

Opinion on the notification for prior checking from the Data Protection Officer of the European Parliament regarding the "recruitment of contract staff" dossier

Brussels, 13 March 2008 (Case 2007-384)

1. Procedure

In a letter dated 6 June 2007, the European Parliament's Data Protection Officer (DPO) sent the European Data Protection Supervisor (EDPS) notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "recruitment of contract staff" dossier.

Since the "recruitment of contract staff" processing is already taking place, checking cannot be considered as prior. The processing is therefore subject to ex-post checking.

A number of additional questions were put to the DPO in e-mails dated 29 June 2007. Replies were given at a meeting with the data controller on 13 September 2007 organised at the DPO's request in order to clarify the facts. Confirmation of the facts was requested on 27 September 2007 and provided on 5 December 2007. After receiving the new rules of procedure of the Joint Committee on the selection of auxiliary contract staff, the EDPS decided to extend the time limit for issuing its opinion by one month, in accordance with Article 27(4) of Regulation (EC) No 45/2001.

On 22 January 2007 the draft opinion was sent to the DPO for comments, which were provided on 7 March 2008.

2. Facts

The general purpose of the processing operation is to conduct contract staff recruitment in compliance with the provisions on engagement in the Conditions of employment of other servants of the European Communities (CEOS). The specific provision is Article 82 in Chapter 3 of Title IV. Paragraph 6 of that Article stipulates that "each institution shall adopt general provisions on the procedures for engagement of contract staff in accordance with Article 110 of the Staff Regulations, as necessary".

The secondary purpose is to obtain some of the information needed to establish the data subject's entitlements on taking up his or her appointment.

2.1. Definition

Pursuant to the CEOS (Article 3a(1)(a)), "contract staff" means "staff not assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned and engaged for the performance of full-time or part-time duties: (a) in an institution to carry out manual or administrative support service tasks".

Pursuant to the CEOS (Article 3b), "contract staff for auxiliary tasks" means "staff engaged in an institution within the time limits set in Article 88 in one of the function groups referred to in Article 89:

(a) to perform full-time or part-time duties other than those referred to in Article 3a(1)(a), without being assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned,
(b) to replace, after the possibilities of temporary posting of officials within the institution have been examined, certain persons who are unable for the time being to perform their duties, namely:

- (i) officials or temporary staff in the function group AST;
- (ii) exceptionally, officials or temporary staff in the function group AD occupying a highly specialised post, except Heads of Unit, Directors, Directors-General and equivalent functions".

The use of contract staff for auxiliary tasks is excluded where Article 3a applies.

Contract staff for auxiliary tasks are recruited in accordance with Article 3b of the CEOS to ensure continuity of the service.

2.2. Selection procedure:

Staff may be selected prior to recruitment by three different routes: (1) by the European Personnel Selection Office (hereinafter: "EPSO"), (2) by a Joint Committee appointed for the purpose in the EP, or (3) by the political groups in the EP via a Selection Committee set up by them.

(1) at the European Parliament's request, EPSO may help it select applicants for posts as contract staff and contract staff for auxiliary tasks by undertaking one or more of the following tasks:

- (a) publishing calls for expressions of interest, setting out the minimum criteria and the qualifications required;
- (b) entering and validating applications in the database set up for the purpose;
- (c) organising tests.

EPSO sets up a database of applicants for posts as contract staff and contract staff for auxiliary tasks having passed the tests organised by EPSO in the European institutions' various areas of activity. On the basis of recruitment vacancies in the operational services of each Directorate-General, human resource managers are invited to consult the EPSO database to identify applicants who meet their requirements. For EPSO's role in the selection of contract staff, see EDPS opinion 2005-366, published on 14 November 2006.

If human resource managers in the various Directorates-General have not identified applicants on the EPSO database who meet the desired profile, they may then consult any electronic lists still valid showing applicants on whom the European Parliament's Joint Committee on the selection of contract staff for auxiliary tasks has issued a favourable opinion (procedure described in point 2 below).

Where requirements are highly specific and/or when searches of the databases referred to above yield nothing, Parliament services may ask for a meeting of the Joint Committee on the selection of contract staff for auxiliary tasks (see point 2 below).

(2) Applicants for posts as contract staff for auxiliary tasks (Article 3 of the CEOS, function groups II, III and IV) are selected by a Joint Committee set up in the Parliament in accordance with the conditions set out in Articles 88 and 89 of the CEOS; the Committee is responsible for selection. This Joint Committee (also known as the Selection Committee) comprises a chairman representing the Personnel DG, two full members and two alternate members appointed by the Authority Empowered to Conclude Contracts of Employment (AHCC), two full members and two alternate members appointed by the Staff Committee and an observer appointed by the Committee on Equal Opportunities for Men and Women. The Competitions and Selection Procedures Unit in the Directorate-General for Personnel provides secretarial services. Applications go to the Selection Committee, which establishes the list of eligible applicants. A list of those eligible for each post as contract staff for auxiliary tasks, showing the function group, is drawn up. The applications of those selected are then sent to the Recruitment Unit. The list is valid for a year. Temporary staff may also be recruited from that list. Applicants not selected may ask for a review within 20 days of the date on which a letter was sent notifying them that they had not been selected.

The application form is a standard form used to record administrative data and the data subject's language knowledge, training and experience. Item 16 on the form asks if the person has any criminal convictions. Item 17 asks if he has a disability and requires any special facilities in the workplace.

(3) In the political groups, applicants for posts as contract staff for auxiliary tasks (defined in Article 3b of the CEOS, function groups II, III and IV) are selected in accordance with the conditions set out in Articles 88 and 89 of the CEOS by each group's Human Resources Unit, which may decide to set up a selection committee. The committee may include the data subject's future boss, a member of the European Parliament, a representative of the administration, etc. Once the applicant has been selected, the file is sent to the recruitment unit, which recruits the future staff member (see next section).

2.3. Recruitment and establishing entitlements

Once the selection process has ended and the candidate has been selected, the European Parliament sends out a job offer. Enclosed with the letter are the documents necessary to establish the successful candidate's entitlements (allowances, questions regarding the social security scheme and a reply form), forms for the reimbursement of costs incurred in the recruitment procedure (travel expenses), the information needed for the pre-recruitment medical examination, and the relevant extract from the CEOS.

The final job offer will be confirmed at a later stage, if all the conditions imposed by Article 82 of the CEOS are met. The letter with the job offer asks the successful candidate to send:

- a letter expressing acceptance of the offer (by fax within two weeks);
- a birth certificate;
- a certificate of nationality or a certified true copy of the candidate's current passport;
- an extract from the judicial record less than a year old;
- a residence certificate (certificate proving the most recent private address);
- certified true copies of documents from ALL previous employers, or in the case of the self-employed, documents specifying the nature and duration of their professional experience;

- certified true copies of qualifications and diplomas

and, where appropriate:

- a marriage certificate;
- an official document certifying the status of unmarried partners;
- a copy of the Court judgment pronouncing divorce or legal separation and pronouncing on custody of children, birth certificate(s) of child(ren), document attesting to any allowances for dependent children received elsewhere;
- a recent payslip of the spouse;
- a school attendance certificate for the child(ren) aged 15 or over
- document confirming that the applicant has fulfilled any obligations imposed on him by the laws concerning military service in his country.

The CEOS provides for a derogation from the documentary evidence requirement for contracts of not more than three months. So far that derogation has been applied only once.

It goes without saying that if the person does not fulfil the conditions laid down by the CEOS, the offer cannot be confirmed and is consequently deemed null and void. Possible reasons for exclusion include:

- medical unfitness; before being engaged, the contract staff member undergoes a medical examination to check that he fulfils the physical fitness requirement. **The result of that examination is valid for a year unless otherwise indicated by the Institution's medical officer who may, if necessary, set a shorter period of validity.**
- having a criminal record: however, the Appointing Authority has discretion on this question. Acceptance of an applicant with a criminal record must be the subject of a reasoned decision.
- insufficient educational level or professional experience.

For contracts of more than three months, Parliament reserves the right not to proceed any further if documents requested are not received within the two-week period.

2.4. Other information on the processing operation

The persons concerned by the processing operation are the applicants for contract staff posts at the European Parliament.

The categories of data processed are those by which the person can be identified (name, forenames, date of birth, nationality), data relating to the character references referred to in Article 82(3)(a) of the CEOS (criminal convictions are requested on the application form, and a copy of the judicial record is requested when the supporting documents are collected if the candidate is selected), the data needed to establish entitlements (if the candidate is selected), and data relating to the candidate's career. Information on medical fitness (yes/no) (if the candidate is selected), mention of a physical disability and a description of any adjustments to be made to the workplace if necessary, information on family members (if the candidate is selected) and civil status are also processed. The Competition Unit also deals with applications submitted to the EP Selection Committee.

The data are stored electronically and on paper.

Some of the data, i.e. data relating to applicants finally employed as other servants, is currently stored for an indefinite period (in the personal file); the note accompanying the notification does, however, state that there should be an amendment in the future. Data relating to eligible applicants not recruited are stored for a period of two and a half years after the end of the period validity of the list of applicants eligible for a contract staff post and any extensions to it (the letter to eligible applicants informs them of the date of validity). Data relating to applicants not selected are stored for two and a half years after the date of the institution's last communication with them.

The data recipients are the officials and staff of the competition and recruitment units and the unit of employment (the unit seeking to fill the vacant post). The Selection Committee receives only the applications. Records of the Selection Committee's proceedings and the list of applicants it selects do not leave the competition unit unless there is a complaint or an appeal requiring the competent body (European Ombudsman, European Union Civil Service Tribunal, EDPS) to consult them.

The conditions for exercising the rights of the data subject (right of access, right of rectification, right to erase and right to block) are governed by the implementing rules for Regulation (EC) No 45/2001 laid down in the Decision of the Bureau of the European Parliament of 22 June 2005.

There is an "important legal notice" on the Parliament's general internet site, which contains information on data protection. The notice is currently being revised. The letter sent to applicants when they take up their posts also contains the following text in point 7: "Pursuant to the legislation on protection of personal data, your data will be processed in an automated system under the responsibility of the European Parliament recruitment unit. To help integrate you into the institution, it is possible that those data may be passed on to the department employing you."

3. Legal aspects

3.1. Prior checking

The notification received by mail on 6 June 2007 describes a personal data processing operation. Applicants' personal data are collected and processed within the meaning of Articles 2(a) and 2(b) of Regulation (EC) No 45/2001. Regulation (EC) No 45/2001 applies to the processing of personal data 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 (Article 3(1)). In the case in point, the data processing is carried out by the European Parliament and comes within the scope of Community law. Both automated and manual processing are carried out. Thus this is partly automatic or manual processing in a structured whole (Article 3(2) of the Regulation). Consequently, such processing falls within the scope of Regulation (EC) No 45/2001.

Article 27 of Regulation (EC) No 45/2001 makes processing operations presenting specific risks to the rights and freedoms of data subjects subject to prior checking by the EDPS. Article 27(2) contains a list of processing operations likely to present such risks, such as "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*" (Article 27(2)(a)) and "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency*

and conduct" (Article 27(2)(b)). The personal data involved are being processed in order to evaluate personal aspects relating to the data subject, namely his or her competence for the purposes of employment at the Parliament. Furthermore, since data relating to criminal convictions and health will also be collected in the context of the recruitment procedure, the processing operation is likely to present risks under Article 27(2)(a). This case therefore falls within the scope of the prior checking procedure under several heads.

This check is restricted to the recruitment of contract staff and contract staff for auxiliary tasks, i.e. to the organisation of the test and the establishment of the reserve list by Parliament itself. Organisation of tests and establishment of reserve lists by EPSO¹ are covered by a separate prior check.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed *ex post*. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The formal notification was received through the post on 6 June 2007. In accordance with Article 27(4), this opinion had to be delivered within two months, i.e. by 7 August 2007 at the latest. In the light of the facts set out in point 1 ("Procedure"), the EDPS will therefore deliver his opinion no later than 24 March 2008 (124 days' suspension + one month extension + August + 45 days for comments).

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing must be *"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"*. Recital 27 of the preamble stipulates that (...) *"the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies."*

The recruitment of contract staff and contract staff for auxiliary tasks falls within the scope of performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of official authority vested in the Parliament. The processing operation is therefore lawful.

The legal basis for the processing operation appears in Title IV, Chapter 3, of the CEOS. The legal basis is valid and supports the lawfulness of the processing.

3.3. Processing of special categories of data

Article 10(1) of the Regulation provides that *"personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited"* unless grounds can be found in Article 10(2) or 10(3).

¹ The EDPS has examined EPSO's processing arrangements. "Recruitment, by competition, of permanent staff for the European institutions or for Community bodies, offices and agencies" in its opinion dated 24 February 2006 (File 2004-236).

The justification for collecting a medical certificate as well as information relating to a potential disability of the data subject is found in Article 83(3)(d) of the CEOS, which states that a member of the contract staff may be appointed only on condition that he is physically fit to perform his duties. Collection of such data therefore complies with Article 10(2)(b) of the Regulation, which states that the prohibition on processing data concerning health does not apply where *"processing is necessary for the purposes 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"*.

The justification for processing of data concerning offences, criminal convictions or security measures comes from Article 82(3)(c) of the CEOS, and therefore complies with Article 10(5) of the Regulation, which stipulates that the *"processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards."*

3.4. Data quality

Pursuant to 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"*. In this case, the data required are necessary to enable the procedure for recruiting contract staff to be properly run. In this respect the EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled.

Nonetheless, the EDPS would draw the data controller's attention to the fact that the invitation to describe criminal convictions in point 14 of the form in the recruitment notice is excessive. A copy of the criminal record will be provided to the Parliament by the data subject, and any criminal convictions relevant for the processing operation will be forwarded on that occasion. The question asking for a description of criminal convictions is therefore not appropriate; it may also lead to the collection of excess data. The EDPS recommends that the question be removed from the form.

Moreover, the data must be *"processed fairly and lawfully"* (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 3.2 above). As for fairness, this relates to the information which must be transmitted to the data subject (see section 3.9 below).

Lastly, under Article 4(1)(d) of the Regulation, data must be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that 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"*. The system itself helps to ensure that data are correct, since the applicant produces the application and the applicant selected for the post produces the documents needed to establish entitlements. Moreover, the data subject has the right to access and rectify data to ensure that they are kept up to date and that the file is as complete as possible. This is a second way of ensuring the quality of data. See point 3.8 below on the rights of access and rectification.

3.5. Data storage

Under Article 4(1)(e) of the Regulation, 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*".

For the record, the procedure for storing data makes a distinction between persons recruited and persons not recruited. Some elements of the application files are kept in the personal file of the recruited person indefinitely. The storage criteria for personal files therefore apply. In a similar case², the EDPS considered that it was reasonable to fix the storage period at 10 years, starting from the date when the staff member leaves or the date of the last pension payment. This would apply to those parts of application files stored in personal files.

This long-term data storage in personal files will have to be accompanied by appropriate safeguards. The data stored are personal.

As regards applicants not recruited and applicants not selected by the EP, the EDPS considers that the two-and-a-half-year storage period set by the competitions unit is reasonable given the purpose; retaining the data makes it possible to provide justification for failing applicants, to deal with any complaint addressed to the European Ombudsman or the EDPS, to handle appeals to the Court of Justice and to respond to audit services that may need to see them pursuant to Article 49 of the implementing rules for the Financial Regulation.

As to the extract from the judicial record, the EDPS is doubtful whether it is appropriate to keep such a document for so long. Any offences committed by the data subject will be gradually deleted from the records by the Member State in line with the gravity of the acts concerned. The Parliament cannot keep these data longer than the Member State. In the same way, a clean judicial record is clean at a given point in time; one year later, the information is not subject to updating. Furthermore, obtaining the judicial record is a condition of the member of staff's engagement. This condition is laid down in Article 82(3)(c) of the CEOS. The judicial record is therefore strictly necessary for the recruitment of the staff member, and once this has taken place, there is no need to store it. Finally, such long-term storage does not comply with the right to erasure of criminal records provided for by Member States by virtue of the right to oblivion. The EDPS therefore requests the Parliament not to keep the extract from the criminal record after recruitment. An attestation similar to that following the medical examination would be adequate as a supporting document.

3.6. Transfer of data

Under Article 7(1) of the Regulation, personal data may be transferred within or to other Community institutions or bodies only if the data are "*necessary for the legitimate performance of the tasks covered by the competence of the recipient*".

The recipients of personal data are the officials and staff of the recruitment unit, the competitions unit, the career management unit, the individual rights unit and, for CVs, the unit responsible for selection (the unit seeking to fill the job vacancy) and the selection committee provided for by *the Rules of Procedure of the Joint Committee for the selection of contract staff for auxiliary tasks*, on a need-to-know basis.

²

EPSO Case 2004/236 – see also Case 2004/274 (Staff appraisal – European Central Bank)

Access may also be granted to the bodies authorised to carry out external checks, such as the Court of Auditors and OLAF. In addition, the Civil Service Tribunal³, the European Ombudsman and the EDPS may, on request, receive copies of items from these files in the context of cases before the Civil Service Tribunal or complaints to the Ombudsman or the EDPS. In the case of recruitment, such proceedings are a frequent occurrence. These transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks falling within the competence of the recipient.

The EDPS believes that transfers of data under such circumstances are necessary for the legitimate performance of the recipients' tasks. The requirements of Article 7 of the Regulation are therefore met.

Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". The EDPS would like all those receiving and processing data in the context of the selection procedures for contract staff to be reminded of that provision.

3.7. Processing of staff number or unique identifier

The Parliament uses the personal number for the recruitment of temporary staff. The use of the staff number may have the consequence of allowing interconnection of data processed in different contexts. This is not the place in which to determine the conditions under which the Commission may process a personal number (Article 10(6) of the Regulation), but it is appropriate here to emphasise the attention that must be paid to this aspect of the Regulation. In the case in point, the Parliament's use of the staff number is reasonable as it is used for the purposes of identifying the person and keeping track of the file. The EDPS considers that this number may be used in the context of the recruitment procedure.

3.8. Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. Article 14 of Regulation (EC) No 45/2001 establishes the data subject's right of rectification. In the same way that the data subject has a right of access, he or she may also directly change personal data or have them changed, if necessary.

The conditions for exercising the rights of the data subject (right of access, right of rectification, right to erase and right to block) are governed by the implementing provisions for Regulation (EC) No 45/2001 laid down in the Decision of the Bureau of the European Parliament of 22 June 2005. The Parliament therefore guarantees the rights of access and rectification. It is nevertheless possible to restrict the right of rectification on the basis of Article 20(1)(c) with reference to the deadline for applications and solely as regards data relating to applicants' professional experience and training (the European Parliament may restrict the application of Article 14(1) where such restriction constitutes a necessary measure to safeguard the rights and freedoms of others). The EDPS is aware that the purpose of the restriction is to ensure a fair procedure and objective conditions for all applicants. In the case of the record of the proceedings of the Selection Committee, data subjects are not allowed access to comparative data or to data which would identify a member of the Selection Committee.

³ The European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), has jurisdiction, rather than the Court of First Instance. The Court of First Instance is the appeal body.

The EDPS therefore considers that the data subject's rights of access and rectification are guaranteed.

3.9. Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed when his or her personal data are processed and lists a series of items of information that must be provided, some compulsory and some optional. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing. Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on informing the data subject applies in the case in point since the data subject himself provides some of the data collected. Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since some information is collected from the different participants in the process, inter alia the Medical Service and EPSO.

In this instance, information is provided to data subjects in the important legal notice on personal data protection on the European Parliament's website. That notice is currently being revised. The letter to the applicants lists the data controller and the data recipients.

Nevertheless, some specific items of information on the processing for recruitment of contract staff are not provided. Yet Articles 11 and 12 are vital in ensuring fair data processing for the data subject. The EDPS therefore asks the Parliament to provide data subjects (applicants for contract posts including eligible applicants not recruited and applicants not selected by the EP) with the information set out in Articles 11 and 12 of the Regulation in a comprehensive manner, and specifically relating it to the processing operation under consideration here.

3.10. Security

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements "*appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*".

The EDPS considers that the full set of security measures and the other organisational and technical measures taken to ensure maximum processing security are such that they can be regarded as adequate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The processing proposed does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that the European Parliament must ensure that:

- point 14 of the form in the vacancy notice, relating to the description of criminal convictions, is deleted;
- the extract from the judicial record is not kept after the recruitment procedure;

- all those receiving and processing data in the context of contract staff selection procedures are reminded that they may not use them for other purposes;
- data subjects are fully provided with all the information itemised in Articles 11 and 12 of the Regulation.

Done at Brussels, 13 March 2008

[Signed]

Peter HUSTINX
European Data Protection Supervisor