



Opinion on a notification for Prior Checking received from the Data Protection Officer of the Commission regarding the selection of senior officials in the Commission

Brussels, 17 September 2007 (Case 2007-193)

1. Proceedings

On 20 March 2007, the European Data Protection Supervisor (hereinafter 'EDPS') received from the Data Protection Officer of the Commission a notification for prior checking regarding the data processing operations that take place in the context of the selection of senior officials in the Commission ('the Notification'). The data processing operations are mainly carried out by DG PERSONNEL AND ADMINISTRATION ('DG ADMIN'), recruiting Directorates-General ('recruiting DG') and the Consultative Committee on Appointments ('CCA').

On 27 April 2007, the EDPS requested complementary information from DG ADMIN A5 regarding the data processing. DG ADMIN A5 provided the information on 31 May 2007. On 19 June 2007, the EDPS decided to extend the two-months period deadline for one month to deliver his opinion as foreseen by Article 27.4 of Regulation (EC) No 45/2001 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 (hereinafter "Regulation (EC) No 45/2001"). This was due to the complexity of the data processing actions at stake and the new information received with the responses to the EDPS request for further information, which called for further analysis. On 18 July 2007, the EDPS sent the draft Opinion to DG ADMIN for comments informing that the month of August would not count towards the two months period during which the EDPS has to issue a formal opinion. DG ADMIN A5 responded on 11 September 2007.

In addition to analysing DG ADMIN A5's comments, at this time, the EDPS had the opportunity to review and take into account for the purposes of this Opinion, the European Ombudsman's decision of 10 July 2007 which concluded that the Commission had violated some provisions of Regulation (EC) No 45/2001 in processing personal data for the purpose of selecting senior officials in the Commission. The Ombudsman's decision was issued in answer to a complaint against the Commission for unauthorised disclosure of personal information occurred in the context of a procedure for the selection of senior officials. In particular, the European Ombudsman's decision deals with the so called "second and third leaks" to the Maltese press of the names of several candidates for the post of Head of Representation of the Commission in Malta¹. The EDPS understands that the data processing operations notified to the EDPS have been overhauled in order to minimize the chances for similar disclosures to occur again.

¹ Decision of the European Ombudsman on complaint 452/2005/BU against the European Commission, adopted on 10 July 2007. In this regard, the EDPS opened and later closed an investigation into the so called "first leak" of the same type of information in a Maltese newspaper.

2. Examination of the matter

DG ADMIN organises and manages the selection process of senior officials in the Commission in order to select the best suited candidates for a particular position². The positions are open to internal candidates and in some cases vacancies are also open to external candidates. The procedures that are the object of the Notification refer to the selection of both external and internal candidates, either through the procedure of transfer or promotion as defined under Article 29.1 a (i) and (iii) of the Staff Regulations ('internal selection procedure') or through a so-called 'external selection procedure' whereby recruitments may be made from outside the institutions (Article 29.2 of the Staff Regulations)³. The data processing operations that take place in the context of selecting senior officials in the Commission are summarised below under section 2.1.

In analysing the data processing operations in the context of the current prior check, the EDPS notes that the processing operations aim at maintaining confidential the names of participants in senior management recruitment procedure. This procedure is opposed to the so-called open procedures where the names would be disclosed to the public in general. This system has been suggested by the European Ombudsman. Where such open procedure would be in line with Article 4 of Regulation 45/2001⁴, it is up to the Commission to decide on the approach it wants to follow in the selection procedures, whether to disclose or not the names of candidates. Thus, the EDPS has analysed the current data processing operations under the current approach, based in the confidentiality of names, without challenging this approach.

2.1 The Facts

The data processing operations that take place in the context of selecting senior officials in the Commission can be summarised as follows:

Further to the *receipt* of CVs and motivations letters for a specific vacancy through e-mail (in case of an internal selection procedure) or through the so-called 'CV-online encadrement superieur' (for an external selection procedure), DG ADMIN A5 proceeds to the *filing* of these documents and carries out a *prior eligibility check*. Secondly, a pre-selection panel set up by the recruiting DG *analyses* the documents received by each candidate *and interviews* certain candidates. A report containing the list of candidates best qualified is submitted to the CCA, a consultative body whose role is to deliver opinions on the suitability of candidates to senior positions in the Commission. Thirdly, on the basis of the pre-selection report and other information gathered, the CCA issues a preliminary opinion on the most suitable candidates. These candidates undergo further assessment. In order to carry out the further in-depth assessment, the CCA uses various tools, including the latest Career Development Report (for internal applicants only) the results of assessment centre tests that candidates have been asked to undergo with an external human resources consultant and an interview with the members of the CCA in the presence of the external human resources consultant. Finally, the CCA establishes a shortlist accompanied by an evaluation sheet of each candidate which is communicated to the Commission. Before the final appointment by the Commission, candidates are interviewed by one or more members of the College.

² The term 'senior officials' refers to officials occupying functions corresponding to the basic post of Director General in grades AD 16 or AD 15 as well as those occupying functions corresponding to the basic post of Director in grades AD 15 or AD 14.

³ External procedures are opposed to internal procedures whereby vacancies are filled by promotion or transfer, internal competition and inter-institutional transfer.

⁴ Provided that candidates had been informed in advance that such disclosure would be made and have the opportunity to ask for confidentiality on legitimate grounds.

The main criteria taken into account for the selection of senior officials are merit, gender balance and geographical balance.

The **purpose** of the data processing operations is to manage the selection of senior officials for the Commission in order to select the best suited candidates for each particular position.

The **primary responsibility** for the data processing lies within DG ADMIN. In particular, within this DG, the main responsibility is co-shared by Unit A5 and the Unit responsible for the secretariat of the Consultative Committee for Appointment (ADMIN CCN-Proc). These two units, together with the recruiting DG and the CCA, carry out most of the data processing operations involved in the selection of candidates. In addition, some of the processing is carried out by a human resources consultant ('contractor') at an assessment centre. The contractor is established in Belgium and is bound by Belgian data protection legislation. A contract between the contractor and the Commission establishes the rights and obligations of both parties. As far as the role of the contractor is concerned, the contract clearly establishes his role as data processor⁵ by stipulating that the contractor acts only on instructions from the Commission, *"notably as concerns the purposes of the processing, the categories of the data which may be processed, the recipients of the data and the means by which the data subject may exercise his rights"*. The contract imposes upon the contractor the obligation to adopt appropriate technical and organisational security measures to protect the personal data.

The data processing operations that take place in the selection of senior officials in the Commission are both manual and electronic, and sometimes it is difficult to separate the two types of processing operations. As further illustrated below, the documents that reflect the assessment of candidates to senior positions are produced, stored and transmitted electronically. However, they are also stored and sometimes distributed in paper form. The list of the most relevant **manual and electronic operations** carried out in the context of the selection of senior officials in the Commission can be summarised as follows:

(i) Reception by DG ADMIN A5 of CVs and motivation letters and further storage in a server accessible to DG ADMIN A5 and DG ADMIN CCN-Proc. The server drive where the information is stored is referred to as "R/Encadrement".

(ii) Upon receipt of CVs and motivation letters for a specific vacancy, DG ADMIN A5 proceeds to make printouts which are subsequently stored in files in DG ADMIN A5.

(iii) Transfer of the above information to various recipients within the Commission involved in the selection. Such transfers take place not only within DG ADMIN but particularly towards other Directorates Generals. Also, a copy of each document is sent to the Secretary General Unit A1 for the production of the so-called PERS document⁶. Whereas most of the information sent to the various recipients in the Commission is transferred by e-mail, the information is sent by e-mail and in paper form to the Secretary General Unit A1.

(iv) *Assessment* by a pre-selection panel set up by the recruiting DG of all the applications received, based on the information submitted by candidates and possibly interviews⁷. *Drafting* of a report containing the list of the candidates best qualified which is subsequently transferred electronically to the CCA.

⁵ A data processor is a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the data controller.

⁶ Documents quoted "PERS" by the Secretariat-General (SG.Direction A: "Registry and Commission decision making process") which include all documents relative to personnel matters in support of Commission decisions.

⁷ The pre-selection panel is formed by permanent officials occupying at least the same function as the position to be filled.

(v) *Assessment* by the CCA of the pre-selection's panel report, evaluation grids and various documents received from candidates. *Adoption* of a preliminary shortlist of candidates.

(vi) *Invitation* of short listed candidates to take *tests* in an assessment centre which is an external human resources consultant, operating under the instructions of the Commission. The assessment centre submits a report on each candidate to the CCA. The reports are stored in paper form and electronically by DG ADMIN CCN-Proc.

(vii) The CCA, after *considering* the above information and the performance of each candidate during an interview, which is *reflected* in evaluation sheets, *issues* a formal opinion. The opinion together with the evaluation sheets and the CV's of the candidates is sent by e-mail to the portfolio Commissioner(s) and to the Director General of the recruiting DG; a paper copy is sent to the Secretariat General for the preparation of a PERS document.

(ix) The Commission takes a decision during a Commission meeting on the most suitable candidate.

As indicated above, manual and electronic data processing operations are to a certain extent intertwined. Indeed, most of the processing operations described above are somehow reflected in electronic documents or transmitted electronically.

The ***types of data subjects*** whose data is collected in the course of the selection of candidates for senior posts within the Commission include the following: (i) officials of the EU institutions which are commonly referred to as "internal candidates" and, (ii) external applicants, i.e., individuals who are not permanent officials, civil servants of the EU institutions and who apply for a given position or who are an official of an EU Institution but do not yet possess the required minimum seniority to apply for a senior management position through an internal selection procedure.

The ***categories of data*** collected and further processed include the following: (i) Identification data, which may include surname, first name, date (and place) of birth, sex, nationality, telephone number, email address; (ii) Education and professional experience, which may include the degree/diploma giving access to doctoral studies, date of award of degree, length of professional experience, length of management experience, languages spoken and level, previous working experience in the European Institutions and personnel number (if applicable); (iii) Data related to the suitability of a candidate for a particular vacancy, which may include the assessment by the pre-selection committee as regards the eligibility of the candidate, the matching of the application with the selection criteria and the performance during the interview(s); the performance of candidates in the present position if they are an established official of the European Commission as recorded in the Career Development Report; the performance of candidates during the assessment centre tests as recorded by the human resources consultant, and the Consultative Committee on Appointments evaluation of candidates who have been invited for an interview.

The ***sources of personal data*** are twofold: In the first place, data are provided directly by candidates, mostly as part of their curriculum vitae and supporting documents. This is done through e-mail (in case of an internal selection procedure) or through the application 'CV-online encadrement superieur' (for an external selection procedure). In the second place personal data are generated by the pre-selection panel and by the CCA, as a result of their selection tasks. In the case of an external selection procedure, the data provided directly by individuals is provided through filling an on-line application, which is a necessary requirement in order to be considered for an advertised position. While applying for a particular position, applicants are asked first to fill in a registration form which, among others, asks for the personal details, studies, languages and whether the individual has worked for the institutions. Then, the individual is allowed to apply for the vacancy. Information requested includes the years of professional experience and

the years of professional experience in a management or advisory function at a high level. Candidates are also asked to enter a letter of motivation and attach a CV.

As far as the **conservation** of the data is concerned, according to the Notification, the selection dossiers (paper version) are destroyed 10 years after the end of the selection procedure. In case of legal action against the appointment decision, the 10 years retention period is extended until one year after the final decision. According to the privacy statement of "CVONLINE Encadrement Supérieur" the retention period for the electronic version of CVs and motivation letter is 12 months after the nomination of the selected candidate. The conservation periods vary according to the storage media of the documents and the nature of the documents: 10 years storage for paper selection dossiers to keep information in case of complaints and 12 months for electronic version of CVs and motivation letters in CVONLINE as they are in a separate application which is used only for the candidates to apply. This information is then moved to R drive and used for the selection process.

The data stored in paper form are kept by ADMIN.A.5, locked in a room. The electronic data are stored in a shared drive R/Encadrement, with access limited to DG ADMIN A5 and DG ADMIN CCN-Proc. The servers are located in the Commission's data center.

The data controller may **transfer personal data** gathered in the context of the selection of senior officials in the Commission to the following types of recipients, all of which are community institutions or bodies:

(a) During the **first phase** (receipt of information), the CVs and motivation letters are made available to the DG which has a vacant post, in particular to the Head of Unit of the Human Resources Unit. In addition, the same information is made available to the Commissioner in charge of Personal and Administration, to the Private Office of the President, the Private Office of the portfolio Commissioner, the Secretary General, the Director General DG ADMIN, the Director DG ADMIN A, the president of the pre-selection committee, the CCA Permanent Rapporteur and the Rapporteur for the procedure. Finally, the same information is sent to the members of the pre-selection panel by e-mail.

(b) During the **second phase** (assessment by the pre-selection committee), the report prepared by the pre-selection panel at the end of the phase, together with evaluation grids is sent to the CCA.

(c) During the **third phase** (assessment by the CCA), when the CCA has already issued a formal opinion, the CVs, motivation letters, opinion of the CCA and evaluation sheets will be sent to the Private Office of the Portfolio Commissioner(s) and, when required, to the Private Office of the Commissioner in charge of Personal and Administration (for Deputy Director-General and Director-General positions) and to the Private Office of the Commission President (for Director-General positions). The same information is sent to the SG for the preparation of the so-called PERS document which will then be sent to all Commissioners, Director General DG ADMIN and SJ and the DG concerned.

(d) At the end of the process, the data of the selected candidate are sent to the Medical Service and the Office for the Administration and Payment of Individual Entitlements ("PMO").

As far as the **right to information** is concerned, the Notification explains that information is given through different channels depending on whether the candidate is an EU civil servant or an external candidate.

In the latter case, information to candidates is given on-line, through the Web site of DG ADMIN A5. This takes place when candidates register their profile which is a necessary step

prior to registering on-line for a particular vacancy. The Web site that contains the list of vacancies is the following one:

http://ec.europa.eu/dgs/personnel_administration/working_senior_mgt_en.htm.

A copy of the privacy statement providing the relevant information was annexed to the Notification. A member of the EDPS staff registered her profile as a test in order to check how information was provided to candidates. It was noted that a pop up box was displayed prior to opening the registration web page. Individuals were asked to click on an "accept button" before they could register their profile. It was noted that the pop-up window with the privacy statement could not be printed or otherwise saved on the individual computer or anywhere else. Later on, the system has been changed and the privacy statement has been made available at the top of the Web-page with a pop-up window allowing candidates to print and save it.

For internal selection procedures, information is provided to candidates after they have sent their application (the CVs and motivation letters) to the functional mailbox ADMIN-JOB-VACANCIES-MANAGEMENT@ec.europa.eu. The EDPS understands that upon receipt of the application, they are sent a copy of the privacy statement that is available in the Web site, prior to registering for a position.

Staff from the EDPS office noted that the privacy statement available on the web site http://ec.europa.eu/dgs/personnel_administration/working_senior_mgt_en.htm contained information on the identity of the data controller, the purposes of the processing, categories of data processed, legal basis, the recipients of the data, the existence of a right of access and the right to rectify. It also contains the time limits for storing the data and the candidates' right to consult the EDPS. The EDPS noticed some inconsistencies between the paper version of the privacy statement submitted with the Notification (in French) and the version that appeared in the Website when a member of the EDPS Staff registered her profile. On 25 May 2007, the data controller explained to the EDPS that whereas the Notification was accompanied by the final version of the privacy statement, there had been a delay in uploading the latest version of the privacy statement on the Website, which still featured the old version, when the Notification was submitted to the EDPS. The data controller confirmed that the problem had been fixed.

As far as ***access rights and rectification*** are concerned, as described in the privacy statement, individuals are recognised such rights and they are informed that they can be exercised by contacting the data controller. No further information is given about the procedure.

The privacy statement also recognises the right to access the data held by the sub-contractor, after the selection has taken place. The privacy statement says that the information will be provided "orally". There is no reference to the possibility to access the decisions and information sheets on each candidate taken by the pre-selection committee or the Consultative Committee on Appointments.

As far as ***security measures*** [.....]

2.2. Legal Aspects

2.2.1. Prior Checking

This Notification relates to the procedure that takes place within the Commission, mainly DG ADMIN A5 and DG ADMIN CCN-Proc, the recruiting DG and the CCA towards hiring senior officials, starting with the publication of a vacancy until the end phase where the most suitable candidate is selected. The data processing operations start with the collection of CVs and motivation letters. They continue with the assessment of candidates which is reflected in reports

and paper sheets that are stored and transmitted electronically. The final step is the selection of the most suitable candidate. Taking this into account, this Opinion will assess the extent to which the data processing operations described above carried out by the Commission with the purpose of selecting the best candidates are in line with Regulation (EC) No 45/2001. This Opinion will not address data processing operations that go beyond this scope. For example, the data processing that takes place after the selected candidate has accepted the job, such as the data processing carried out by the Office for the Administration and Payment of Individual Entitlements ("PMO"), for example in the context of the payment of salaries, pensions, mission expenses, are not dealt under this Opinion. In fact, some of such data processing operations have already been the object of a previous prior check Opinion by the EDPS⁸.

Applicability of the Regulation. Regulation (EC) No 45/2001 applies 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*" and to the processing "*by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law*"⁹. For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the selection of senior officials in the Commission entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described in the Notification, personal data of individuals who apply for senior positions in the Commission are collected and further processed.

Second, as described in the Notification, the personal data collected undergo "*automatic processing*" operations, as defined under Article 2(b) of the Regulation (EC) No 45/2001 as well as manual data processing operations. Indeed, some of the personal information is collected electronically directly from members. Other information is created by the pre-selection panel or CCA on the basis of the candidates' performance and it is stored and transferred electronically at a later stage.

Finally, the processing is carried out by a Community institution, in this case two units within DG ADMIN (DG ADMIN A5 and DG ADMIN CCN-Proc), the recruiting DG and the CCA, which are part of the European Commission, in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001). Therefore, all the elements that trigger the application of the Regulation are present in the selection of officials for senior positions in the Commission.

Grounds for Prior Checking. Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*processing operations likely to present specific risks to the rights and freedoms of data subject 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, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of selecting officials for senior positions in the Commission precisely aim at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, the data controller will perform various assessment activities such as weighing up whether the individual in question matches the selection criteria, judging his/her performance during the interviews, judging the performance of each candidate in his/her current positions,

⁸ See for example Opinion of 10 July 2007 on a notification for prior checking related to management of the sickness insurance scheme carried by the PMO (Case 2004-238); Opinion of 22 June 2006 on a notification for prior checking on "SYSPER2- e-CV, the Commission's human capital database" (Case 2005-406) and Opinion of 4 February 2005 on the notification for prior checking relating to the appraisal of senior management staff (Case 2004-95). These opinions are available at: <http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/40>

⁹ See Article 3(2) of Regulation (EC) No 45/2001.

etc. In sum, taking the above into account, clearly the data processing operations fall within Article 27(2) (b) and must therefore be prior checked by the EDPS.

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, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

Notification and Due Date for the EDPS Opinion. The Notification was received on 20 March 2007. On 19 June 2007, the two months period deadline for the EDPS to deliver his opinion was extended by one month. The period within which the EDPS must deliver an opinion was suspended for a total of 58 days to request further information from DG ADMIN and allow for comments on the draft EDPS Opinion. In addition, the two months period deadline was also suspended during the month of August. The Opinion must therefore be adopted no later than 18 September 2007.

2.2.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, the grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if 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*".

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) No 45/2001, two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

Legal Basis. In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations that take place in the context of the selection of officials for senior positions in the Commission, the EDPS takes note of the following legal instruments: (i) Article 29 of the Staff Regulations; (ii) Rules of procedure for the Consultative Committee on Appointments of 6 February 2007 (C(2007) 380/2) and, (iii) the Compilation Document on Senior Officials Policy of 25 October 2004 (SEC (2004) 1352/2). As further described below, these legal instruments set forth the overall policy and specific procedures that the Commission must follow in order to appoint officials to senior positions in the Commission. In addition, the Rules of procedure for the Consultative Committee on Appointments define the rules of procedure of the CCA, whose intervention is an integral part of the selection of candidates for senior positions.

In particular, Article 29.2 of the Staff Regulations establishes that "*A procedure other than the competition procedure may be adopted by the Appointing Authority for the recruitment of senior officials (Directors-Generals or their equivalent in grade AD 16 or AD 15 and directors or their equivalent in grade AD 15 or AD 14) and, in exceptional cases, also for recruitment to posts which require special qualifications*". Thus, Article 29.2 of the Staff Regulation authorises the European institutions, in this case the Commission to engage in selection procedures other than the competition procedure in order to recruit senior officials. Article 29 of the Staff Regulations was complemented by the Compilation Document on Senior Officials Policy of 25 October 2004 (SEC (2004) 1352/2) which defines the concrete procedures for the selection of candidates for senior positions in the Commission in a single document.

Upon analysis of the above legal framework, the EDPS considers that the data processing that takes place in connection with the selection of candidates for senior positions in the Commission is carried out on the basis of (i) the Staff Regulations (Article 29), (ii) Rules of procedure for the Consultative Committee on Appointments of 6 February 2007 (C(2007) 380/2) and (iii) the Compilation Document on Senior Officials Policy of 25 October 2004 (SEC (2004) 1352/2). These legal instruments foresee that the Commission engages in selection procedures in order to select internal or external candidates for senior positions. Towards this end, specific procedures have been created that ensure the selection of the best suited candidates in a transparent manner. In conclusion, the EDPS considers that the data processing that occurs in the context of the selection of senior officials is legally based on the above legal instruments.

Necessity Test. According to Article 5(a) of Regulation (EC) No 45/2001, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing that occurs in the context of the selection of senior officials is "*necessary*" for the performance of a task, in this case, for the selection of the best suited candidates.

As outlined above, under the Staff Regulations and secondary legislation, the Commission is entitled to adopt procedures to recruit candidates for senior positions. To put into practice this provision, it is necessary for the Commission to collect and further process personal information of candidates. Unless the Commission collects CVs and motivation letters and unless it can test the candidates through various procedures in order to evaluate their competences and whether they match the selection criteria, it would not be possible for the Commission to ensure a fair selection of candidates. In conclusion, it is the EDPS's view that the data processing that takes place in the context of the selection of officials for senior positions is necessary to ensure the selection of the best candidates in an open, fair and transparent way.

2.2.3. Processing of Special Categories of Data

Article 10.1 of Regulation 45/2001 establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject ex Article 10(2)(a).

The Notification states that no data falling under the categories of data referred to in Article 10.1 are processed in the context of the data processing operations notified for prior checking. Taking into account the overall purpose pursued by the Commission when it engages in data processing operations to select officials for senior positions, the EDPS understands that the collection of special categories of data is not the Commission's intention in the context of such selection. Indeed, the gathering of special categories of data does not seem very helpful towards selecting candidates insofar as such data may be irrelevant for the purposes of selecting the best suited candidate. However, the EDPS considers that in the context of selecting candidates for senior positions, applicants may reveal information on their disability or other types of special categories of data. If this occurs, it should be considered that candidates have given their consent to the processing of that data, thus, the condition of Article 10(2) (a) would be met. In addition, this consent is given in the context of staff management (recruitment) in order to enable the employer to comply with his specific obligations in the field of employment law to provide for extra time and to provide specific IT equipment for the tests ex Article 10(2)(b) of the Regulation according to which the prohibition shall not apply where the processing is "*necessary for the purpose of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is*

authorised by the treaties establishing the European Communities or other legal instruments adopted on the basis thereof".

Article 10.5 of Regulation (EC) No 45/2001 establishes that "[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." According to the Notification no such data are collected in the context of the selection of candidates for senior positions.

2.2.4. Data Quality

Adequacy, Relevance and Proportionality. Pursuant to Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This is referred to as the data quality principle.

The type of information requested to apply for a senior position is twofold: on the one hand, in an external selection procedure, candidates are asked to fill in an on-line application form which contains two standard questions, namely, the number of years of professional experience after obtaining the university degree and the number of years of experience in a management or advisory function at high level. On the other hand, candidates are asked to provide a CV and a letter of motivation which must be sent by e-mail to DG ADMIN A5 for an internal selection procedure or uploaded in the on-line application form for an external selection procedure. The EDPS considers that the questions which candidates have to answer are adequate and relevant in relation to the purposes for which they are intended to be used. Indeed, in order to determine whether a candidate complies with the minimum conditions of eligibility for a senior position, the Commission must necessarily know his/her years of experience and the years of experience in management or advisory functions. Furthermore, CVs and a motivation letters can be considered as relevant and adequate information for the purposes of selecting candidates for a given position. Only if the Commission has information on the education and professional experience as well as on the candidate's suitability for a given job, will the Commission be able to select the best suited candidate. In sum, the EDPS considers that the information collected from candidates in the context of the selection of candidates for senior positions in the Commission complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

Fairness and Lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.7.

Accuracy. According to Article 4(1)(c) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date, and every reasonable step must be taken to ensure that the data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*". In this case, an important part of the data has been provided by the applicant himself/herself. This procedure itself helps to guarantee the accuracy of the personal data. However, other information is not provided directly by the individual but generated by the various assessment bodies. In this regard, as further developed below, it is important for the candidate to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data hold about them is accurate. In this respect, see also Section 2.2.8.

2.2.5. Conservation of Data

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

As stated in the facts, there is a certain ambiguity concerning the storage periods presented to the EDPS with the Notification and as it is stipulated in the privacy statement. According to the Notification, the selection dossiers are destroyed 10 years after the end of the selection procedure. In case of legal action against the appointment decision, the 10 years retention period is extended until one year after the final decision. However, according to the privacy statement the retention period for the CVs and motivation letter is 12 months after the nomination of the selected candidate. At the same time, the privacy statement recognises that the results of the assessment centre have a validity of two years, which implies that such results are kept for at least two years.

The EDPS recommends that the controller clarifies and reconsiders the storage periods. DG ADMIN should reconsider whether keeping applications and relevant documentations for 10 years is necessary, or whether a shorter deadline would be sufficient. In this regard, in principle and since a comprehensive justification is lacking regarding retention, the EDPS has reservations about the need to keep the data for such a long period. The EDPS considers that a maximum period of 5 years would be sufficient for the purposes of facing possible challenges for non-selected candidates, as this is the approximate period during which documents are required to be kept under the Financial Regulation. This is even more the case regarding data of informative nature such as the address, telephone number, etc. Of course, data of candidates that are successful may be retained longer by other data controllers who will have to process such data in the context of their data processing operations. For example, parts of such data will be kept in the personal file of the recruited person. This Opinion does not address the adequacy of such retention periods, which need to be reviewed in the context of each particular data processing operation.

According to the Notification, the possibility for storing data for historical, statistical or scientific reasons appears to be excluded.

2.2.6. Transfers of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made to (i) Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

According to the Notification except for the transfers to the data processor, addressed below, the rest of the transfers are made to Community institutions and bodies, thus, Article 7 of the Regulation applies. Article 7 of Regulation (EC) No 45/2001 requires personal data to be transferred "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary.

The EDPS considers that the transfers of information to the recipients described in the Notification for the purposes stated comply with the first requirements. Indeed, all the recipients have the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the candidates. The level and concrete tasks vis-à-vis the assessment varies depending on the recipient. All the recipients, at some point of the procedure have the obligation to assess the candidates. This applies to the members of the pre-selection committee, to the CCA

as well as to the Member(s) of the Commission, particularly to the portfolio Commissioner, who must be able to choose an individual with whom he/she feels that it can build a relationship of trust and confidence.

However, the EDPS questions whether the amount of data transferred to each one of the above mentioned recipients is necessary in relation to the purposes for which the data are transferred and further processed by each recipient. In particular, the EDPS questions whether the transfer of information to the various recipients in the first phase of the procedure is necessary. Let us recall that during the first phase (receipt of information), the list of candidates and their CVs are made available to the DG which has a vacant post, in particular to the Head of Unit of the Human Resources Unit. The same information is also made available to the Commissioner in charge of the Personal and Administration, to the Private Office of the President, the Private Office of the portfolio Commissioner, the Secretary General, the Director General DG ADMIN, and the Director DG ADMIN A, the president of the pre-selection committee, the CCA Permanent Rapporteur and the Rapporteur for the procedure. Taking into account that the candidates have to undergo various selection phases during which most of them will not be selected, it seems unnecessary to send the complete CVs and list of candidates to the recipients/assessors who only intervene at the end of the selection process. For example, if the initial list has 100 candidates for one post for which 10 members will be short listed, it seems pointless to send the names and CVs of the 100 individuals to recipients other than the Head of Unit Resources of the recruiting DG and the members of the pre-selection and CCA committees. The role played by the remaining recipients (the Commissioner in charge of the Personal and Administration, the Private Office of the President, the Private Office of the portfolio Commissioner, the Secretary General, the Director General DG ADMIN, the Director DG ADMIN A) at the early stages of the selection process is uncertain. However, if the role is to have an overview of the level of interest generated by a given position and an overall view of the number of candidates, it would seem unnecessary for them to have the whole dossier of each candidate. Instead, a report stating the number of candidates should be sufficient.

As described in the facts, information about candidates is transferred and further processed by the human resources consultant ('contractor'). The contractor is established in Belgium and is bound by Belgian data protection legislation. The EDPS considers that the contractor is a data processor as defined under Article 2 (e) of Regulation (EC) No 45/2001. It was confirmed that a contract has been signed with the contractor which, among others, imposes upon the contractor the obligation to adopt appropriate technical and organisational security measures to protect the personal data. In sum, the EDPS considers that Article 23 of Regulation (EC) No 45/2001 is complied with.

2.2.7. Right of Access and Rectification

According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

According to the privacy statement, individuals are recognised such rights and they are informed that they can be exercised by contacting the data controller. No further information is given about how and at which stages this can be done. There is no reference in the statement to the possibility to access the decisions and information sheets on each candidate taken by the pre-selection committee or the Consultative Committee on Appointments. However, the privacy statement recognises the right to access the data held by the sub-contractor, after the selection has been completed. The privacy statement says that the information will be provided "orally".

The EDPS recalls that candidates should be able to have access to their entire file, comprising the grids and assessment notes concerning them drafted by the various committees competent for their assessment (pre-selection panel and CCA). Because part of the assessment procedure is based on answers given in oral interviews, candidates should be able to receive the marks/comments obtained in this type of test. For example, written feed-back could be a re-transcription of the parts of the selection file which concern the evaluation of performances of each candidate.

The EDPS is aware that there is a limitation to this rule; this is the principle of the secrecy of selection committee's proceedings, as set out in Article 6 of Annex III to the Staff Regulations. Accordingly, no marks given by individual members of the committee should be given. The EDPS notes that in the area in which the selection committee is covered by the principle of secrecy, the right of access does not apply even though personal data are processed, if that area is covered by the exception in Article 20(1)(c) for the protection of the rights of others, in this instance both the right of selection board member themselves and their need to have their independence reinforced and the right of other applicants to be treated fairly and in like fashion. Article 20 (1) states that "*The Community institutions and bodies may restrict the application of () Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject of the rights and freedoms of others*". This means that information comparing the data subject with other applicants should not be provided and no information should be given regarding the particular remarks of members of the committees. The EDPS calls upon DG ADMIN to ensure the application of the right of access as described above.

Regarding the right to access to the data held by the sub-contractor, the EDPS fails to understand why such information is limited to an "*oral feedback on his/her results*". In cases of a selection test based on multiple-choice answers, the EDPS considers that individuals should be able to have copies of the written answers and a copy of the sheet of correct answers on request. In case of a written test, candidates should be able to obtain a copy of their answer paper on request and the individual assessment sheet showing the assessment of the test.

The EDPS considers that in the context of this data processing, the applicant's right of access to information concerning them directly and individually must be strictly complied with. It enables applicants to see which elements were taken into account for the overall assessment. Access to such data should be offered on the basis of Article 13 of the Regulation, thus not implying any right of rectification. Right of access under Article 13 does not serve the same purpose as under Article 14 of the Regulation (right of rectification). The applicant's right of access enables them to see that the selection board has acted fairly and objectively. Such a right does not interfere in any way with the principle of equal treatment of applicants since it is open to all of them.

The right of rectification on the other hand, can obviously apply only to factual data. Marks allocated could not under any circumstances be open to a right or rectification by the data subject, except in the context of the appeals established appeals procedures. Furthermore, the EDPS notes that limitations to the right of rectification of candidates' data, after the deadline for the sending of documents regarding a given competition may be necessary for different reasons, including of practical nature. In this regard, the EDPS considers these limitations can be seen as necessary to ensure objective, certain and stable conditions for the competition, and essential to the fairness of processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

In the light of the above, the EDPS recommends that DG ADMIN sets up procedures to ensure access to candidates' personal data as described above. Information about the procedures to exercise the right of access should be given to individuals, in the privacy statement. In addition, the EDPS considers that the Compilation Document on Senior Officials Policy of 25 October 2004 (SEC (2004) 1352/2) and the Guidelines for Candidates on Senior Management

Appointment Procedures should refer to the existence of the right of access and the procedures to exercise it. Thus, the EDPS calls upon DG ADMIN to modify these documents to refer to the existence of these rights.

2.2.8. Information to the Data Subject

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

In order to comply with this obligation, information to candidates is given through an e-mail notification in case of an internal selection procedure or on-line, through the Website of DG ADMIN for an external selection procedure. This takes place when candidates register their profile which is a necessary step prior to registering on-line for a particular vacancy. Prior to the opening of the registration page, a pop up box is displayed which contains the privacy statement. Unless individuals click on the "accept button" which means that individuals acknowledge that they have been informed, they can not register their profile. The pop-up window with the privacy statement can not be printed or otherwise saved in the individual computer or anywhere else. This means that individuals have no possibility to go back to the privacy policy to check the information contained in the privacy statement.

The EDPS considers the provision of information through the pop-up window provided interactively on the screen appropriate. The EDPS also finds it appropriate to provide the information before collecting any information from individuals. However, the EDPS considers that the technical set up should allow individuals to save or print out the privacy policy. Individuals are not expected to remember the content of the privacy statement; therefore it is important that they have the possibility to go back to it after the registration of their profile and read the details regarding the processing of their personal data. For example, if individuals wish to exercise the right of access, they will need to consult the privacy statement in order to understand the procedures and address where they can do so. In this case, candidates should be alerted of their need to print out or save the privacy statement. Alternatively, the privacy policy should be set up in a way that candidates could go back to it as many times as they wish, directly on the website. The EDPS is glad to learn that the system has been changed and now it allows candidates to both print and save the privacy statement.

The EDPS also reviewed the content of the information provided in the privacy statement to verify whether the content satisfies the requirements of Articles 11 and 12 of Regulation (EC) No 45/2001. The privacy statement contains information on the identity of the data controller, the purposes of the processing and how the data is processed, the conditions for the exercise of the right of access and the legal basis for the processing operations. The EDPS considers that the privacy statement contains most of the information required under Articles 11 and 12 of the Regulation, however, he considers that several amendments would contribute to ensure full compliance with Articles 11 and 12, in particular:

- (i) In order to ensure full transparency and fair processing, it would be appropriate to add a contact address (that of the data controller or someone from his Unit) where individuals could send questions regarding the privacy statement and the overall data processing.
- (ii) The information regarding the right of access vis-à-vis the information hold by the assessment center should be amended.
- (iii) Clear information on the time limits for storing the data should be included.

2.2.9. Security measures

[.....]

3. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations in this Opinion are fully taken into account. In particular, DG ADMIN must:

- Clarify and reconsider the storage periods. In particular, evaluate why a shorter maximum period of 5 years is not sufficient for the purposes pursued (as opposed to the current 10 years storage period).
- Limit the amount of information transferred during the first phase. Recipients other than the pre-selection committee and the CCA should only receive a report stating the number of candidates without personal information included therein.
- Ensure that applicants have access to their file comprising the grids and assessment notes concerning them drafted by the various committees competent for their assessment (pre-selection panel and CCA). This applies without prejudice to the application of Article 20(1) (c) of Regulation 45 /2001.
- Ensure that access to the data held by the sub-contractor is not limited to an "*oral feedback*". In cases of selection tests based on multiple-choice answers, individuals should be able to have copies of the written answers and a copy of the sheet of correct answers on request. In case of a written test, candidates should be able obtain a copy of their answer paper on request and the individual assessment sheet showing the assessment of the test.
- Amend the privacy policy as recommended in this Opinion.
- Raise awareness among DG ADMIN A5 and DG ADMIN CCN-Proc regarding the need to ensure the confidentiality of the information. This should include training and signing a specific confidentiality declaration.
- Implement as soon as possible the security measures intended to enhance the security of the information held and exchanged electronically.
- Ensure that information on candidates is always transferred in sealed envelopes marked 'confidential' or 'for the addressee only'.

Done at Brussels, 17 September 2007

Peter HUSTINX
European Data Protection Supervisor