



Opinion on a notification for prior checking received from the Data Protection Officer of the European Monitoring Centre on Racism and Xenophobia on "Data processing operation for recruitment"

Brussels, 1 February 2006 (Case 2005-132)

1. Proceedings

On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested communication of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.

After receipt and analysis of the inventories, the EDPS identified certain priority themes and chose a number of processing operations subject to prior checking to be addressed. Staff appraisal is one of these priority themes.

On 15 June 2005, the EDPS received a notification by e-mail for prior checking from the Data Protection Officer of the European Monitoring Centre on Racism and Xenophobia (EUMC), concerning staff recruitment. The staff recruitment is based on the appraisal of the potential candidates. "Recruitment in EUMC" may therefore be considered as a priority theme as staff appraisal case.

The EDPS received the notification by mail on 27 June 2005. The notification included two documents: the notification to the DPO as provided for in Article 25 of Regulation (EC) 45/2001 and an e-mail from the DPO regarding the information provided to the data subjects.

Additional information was requested by e-mail on Wednesday 20 July 2005. The answer was given on Thursday 13 October 2005. A second request for information was made on Wednesday 19 October 2005. The answer was given on Friday 11 November 2005. A description of facts was sent for confirmation on 16 November. The comments were received on 2 December. A last request for information was made on 5 December. The answer was given on Friday 13 January 2006.

2. Examination of the matter

2.1. The facts

The European Monitoring Centre on Racism and Xenophobia (EUMC) recruits staff members through open recruitment procedures. To date the recruitment deals with staff under the Conditions of Employment of other servants (Temporary agent, Seconded National Expert). They are presently recruited through open publications by the EUMC. According to the EUMC web site, the EUMC does not have enough resources at the moment to offer any internship. The unsolicited applications (applications not responding to published post - spontaneous applications) receive a response and are stored in a specific electronic file as well as in a specific paper file, even if the EU format is not used.

Applications should be submitted by e-mail, in the form of a letter of motivation (cover letter) and a detailed C.V. The personal data of staff under the Conditions of Employment of other servants are registered in a Microsoft Access database. The application files (CVs, certificates, letters of recommendations, etc.) are stored in the EUMC archives. Electronic applications are saved in electronic files of the respective applicant. The data processing activity is carried out automatically and manually.

The data subjects are the persons applying for posts published or not (in the case of spontaneous applications) by the EUMC. The use of the European CV format is compulsory.

The data of candidates whose application is refused (i.e. they do not meet the admission conditions criteria) are stored for 1 year in order to be able to prove that candidates' applications were received and for what reasons they were refused.

The EUMC keeps a reserve list with the candidates whose application is accepted. The so-called reserve list is established by the EUMC itself. The data of the candidates on the EUMC reserve list are stored one and a half year. The validity of the reserve list can be extended. Applications to become a SNE are kept for three years. The retention period commences on the deadline date of the submission of applications. Spontaneous applications are kept for one year after their receipt.

The data registered in the Microsoft Access Database are the following: identification number, name, address, telephone number, e-mail address, date of birth, gender, nationality, post applied for, supporting documents sent or brought at the interview by the candidate, date of receipt of application, application refused or not (including reasons if an application is refused), interview date and time.

The data of the applicants are transferred to the recruitment selection committee members. The EUMC Selection Committees are composed of five people, viz. the Head of the Unit of the post to be filled, a representative of the EUMC Staff Committee, a representative from the Administration Unit and two other members, usually appointed from among other staff members of different Units. In cases where the post published requires expert knowledge (e.g. in the field of research), external experts are invited to participate. Selection Committee members are provided with the data of the applicants (i.e. their CVs and supporting documents). These documents are given back to the Administration (personnel section) after the conclusions of the Selection Committee are established. Internal Selection Committee members are made aware of the confidentiality of these personal data.

The Data Protection Officer suggested including the following clause in all correspondence with applicants and in the publication of posts on the EUMC web site: "the follow up of your application requires the recording of your personal data (name, address, telephone number, e-mail, date of birth, gender, nationality, etc) in a file. Should you require further information or wish to exercise your rights (e.g. access or rectify data), please contact _____". This clause will be included in all publications of posts regarding all EUMC recruitment procedures.

On the EUMC web site, in the recruitment section, a web page on data protection is provided. Information is given to the data subject on the processing operation, the lawfulness of the processing (Article 5 (c) of Regulation (EC) 45/2001), the right of access and rectification, the transfer of data, the data retention period and the right of the data subject to have recourse to the EDPS.

Security measures have been adopted.

2.2. Legal aspects

2.2.1. Prior checking

The notification received on 27 June 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)) by a Community body in the exercise of activities within the scope of Community law.

According to Article 3(2) of Regulation (EC) 45/2001, processing of personal data by automatic means falls within the scope of Regulation (EC) 45/2001. The personal data of the applicants are stored in a Microsoft Access database. Processing of personal data other than by automatic means is also covered by the scope of the Regulation, provided that the personal data form part of a filing system. In this case some documents linked to the applications are retained in a paper version and stored in the EUMC archives. The processing therefore falls within the scope of Regulation (EC) 45/2001.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as "processing operations intended to evaluate certain aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). The collecting of applications typically qualifies as processing of personal data intending to evaluate personal aspects relating to the data subject and is therefore subject to prior checking.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case the procedure to retain the data has already been established. This is not a serious problem as far as any recommendations made by the EDPS may still be adopted accordingly.

The applicants are recruited through the use of the European CV format. It was set up by the European Centre for the Development of Vocational Training (CEDEFOP) at the Commission's initiative. The EDPS will take into account the use of the European CV format but the European CV format itself is not subject to prior checking here.

The notification from the DPO was received on 27 June 2005. The present opinion must be delivered within a period of two months that is no later than 28 August 2005. Further requests for information suspended the deadline for 162 days (84 + 23 + 16 + 39). The opinion on the notification is to be issued no later than the 6 February 2006.

2.2.2. Legal basis for and lawfulness of the processing

The legal basis of the processing of job applications for temporary agents can be found in Article 12 of the Conditions of Employment of other servants of the European Communities for temporary agents which states that "engagement of temporary staff shall be directed to securing for the institution the services of persons of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities". The legal basis of the processing of job applications for Seconded National Expert (SNE) can be found in the Commission Decision of 27 February 2004 (C(2004) 577) implemented by the Decision 2004/07 of the EUMC Director regarding Detached National Experts.

The lawfulness of the processing is covered by the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities or in the legitimate exercise of an official authority vested in the Community institution on the basis of Article 5(a) of Regulation 45/2001. As the EUMC needs to fulfil its task to have highly qualified staff and since part of the staff may be temporary agents or Seconded National Experts, the collection of applications falls within the scope of Article 5(a). The legal basis found in Article 12 of Conditions of Employment of other servants of the European Communities and in the Decision 2004/07 of the Director regarding Detached National Experts of the EUMC support the lawfulness of the processing operation.

Furthermore, the lawfulness of the processing operation can also be found in the fact that the data subject has unambiguously given his or her consent by sending his/her application (Article 5(d)).

2.2.3. Data Quality

According to Article 4 (1) (c) of Regulation (EC) 45/2001, data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. After careful examination, the EDPS is of the opinion that the data listed in the notification form, collected for the recruitment of EUMC members, complies with Article 4 (1) (c) of Regulation (EC) 45/2001. All data are relevant for the purpose of selection for which the collection is made. Nevertheless, the EDPS would like to warn the EUMC on the use of the European CV format to collect data. The lack of instructions on how to complete the form may confuse the applicants on the relevance of the data collected and entails the collection of excessive data. Mention should be made of what data are mandatory and what are not (see point 2.2.9 on Information to the data subject). The data subject who then gives information voluntarily makes the judgement as to those data being adequate, relevant and not excessive.

Spontaneous applications for jobs are not formalised and may contain other information. These additional data are not requested but given voluntarily by the data subject who himself/herself makes the judgement as to those data being adequate, relevant and not excessive.

The data must be accurate and where necessary kept up to date. The Regulation further provides "that every reasonable step must be taken to ensure that the data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified". The right of access of the data subject to his/her own data is a means of guaranteeing the accuracy and of updating his/her data (see right of access 2.2.8).

2.2.4. Conservation of data/ Data retention

Regulation (EC) 45/2001 states that data may not be kept in a form which permits identification of the data subject any longer than is necessary for the intended purpose (Article 4(1)(e)).

As regards applications refused, the files are retained for one year in order to be able to prove that candidates' applications were received and for what reasons they were refused. The EDPS welcomes the one year period.

As regards data of the applicants who are on the reserve list established by the EUMC, the files are retained for one and a half year. The EDPS welcomes the retention period. As the validity of the reserve list may be extended by the EUMC, the EDPS is of the opinion that rules for the extension of the validity of the reserve list should be established.

The EDPS also approves the time limit period of three years established for the SNE applications and the time limit period of one year established for the spontaneous applications.

As regards applications of recruited staff, data are processed for administrative reasons. Given this purpose, the EDPS considers that it is important for the EUMC to be clear on the period of retention. The EDPS considers that a reasonable time limit should be established. Notably, in accordance with Article 4 (1) (e), data of purely informative nature no longer necessary for administrative reasons as, for instance, the European CV, can be disposed of prior to the expiry of the retention period of the personal file.

2.2.5. Compatible use / Change of purpose

The purpose of the processing is to recruit EUMC members for a well defined post. After the selection procedure has ended, the further processing of data of successful candidates is to keep a stock of candidates (a reserve list) for potential vacancies (for e.g. three years for the SNE) at the EUMC. The further processing is fully compatible with the initial purpose (Article 4 (1) b).

2.2.6. Transfer of data

Article 7 of Regulation (EC) 45/2001, provides that personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The applications of the candidates are transmitted to the Recruitment Selection Committee Members in order to make the right selection. The EDPS notes that the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

In principle, the data contained in the job applications file is only handled by the Personnel Division. In the case of a reserve list, it is therefore possible that in a given situation, data will be transferred within the institution, for example from the Personnel Division to another

Division in need of personnel. Consistent with the purpose of this collection, when the occasion arises, the data may be transferred to the relevant Division of the EUMC under the conditions of Article 7, point 1 of Regulation (EC) 45/2001. This implies that personal data may be transferred within an institution only if it is necessary for the legitimate performance of tasks covered by the competence of the recipient. The EDPS is therefore of the opinion that the data should only be transferred to the person empowered to carry out the selection (e. g. Heads of Division) and that person should not store the data themselves, nor use them for another purpose than that for which they were collected.

The applications of recruited staff are transmitted to the administrative unit and stored in the personal file for administrative reasons such as the establishment of individual rights and others. The transfer of data is necessary for the legitimate performance of the tasks covered by the competence of the recipient which are the human resources management.

2.2.7. Processing of personal number or unique identifier

The Article 10 (6) of Regulation 45/2001 provides that "the EDPS shall determine the conditions under which a personal number or other identifier of general application may be processed by a community institution or body". The question of establishing the conditions under which the EUMC may process a personal number is not examined here. However, the EUMC's use of a unique identification number is considered reasonable, because it is a means of facilitating the processing task.

Indeed, upon submission of an application form it is assumed that the candidates receive their personal number. The use of this personal number has therefore no other purpose than to identify the data subject.

2.2.8. Right of access and rectification

Under Article 13 (c) of Regulation (EC) 45/2001, the data subject has the right to obtain from the controller, at any time and without restraint, communication in an intelligible form of the data undergoing processing. Article 14 gives the data subject the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

The EDPS welcomes the fact that the right of access and rectification are granted by the EUMC as described in the privacy statement in the EUMC web site. The statement includes the following limitation of the right of rectification: "Please note that for practical reasons there is no possibility to update and correct data after the deadline of the competition". The EDPS is of the opinion that any limitation to the right of rectification should only concern the merits and skills for recruitment (professional experience, education, training...), but not other data such as contact details, misspelled name.... This limitation is necessary to ensure objective, certain and stable conditions for the competition, essential to the fairness of the processing. Indeed, Article 20.1 (c) provides for restrictions to right of rectification where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedom of others.

In the case of "reserve list", the applicants should be allowed to update and rectify their data before participating to a selection procedure for a new post.

2.2.9. Information to the data subject

The Regulation states that a data subject must be informed of the processing of data relating to himself/herself and lists a range of compulsory items of information which must be provided (identity of the controller, purposes of processing, recipients, right of access, whether replies to the questions are obligatory or voluntary as well as the possible consequences of failure to reply). Insofar as such information is necessary to guarantee the fair processing, additional information has to be supplied regarding legal basis, time-limits and the right to have recourse to the EDPS. In this instance, Articles 11 and 12 of the Regulation apply, since data are collected both directly (Article 11) and indirectly (Article 12, for example notes taken during an interview) from the data subject.

The EDPS welcomes the DPO proposal on including a clause in all correspondence with applicants and in the publication of posts on the EUMC web site. The EDPS is of the opinion that the clause should be even more detailed and include information regarding legal basis, time limits for storing data and the right to have recourse to the EDPS as it is necessary to fully ensure that the data subject is in a position to exercise all means at his disposal.

The EDPS welcomes the recruitment section of the web site devoted to data protection. The EDPS is of the opinion that the information given on the legal basis of the processing operation should be modified as follows: Article 12 of Conditions of Employment of other servants of the European Communities for temporary agents and the Decision 2004/07 of the Director regarding Detached National Experts of the EUMC.

The EDPS notes that the sentence: "you are free to give your data on a voluntary basis. Failure to reply automatically excludes the subject from recruitment" is too vague and does not explain whether replies to the EU CV format questions are obligatory or voluntary and the consequences of failure to reply. In the same line the words "see instruction" without proper instruction on the EU CV format on the EUMC web site may confuse the data subject on what data are mandatory and what are not. The EDPS recommends providing further information as to what fields are obligatory or not in the EU CV format (on the EUMC web site) as it is the only way to apply. At least, a direct link to the CEDEFOP CV instructions should be provided and not, as is the case now, a link to the CEDEFOP homepage. These instructions are necessary to allow the data subject decide what information he will provide.

Information should also be given on the processing of spontaneous applications. The words on the EUMC web site "please note that we are unable to consider any unsolicited applications whether received by post or by e-mail. Unsolicited applications will not receive any response" allows applicants to assume that there is no processing operation. At least, the data retention period should be mentioned.

The data subject should be informed about the potential transfer of his/her application file to another service than the one for which he/she applied.

2.2.10. Security measures

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account:

- Rules for the extension of the validity of the reserve list should be established.
- Regarding the data processed for administrative reasons (recruited staff), a reasonable time limit of retention should be established. Notably, data of purely informative nature no longer necessary for administrative reasons can be disposed of prior to the expiry of the retention period.
- The data of the successful applications kept (three years for the SNE for e.g.) should only be transferred to the person empowered to carry out the selection (e.g. Head of Unit). That person can not store the data themselves, nor use them for another purpose than that for which they were collected.
- Any limitation to the right of rectification should only concern the merits and skills for recruitment. Apart from that, it should be possible to rectify any inaccurate or incomplete personal data.
- The information given on the legal basis of the processing operation should be modified as follows: Article 12 of Conditions of Employment of other servants of the European Communities for temporary agents and the Decision 2004/07 of the Director regarding Detached National Experts of the EUMC.
- The clause suggested by the DPO should be even more detailed and include information regarding legal basis, time limits for storing data and the right to have recourse to the EDPS as it is necessary to fully ensure that the data subject is in a position to exercise all means at his disposal.
- The EUMC web site should provide proper information concerning the use of the European CV form; information should be given as to what data are obligatory and what are not. At least a direct link to the CEDEFOP CV instructions should be provided and not as it is the case now, a link to the CEDEFOP homepage.
- Information should also be given on the processing of spontaneous applications. At least, the data retention period should be mentioned.
- The data subject should be informed about the potential transfer of his/her application file to another service than the one for which he/she applied.

Done at Brussels, 1 February 2006

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