OLAF Supervisory Committee

OPINION No 1/2011

Access by OLAF to personnel data held by the Commission

Brussels, 30 May 2011

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1. Background

1.1 In the context of assessing initial information received by OLAF, Unit C4, "Operational Intelligence", which supports the two Directorates in charge of Investigations and Operations, needs to be able quickly, accurately and discreetly to identify, particularly where allegations of conflicts of interest may arise, an alleged person. To do this, OLAF needs to have access to information contained in the Human Resources databases maintained by the Commission. In particular, OLAF requires access to data relating to individual employees and to their family status and connections, the home addresses and telephone numbers and dates of birth of the employees and their family members. This latter data is referred to as "family tree" data.

1.2 OLAF is anxious that, in accessing this information, the reputation of innocent individuals working in the Commission or other EU bodies is not harmed and that where allegations made are groundless that fact can be verified without disseminating the allegations made – sometimes, based on very flimsy grounds. Equally, where the allegations turn out to be well founded, OLAF is anxious that, at this preliminary stage, as few people as possible are alerted to the allegations, so that the person who may potentially be the subject of an investigation is not alerted prematurely.

1.3 OLAF proposes, therefore for a limited number of staff in C4 to have direct, read-only, confidential "Pull" access to the family tree data, allowing them to see a limited set of data to be able to validate allegations prior to the opening of an investigation.

2. Current Position

2.1 Article 4 (2) Regulation EC 1073/1999 provides that

- the Office shall have the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises. The Office shall be empowered to inspect the accounts of the institutions, bodies, offices and agencies. The Office may take a copy of and obtain extracts from any document or the contents of any data medium held by the institutions, bodies, offices and agencies and, if necessary, assume custody of such documents or data to ensure that there is no danger of their disappearing.

2.2 This provision enables OLAF to have unrestricted access (providing that it complies with the requirements of paragraph 1 of Article 4[1]) to data held by the Commission,

[1] .Article 4, Paragraph 1:
"The Office shall carry out administrative investigations within the institutions, bodies, offices and agencies (hereinafter internal investigations).
These internal investigations shall be carried out subject to the rules of the Treaties, in particular the Protocol on privileges and immunities of the European Communities, and with due regard for the Staff Regulations under the conditions and in

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including data relating to Commission personnel. The provision applies to OLAF internal investigations which are underway.

2.3 The Secretariat-General is prepared to grant OLAF "push" access to the family tree data, but not "pull" access, as requested. The reason provided for refusal of pull access is data protection. As controller of the personal data, the Commission asserts that it must filter requests and provide only the personal data that it deems legitimate, necessary and proportional for OLAF to ask. This "filtering process" appears to be applied only to requests made by OLAF, as other services within the Commission having a direct "pull" access without the intervention of the controller.

2.4 The Supervisory Committee is concerned that this limitation on OLAF's direct, read-only confidential access to family tree data may prejudice its independence in relation to its investigatory function.

3. Meetings with the Secretariat-General and with the EDPS

3.1 The Supervisory Committee and members of the Secretariat have met with the staff of the Secretariat General on two occasions, on the 25 November 2010 and 8 December 2010 and with the Secretary General herself on the 15 December 2010 to discuss this issue. The Secretariat General recognises that OLAF "has indeed the right to access any database it considers relevant for investigative purposes for the opening and throughout the duration of an investigation, even before the formal opening decision, when linked to a specific CMS case number" but it maintains that OLAF cannot have direct "pull" access.

3.2 Since OLAF's request for access to data is covered by the provisions of article 7.2.2 of EC Regulation 45/2001, OLAF and the Supervisory Committee have sought the views of the EDPS and, in consequence have had two meetings with Mr Hustinx, the EDPS, on 15 December 2010 and 25 March 2011.

4. The position regarding data protection

4.1 A requirement for compliance with Article 7.2. paragraph 2 of Regulation 45/2001[2] is the need to establish necessity for the transfer of the data from the Commission to OLAF.

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accordance with the procedures provided for in this Regulation and in decisions adopted by each institution, body, office and agency. The institutions shall consult each other on the rules to be laid down by such decisions."

[2] *Article 7*

Transfer of personal data within or between Community institutions or bodies

Without prejudice to Articles 4, 5, 6 and 10:

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4.2 Necessity must be verified. If the type and amount of data accessed varies on each occasion, then the verification of necessity should take place ex ante for each individual access. If there are categories of similar limited access for the same purpose, which can be verified ex post by both sides, then it may be possible to cluster them together to verify necessity. This is part of the structure that should be developed between the data controller and the data recipient. The solution must address the question of necessity, and be verifiable. It must also include a strict purpose limitation.

4.3 In the situation outlined above, OLAF is able to pre-define the necessity of the transfer of the data because the necessity is always the same: identification of the individual(s) allegedly involved in a matter under assessment or investigation. As explained by Unit C.4, OLAF needs access to a limited number of data fields in the Commission data bases for the purpose of ensuring the proper identification of a Commission staff member allegedly involved in a fraud or irregularity. The data fields which OLAF will access for this purpose are:

- date of birth,
- address,
- address in case of accident, and
- telephone number.

(Other relevant data fields, such as Name, statute, ID no., organisational entity and dates of working for that entity are available to all Commission staff in Sysper2).

4.4 In cases where allegations of conflict of interest involving a family member are involved, OLAF will also need to access the "family tree" data in order to verify the identification of the relatives who may be concerned, including partner and relatives in the ascending and/or descending line. The data fields in these cases would be:

- name,
- date of birth.

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1. Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.

2. Where the data are transferred following a request from the recipient, both the controller and the recipient shall bear the responsibility for the legitimacy of this transfer.

   The controller shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data. If doubts arise as to this necessity, the controller shall seek further information from the recipient.

   The recipient shall ensure that the necessity for the transfer of the data can be subsequently verified.

3. The recipient shall process the personal data only for the purposes for which they were transmitted.

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Access will be made by one of a small group (three or four) of trained intelligence staff. Furthermore, OLAF keeps a careful log file of each instance of access to such data bases. It logs the following information:

- which data base was accessed,
- the date,
- the staff member accessing the data,
- the number of the request in the CMS intelligence module which triggered the need for the access, and
- the OF case number.

4.5 OLAF expects these records to be logged automatically by the CMS, later this year. These access logs are available for review by the controller, the Data Protection Officers, and the EDPS at any time.

4.6 In such circumstances, where the purpose of the transfer is limited to the identity of individuals, and accurate log files are kept, the Supervisory Committee believes that the requirements of Art. 7(2) are satisfied without having to ask the controller's permission before each individual access.

5. Interpretation of Article 7.2. of EC Regulation 45/2001

5.1 Article 7.2 of EC Regulation 45/2001 appears to allow for a number of different scenarios. It could be read as creating a structured dialogue between the data controller and the data recipient, as both need to verify the necessity of the transfer.

5.2 It appears that "pull" access is not accorded on an automatic basis but it is granted on request within the Commission in other contexts. In the following instances, “pull” access gave rise to problems, but in the last example below, it was accorded:

- Communication between Sysper 1 and Sysper 2 - Sysper 1 was problematic because it allowed pull access without sufficient safeguards/traceability of who had access.
- PNR - This involved pull access by a third country, which is unacceptable.
- ABAC and payment transactions - could not function without pull access.

Indeed, "push" access can also be unacceptable, if personal data is sent without verifying necessity.

5.3 It does not appear, therefore, that there is any fundamental data protection bar in principle to allowing OLAF access to the data sought.

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6. The way forward

6.1 The Supervisory Committee considers that the need for OLAF to have access on a "pull" basis to personnel data held by the Commission to establish, prior to the opening of an investigation whether a person can be identified or eliminated, is essential to its work. To deny OLAF this access could threaten its independence in its investigatory function.

6.2 The Supervisory Committee recommends a modification to the "Memorandum of understanding concerning a code of conduct in order to ensure a timely exchange of information between OLAF and the Commission with respect to OLAF internal investigations in the Commission."[3] This provision could set out a protocol for access to Commission data at the selection phase, along the same lines as that provided for in Article 4.2 of Regulation EC 1073/99 for investigations which have been commenced.

6.3 The Committee therefore suggests that a practical way forward is for negotiations to commence to find a solution between OLAF and the Commission. One practical suggestion would be for an external mediator to be appointed who has the trust and confidence of both OLAF and the Commission. An appropriate mediator could be someone such as a former high level official or Commissioner. The Supervisory Committee therefore recommends that agreement be sought as soon as possible with the Commission to appoint a suitable mediator to resolve this problem.

6.4 The Supervisory Committee would hope and expect that agreement can be reached on this issue. The Supervisory Committee recommends that the reform of Regulation 1073/99 would provide an ideal and opportune moment to amend Article 4 to include access by OLAF to information held by the institutions prior to the opening of a case and also at any stage of an investigation.

[3] SEC 871, 14.8.2003 (consolidated).

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