consult the DPO with a view to challenging the restriction and of their rights to lodge a complaint with the EDPS.

3. The European Ombudsman may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis. As soon as it would no longer cancel the effect of the restriction, the European Ombudsman shall provide the information to the data subject.

Article 7 - Communication of a personal data breach to the data subject

1. Where the European Ombudsman is under an obligation to communicate a data breach under Article 35(1) of the Regulation, it may, in exceptional circumstances, restrict such communication wholly or partly. It shall document in a note the reasons for the restriction, the legal ground for it under Article 2 and an assessment of its necessity and proportionality. The note shall be communicated to the EDPS at the time of the notification of the personal data breach.

2. Where the reasons for the restriction no longer apply, the European Ombudsman shall communicate the personal data breach to the data subject concerned and inform him or her of the principal reasons for the restriction and of his or her right to lodge a complaint with the EDPS.

Article 8 - Confidentiality of electronic communications

1. In exceptional circumstances, the European Ombudsman may restrict the right to confidentiality of electronic communications under Article 36 of the Regulation. Such restrictions shall comply with Directive 2002/58/EC of the European Parliament and of the Council (3) .



2. Where the European Ombudsman restricts the right to confidentiality of electronic communications, it shall inform the data subject concerned, in its reply to any request from the data subject, of the principal reasons on which the application of the restriction is based and of his or her right to lodge a complaint with the EDPS.

3. The European Ombudsman may defer, omit or deny the provision of information concerning the reasons for the restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis. As soon as it would no longer cancel the effect of the restriction, the European Ombudsman shall provide the information to the data subject.

Article 9 - Entry into force

This Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Done at Strasbourg, 9 November 2020.

For the European Ombudsman

Emily O'REILLY

(1) [OJ L 295, 21.11.2018, p. 39 \[Link\]](#).

(2) Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission ([OJ L 56, 4.3.1968, p. 1 \[Link\]](#)).

(3) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ([OJ L 201, 31.7.2002, p. 37 \[Link\]](#)).