



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission on the EUROPA Election Observation Roster

Brussels, 23 July 2007 (Case 2007-244)

1. Proceedings

On 10 April 2007, the European Data Protection Supervisor ("**EDPS**") received from the Data Protection Officer at the European Commission a notification for prior checking relating to the EUROPA - Election Observation Roster ("**Roster**").

The EDPS requested the European Commission to provide further information on 16 April 2007. A response was given on 30 April 2007. The case was suspended for a second time pending further information on 3 May 2007 and a response was received on 4 May 2007. The case was suspended pending comments on the draft opinion from the DPO on 15 June 2007 and these were received on 20 June 2007. Finally, the EDPS requested additional information on 26 June 2007, and the Commission responded on 18 July 2007.

2. The facts

The observation of elections is an important component of the EU's policy in promoting human rights and democratisation throughout the world. To accomplish this, the European Commission recruits Election Observers via the Europa website.

Candidates are invited to enter their *curriculum vitae* ("**CV**") into the electronic form provided. After screening the CVs of their own nationals, Member State governments will propose the most qualified candidates for the position of Long-Term or Short-Term Observer ("**LTO/STO**") in individual European Union Election Observation Missions ("**EUEOM**"). The final selection of LTOs and STO's will be made by the Commission. Core Team experts are directly recruited by the Commission.

The purpose of the processing of personal data is the selection of observers who will participate in an EUEOM. The selection process is two-step: Focal points in Member States are required to propose a fixed number of observers for a given Observation mission, matching specific criteria for such a mission, and ranked by priority. So they do their own selection amongst their national candidates. The Commission Services Selection Committee uses these short lists to make the final decision.

Applicants who add their CVs to the Roster for selection form the main class of data subjects. Other classes of data subjects who appear in the Roster are the referees and next of kin, whose names and contact details are provided by the candidate. Most of the personal data processed

Postal address: rue Wiertz 60 - B-1047 Brussels

Offices: rue Montoyer 63

E-mail: edps@edps.europa.eu - Website: www.edps.europa.eu

Tel.: 02-283 19 00 - Fax : 02-283 19 50

during the procedure are obtained directly from the data subjects via their CV. The data subject provides the names and contact details of two people to provide a reference. However, the referees are contacted rarely, when there is a cause for the Commission to doubt the accuracy of the data provided by the applicants on their CVs. Contact would be made by telephone and no information is recorded on the Roster.

Classes of personal data that are collected include personal identifier data (including name, nationality, place of birth, contact details and passport details), data on qualifications and previous experiences and next of kin name and contact details. Data regarding the observer's evaluations on their different missions (highly recommended, recommended, recommended but needs to improve, etc.) are also processed.

A Specific Legal Notice on the Election Observers web page provides information as to:

- the identity of the controller;
- the purposes of the processing of personal data;
- categories of recipients of the personal data - the applicant's government and the Commission Services involved in the administration of the EUEOM.
- the existence of the right of access and rectification;
- the retention period for personal data held on CV;
- the contact details for the EUEOM Team (EuropeAid-info@ec.europa.eu); and
- the right to have recourse to the EDPS.

The online CV submission informs the candidates that it is mandatory to complete certain fields before the application is submitted. A candidate is unable to send the CV until these fields are completed. Once a candidate sends the CV, a personal identifier is generated which the candidate can then use to access, verify and modify his/her CV online via the web. The individual also receives information at this point that his CV will be held on a database of candidates.

After this, Member State governments can access CVs of candidates from the Member State concerned for the purposes of short-listing candidates. Some states use focal points to organise interviews and check language skills, professional background or experience, some others do not. Member States then prepare a list of candidates whom they propose to the European Commission as observers.

The Commission selects Election Observers from these proposals using CVs and other data extracted from the Roster.

The criteria for selection are available for candidates to view in the document *"EU Guideline on Common Criteria for the Selection of Electoral Observers"*, which is prominently displayed on the Electoral Observers page of the European Commission website.

Certain personal data included on the Roster will be passed to third parties, the so-called "Implementing Partners" who implement the EUEOMs on behalf of the European Commission. The Implementing Partners are international organisations (the International Organization for Migration and the United Nations Development Programme), with offices in Brussels, where their contracts were signed with the Commission. It is the Implementing Partner who contracts the observers, makes the necessary travel arrangements, administers payments, and carries out other tasks related to the practical implementation of the EUEOMs. The Implementing Partner has access to a limited amount of personal data including the names, contact details (address, telephone numbers, email address), nationality, place of birth,

and passport details of the candidates. At the same time, it does not have access to other personal data, for example, resume data or evaluation data. In fact, the Implementing Partner does not have direct access to the Roster application itself. It only receives the above-mentioned limited amount of personal data from the Commission. The Implementing Partner, however, is also in direct contact with the observers, and asks them for their bank account numbers and any other relevant information necessary to carry out its tasks (e.g., to obtain visas and accreditation).

The Commission does not provide specific instructions to the Implementing Partner as to how long it should conserve the data available to it, or have specific and detailed knowledge of the data processing operations carried out by the Implementing Partner. However, the Commission pointed out that in one clause of the contracts with the Implementing Partner, the terms of reference of the LTO Coordinator have been amended and now stipulate that *"he/she signs a letter of confidentiality on the information obtained in the Roster"*. This letter of confidentiality reads as follows:

"I, the undersignedassigned in my capacity as Observer Coordinator in the EU Electoral Observation Mission to Nigeria 2007 certify by the present not to reveal under any form the information contained in the Roster to which I will have access for a limited time in order to introduce the evaluations of the Observers."

When a mission ends in the field, the LTO Coordinator evaluates the observer together with the Core Team members. Both the observer and the LTO Coordinator sign the evaluation form. When an observer disagrees with his/her evaluation, he/she has the opportunity to provide further comment directly onto the Roster. Observers who disagree can also contact Commission Services, and provide additional information. The information is checked by Commission Services with the Core Team members. The evaluation can then be modified by the Core Team if necessary. The candidate is kept informed of the result of this investigation. The evaluations are used by both the Member States and the Commission for future selection processes.

Data are retained on the system for a period of five years, measured from the day that the individual last updated his or her CV. Individuals have the ability to delete their CVs from the system at any time unless they have been short-listed by the Member States in which case the deletion will be impossible. To apply as experts for the Core Team positions, applicants are required to have at least three prior experiences in the EUEOMs. Therefore, the Commission considers that it is essential to keep the data to check on information provided by the candidates. Commission staff from DG RELEX/B1 has access to the data to administer the selection of candidates and the Roster itself. DG AIDCO/04 also has access to CVs of candidates for the purpose of selecting candidates for EUEOMs.

Candidates with Belgian, French, German, Spanish and Swedish nationality are required, in addition to adding their names to the Roster on the Election Observers webpage, to follow additional registration procedures with organisations in their home countries.

Once a CV is added to the database it is accessible only through the use of the personal number or by access being granted to authorised persons.

3. Legal aspects

3.1. Prior checking

Applicability of the Regulation. Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (“**Regulation 45/2001**”) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. 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. The Roster processes data relating to contact details and work experience of identifiable individuals. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by Community institutions and bodies in activities all or part of which fall within the scope of Community law

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In this case the processing is carried out both on computer and in a structured paper filing system.

Regulation 45/2001 therefore applies.

Grounds for prior checking. Article 27(1) of Regulation 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. This list includes Article 27(2)(b) *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct "*. The Roster system is used to evaluate candidates in relation to their ability to be part of an EUEOM and then evaluates their conduct once a mission has been completed. Thus the Roster is subject to prior checking by the EDPS.

Limitations on the scope of this Opinion. The EDPS is not competent to deal with the short-listing by Member States and as such this aspect of the selection process will not be dealt with in this opinion. However, the processing of personal data by competent authorities in each Member State will be covered by national data protection legislation.

Ex post 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 processing operation has already been established.

Taking into account that a large number of processing operations were already in place before the EDPS was established and became fully functional in the year 2004, these prior checking operations, by definition, have to be carried out ex-post. For these reasons, the EDPS does not view the delay with the submission of the Notification as an insurmountable problem in the present case, provided that all recommendations that EDPS makes in this Opinion will be fully taken into account.

Timing of the Notification and due date for the EDPS Opinion. The notification of the DPO was received on 10 April 2007. According to Article 27(4) of Regulation 45/2001 the present opinion must be delivered within a period of two months that is no later than 11 June 2007. However, the timetable has been suspended for 42 (14+1+5+22) days, so the opinion must be delivered no later than 23 July 2007.

3.2. Lawfulness of the processing. Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the *"processing is necessary for 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"*.

Council Decision 9262/98 - PESC 157 - COHOM 6 Guidelines - EU POLICY ON ELECTORAL OBSERVATION provides the basis for EUEOMs as well as the Code of Conduct which Election Observers are required to adhere to.

Council Decision 8728/99 – PESC 165 – COHOM 4 EU GUIDELINES ON COMMON CRITERIA FOR THE SELECTION OF ELECTORAL OBSERVERS provides the detailed criteria upon which all Election Observers must be selected.

The EDPS is satisfied that the processing of personal data in the Roster is legitimate as it is necessary for performance of a task carried out in the public interest on the basis of these two Council Decisions and is therefore legitimate under Article 5(a) of Regulation 45/2001.

3.3. Data Quality. According to Article 4(1)(c) of Regulation 45/2001 "personal 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 and collected from the data subjects for the purposes of the Roster comply with the criteria set out in Article 4(1)(c).

Article 4(1)(d) provides that personal data must be *"accurate and, where necessary, kept up to date"*. As a quality assurance in the process, applicants are informed that they are able to correct or update their CVs at any time. Applicants can also add comments to evaluations that have occurred after an EUEOM. However, on rare occasions the applicants' referees may be contacted. The information from these referees is not recorded and therefore the data subject cannot access or rectify the data. In this respect, the EDPS recommends that any comments received from the referees should also be recorded in the database.

Article 4(1)(a) also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (see point 3.2.) and fairness will be dealt with in relation to information provided to data subjects (see point 3.8.).

3.4. Conservation of data. Article 4(e) of Regulation 45/2001 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".

Personal data are retained in the online CVs for a period of 5 years, measured from the date the individual last updated his/her CV as explained under point 2 above.

The EDPS is satisfied that the retention period specified is necessary to ensure that at any given time a significant pool of candidates for EUEOMs is available. The EDPS is also satisfied that if an individual does not wish to be considered for an EUEOM, they can delete

their CVs at any time before they have been selected for an EUEOM. Thus the conservation of data is in accordance with the provisions of Article 4(e) of Regulation 45/2001.

3.5. Recipients and data transfers

Access by Commission staff. Article 7(1) of Regulation 45/2001 states 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.*"

Commission staff from DG RELEX/B1 has access to the data to administer the selection of candidates and the Roster itself. DG AIDCO/04 also has access to CVs of candidates for the purpose of selecting candidates for EUEOMs. The EDPS is satisfied that transfers to both of these Community bodies are in accordance with the provisions of Article 7(1) of the Regulation.

Access by Member State officials. Member States are able to access the CVs of candidates in order to administer the short-listing of candidates for EUEOMs. Thus the EDPS is satisfied that this transfer of data is in accordance with the provisions of Article 8(a) of the Regulation.

Access by the Implementing Partner is discussed under point 3.9 below.

3.6. Processing of personal number or unique identifier. The Roster generates personal numbers for each of the candidates when they first submit their CVs. The use of the personal number may have the consequence of allowing interconnection of data processed in different contexts. This is not the place in which to determine the conditions under which the Roster may process a personal number (Article 10(6) of Regulation 45/2001), but it is appropriate here to emphasise the attention that must be paid to this aspect of the Regulation. In the case in point, the Roster's use of the personal number is reasonable as it is used for the purposes of identifying the candidates and allowing them to access their personal data on the Roster. The EDPS considers that this number may be used in the context of the Roster.

3.7. Right of access and rectification. Article 13 of Regulation 45/2001 provides for the right of access for the data subject to his or her personal data. Article 14 of the Regulation provides for a right of rectification of any inaccurate or incomplete data.

The EDPS welcomes that candidates for EUEOMs can access and update their CVs on-line and that candidates also are involved in the drafting of evaluations after each EUEOM.

However, the contact with referees by the Commission to ensure accuracy does not seem to be established well enough as part of the policy surrounding the Roster. While referees are used only rarely to check the accuracy of aspects of the candidate's CV where there is some doubt, there is no systematic policy of recording the information obtained from the referees. If this information is used to evaluate whether a candidate is selected for an EUEOM or not, then it will be recorded in some form but will neither be accessible to the candidate nor open to challenge by the candidate in the event of any inaccuracy.

The EDPS therefore recommends that any communications with the candidates' nominated referees should be recorded on the Roster, as already noted above in point 3.3.

3.8. Information provided to data subjects. Article 11 of Regulation 45/2001 requires certain information to be supplied where the data have been obtained from the data subject. Article 12 requires certain information to be supplied where the data have not been obtained

from the data subject. During the selection procedure personal data are obtained directly from the data subjects on the online CV. Certain personal data may also be obtained from referees. Thus Articles 11 and 12 will both apply to the Roster.

The EDPS welcomes that as noted in point 2 above, the Election Observers web page provides a Specific Legal Notice, including also data protection notice containing most of the items required under Articles 11 and 12 of the Regulation. The EDPS also welcomes that it is clearly noted on the on-line CV form which fields are mandatory and have to be completed before the CV can be submitted.

Finally, the EDPS welcomes that the evaluation process ensures that the data subject is kept informed of what personal data are being added to the Roster as they have to sign the evaluation form once it has been completed by the Observers Coordinator.

However, the candidates are not advised that their data may be passed to the Implementing Partner who implements the EUEOMs on behalf of the Commission, nor are they made aware of the facts or circumstances in which their nominated referees may be contacted.

The EDPS therefore recommends that the Specific Legal Notice should be amended to contain information concerning the transfer of the candidates' data to the Implementing Partner. The Specific Legal Notice should also explain in which circumstances the referees will be contacted, and that their comments will be noted on the Roster.

In addition to candidates, there are three other classes of data subjects, the referees, the next of kin and the EUEOM Coordinators. The Observers Coordinator "ID code" for a given mission will only appear on the "Mission Page", not on the CV. The referees and next of kin are given no information by the controller. Considering that over 1000 candidates have added their CV over the last year, it is likely to constitute a disproportionate effort for the Commission to provide the information stipulated in Article 12(1) to each of the referees and next of kin. However, it would not be unreasonable to amend the sections to include a statement advising the candidates to inform their next of kin and referees that they have submitted their names to the Roster. In addition, whenever referees are contacted, it must be pointed out to them that their comments will be included in the Roster.

The EDPS therefore recommends that a statement be added to the sections of the CV for next of kin and referees advising the candidate to inform the people concerned that they have submitted their names to the Roster and that the comments of the referees, if contacted, may be included as well.

3.9. Processing data on behalf of controllers. Article 2(e) of Regulation 45/2001 states that "'processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller". Article 23 of the Regulation discusses the role of the processor and the obligations of the controller in ensuring compliance by the processor with data protection requirements.

The European Commission contracts out the implementation of EUEOMs to an Implementing Partner. Certain personal data on the selected candidates are passed to the Implementing Partner for this purpose, as described in point 2 above. As also noted there, the Implementing Partners are international organizations with offices in Brussels.

To ensure compliance with the requirements of Article 23 the EDPS recommends that the Commission enters into appropriate contractual arrangements with the Implementing Partners, covering the data protection aspects of the contracted-out processing operations.

The legal situation, and therefore, also the required content of the contracts, may be different depending on (i) whether the Implementing Partner is subject to a national law adopted pursuant to Directive 95/46/EC, or (ii) whether it is not, for example, because its specific legal status grants it immunity from national data protection laws:

- **Implementing Partner subject to Directive 95/46/EC**

In the former case, pursuant to Article 23 of Regulation 45/2001, the contractual arrangements between DG AIDCO and the Implementing Partner should specifically provide that (i) the Implementing Partner shall only act on instructions from the controller, and that (ii) the processing of personal data by the Implementing Partner will be subject to national legislation transposing the security and confidentiality requirements set forth in Articles 16 and 17 of Directive 95/46/EC.

- **Implementing Partner not subject to Directive 95/46/EC**

As for the latter case, Article 9(1) of Regulation 45/2001 additionally provides that *"personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out."*

To ensure the required "adequate level of profession", the EDPS recommends that DC AIDCO adopts the standard contractual clauses for the transfer of personal data to third country processors recommended by the Commission¹. While the EDPS recognises that the Commission is not an addressee of this Decision, he points out that Article 9(1) of Regulation 45/2001 should be interpreted in the light of Recital 12, which states the following:

"Consistent and homogenous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data should be ensured throughout the Community".

It is therefore reasonable to conclude that the purpose of the Regulation in relation to Article 9(1) is to ensure that the Commission is maintaining standards in its own contractual relationships that are both consistent and homogenous with those set out in its own decisions applicable to others.

3.10. Security measures.

(.....)

¹ Commission Decision of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC (2002/16/EC).

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing that all recommendations listed in point 3 above are fully taken into account. These include, without limitation, the following:²

- If the Implementing Partner is subject to Directive 95/46/EC, the contract between the Commission and its Implementing Partner should specifically provide that (i) the Implementing Partner shall only act on instructions from the controller, and that (ii) the processing of personal data by the Implementing Partner will be subject to applicable national legislation transposing the security and confidentiality requirements set forth in Articles 16 and 17 of Directive 95/46/EC.
- If the Implementing Partner is not subject to the Directive, the contract should include the standard contractual clauses recommended in Commission Decision 2002/16/EC.
- Any communication with the candidates' referees should be recorded on the Roster.
- The Specific Legal Notice should be amended to contain information concerning (i) the transfer of the candidates' data to a third party Implementing Partner and (ii) the policy on communications with referees as recommended above.
- A statement should be added to the sections of the CVs for next of kin and referees advising the candidates to inform the people concerned that they have submitted their names to the Roster.
- [...]

Done at Brussels, on 23 July 2007

Peter HUSTINX
European Data Protection Supervisor

² When commenting on the draft EDPS Opinion, the Commission described its plans how to implement some of these recommendations. The EDPS welcomes the Commission's efforts to swiftly address the recommendations. However, it points out that any proposed future changes to the existing procedures based on the EDPS recommendations will be addressed during the follow-up phase of this prior checking procedure rather than in this opinion.