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**Subject: Prior-check Opinion on “Whistleblowing procedure in the REA and the relevant internal fraud issues” (case 2014-0178)**

Dear [...],

On 6 February 2014, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001<sup>1</sup> (‘the Regulation’) on the whistleblowing procedure and the relevant internal fraud issues at the Research Executive Agency (REA) from the Data Protection Officer (DPO) of the REA.<sup>2</sup>

The EDPS has issued Guidelines on how to process personal information within a whistleblowing procedure (‘the Guidelines’).<sup>3</sup> Therefore, the description of the facts and of the legal analysis will only mention those aspects which differ from these Guidelines or otherwise need improvement. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for whistleblowing at the REA.

EDPS recommendations and reminders are highlighted in bold below.

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<sup>1</sup> OJ L 8, 12.1.2001, p. 1.

<sup>2</sup> As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis. The case has been pending the reply of REA in relation to questions about security measures. On 29 January 2018 we informed the REA by email that, in order to proceed with the case, we will include a recommendation about the security for this processing activity in the Opinion.

<sup>3</sup> Guidelines on processing personal information within a whistleblowing procedure, available at: [https://edps.europa.eu/sites/edp/files/publication/16-07-18\\_whistleblowing\\_guidelines\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/16-07-18_whistleblowing_guidelines_en.pdf)

## **Description and assessment**

### **1. Transfer information on a case-by-case basis**

Whistleblowing procedures are intended to provide safe channels for anyone who becomes aware of and reports potential fraud, corruption, or other serious wrongdoings and irregularities. REA's internal procedures state, under point 2 on internal whistleblowing, that the recipient of the information is obliged to transmit the information received without delay to OLAF.

In light of the above, the EDPS points out that OLAF is the competent body to investigate fraud against the EU budget and alleged serious misconduct. Since the scope of the whistleblowing procedure is not limited to potential fraud only, there is a possibility that REA may receive information that it is not within the competence of OLAF. In accordance with Article 7(1) of the Regulation, the transfer of personal information should only take place when necessary for the legitimate performance of tasks covered by the competence of the recipient. Therefore, **REA should assess, on a case-by-case basis, the requirements for transferring the personal information to OLAF and adapt the internal procedures accordingly.**

### **2. Definition of data subjects**

In the notification, under point 5/ *Description of the category or categories of data subjects*, REA states that the persons concerned by the suspicion of a serious wrongdoing/irregularity are not considered as data subjects under this notification, as the investigation related to the relevant internal fraud issues is conducted by OLAF and not by the REA. In this regard, the EDPS would like to clarify that under Article 2(a) of the Regulation, personal data means any information relating to an identified or identifiable natural person (referred to as 'data subject'). An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. **Therefore, any person identified in a whistleblowing report is considered as a data subject and the Regulation is applicable to all of the people involved**, independently whether the information is sent to OLAF or not. **The current practice of REA should therefore be amended to cover all affected individuals such as whistleblowers, witnesses, third parties (members of staff or others that are merely quoted) and the person(s) against whom the allegations has been made.**

### **3. Ensure confidentiality of all persons implicated in a whistleblowing report**

The EDPS welcomes the fact that REA ensure the protection of the whistleblower's identity but **reminds the REA that the accused person should be protected in the same manner as the whistleblower.** The reason is due to a possible risk of stigmatisation and victimisation of that person within the organisation to which they belong. The accused persons will be exposed to such risks even before they are aware that they have been incriminated and before the alleged facts have been investigated to determine whether they are substantiated.

### **4. Inform each category of individuals**

REA has explained that the data subjects are informed through a specific privacy statement that is published on the REA intranet. This privacy statement is also provided to the data subject since it is included in the acknowledgement of receipt sent to the person reporting potential fraud/an irregularity.

In the light of the recommendation, that all individuals involved in a report should be considered as data subjects, REA should **provide information to all individuals who are affected by a**

**particular whistleblowing procedure, including the accused person, as soon as practically possible, unless an exception in Article 20(1) of the Regulation applies.<sup>4</sup>**

#### 5. Define conservation periods depending on the outcome of the case

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 five years for cases closed without investigation. The EDPS Guidelines does however recommend different conservation periods depending on the outcome of the case. **Therefore, REA should align its conservation periods with the ones mentioned in the EDPS Guidelines.<sup>5</sup>**

To recall, the EDPS recommends the following conservation periods:

Personal information that is not relevant to the allegations should not be further processed.<sup>6</sup>

When an initial assessment is carried out but it is clear that the case should not be referred to OLAF or is not within the scope of the whistleblowing procedure the report should be deleted as soon as possible (or referred to the right channel if it for example concerns alleged harassment). In any case, personal information should be deleted promptly and usually within two months of completion of the preliminary assessment<sup>7</sup>, since it would be excessive to retain such sensitive information.

If it is clear after the initial assessment that a report should be transferred to OLAF the EU institution should carefully follow what actions OLAF takes. If OLAF starts an investigation it is not necessary for the EU institutions to keep the information for a longer period. In case OLAF decides not to start an investigation, the information should be deleted without delay.

In case a longer retention period is envisaged, access to the personal information should still be limited. It is a good practice to separate these reports from the main case management system/daily system in use.

#### 6. Security measures

[...]

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In light of the accountability principle, the EDPS trusts that REA will ensure that these considerations and recommendations are fully implemented. The EDPS has therefore decided to **close case 2014-0178.**

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<sup>4</sup> See page 7 of the EDPS Guidelines on Whistleblowing.

<sup>5</sup> See page 9 of the EDPS Guidelines on Whistleblowing.

<sup>6</sup> See also page 6, point 4 of the EDPS Guidelines on Whistleblowing.

<sup>7</sup> Article 29 Working Party Opinion 1/2006, WP 117, page 12.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc: [...], DPO, REA