



Opinion on a notification for prior checking received from the Data Protection Officer of the Council concerning the "certification procedure" dossier

Brussels, 23 March 2006 (File 2006-45)

1. Procedure

On 20 July 2004 the European Data Protection Supervisor (EDPS) sent a letter to the Data Protection Officers asking them to help draw up a list of data processing operations that might be subject to prior checking by the EDPS, as provided for in Article 27 of Regulation (EC) No 45/2001. The EDPS asked for information on all operations subject to prior checking, including those that started before the Supervisor was appointed and for which checking could never be deemed "prior", but which would be subject to "ex-post" checking.

On the basis of the lists received from Data Protection Officers (DPOs), the EDPS identified the priority areas, namely data processing in disciplinary dossiers, staff assessments or medical dossiers. On 10 November 2006 the EDPS asked all DPOs to update their lists and added two new priorities: social services and e-monitoring. Further to this update request, the Council's Data Protection Officer forwarded a dossier on "the certification procedure", that must be subjected to ex-post prior checking insofar as it contains data concerning the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)).

In a letter dated 23 January 2006 a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "certification procedure" dossier was drawn up by the Council's Data Protection Officer and several annexes were attached thereto.

Questions were put to the Council's Data Protection Officer in an e-mail dated 10 February 2006, to which replies were given on the same day.

2. The facts

The Council organises a procedure for selecting officials authorised to follow training as part of the certification procedure (Article 45a of the Staff Regulations). In the case in point, the case submitted relates to 2005. The aim of the procedure is to select those officials in the AST function group, grade 5 and above, authorised to undertake training as part of the certification procedure, which will enable them to be appointed to a post in the same grade in the AD function group.

The selection procedure for officials authorised to follow the programme is laid down in a Council Decision ¹.

The stages in this procedure are:

1. publishing a call for applications;
2. drawing up the list of a limited number of officials authorised to take part in the training programme each year;
3. taking part in the training programme provided by the European Administrative School;
4. drawing up and publishing the list of officials who have passed the examinations, thereby demonstrating that they have successfully taken part in the training programme.

2.1 Applications

For the 2005 exercise, only B* officials in grade 5 and above and appointed to a permanent post at the General Secretariat of the Council may apply. On the date of publication of the call for applications, the status of those officials must be one of the following: in active service, on parental leave or family leave, or seconded in the interests of the service. However, applications may not be submitted by officials who, in the course of 2005 or 2006, are to be retired automatically, or in respect of whom the Appointing Authority has adopted a decision resulting in termination of service, or to whom the Appointing Authority has granted an invalidity allowance.

2.2 Detailed rules for applications

A deadline for submitting an application is fixed. Applications submitted after that deadline cannot be considered.

The application must be made by submitting an application form, which must be signed, together with all supporting documents, to the Career and Development of Competencies Unit of the Human Resources Directorate. The form to be completed may be downloaded from the DOMUS Intranet site, DGA 1, forms, certification. It may also be obtained by e-mail.

2.3 Admissibility criteria

After examining the applications, the Appointing Authority draws up and publishes the list of officials deemed admissible to the certification procedure in accordance with the admissibility criteria in force under the procedure. (Officials in the AST function group (B* as a transitional measure) in grade 5 or above and with at least five years' seniority in accordance with the criteria set out in Articles 3 and 4 of the Council Decision of 20 September 2005).

2.4 Criteria used to rank officials by order of priority and their relative importance

The Appointing Authority examines the admissible applications and ranks them in order of priority using the following criteria: staff reports, education and training and professional experience acquired within the institutions.

The content of the criteria, their value and weighting are determined by the Appointing Authority after obtaining the opinion of the Joint Committee. After ranking the applications,

¹ Council Decision of 20 September 2005 concerning the general implementing provisions for Article 45a of the Staff Regulations (Staff Note 162/05 of 26 September 2005)

the Appointing Authority adopts and publishes a draft list of officials selected to take part in the training programme.

2.5 Appeal procedures concerning the list of selected officials

Within ten working days of publication by the Appointing Authority of the draft list of selected officials, officials who have applied may submit an appeal to the Joint Certification Committee setting out their reasons for doing so, together with all relevant supporting documents and information.

2.6 Role of the Joint Certification Committee

The Joint Certification Committee examines the draft list and the appeals submitted by officials and issues a reasoned opinion within twenty working days following the ten days allowed for officials to submit appeals.

The Appointing Authority adopts and publishes the list of officials authorised to take part in the training programme, taking into account the opinion of the Committee.

2.7 Training organised by the EAS (European Administrative School)

During this phase the institution delegates to the European Administrative School the definition and organisation of the training programme, the organisation of the written and oral tests and the drawing up of the list of officials who have passed those tests.

The training lasts approximately 40 days and is considered as a training activity in the interests of the service. A common part (roughly 70% of the training) will comprise four modules: analysis, communication, organisation and budget.

In addition, participants follow a specific module of their choice. So far, seven specific modules are on offer. For those applicants who have been selected to take part in the training, the choice of the specific module is made after applications have been selected. The applicant concerned makes the choice in concertation with DGA 1A, which consults the hierarchical superior.

2.8 Other information from the notification

Data subjects

Officials in the AST function group (B* as a transitional measure) in grade 5 or above and with at least five years' seniority in accordance with the criteria set out in Articles 3 and 4 of the Council Decision of 20 September 2005

Categories of data

The data needed to select officials are: staff reports, attestation(s) of seniority of service in the European institutions, copy of the highest diploma, attestations of any professional training, application form. The list containing this information is set out in the application form.

Information

The Council Decision of 20 September 2005 (Staff Note No 162/06) informs candidates concerning the procedure. A staff note on the Decision by the Appointing Authority regarding the number of persons to be selected and the criteria for classifying applications will be issued. The call for applications informs candidates as to the documents to be submitted with their

application, the practical arrangements for the procedure and the information supplied in accordance with Article 11 of Regulation 45/2001 on data protection.

Annex to the call for applications in the framework of the certification procedure

The attention of General Secretariat staff is drawn to the following information communicated in accordance with Article 11 of Regulation No 45/2001 on data protection. The annex provides information on the identity of the controller, the purpose of the processing operation, the recipients of the data, as well as information on whether or not replies to the questions are obligatory and the possible consequences of failure to reply, the rights of access and rectification, the legal basis and the time-limits for storing the data.

Rights of the data subjects

Applicants have the right to access and to rectify the information they have provided at any time, with the exception of the period when the persons designated by the Appointing Authority are processing applications. Any rectification of data following that period cannot alter the outcome for that particular year.

Automated/manual procedures

Partially automated procedures. The only fully automated procedure will consist of drawing up an internal list of candidates in Word and/or Excel in order to manage the applications and the publication by the Appointing Authority of the lists of candidates admitted.

Data storage medium

Data in paper format will be kept in the Career and Development of Competencies Unit of the Human Resources Directorate, in secure document storage rooms and/or furniture. Computerised data will be stored on the computers of the Career and Development of Competencies Unit; these computers may only be accessed by authorised persons, using a login and password.

Recipients

The list of officials (surname, first name, contact details for training purposes) authorised to follow the compulsory training courses as established by the Appointing Authority will be forwarded to the European Administrative School (EAS), which is attached to EPSO. At the end of the training course, EPSO will forward to the Appointing Authority the list of officials who have successfully completed the training programme.

The following will have access to the data contained in applications: the Career and Development of Competencies Unit, its secretariat and the Joint Certification Committee provided for in Article 10(2) of the Council Decision of 20 September 2005. With regard to the persons selected, the Personnel and Administration Directorate (DGA 1 B) will have access to the data supporting their admissibility and the results of the training organised by the EAS.

Data storage policy

All documents are kept for as long as it is possible to contest the decision. The maximum time-limit for these appeal procedures is six weeks (+ time for the publication by the Appointing Authority of the list of officials selected) in the case of appeals provided for in Article 5 of the Council Decision of 20 September 2005, with an additional seven months for appeals pursuant to Article 90 of the Staff Regulations, plus, finally, three months to bring an appeal to the Court of Justice of the European Communities, as well as the time needed for the Court of Justice to hear the case. This amounts to approximately one year, not including the time for appeals to the Court. The dossiers of the candidates who are not selected are kept for three years in case they

apply again. They will be able to supplement or amend their data. There is no time-limit for blocking or deleting data.

Historical, statistical and scientific purposes

Anonymous statistics (for example, on the number of applications in each exercise) can be compiled for the purpose of monitoring the procedure.

Security measures

The data will be kept in compliance with Article 22 of Regulation (EC) No 45/2001: the procedures and measures in force in the Human Resources Directorate (DG A IA) and the duty of discretion of officials processing the data will be observed. Other measures will be taken for the storage of automated or non-automated data.

3. Legal aspects

3.1 Prior checking

The notification received on 23 January 2006 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The processing operation presented is carried out by an institution, in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)).

The processing for the certification procedure is partly by automatic means, insofar as the lists of candidates are drawn up in house in Word and/or Excel, for the purpose of managing the applications and so that the Appointing Authority can publish a list of applicants. The data are also kept on paper in the Career and Development of Competencies Unit. Article 3(2) therefore applies.

Consequently, such processing comes under Regulation (EC) No 45/2001.

The European Data Protection Supervisor does not carry out prior checking of the phase carried out by the European Administrative School, which bears its own responsibility for processing at that stage. This should be the subject of a separate notification for prior checking.

Under Article 27 of Regulation (EC) No 45/2001, processing operations that present specific risks to the rights and freedoms of data subjects are subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to present such risks "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The certification procedure for Council officials is a personal data processing operation for evaluation purposes and is therefore covered by Article 27(2)(b) and subject to prior checking by the European Data Protection Supervisor.

Checking by the European Data Protection Supervisor should take place prior to processing. In the present case processing began before the European Data Protection Supervisor was consulted and the checking is therefore ex-post. This in no way reduces the desirability of introducing the recommendations submitted by the European Data Protection Supervisor.

Official notification was received by letter on 23 January 2006. Questions were put by e-mail on 10 February 2006. In accordance with Article 27(4) of the Regulation, the two-month period in which the European Data Protection Supervisor should deliver his opinion is

therefore suspended. The replies were received by e-mail on the same day. The European Data Protection Supervisor will deliver his opinion by 24 March 2006.

3.2 Legal basis and lawfulness of the processing operation

The legal basis for the data processing operation in question is to be found in:

1. Article 45a of the Staff Regulations (certification procedure);
2. the Council Decision of 20 September 2005 concerning the general implementing provisions for Article 45a of the Staff Regulations ².

The legal basis is sufficiently clear and raises no particular questions.

As well as its legal basis, the operation's lawfulness also needs to be considered. Article 5(a) of Regulation (EC) No 45/2001 provides that *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution"*.

The certification procedure, which involves the collecting and processing of personal data on officials comes within the legitimate exercise of official authority vested in the institution. The fact that the legal basis is to be found in the Staff Regulations supports the lawfulness of the processing operation.

3.3 Data quality

Data must be *"adequate, relevant and not excessive"* (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as satisfying these conditions as regards processing. The data required are administrative in nature and necessary to appraise the work of officials. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled in this respect.

The data must also be processed *"fairly and lawfully"* (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.8 below on this point.

Under Article 4(1)(d) of the Regulation, *"data must be accurate and, where necessary, kept up to date"*. The data subject has the right to access and the right to rectify data, so that the file can be as comprehensive as possible. This also makes it possible to ensure the quality of data. See point 3.7 below on the dual rights of access and rectification.

3.4 Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle that *"personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed"*.

² Council Decision of 20/9/2005 (Staff Note 162/05).

All the documents necessary for the certification applications will be kept until the official has exhausted all means of contesting the decision, including the time-limits for bringing an appeal to the Court of Justice.

If there is no appeal to the Court, files are kept for about one year: six weeks for the appeal procedure plus seven months for appeals under Article 90 of the Staff Regulations, plus three months for bringing an appeal to the Court of Justice.

The files of applicants who have not been selected will be kept for three years before destruction, in case they re-apply.

The certification file of successful applicants will be added to their personal file. In that case, Article 26 of the Staff Regulations applies, in particular *"an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them"*.

Data are thus conserved for a long, but unspecified period. The European Data Protection Supervisor considers that a period during which data may be conserved needs to be set. In a similar case³, the EDPS considered that it was reasonable to fix the conservation period at 10 years, starting from the moment when the staff member leaves or after the last pension payment. The EDPS also considers that data of a purely informative nature no longer necessary for administrative reasons can be disposed of after a minimum retention period of 5 years.

This long-term data conservation will have to be accompanied by appropriate guarantees. The data conserved are personal. The fact that they are archived for long-term conservation does not divest them of their personal nature. For that reason, data conserved over a long period must be covered by adequate measures for transmission and conservation, like any other personal data.

Data may be kept for statistical purposes. Anonymous statistics may be compiled so that the procedure can be monitored. Since the data will be rendered anonymous, Article 4(1)(e) of the Regulation is complied with.

3.5 Change of purpose/Compatible use

Data are retrieved from or entered into the staff databases. The processing operation under review involves no general change to the stated purpose of staff databases, of which the certification procedure is only one aspect. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

3.6 Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data 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"*.

³ Case 2004/274 – Staff appraisal procedure – European Central Bank.

The data will be circulated between various departments at the Council. Personal data may only be transferred within an institution if they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

In the current case, transfer to staff in the Career and Development of Competencies Unit, the Appointing Authority, the Joint Certification Committee and the Personnel and Administration Directorate is in accordance with the legitimate performance of the tasks of those involved.

Moreover, data relating to officials authorised to follow training are forwarded to the European Administrative School, which is attached to EPSO. At the end of the training course, EPSO forwards to the Appointing Authority data concerning the officials who have successfully completed the training programme. Finally, files may be sent to the Court of First Instance (CFI) in connection with appeals to the CFI⁴. In this case such transfers are legitimate, since they are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

3.7 Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, data subjects have access to their evaluation files so that they can complete all the sections required for the procedure to take its course.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In the same way that the data subject has a right of access, he or she may also directly change factual personal data or have them changed, if necessary.

In this case, these rights are ensured by Section 5 of the Council Decision of 13 September 2004 *"adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council 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"*, published in Official Journal L 296 of 21 September 2004.

Section 5 of the Council Decision covers the procedure for data subjects to exercise their rights, and includes general provisions as well as provisions on the rights of access, rectification, blocking, erasure and objection available to the data subjects. It also includes information on notification to third parties, automated individual decisions, and exceptions and restrictions. However, the Staff Note does not refer to this Council Decision.

One restriction to the rights of access and rectification is clearly announced in the rules for data subjects, namely the temporary restriction of access and rectification while the persons designated by the Appointing Authority are processing applications (see point 2.8 above). The European Data Protection Supervisor considers that this restriction is admissible, since it falls within the scope of Article 20(1)(c) of Regulation (EC) No 45/2001 (*"the Community institutions and bodies may restrict the application of (...) Articles 13 to 17 (...) where such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of*

⁴ The European Union Civil Service Tribunal, established by the Council Decision of 2 November 2004 (2004/752/EC, Euratom) is competent in place of the Court of First Instance. The latter is the appeal body.

the rights and freedoms of others") and is necessary to ensure objective, sure and stable conditions for all applicants to guarantee the fairness of the procedure.

The European Data Protection Supervisor asks that the Staff Note should mention the Council Decision of 13 September 2004 presenting the rights available to data subjects.

3.8 Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case. Inasmuch as the official or staff member personally fills in the data required of him or her, the data subject provides the data himself or herself.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since the information is collected from the different participants in the process (reporting officers, countersigning officer, committees etc.).

In this case, the data subject is informed by the Annex to the Staff Note "Call for applications for the 2005 certification procedure".

The provisions of Article 11(a) (identity of the controller), (b) (purposes of the processing operation), (c) (recipients or categories of recipients of the data), (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) and (e) ("the existence of the right of access to, and the right to rectify, the data concerning him or her") must be notified to the data subjects. To ensure that the processing is carried out completely fairly, paragraph (f) of this Article should also be mentioned. It states the following: *legal basis of the processing operation, time-limits for storing the data and right to have recourse at any time to the European Data Protection Supervisor.*

The provisions of Article 12 (a) (the identity of the controller), (b) (the purposes of the processing operation), (c) (the categories of data concerned), (d) (the recipients or categories of recipients of the data), (e) ("the existence of the right of access to, and the right to rectify, the data concerning him or her"), and (f) (*the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*) must be notified to the data subjects.

Only the point relating to recourse to the European Data Protection Supervisor is not mentioned in the current case. The European Data Protection Supervisor recommends that this point should be inserted in the various documents providing information about the certification procedure.

3.9 Security

Under Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, *"the controller shall implement appropriate technical and organisational measures to ensure a*

level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected".

Other organisational and technical measures are taken to ensure maximum security of data processing.

In the light of all these measures, the European Data Protection Supervisor considers that they can be considered as appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means in particular that the Council should:

3. determine a precise time-period for which data relating to successful applicants may be kept long-term on their personal files;
4. in connection with this long-term data retention, establish appropriate measures for the transfer and retention of personal data;
5. include in the Staff Note a reference to the Council Decision of 13 September 2004 *adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council 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;*
6. insert a reference to recourse to the European Data Protection Supervisor in the various documents giving information on the certification procedure.

Done at Brussels, 23 March 2006

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European Data Protection Supervisor