

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission on verification of lack of conflict of interest of special advisers and its publication on Europa website

Brussels, 11 September 2007 (Case 2007-294)

1. Proceedings

On 7 May 2007 the European Data Protection Supervisor (EDPS) received a notification for prior checking from the Data Protection Officer (DPO) of the European Commission on the verification of lack of conflict of interest of special advisers and its publication on the Europa website. The DPO enclosed several attachments with the notification providing further details on the processing. The EDPS requested further information on 8 June 2007. The DPO answered on 12 July 2007.

2. Examination of the matter

2.1. The facts

According to Article 5 of the Conditions of employment of other servants of the European Communities for the purposes of these conditions, 'special adviser' means a person who, by reason of his special qualifications, is engaged to assist one of the institutions of the Communities either regularly or for a specified period. An official, and by analogy special advisor, shall not, in the performance of his duties, deal with a matter in which, directly or indirectly, he has any personal interest such as impair his independence, and, in particular, family and financial interests¹.

The notification states that the purpose of the processing is to analyse the activities of special advisers in order to avoid conflict of interest with their future activity as special advisers and to publish the declarations on honour on the Europa website once the special advisor is employed with the European Commission. To this end, before taking up their duties, special advisers are obliged to submit a declaration on current gainful activities and those of the last three years and indicating also the current activities in a voluntary or honorary capacity and those of the last three years. Some activities declared in this way may refer to political or trade union affiliation. Names, addresses and telephone numbers of the employers have to be included in the declaration. Furthermore, future special advisers must sign a declaration on honour stating the absence of conflict of interest between the activity as special advisor and other activities.

¹ Article 11a of the Staff Regulations. According to Article 124 of the Conditions of employment of other servants of the European Communities this provision must be applied by analogy to special advisers.

The Head of Unit of DG ADMIN/A5 (Organisation chart and staff management) receives the declarations on the honour and the declarations of activities. The Head of Unit of DG ADMIN/A5 (the controller) analyses both declarations. If, during the screening of the declarations of activities, a risk of a conflict of interest is identified, the concerned parties (the Special Adviser himself and the Commissioner, via his Cabinet) are informed that there is a risk of a potential or real conflict of interest. The Commissioner and the Special Adviser have the opportunity to react. If no assurance is given by the Commissioner or by the Special Adviser, DG ADMIN asks the Special Adviser for supplementary information which is transmitted to the Commissioner concerned in order to allow him/her to take an informed decision. Failing provision of assurance by the Commissioner concerned, the Commission does not award a contract to the Special Adviser. If a contract is already in force, the Commission puts an end to the contract.

If there is no conflict of interests, the Special Adviser can be appointed. The contract will be signed by both parties.

The contract to be concluded with the special advisors will be prepared by DG Personnel and Administration in cooperation with the Commissioner wishing to engage the special advisor. Documents received by the controller may be accessed by Head of Cabinet of the Commissioner in charge of Administrative affairs, audit and anti-fraud, the Commissioner to be assisted and DG ADMIN B3. A list of special advisors hired is sent to the budgetary authority. Special advisors' name, CV, photo, mandate and the Commissioner assisted as well as the declaration on honour will be published on the Europa website.

Data subjects are special advisers of the European Commission employed under Article 5 of the Conditions of employment of other servants of the European Communities, advising Commissioners.

Data subjects are informed about the identity of the controller, who is the Head of Unit of DG ADMIN A5. They are informed about the purposes of the processing, the recipients of the data, about their right of access and rectification, the legal basis of the processing, the time limit of the storage and about the right to have recourse at any time to the EDPS. Data subjects are furthermore informed that the questions on the declaration are of compulsory nature and have to be answered by the data subjects. This information is indicated in a note given to the future special advisor². The contract signed gives further details on the processing indicating that the special advisor's name, CV, photo, mandate and the Commissioner assisted as well as the declaration on honour will be published on the Europa website and will be made up to date, if necessary. Special advisors are invited to communicate any change of their other activities to DG ADMIN in order to keep data on special advisors up to date.

Personal data are kept by the controller for five years after the expiry of the contract with the special advisor. Data may be kept for longer if it is necessary for the establishment of a legal claim.

Paper copies of declarations received by DG ADMIN A5 are kept in a locked cabinet. Should the declaration be sent electronically, it is kept encrypted (zipped with a password/SECEM). DG ADMIN A5 uses the standard IT infrastructure of the Commission in order to ensure effective protection of the data. Physical access to the documents kept in relation to the

² Note on regulatory information on the protection of individuals with regard to the processing of personal data - special advisers: verification of no conflict of interest and publication on Europa

processing under scrutiny is limited to the staff of Unit A5. Any message (mail or e-mail) forwarding the declaration on activities is registered. Furthermore, in case of paper sending, "Staff matter" marking is applied.

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 ("the Regulation"). The processing implies collection, storage, consultation, use, transfer and dissemination 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 institution, in the exercise of activities which fall under the scope of Community law (Article 3(1)).

The processing of personal data is carried out partly by automatic means. Personal data processed form 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) of the Regulation contains a list of processing operations that are likely to present such risks including the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct. The procedure under scrutiny aims at establishing whether or not the person concerned can be engaged as a special adviser by the European Commission. To this end personal and professional aspects are analysed. This makes Article 27(2)(b) applicable and subjects the case for prior checking 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 7 May 2007. According to Article 27(4) the present opinion must be delivered within a period of two months. The two months period was suspended for 34 days for requesting further information, plus the month of August, and for 12 days to allow comments from the DPO, altogether for 76 days. Thus the present opinion must be delivered by 23 September 2007.

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.*" The procedure falls within the scope of the legitimate exercise of official authority vested in the European Commission. Thus the lawfulness of the processing is respected.

The processing of the CV and the declaration of activities is lawful according to the Articles 11 and 11a of the Staff Regulations and to the Decision of the Commission C(2004)1318 of 7 April 2004 on the Special advisers.

As it was mentioned among the facts, the special advisor's name, CV, photo, mandate and the Commissioner assisted as well as the declaration on honour will be published on the Europa website. There is no provision which would require the controller to do so. As to the legal basis of the processing, the notification referred to Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents. The EDPS acknowledges that the dissemination of the documents and data mentioned contributes to the transparency of the activities of the European Commission. However, the EDPS is not convinced that the special advisers' photo is needed to achieve high level of transparency and thus recommends to make their publication optional.

2.2.3. Processing of special categories of data

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) of the Regulation.

As it was referred to in the notification, the Curriculum Vitae and the declaration of activities may reveal political or trade union affiliation which are classified by the Regulation as special categories of data (Article 10(1)). These documents are processed by the controller. In addition, CVs are published on the Europa website. It must be noted that the information held in the CV and declaration of activities is in general overlapping. However, the differentiation of treatment between the CV and the declaration of activities can be justified by the fact that the information provided in the CV can be incomplete. In fact, there is no model of the CV that the special advisers have to follow. It can also not be excluded that the special adviser would not wish to publish on the internet some of his activities in order to protect special interests e.g. defence and military matters.

As regards processing of personal data included in the declaration of activities, the controller can rely on Article 10 (2)(b) which makes the processing lawful since these data are necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law, in particular Articles 11 and 11a of the Staff Regulations.

As regards the processing of special categories of data in the CVs, the EDPS agrees that these data can be made public since the data subject has given his or her consent to the processing. It must be, however, added that making public of CVs is only lawful if the controller gives sufficient information about the processing in advance.

The EDPS would like to underline certain aspects analysed in his background paper³ in which it was emphasised that once it has been determined that a document falls within the scope of Regulation No 1049/2001, and no other provision prohibits access, the decisive question is whether or not the exception (not allowing free access) of its Article 4(1)(b) applies. To this extent, three conditions must be fulfilled: a) the privacy of the data subject must be at stake, b) public access must substantially affect the data subject, c) public access is not in the present case allowed by the data protection legislation. The EDPS considers that Article

³ Public access to documents and data protection, Background paper of the EDPS issued in July 2005

4(1)(b) of the Regulation No 1049/2001 does not prevent the disclosure of the data (name, CV, photo, mandate and the Commissioner assisted as well as the declaration on honour) relating to the special advisors.

2.2.4. Data Quality

According to the Article 4(1)(c) of the Regulation "*Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*".

The data processed cover information mainly related to the professional career of the special advisors. Nevertheless, it is difficult to establish every possible category of data which may be included in the CVs. There is no model of the CV that the special advisors have to follow. It must be therefore ensured that special advisors' attention is drawn to the fact that CVs are subsequently published on the Europa website and that the data included in the CV are relevant. The controller should verify, before the publication on the Europa website, if the data included by the special adviser are not irrelevant or excessive in relation to the purpose of the processing.

The EDPS is of the opinion that, if that recommendation is taken into account, the procedure as designed will comply with the criteria set in Article 4(1)(c).

The Regulation also provides for that "*personal data must be accurate and, where necessary, kept up to date*" (Article 4(1)(d)). Providers of the data (the data subjects) are invited to notify any change of their particulars during the existence of the contract in order to keep data up to date.

The EDPS concludes that the procedure itself guarantees the accuracy and up to date nature of the data.

The data subject has the right to access and the right to rectify data, so that the data kept about him/her can be as complete as possible. This also makes it possible to ensure the quality of data.

2.2.5. Conservation of data/ Data retention

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 related to the verification of lack of conflict of interest are kept by the controller in a secure room for five years following the expiry of the contract. Documents and electronic files are then erased/deleted. Documents, however, may be kept for a longer period in case of pending legal claims, until the end of the legal claim.

The EDPS considers that this retention policy is in line with the Regulation and Article 4(1)(e) is complied with.

From the notification it seems to be obvious that data are not kept for statistical, historical or scientific purposes. Thus Article 4(1)(d) of the Regulation is not applicable.

2.2.6. Transfer of data

According to Article 7 of the Regulation "*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*".

Data processed in the framework of the verification of lack of conflict of interest may be transferred to the Head of Cabinet of the Commissioner in charge of Administrative affairs, audit and anti-fraud, the Commissioner to be assisted and DG ADMIN B3. The EDPS considers that this procedure is in line with the Regulation and Article 7 is complied with.

A list containing the names of special advisors is sent to the budgetary authority. Special advisors' name, CV, photo, mandate and the Commissioner assisted as well as the declaration on honour will be published on the Europa website and accessible by anyone. In the letter of 13 February 2007 (EDPS reference C 2006-0403⁴), the EDPS stated that there is no transfer of data to a third country, within the meaning of the Regulation, every time that personal data are published on the Internet through the Europa website by a controller in a European institution. Thus, although the rest of provisions of the Regulation apply, its Article 9 does not.

2.2.7. 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. Under Article 14 of the Regulation the data subject has the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

The right of access is obviously ensured to the data subject regarding the data published on the Europa website. The only document provided by the data subject and not published, the declaration of activities, is also accessible by data subjects. Article 13 of the Regulation is thus complied with.

Data subjects are expressly invited to notify any incomplete or inaccurate personal data provided and/or kept. The controller guarantees that incomplete or inaccurate personal data will be rectified upon request of the data subject. The EDPS considers that requirements of Article 14 are respected.

2.2.8. Information to the data subject

The Regulation states that data subjects must be informed of the processing of data relating to him/her 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 information processed by the controller originates only from the data subjects, Article 11 of the Regulation applies.

⁴ Available on :

http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Adminmeasures/07-02-13_Commission_personaldata_internet_EN.pdf

Data subjects are informed about the identity of the controller, the purposes of the processing, the recipients of the data, about their right of access and rectification, the legal basis of the processing, the time limit of the storage and about the right to have recourse at any time to the EDPS. Data subjects are furthermore informed that the questions on the declaration are of compulsory nature and have to be answered by the data subjects. Data subjects are also informed about the fact that the special advisor's name, CV, photo, mandate and the Commissioner assisted as well as the declaration on honour will be published on the Europa website.

The EDPS considers that the information given to the data subjects is sufficient and Article 11 of the Regulation is complied with.

2.2.9. 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 considerations are fully taken into account:

- The publication on the Europa website of the special advisers' photo should be optional.
- The controller should verify, before the publication on the Europa website, if the data included by the special adviser in his/her Curriculum Vitae are not irrelevant or excessive in relation to the purpose of the processing.

Done at Brussels, 11 September 2007

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