

## **Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the European Commission regarding the "Selection of confidential counsellors in the framework of the fight against psychological harassment and sexual harassment at the European Commission"**

Brussels, 29 April 2008 (Case 2008-60)

### **1. Procedure**

On 1 February 2008, the EDPS received a notification for prior checking of a data processing operation in the context of the "Selection of confidential counsellors in the framework of the fight against psychological harassment and sexual harassment at the European Commission".

The notification was sent together with a number of documents, including:

- the manual of procedures for the implementation of Commission Decision C(2006) 1624/3 of 26 April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment;
- the Commission Decision of 26 April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment;
- a written declaration to be filled in and signed by candidates;
- an application form to be filled in and signed by candidates;
- a statement on personal data protection in the context of the selection of confidential counsellors (the privacy statement);
- an assessment form to be filled in and signed by the selection panel for confidential counsellors.

On 12 March 2008 the draft opinion was sent to the DPO for comments, which were provided on 15 April 2008. Following the recommendations made in the draft opinion, the data controller has already taken appropriate steps or undertaken to do so.

### **2. Facts**

The fight against harassment is covered by Article 12a of the Staff Regulations of Officials of the European Communities, which states that "*Officials shall refrain from any form of psychological or sexual harassment*". Commission Decision C(2006) 1624/3 of 26 April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment states that this policy applies to all staff working for the institution.

The data controller is the head of unit of ADMIN B.04. His unit is the managing department for the processing operation.

The confidential counsellors are amongst the parties involved referred to by the Decision of 26 April 2006. They are appointed by the Director-General of DG ADMIN in its role as Appointing Authority and are able to intervene when individual cases are referred to them in the context of the informal procedure. The confidential counsellors are organised in a network for which the managing department is responsible.

The confidential counsellors perform this task on a voluntary basis. Their role is to assist individuals who feel that they have suffered psychological or sexual harassment, by listening to them, helping and supporting them, providing information and accompanying them. Their primary role is to alleviate the suffering of anyone who feels that they are a victim of harassment, by listening to them without passing judgment. Also, depending what the victim needs and wants, confidential counsellors may play an active role in providing advice, taking the steps agreed with the victim, and working as intermediaries between the two parties, in particular in attempts at conciliation or attempts to resolve the conflict in an amicable fashion.

The selection procedure involves the processing of personal data contained in the application forms, CVs, motivation letters and declarations submitted following the publication of a call for candidates. This data is collected directly from candidates.

#### Selection procedure for confidential counsellors

The selection procedure consists of the following stages:

- publication of a call for candidates on the Commission's Intranet site;
- receipt and registration of applications;
- checking of the criteria for eligibility and incompatibility by the managing department, which establishes a list of eligible candidates;
- assessment by means of an interview by a selection panel with the eligible candidates, so as to establish a list of candidates selected;
- submission to the Appointing Authority of the list of candidates selected, who have successfully completed all the training modules.

#### Data subjects

The data subjects are those individuals who send in an application following a call for candidates.

#### Categories of data

The data which are the subject of the processing are the data provided by the candidates in connection with their applications.

In principle, the processing operation does not include the sensitive data referred to in Article 10 of Regulation (EC) No 45/2001. However, the possibility cannot be dismissed that candidates may provide some sensitive information in their applications, voluntarily or otherwise. Racial origin may for example be evident from a photograph on the candidate's CV, if one is attached to the application.

Applications consist of an application form and a written declaration to be filled in and signed by candidates. These are sent with a letter of motivation and a CV, for which no model is provided. However, the call for candidates informs them which data must be included in the CV.

In principle, the processing operation under consideration here covers the following areas:

- information relating to the candidate's identity (surname, first name(s), date of birth, nationality, sex);
- administrative information about the candidate (personnel number, category, grade, Directorate-General, unit, current post, status, length of service at the Commission);
- the postal and e-mail address of the candidate (office address, office phone number);
- data relating to the skills, abilities, training, professional experience and language knowledge of the candidates (list of relevant training, relevant professional experience, mother tongue, other languages);
- the fact that the candidate is not in a post which is incompatible with the role, is not the subject of an administrative investigation or disciplinary procedure and has not been subject to any disciplinary penalty;
- data on the assessment of the candidate by the selection panel.

### Transfer of data

The personal data may be communicated by the managing department to the members of the selection panel.

The selection panel consists of one representative of the managing department, one representative of the Mediation Service, one representative of the appeals unit, one representative of the Investigation and Disciplinary Office (IDOC), one representative of the Medical Service and two representatives of the Central Staff Committee. The panel is chaired by the head of unit of the managing department, who takes part in the panel's discussions and decision-taking. Secretarial services for the panel are provided by the managing department. The list of selected candidates is sent to the Director of DG ADMIN for approval. The names and departments of the selected candidates are sent to the human resources managers and immediate superiors of those candidates.

The list of confidential counsellors will be published on the Commission's intranet.

### Right of access and rectification

Officials may correct the data contained in their applications. If there is an error in the personal data concerning them, candidates may request access to and the correction of their personal data and of factual data communicated in the application, as defined in the privacy statement, by sending a written note or e-mail to the data controller.

The proceedings of the selection panel are secret. However, candidates have a right of access to their overall final assessment at the end of the selection process. To obtain access, they must send a written request to the chairman of the panel.

### Information to be given to the data subject

The intranet site of the managing department has a section on harassment ([http://intracomm.cec.eu-admin.net/pers\\_admin/equal\\_opp/harassment/index\\_en.html](http://intracomm.cec.eu-admin.net/pers_admin/equal_opp/harassment/index_en.html)) which includes a link to the privacy statement on personal data protection, which provides the following information:

- the identity of the data controller;
- the purposes of the processing operation for which the data are intended;
- the legal basis of the processing;
- the recipients of the data;

- the conditions for exercising the rights of access to and rectification of such data;
- the time-limits for storing the data;
- the right to have recourse at any time to the European Data Protection Supervisor.

The data controller will amend the privacy statement to include information on whether replies to questions are compulsory or optional, and on any consequences of failing to give a reply in any of the sections of the application form. The privacy statement will also be attached to the application form when the next call for candidates is issued.

#### Data storage policy

The application forms, CVs, letters of motivation and written declarations will be kept until the end of the term of office of any confidential counsellor appointed.

The application forms, CVs, letters of motivation, and written declarations of candidates who have not been selected will be destroyed one year after the end of the panel's proceedings, starting from the date on which the panel ends its work (taking that date to be the date of the minutes).

It is not intended that data will be kept for historical, statistical or scientific purposes.

#### Security measures

[...]

### **3. The legal aspects**

#### **3.1. Prior checking**

The notification received by e-mail on 1 February 2008 relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a) of Regulation (EC) No 45/2001). The data processing operation under consideration here is carried out by a Community body in the exercise of activities within the scope of Community law (Article 3(1)). This data processing operation is, in principle, manual, and is part of a structured whole consisting of the candidates' files. Article 3(2) is thus applicable in this case. The processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations likely to present such risks. Article 27(2)(b) specifies the following as operations which may present such risks: "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.*" The procedure for the selection of confidential counsellors is an operation for the processing of personal data for the purpose of assessment of the qualities and abilities of the candidates, so is therefore covered by Article 27(2)(b), and as such is subject to prior checking by the EDPS.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this specific case, the processing was set up before consultation of the EDPS, so the check necessarily has to be performed *a posteriori*. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The notification was received on 1 February 2008. Under Article 27(4), this opinion had to be delivered within the following two months. This time limit was suspended for 34 days for comments. The EDPS therefore had to deliver his opinion by 6 May 2008.

### **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 provides that 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 in the legitimate exercise of official authority vested in the Community institution"*.

The selection procedure for confidential counsellors in the context of the fight against psychological and sexual harassment at the European Commission, which involves the collection and processing of personal data, comes within the legitimate exercise of official authority vested in the institution. This processing is necessary for the good management and proper functioning of the institution.

The legal basis on which this data processing operation is based is Article 12a of the Staff Regulations, and Commission Decision C(2006) 1624/3 of 26 April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment. The legal basis, which is clear enough, raises no particular issues.

The legal basis complies with the Regulation and supports the lawfulness of the processing.

### **3.3. Processing of special categories of data**

Article 10 of the Regulation states 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"* except where grounds are identified in Article 10(2) of the Regulation, amongst others.

In principle, the processing operation does not include the sensitive data referred to in Article 10 of Regulation (EC) No 45/2001. However, the possibility cannot be dismissed that the applications submitted during the selection procedure might contain data in these special categories, without such data actually being requested. If sensitive information is submitted spontaneously (without being requested) it can be considered that the data subject has given consent to the collection and processing of that data. The condition in Article 10(2)(a) of the Regulation is therefore met.

### **3.4. Data quality**

Under Article 4(1)(c) of Regulation (EC) No 45/2001, data must be *"adequate, relevant and not excessive"*. The processed data described in point 2 of this opinion should be regarded as satisfying these conditions. The data required are necessary for the skills and abilities of the candidates to be assessed. The EDPS acknowledges that the relevance and proportionality of data assessing the data subject are more difficult to establish. Here, the EDPS is satisfied that the Commission has established selection criteria in the presentation of the call for candidates. Article 4(1)(c) of Regulation (EC) No 45/2001 thus seems to be duly complied with in this respect.

Under Article 4(1)(a) of Regulation (EC) No 45/2001, the data must also be "*processed fairly and lawfully*". The lawfulness of the processing has already been discussed (see point 3.2 above). The issue of fairness is linked to the information which must be transmitted to the data subject (see point 3.9 below).

Finally, the 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*" (Article 4(1)(d) of the Regulation). The procedure itself should guarantee the accuracy of the data. In the case under review here, the system requires candidates to submit most of the data necessary for the selection procedure. The data subject, who provides the information voluntarily, judges whether such data are adequate, relevant and not excessive. In this case, the EDPS is pleased that the Commission has specified what information should be contained in the CV.

The rights of access and rectification represent the second means of guaranteeing the quality of the data (see point 3.8 below).

### **3.5. Data storage**

Article 4(1)(e) of Regulation (EC) No 45/2001 states the principle that 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*".

The EDPS considers that the storage period described in point 2 above is proportionate to the purposes of the processing operation, and complies with the Regulation.

### **3.6. Transfer of data**

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

In this case, the data are for circulation among various members of the selection panel. They may also be transferred to the Director of DG ADMIN. Personal data may only be transferred within an institution if they are necessary for the legitimate performance of tasks covered by the competence of the recipient. Transfer to the recipients mentioned above comes within the legitimate performance of the tasks of the various parties. Similarly, the communication of the name and department of the selected candidates to the relevant human resources managers and immediate superiors complies with the Regulation.

In exceptional cases it is possible that data might be transmitted to the internal audit services, the European Ombudsman and the EDPS. These transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks falling within the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

Lastly, 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*". It must be

remembered that no-one receiving and processing data in the context of the selection procedure may use them for other purposes. The data controller must therefore pay particular attention to ensuring that personal data are only processed strictly within the framework of the selection procedure. The EDPS is satisfied that the data controller will remind the members of the selection panel of this principle at his meetings with them.

### **3.7. Processing of personal number or unique identifier**

Article 10(6) of the Regulation states that "*the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body.*" To facilitate the selection procedure, candidates must provide their personal numbers. The EDPS considers that the use of the personal number for the selection procedure must be regarded as reasonable, since it facilitates the identification of the person during the procedure.

### **3.8. Right of access and rectification**

Article 13 of Regulation (EC) No 45/2001 establishes a right of access upon request by the data subject, and lays down the arrangements for exercising it. Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification.

In the case under consideration here, candidates may request access to and the rectification of the factual data given in their applications, by sending a written note or e-mail to the data controller.

The proceedings of the selection panel are secret. However, candidates have a right of access to their overall final assessment at the end of the selection process. To obtain access, they must send a written request to the data controller, who is in fact the chairman of the panel. Of course, the data subject's right of rectification only covers objective and factual data, and not assessments by members of the selection panel, since those assessments result from a subjective evaluation of the data subject.

It must therefore be concluded that Articles 13 and 14 of the Regulation are complied with.

### **3.9. Information to be given to the data subject**

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items. The optional items are applicable if, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject.

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 official himself completes the application form. For assessment data, Article 12 applies.

As indicated above, the provision of information to the data subjects is by means of a privacy statement published on the managing department's intranet site. The EDPS welcomes the contents of this privacy statement, which is particularly comprehensive.

However, the EDPS did not find the text of that privacy statement on the intranet page mentioned in the notification. Only a "Declaration on data protection in the framework of the informal procedure to fight harassment" appears there. According to the information provided by the data controller, the specific privacy statement was available on the intranet site when the call for candidates was published. The EDPS recommends that the specific privacy statement should be presented visibly during the selection procedure for confidential counsellors. The privacy statement should preferably be attached to the application form, so that any candidate who downloads the form receives the privacy statement automatically. The data controller has informed the EDPS that this will be the case for the next call for candidates.

### **3.10. Security measures**

Under Article 22 of Regulation (EC) No 45/2001 concerning the security of processing, *"the controller shall implement 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, on the basis of the information obtained from the notification, Article 22 is complied with in this case.

### **Conclusion**

The proposed processing operation 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 implies, in particular, that the Commission should:

- amend the specific privacy statement to include information on whether replies to questions are compulsory or optional, and on any consequences of failing to give a reply in any of the sections of the application form;
- send the specific privacy statement to any potential candidates, by attaching it to the application form.

Done at Brussels, 29 April 2008

(signed)

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