

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Community Plant Variety Office on recruitment procedure**

Brussels, 2 February 2007 (Case 2006-351)

### **1. Proceedings**

On 6 July 2006, a notification for prior checking on the recruitment procedure was received from the Data Protection Officer (DPO) of the Community Plant Variety Office (CPVO). The DPO attached to the notification (a) the application form to be filled in by the candidates for a vacant post and (b) the "Instructions to the personnel department on the period of time during which the CPVO will keep documents containing personal data submitted to the Office in relation to recruitment procedures or spontaneous applications".

The European Data Protection Supervisor (EDPS) requested further information on 28 July and 9 October 2006. The DPO sent the requested information on 30 November 2006 enclosing the following documents: (a) a vacancy note published on the CPVO website, (b) an updated application form with a text concerning acknowledgment of receipt on the last page, (c) a standard letter sent to the applicants when the application has been received, (d) a notice to be put on the CPVO website related to the general legal notice and (e) a text to be put in the near future on the CPVO website relating to vacancy notices on information to be supplied in accordance with Article 11 of Regulation EC No 45/2001. The procedure was suspended on 21 December 2006 until 10 January 2007 to allow comments from the DPO. The procedure was suspended on 26 January 2007 for a further period of five days in order to clarify the new information provided in the DPO's comments. The EDPS received the requested clarifications on 31 January 2007.

### **2. Examination of the matter**

#### **2.1. The facts**

The CPVO publishes its vacancies via official means (for example on CPVO website). Candidates are requested to send a filled in application form, a detailed CV and a motivation letter. There are no special requirements regarding the content and form of the CV and motivation letter. The standard application form includes data necessary to identify and contact the candidate (name, place and date of birth, nationality, address, telephone number, email address), data related to the candidate's language skills, education (including general, specialist and further training courses), informatics skills, publications, military situation and professional experiences. Candidates are asked to describe their present or most recent post (starting date of the work, exact designation and grade of post, name and address of employer and the nature of work). These details have to be given on the (second) previous post as well. In addition, under the title "Earlier posts" candidates are invited to detail the name and address of the employer, the starting and ending date of the period spent in the given position,

nature of the work and the reasons for leaving concerning earlier employments. Furthermore, candidates are requested to answer questions regarding longer periods spent abroad. The name, address and telephone number of a person who can be contacted, should the applicant not be available, have to be given. Finally, candidates have to answer whether they have ever been convicted or found guilty of any offence by any court. If it is the case, details have to be given on the conviction(s).

Candidates are also invited to describe their interests and skills not related to work (social and sport activities). According to the information received from the DPO, the purpose of this question is to gain an overall view of the candidate. Since in certain posts it is crucial to have enhanced social skills, it is of help for the CPVO if such information is already available in the first phase of the selection. This question is answered by each candidate. However, if a candidate fails to answer this question, the application will not be rejected on account of this failure. Candidates are not informed about this fact. Their attention is drawn to the requirement that all fields must be duly completed on the form because "*candidates, who do not complete the form properly, will be disqualified*".

The three documents mentioned (i.e. a completed application form, a detailed CV and a motivation letter) a photo enclosed must be sent to the Human Resources (HR) officer via e-mail. The HR officer acknowledges the receipt of the application using a standard form, including the reference number, which is linked to the candidate. The HR officer records the candidate number, name, address, linguistic skills and last employment data of each applicant in an excel sheet.

After the deadline of the application, all documents sent to the HR officer are forwarded to the selection committee. The selection committee is composed of several staff members designated by the President of the CPVO. The applications are considered and analysed by each member of the selection committee. A short list of "interesting candidates" is prepared by the committee. The "interesting candidates" are invited to an interview.

Following the interviews, the selection committee meets and votes for the candidates to be selected. Each member has one vote. Minutes are drawn of the committee meetings containing the evaluations of the applicants on the short list ("interesting candidates"). Following the selection procedure, members of the selection committee return all documents relating to the recruitment to the HR department. For each selection procedure the HR officer keeps the applications and the minutes of the committee for 24 months from the date of the decision of the CPVO appointing the successful candidate.

E-mails sent by the candidates are kept electronically and the printed copies are also retained in paper form. At the same time, an excel file is also created as a summary of the candidates' name and most relevant data (name, address, linguistic skills and last employment data of each applicant).

Data and all documents related to unsuccessful applications including the excel sheet with the content described above are kept for 24 months following the date of the decision of the CPVO appointing the recruit. However, according to the policy adopted by the CPVO in June 2006, documents relating to the application procedure may be kept up to five years due to the obligations in relation to the Court of Auditors. Data included in successful applications are transferred to the official's personal file and kept in accordance with the relevant rules of the Staff Regulations.

In case of spontaneous applications, the candidates' attention is drawn to the fact that the CPVO recruits only on the basis of advertised competitions and that they are advised to consult the vacancies on the CPVO website. According to an internal rule of the CPVO, spontaneous applications no older than 12 months shall be consulted whenever a vacancy is published and applicants with corresponding profile will be informed about the vacant post(s). All spontaneous applications are kept for 24 months for verifying the selection procedures by the European Court of Auditors.

Data related to recruitment procedures and spontaneous applications are accessible by the officials of the CPVO handling the applications and verifying the procedure, in particular the members of the HR Department, the Management of the CPVO as well as staff members taking part in the selection procedure. Access may be given to the Finance Department in case of reimbursement and also to internal controllers, internal and external auditors.

If the data subject (candidate for a vacant post) so requires, the data included in the documents sent to the CPVO can be modified or rectified. A request for blocking or erase the data relating to the recruitment is dealt with on a case by case basis. Data subjects are provided with information on the data processing via several documents, including the vacancy note, the application form, the privacy statement, the legal notice (which contains a special part devoted to privacy policy). Furthermore, the standard letter acknowledging the receipt of the application indicates the retention period of the documents sent to the CPVO. The processing aims at evaluating candidates applied for a post within the CPVO. Data are not used for historical, statistical or scientific purposes.

The vice-president of the CPVO is qualified as the controller. The files containing the applications and related documents are kept in locked cupboards or in locked archives. The e-mails sent by the candidates and the excel files containing the information mentioned above are kept on a password-protected PC .

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The notification reveals that there is a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of Regulation (EC) No 45/2001 (henceforth: the Regulation). The processing implies collection, storage, consultation and erasure of personal data which qualifies the operation as processing of personal data (Article 2(b) of the Regulation). The processing operation is carried out by a Community agency, in the exercise of activities which fall under the scope of Community law (Article 3(1)).

Processing of data is carried out partly by automatic means. The appraisal procedure is processed manually but the content forms part of a filing system. Thus Article 3(2) applies in this case.

Article 27(1) of the Regulation 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) contains a list of processing operations that are likely to present such risks, among others the "*processing operation intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)).

The recruitment procedure aims at evaluating personal and professional aspects of the candidates. Thus the processing has to be prior checked by the EDPS.

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, however, the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 6 July 2006. According to Article 27(4) of the Regulation the present opinion must be delivered within a period of two months following the receipt of the notification. The EDPS requested further information on 28 July 2006, the DPO answered on 30 November. The two months period was suspended until the EDPS has obtained further information he requested in accordance with Article 27(b), for 20 days to allow comments from the DPO on the draft opinion and following the DPOs comments for further five days. Thus the present opinion must be delivered by 5 February 2007 (two months + 150 days suspension).

### **2.2.2. Lawfulness of the processing**

Article 5(a) of the Regulation stipulates that personal data may be processed if "*the 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 other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body.*"

Furthermore, according to the recital 27 of the Regulation the "[p]rocessing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies". This processing operation is carried out in the framework of the everyday activity of the CPVO, and the EDPS considers it to be necessary for the performance of tasks carried out in the public interest.

The legal basis of the processing is twofold: first, it can be found in Title III Chapter 1 (Articles 27-34) of the Staff Regulations. In addition, since the participation in the recruitment procedure is not mandatory, the processing is lawful under Article 5(d) of the Regulation because "*the data subject has unambiguously given his or her consent*". In this context special attention has to be paid to the information given to the data subjects. Data subjects' consent has to be interpreted in the light of the information they receive about the data processing. Data subjects' consent has to be "informed", as provided in Article 2(h) of the Regulation. Therefore, the consent cannot exceed the content of information given to data subjects.

### **2.2.3. Processing of special categories of data**

Under Article 10(1) of the Regulation "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited*" unless grounds can be found in Article 10(2) or 10(3). If the candidate reveals special categories of his or her personal data it can be regarded that the data subject has given his or her express consent to the processing of the data. It may be the case, for example, if the applicant asks for special arrangements regarding the interview because of his or her disabilities. Data processed in this context should be deleted once it is not any more necessary for recruitment or reimbursement purposes.

However, special categories of data included in successful application can be forwarded to the personal file in the case it is necessary for the whole period of employment if special arrangements are needed.

The justification for processing of data relating to offences, criminal convictions or security measures is based on Article 28 (a) of the Staff Regulations and is therefore compliant with Article 10 (5) of the Regulation, according to which "*processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards*". As to the extension of this information, see point 2.2.4.

#### **2.2.4. Data Quality**

According to Article 4(1)(c) of the Regulation personal data must be "*adequate, relevant and not 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 and collected for the recruitment procedure, except the categories of data described below, complies with the criteria set in Article 4(1)(c).

The point N° 12 of the application form concerns the candidate's professional experience starting with the present post and following the ones the candidate hold previously. Regarding the third and fourth previous (or even earlier) posts of the candidate the question "Reasons for leaving" has to be answered as well. The EDPS has doubts about this information being relevant for the recruitment procedure. Accordingly, the EDPS recommends reconsidering the mandatory character of those questions.

The question on "Interests and skills not related to work, including social and sport activities" deserves also special attention. By answering this question, candidates give details on skills, interests and activities which are not in relation with the work which they apply for. These details give the opportunity, however, to assess the personality, and not the working skills, of the candidate. The EDPS understands that this question may bring useful information to the knowledge of the staff members participating in the recruitment procedure. The interview is also a means of getting a better impression of the applicants with the clear borderline between appropriate and inappropriate questions which can be asked during an interview. The EDPS considers this question as not fully appropriate regarding the purpose of the application form. Therefore, the EDPS recommends including this question only as optional in the application form. It has to be ensured that applicants not answering optional questions will not be put at any disadvantage on account of the failure to give answer.

Furthermore, this case deals with the processing of personal data related to offences or criminal convictions. The application form includes under point 16 the question "Have you ever been convicted or found guilty of any offence by any court?". Two options are given: "yes" or "no". Should the answer be "yes", the candidate is requested to give details on the conviction(s). The EDPS sees no reason for processing data related to, for example, any conviction for crimes committed by negligence or for traffic accident, especially if the candidate has been convicted long before and it is not any more included in his criminal record. The EDPS does not dispute the relevance of a criminal record when looking for appropriate candidates for a job by the CPVO. However, the phrasing of the question N° 16 may result in a situation where candidates feel obliged to reveal data unnecessary for the recruitment. Accordingly, the EDPS recommends modifying the question, not to include the too broad expression of "have you ever been" but asking for a criminal record or similar

official document issued in accordance with the respective national law, and preferably only from those candidates who are invited to an interview. The EDPS approves that in the future, candidates will have to agree in advance, already on the application form, to provide a criminal record or similar document for the case if it is needed during the recruitment procedure. However, in practice, such a document should only be requested from candidates on the short list (i.e. from those invited to an interview).

As to the excessive information listed above, the EDPS would like to point out that he took fully into consideration Article 2 of Annex III to the Staff Regulations. According to this Article "[c]andidates shall complete a form prescribed by the appointing authority. They may be required to furnish additional documents or information". This provision leaves room for interpretation. Nevertheless, data protection rules provided by the Regulation have to be complied with even if not expressly foreseen by the Staff Regulation. Thus the cited Article of the Staff Regulations cannot be regarded as an exception under the Regulation.

The standard application form is filled in by the applicants, thus the procedure itself guarantees the accuracy of the data. Therefore Article 4(1)(d) is complied with. Furthermore, the data subject has the right to access and the right to rectify data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data.

Since the number of the European Union's official languages has increased to twenty-three in 2007, the EDPS suggests updating the point 6 on the first page of the application form in order to ensure that the skills in all official languages of the European Union can be introduced easily.

The data must also be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 2.2.2.). As regards fairness, this relates to information given to the data subject (see point 2.2.10).

#### **2.2.5. Conservation of data**

The Regulation states 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 were collected or for which they are further processed*" (Article 4(1)(e)).

Data included in unsuccessful applications are kept for 24 months after the decision is made on candidates. This retention makes it possible to prove why the rejected candidates' applications were unsuccessful. For fulfilling the obligations in relation to the Court of Auditors, documents related to the recruitment procedure may be kept up to five years. Taking into account Article 49 of the Commission Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, the EDPS approves the five years retention period of supporting documents. It has to be, however, added, that only those documents should be kept as supporting documents which are necessary in the frame of application of the Financial Regulation.

As to the retention of data relating to spontaneous applications, the 24 month retention period, starting on the day of receipt applies. In 12 months following the receipt, spontaneous applications are consulted in order to inform those candidates with corresponding profiles for vacant posts. Spontaneous applications are kept for 24 months for the verification of the selection procedures by the European Court of Auditors. The EDPS considers that these retention periods comply with the requirements set in Article 4(1)(e) of the Regulation.

Documents related to successful applications are kept in the established officials' personal files in accordance with Article 26 of the Staff Regulations.

Data processed in the framework of recruitment procedure are not kept for statistical, historical, or scientific purposes. Thus the second and third sentences of Article 4(1)(e) do not apply in this case.

#### **2.2.6. Compatible use**

Article 4(1)(b) of the Regulation provides that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*". CPVO does not use the data processed in the analysed context for any purposes other than for evaluation of candidates, selection of new recruit and reimbursement.

The latter inclusion of data in the successful application in the personal file is in accordance with the above provisions. The further use for reimbursement purpose has to be regarded as appropriate in the frame of the processing.

#### **2.2.7. Transfer of data**

Article 7 of the Regulation 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 tasks covered by the competence of the recipient*".

Applications are received by the HR Department. During the selection procedure, data provided by the candidates are transferred to the Management of the CPVO and to staff members taking part in the selection procedure. Access may be given to the Finance Department in case of reimbursement.

Colleagues in charge of internal control or audit may be given access to data received from applicants. Access may be also given to the bodies empowered to carry out external audit, e.g. the Court of Auditors, OLAF or the EDPS.

The EDPS considers that the data made accessible by the CPVO in the way described above is necessary for the legitimate performance of tasks carried out by the recipients. Thus, requirements provided in Article 7 of the Regulation are met.

#### **2.2.8. Processing of personal number or unique identifier**

To facilitate the recruitment procedure, each candidate receives a reference number, which is linked to them. The EDPS considers that this number cannot be regarded as a personal number of general application. Thus Article 10(6) of the Regulation does not apply in this instance.

#### **2.2.9. Right of access and rectification**

Article 13 of the Regulation establishes a right of access - and the arrangements for exercising it - upon request by the data subject. The EDPS is of the opinion that following the application has been rejected and the timeframe open for remedies has elapsed, applicants could be given the right of getting back their application without prejudice to the right of the CPVO to keep a copy of it. Successful applications are included in the established official's

personal file. The Staff Regulations guarantees the officials the right of having access to their personal files.

As regards the access to the results, it has to be made sure that candidates can have access to the results of the selection procedure including any partial scores that might exist according to the procedure pre-established by the CPVO without interfering in any way with the principle of secrecy of selection board proceedings, as set out in Article 6 of Annex III to Staff Regulations. The right of access to the results should be ensured from the day following on which the decision on the applications has been made.

Article 14 of the Regulation provides the data subject with a right of rectification. The right of rectification is of special importance during the whole recruitment procedure. Incidentally not accurate data provided have to be rectified as soon as possible in order to ensure the proper evaluation of the candidate. Similarly, any change in the data included either in the three provided documents (e.g. address for correspondence) must be made up to date without delay. According to the privacy statement, CPVO guarantees the data subjects, upon request, the possibility to modify their personal data until the deadline of the competition. The EDPS is of the opinion that any limitation to the right of rectification could only concern the merits and skills for recruitment (professional experience, education, training) after the deadline for submitting applications, but not other data such as contact details or misspelled name. This limitation might be 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.

#### **2.2.10. Information to the data subject**

The Regulation states that a data subject must be informed of the processing of data relating to him and lists a range of compulsory items of information which must be provided (identity of the controller, categories of data concerned, purposes of processing, recipients, whether replies to the questions are obligatory or voluntary, origin of the data, right of access). Insofar as such information is necessary to guarantee the fair processing, additional information has to be supplied regarding the legal basis, time-limits and the right to have recourse at any time to the EDPS. Since the data have been obtained both from the data subjects and from the staff members participating in the recruitment procedure, Article 11 and 12 of the Regulation apply in this instance.

Information on the processing operation carried out by the CPVO is available in several documents, including the vacancy note, the application form, the privacy statement, the legal notice and the standard letter acknowledging the receipt of the application.

The privacy statement and the application form explain that the documents submitted to the CPVO will be kept for a period of two years. The EDPS recommends bringing this information in line with the retention policy adopted in June 2006 on retention periods taking also into consideration the EDPS' recommendation on supporting documents (see point 2.2.5.). It should be also indicated in the acknowledgment that following the two years period open to remedy, unsuccessful candidates can get back their application, if they wish so.

Considering the above recommendations of the present opinion, the EDPS recommends rephrasing the sentence of the Privacy statement, according to which "failure to reply, automatically excludes the subject from recruitment". The EDPS would like this sentence to



be complemented with the reference to questions which can be answered on a voluntary basis, informing candidates that the failure to reply to these questions do not result in the rejection of the application.

As to the legal basis, the EDPS recommends indicating the exact sources of the provisions on which the processing is based (i.e. provisions of the Regulation and of the Staff Regulations) in the privacy statement. Furthermore, the identity of the controller has to be clearly indicated.

The EDPS would like to draw attention to the special situation of candidates sending spontaneous applications to the CPVO. They are not in the possession of all documents including crucial information of the data processing related to applications. This has to be fully taken into account and CPVO must provide candidates applying spontaneously with all the information which is available for other candidates when acknowledging the receipt of the application, including in their case the purpose of the first 12 months of retention.

### **2.2.11. 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 the Regulation.

### **Conclusion:**

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

- The question "Have you ever been convicted or found guilty of any offence by any court?" in the application form should be replaced by a request for a criminal record or a similar official document issued in accordance with the respective national law, and only short-listed candidates invited to an interview must provide this document;
- The mandatory character of "reasons for leaving" regarding the third and fourth previous posts should be reconsidered;
- It should be clearly indicated that the question on interests and skills not related to work, including social and sport activities, has not to be answered compulsorily;
- It has to be made sure that candidates can have access to the results of their application including any partial scores that might exist according to the procedure pre-established by the CPVO;
- The information on the retention period in the privacy statement, in the application form and in the acknowledgement of receipt of spontaneous applications should be brought in line with the retention policy of the CPVO;
- The sentence "failure to reply, automatically excludes the subject from recruitment" should be complemented with the reference that certain questions can be answered on a voluntary basis, and failure to reply to these questions do not result in the rejection of the application;
- It must be made possible for candidates to ask for rectification of their data not concerning the merits and skills for recruitment even after the deadline for submitting applications;

- The legal basis of the processing should be clearly indicated in the privacy statement by giving the exact sources of the provisions;
- The identity of the controller should be precisely indicated.

Done at Brussels, 2 February 2007

Peter HUSTINX  
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