

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Medicines Agency regarding national expert's expression of interest

Brussels, 26 October 2007 (Case 2007-423)

1. Proceedings

On 25 June 2007 the European Data Protection Supervisor (EDPS) received a notification from the Data Protection Officer (DPO) of the European Medicines Agency (EMA) for an ex-post prior check relating to the management of national expert's expression of interest.

The notification on the processing operation consists of the formal notification to the EDPS, a copy of the *Executive Director's Decision laying down the rules on the secondment of national experts to the EMA* of 15 November 2006 and a copy of EMA's *Decision on the adoption of implementing rules relating to the protection of individuals with regard to the processing of personal and the free movement of such data* of 12 June 2007.

An information request was sent to EMA by e-mail on 19 July 2007, the reply to it received on 7 August 2007. The procedure was suspended on 8 October 2007 for seven days to allow for comments by the DPO on the draft opinion.

2. Examination of the matter - the facts

Throughout the year EMA collects expressions of interest from national experts to be seconded in the different units of the institution. The processing in this framework implies operations such as collection, organisation, storage, consultation and distribution of CVs in order to set up a reserve list of potential candidates for free posts.

The data subject of this processing activity is any person applying for a position as a national expert within EMA (job applicant). The categories of data collected in the framework of such applications are the following: personal data (name, sex, nationality, date of birth), contact data (email address, address, telephone number), academic and professional data (studies and previous employment) and other relevant information.

A curriculum vitae (CV) must also be attached to the applications. EMA receives, usually via normal mail, paper copies of the CVs. These and the applications as such are stored in locked filing cabinets for three years.

The applications received are subsequently used for selecting suitable candidates. The selection procedure as such is notified to the EDPS for prior checking with a separate notification which is currently under examination. It will be dealt with in the respective opinion¹.

¹ Case 2007/421

Data subjects are granted the usual rights of access as provided for in Section 5 of Regulation (EC) No 45/2001 (hereinafter "the Regulation"), the detailed procedures had been put in place by the said Executive Director's decision of 12 June 2007. Further practical measures, such as online requests for access to data and an easy complaint procedure to facilitate the data subject's access, are in preparation but apparently not yet fully implemented.

The electronic processing of data is only foreseen for CVs of those national experts who are actually seconded to EMEA. These data are disposed of after the data subject's death.

3. Legal aspects

3.1. Prior checking

The notification received on 25 June 2007 relates to processing of personal data that is any information relating to an identified or identifiable natural person, as provided for by Article 2(a) of the Regulation.

The processing of data is carried out by EMEA in the exercise of its activities, as outlined in Article 3(1) of the Regulation. In view of the fact that the applications and CVs attached are stored in databases or in closed filing drawers, both automatic and manual methods are used. It follows that this "mixed" processing operation falls within the scope of the Regulation, as provided for by Article 3(2).

According to Article 27 (2)(b) of the Regulation, processing operations intended to evaluate personal aspects relating to data subjects, including their ability, efficiency and conduct, are likely to present specific risks to the rights of data subjects; they shall therefore be subject to prior checking by the European Data Protection Supervisor. Indeed, on the facts, the processing operation in question concerns the evaluation of the candidates' ability to work as national expert in various units of EMEA.

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. This should not raise a serious problem, as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 25 June 2007. According to Article 27(4) the present opinion must be delivered within a period of two months. The period was suspended following EDPS's request for further information of 19 July 2007 and during the month of August. The procedure was suspended on 8 October 2007 to allow for comments by the DPO. The opinion must therefore be delivered no later than 26 October 2007.

3.2. Lawfulness of the processing

As stated in Article 5(a) of the Regulation, personal data may be only processed if "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...". On the facts, the collection and further processing of personal data of job applicants is carried out in the legitimate exercise of EMEA's authority.

The Executive Director's Decision laying down the rules on the secondment of national experts to the EMEA of 15 November 2006 constitutes the legal basis of the processing

operation in question. On the basis of this decision, adopted in the legitimate exercise of an official authority, the recruitment of "seconded national experts should enable EMEA to benefit from the high level of their professional knowledge and experience ...".

Hence, the legal basis found in the said Executive Director's decision supports the lawfulness of the processing operation.

3.3. Processing of special categories of data

CVs submitted in the course of an expression of interest might contain data covered by the provisions of Art 10 of the Regulation. The procedure in question may therefore involve the processing of special categories of data revealing racial or ethnic origin (e.g. in case there is a photo attached to the CV), trade union membership and data concerning health or sex life.

Article 10(1) of the Regulation prohibits the processing of special categories of personal data. This prohibition, however, can be lifted where the data subjects has given his/her express consent to the processing (Article 10(2)(a)).

When an applicant reveals sensitive information as described above, it should be considered as giving his/her consent to the processing of that data, thus the condition of Article 10(2)(a) is met, without prejudice of further considerations as to data quality (see below 3.4.).

3.4. 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 subject for the purposes of the selection of national experts comply with the criteria set out in Article 4(1)(c). Nevertheless, it might happen that candidates include data which are irrelevant and excessive in relation with the purposes of the processing; in this case, EMEA has to make sure that they are deleted in the most appropriate way.

Article 4(1)(d) provides that personal data must be "accurate and, where necessary, kept up to date". As much of the personal data supplied during the selection process are provided by the data subject, the EDPS is of the opinion that this ensures that the data are accurate and kept up to date during recruitment. Furthermore, the data subject has the right of access and rectification of data (see 3.8), during the selection procedure so that the file can be as complete as possible, which also ensures the quality of data.

Article 4(1)(a) also provides that personal data must be "processed fairly and lawfully". Lawfulness has already been discussed (see 3.2) and fairness will be dealt with in relation to information provided to data subjects (see 3.9)

3.5. 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)). The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if

that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes".

Data collected in the context of expressions of interest by national experts are kept at EMEA for a minimum of 3 years after receipt, this applies to all applications included those of applicants not recruited to EMEA. Data of national experts recruited by EMEA will become part of their personal files, data of applicants not recruited will be disposed of after 3 years. It follows that, the data are conserved for a reasonable period in accordance with Article 4(1)(e) of the Regulation. Indeed, it is reasonable to keep the data of potential candidates for three years, and then delete them, and to keep data of recruited candidates in the context of their personal files.

For statistical purposes only data on the nationality of applicants is kept after this retention period, which means data are made anonymous.

3.6. Compatible use - Change of purpose

Article 4(1)(b) of the Regulation, points out that personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes...". Indeed, the data collected are only used for facilitating the internal selection procedure of national experts within EMEA, including the involved administrative follow-up and under no circumstances such data are used for other purposes, including direct marketing purposes. Thus, the original purpose is fully respected.

3.7. Transfer of data

Under Article 7(1) 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".

The national expert's data is only disclosed to staff involved in the recruitment process and the human resource department. External transfer of data is not foreseen.

The EDPS considers that the data transferred are necessary for the tasks covered by the competence of the recipients mentioned and thus Article 7 of the Regulation is respected. Data could furthermore be transferred to the agency's DPO, the internal auditor, the EDPS and the Court of First Instance. These data transfers are legitimate because they are necessary for the performance of tasks covered by the competence of the recipient.

3.8. 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.

EMEA considers rights of access and rectification fulfilled by the Decision on the adoption of implementing rules relating to the protection of individuals with regard to the processing of personal and the free movement of such data of 12 June 2007. EDPS welcomes the content of this decision but recommends publishing this decision on EMEA's website.

3.9. 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.

Article 11 (information to be supplied where the data have been obtained from the data subject) on information to be given to the data subject applies in this case. Insofar as the national expert to be recruited personally fills in the data required of him or her, the data subject provides the data himself or herself.

EMEA's Executive Director's Decision laying down the rules on the secondment of national experts to the EMEA of 15 November 2006 defines all rights and duties of national experts recruited to EMEA. However, this document gives no information on the provisions of Article 11. Therefore EDPS recommends adopting and publishing a specific policy statement concerning this processing operation which should refer to all the provisions of Article 11.

3.10. Security measures

After careful analysis of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of the Regulation.

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the considerations are fully taken into account. EMEA should:

- if candidates include data which are irrelevant and excessive in relation with the purposes of the processing, EMEA has to make sure that they are deleted in the most appropriate way.
- publish the Executive Director's Decision on the adoption of implementing rules relating to the protection of individuals with regard to the processing of personal and the free movement of such data of 12 June 2007 on its website,
- adopt and publish a specific policy statement concerning this processing operation which should refer to all the provisions of Article 11.

Done at Brussels, 26 October 2007

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