

Opinion on a notification for Prior Checking received from the Data Protection Officer of the Commission regarding the selection and management of interim staff at JRC

Brussels, 9 June 2008 (Case 2008-139)

1. Proceedings

On 4 March 2008, the European Data Protection Supervisor (hereinafter 'EDPS') received from the Data Protection Officer of the Commission ('DPO') a notification for prior checking regarding the data processing operations that take place in the context of the selection and management of interim staff at the Joint Research Centre ('the Notification'). The data processing operations are carried out by different Units of the Joint Research Centre ('JRC').

On 29 April 2008 the EDPS sent the draft Opinion to JRC for comments and to obtain some additional factual information. JRC responded on 3 June 2008.

2. Examination of the matter

2.1 The Facts

The Management Support Units ('MSU') of each of the Institutes/Directorates of the JRC that use interims collect information about potential candidates to interim positions. The information is collected from two sources: First, from interim agencies¹ which work for each Institute/Directorate and who are the employers of the candidates that will finally be selected by JRC. Second, directly from the candidates, both before the selection and afterwards from the successful candidate, once he/she has started his/her job.

The *purpose* of the data processing operations is to select and manage interim staff for JRC.

The *primary responsibility* for the data processing lies within JRC. In particular, the main responsibility lies with the MSUs. .

The data processing operations that take place in the selection of interim staff are both manual and electronic and can be summarised as follows:

(i) Reception by the MSU of each Institute/Directorate of CVs of pre-selected candidates and supporting documents. In particular, within each MSU it is the human resources sector that receives and further processes the information. Storage of this information in paper and also in servers is accessible only to the human resources staff of each of the MSU. (ii) Upon receipt of CVs a selection committee, assisted by the human resources staff of the MSU,

¹ The agencies are established in the Member State where the Scientific Institutes are located (Italy, Spain, the Netherlands, Belgium, and Germany). Their data processing activities must comply with national laws, including the laws that implement data protection legislation. This prior check Opinion does not address the extent to which the data processing carried out by these agencies is in compliance with the law.

chooses the most appropriate candidate. As part of the selection, the candidates may be asked to pass interviews². (iii) The successful candidate is asked to supply additional information, including a certificate of good conduct and then, periodically, timesheets that list, among others, the time effectively worked, salary, etc. (iv) Transfer of the information on the successful candidate to various recipients within JRC. Information is mainly transferred to the Directorate General B, Unit B1 (Human Resources) for its introduction in Sysper 2. It will also be sent to the security office of the sites for access requests (to buildings) and to the financial departments of each of the seven institutes for the payment of the invoices. Finally, personal data concerning hours worked will also be sent to the interim agency.

The *types of data subjects* whose data are collected are applicants, i.e., individuals who have been pre-selected by the interim agencies for a given position and successful candidates.

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, date of award of degree, length of professional experience, languages spoken and level and previous working experience. (iii) Information generated during the interviews and during the selection process. In addition, for successful candidates (iv) a certificate of good conduct will be collected and (v) financial data which include the number of hours effectively worked and the salary.

The sources of personal data are twofold: In the first place, data are provided by the interim agency, including the curriculum vitae and supporting documents for each candidate. In the second place, personal data are provided by the selected candidate, as is the case with the certificate of good conduct and the financial data or hours effectively worked.

As far as the *conservation* of the data is concerned, according to the Notification, the data of candidates are kept for five years. The data of successful candidates are kept during the time of their employment plus seven years to allow the auditors to verify the financial control procedures.

The data stored in paper form are stored by the MSUs that recruit the interims. The electronic data are stored in JRC Data Centre. Both paper and electronic files are available only to designed officials.

The data controller may *transfer* personal data gathered in the context of the selection and management of interim staff to the following types of recipients, all of which are Community institutions or bodies:

(i) For the successful candidate, personal information is transferred to Directorate General B, Unit B1 (Human Resources) for its introduction in Sysper 2. (ii) It will also be sent to the security office of the relevant site to manage the access requests to the buildings and, (iii) to the financial departments of the relevant institutes for the payment of the invoices.

As far as the *right to information* is concerned, the Notification provides that individuals receive a privacy statement informing them of the data processing carried out by JRC. Towards the future MSUs will provide the privacy statement to the individuals when they are called for an interview.

² Because of the nature of the interim positions, it should be recalled that the successful candidate is employed by the interim agency, under national laws. The interim agency as a contractor of JRC will provide his services to JRC through the selected candidate.

A copy of the privacy statement providing the relevant information was annexed to the Notification. The statement contains information on the identity of the data controller, the purposes of the processing, categories of data processed, 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.

As far as *access rights and rectification* are concerned, the Notification provides that individuals can ask for incorrect data to be corrected by contacting the human resources officer or sending an email to the functional mailbox. The Notification explains that incorrect data in the spreadsheet which show the number of hours effectively worked can be corrected by sending an email to the functional mailbox. The Notification does not refer to the right to access and correct data regarding the selection procedure, such as evaluations of interviewed candidates.

As far as *security measures* are concerned, the data controller acknowledges that it has put technical measures in place to ensure the level of security appropriate to the risks, and to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss or alteration, and to prevent all other unlawful forms of processing.

2.2. Legal Aspects

2.2.1. Prior Checking

This Notification relates to the procedure that takes place within JRC, towards selecting interim staff and also managing certain data of successful candidates. The data processing operations start with the collection of CVs and underlying documents. They continue with the assessment and selection of candidates. Finally, additional data processing occurs with regard to the selected candidate, during the time he/she provides his services to JRC. Taking this into account, this Opinion will assess the extent to which the data processing operations described above carried out by JRC with the purpose of selecting the best candidates and managing the performance of the work of those selected 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 by the interim agency which is subject to national legislation implementing the data protection Directive³.

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"⁴. For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the selection of interim staff in JRC 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 interim positions 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

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

⁴ See Article 3(2) of Regulation (EC) No 45/2001.

Regulation (EC) No 45/2001 as well as manual data processing operations. Indeed, some of the personal information is collected and/or further processed electronically. Finally, the processing is carried out by a Community institution, in this case JRC in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001).

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. The processing operations that occur in the context of selecting interim staff in JRC 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 matches the selection criteria, judging his/her performance during the interviews, judging the performance of each candidate in his/her current positions, etc. In sum, taking the above into account, the data processing operations fall within Article 27(2)(b) and must therefore be prior checked by the EDPS. In addition, because the selected candidate has to provide a certificate of good conduct which may reveal his/her involvement in criminal activity, the processing is also subject to prior checking under Article 27(2)(a).

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 started. 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 4 March 2008. The two months period within which the EDPS must deliver his Opinion was suspended for 34 days to allow the data controller to review the draft Opinion, provide comments and provide additional factual information. The Opinion must therefore be adopted no later than 9 June 2008 (being 7 June a Saturday).

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.

The legal basis for the hiring of interim staff at JRC can be found in the framework contract under which cover interims can be hired. There are various framework contracts that enable the different Institutes/Directorates to hire interims⁵

There are various reasons justifying JRC's need for interim staff, including replacing staff absent due to maternity leave, sickness or other reasons; coping with peak periods which require an additional workforce for a fixed period of time; carrying out, on a temporary basis, tasks which require specific competencies which are not available within JRC. The framework contract was entered in order to ensure that cover interims could be hired to perform the tasks described above. The overall objective of the framework contract is to provide JRC with the necessary interim personnel in a timely fashion and in line with the job profiles requested.

The EDPS is satisfied that the data processing operations in which JRC is engaged are necessary to enable JRC to perform the task consisting in selecting the most appropriate interim staff and managing the performance of their activities. In reaching these views, the EDPS has also taken into account that Recital 27 of the Regulation makes clear that "the processing of personal data for 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". A recruitment procedure is necessary for the management and functioning of JRC. It is necessary for the performance of tasks carried out in the public interest.

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 does not discuss the collection of data falling under the categories of data referred to in Article 10.1. Taking into account the overall purpose pursued by the Commission when it engages in data processing operations to select interim personnel, 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 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, applicants may nevertheless 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, provided that the data are relevant, the processing is lawful in the context of staff management (recruitment) in order to enable JRC to comply with its specific obligations in the field of employment law 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

⁵ For example, interims in Geel are hired under the framework contract ADMIN/d1/pr/2007/001

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, police certificates of good conduct are collected from successful candidates. As further illustrated below, the EDPS considers that existing legislation justifies that JRC collects criminal records. However, the EDPS considers that the collection of certificates of good conduct is excessive and goes against the data quality principle (see discussion under section 2.2.4).

The legal basis for processing criminal records regarding officials and other servants can be found in Article 28(a) of the Staff Regulations, Articles 12 (2) (a) and 82 (3) (a) of the Conditions of Employment of Other Servants which require that a candidate may be recruited as a member of the staff only on condition that "he/she is a national of one of the Member States, and enjoys his/her full rights as a citizen". This legal instrument provides the basis to process data related to criminal convictions. Whereas these articles are not directly applicable to interim staff but only to officials and other servants the EDPS considers that, given the rationale behind these articles, they should apply *mutatis mutandis* to interim staff. The reasons that justify the processing of this category of data from official/other servants also apply to interim staff who is hired to replace officials/other civil servants and are therefore expected to ensure the same guarantees. Thus, it seems appropriate that these articles should also apply to the collection of data from interim staff for the purposes described in the Notification.

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 interim positions includes the CV and supporting documents. Only if JRC has information on the education and professional experience as well as on the candidate's suitability for a given job will JRC be able to select the best suited candidate. Also, additional information is produced when the selected candidate has started performing his/her duties, which involves the number of hours effectively worked. This information is necessary for the payment of the data subject. In sum, the EDPS considers that this information complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

However, the EDPS is concerned about the collection of police certificates of good conduct. In legal terms and particularly in certain Member States, police certificates of good conduct contain information that goes beyond a record containing criminal convictions. In particular, in some Member States a police certificate of good conduct may contain information about the character of an individual, his moral behaviour, etc. Whereas, it may be necessary for JRC to collect information contained in criminal records in order to filter individuals that may pose a risk to the JRC, it does not appear necessary to have the information that may be contained in a certificate of good conduct.

For this reason, the EDPS is of the view that JRC should not continue collecting police certificates of good conduct. Instead, the need to know whether individuals have engaged in criminal activity should be evidenced by other means such as a criminal record.

Fairness and Lawfulness. Article 4(1)(a) of Regulation (EC) No 45/2001 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 2.2.8.

Accuracy. According to Article 4(1)(c) of Regulation (EC) No 45/2001, 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 assessment body within the MSU. 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 held 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.

According to the Notification, the data of candidates are kept for five years. The data of successful candidates are kept during the time of their employment plus seven years to allow the auditors to verify the financial control procedures.

The EDPS is satisfied with the five years conservation period regarding unsuccessful candidates. The EDPS considers that a maximum period of five years would be sufficient for the purposes of facing possible challenges for non-selected candidates. This is even more the case regarding data of informative nature such as the address, telephone number, etc. The EDPS is also satisfied with the seven years conservation period for data of successful candidates. This period is justified on the provisions of Article 49 of the detailed rules for the implementation of the financial Regulation. In addition the Regulation provides that documents related to operations not definitively closed shall be kept until the end of the year following that in which the operations are closed. Thus, keeping supporting documents relating to the payment procedure of interim staff is fully justified.

Whereas the above applies as a general rule for most personal data collected within the scope of selecting and managing interim staff, the EDPS suggests that JRC makes some exception to the periods outlined above regarding the conservation of sensitive data. In particular, the EDPS considers that highly sensitive data, such as those regarding requested accommodations for disability should not be kept for longer than absolutely necessary for purposes of selection and recruitment. These data should be deleted after the shortest possible timeframes following the recruitment procedure.

The EDPS also encourages a flexible approach to accommodate candidates who wish to withdraw their applications and wish to request that their data be deleted earlier than the general timelines provided by JRC. For example, if a candidate withdraws his/her application and specifically requests JRC to delete his/her name, CV and supporting documents from its database (both in paper and in electronic form), JRC should accommodate such a request, unless exceptional circumstances (e.g. an ongoing litigation warrants otherwise).

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 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 requirement. Indeed, all the recipients have the competences to perform the task for which the data is transferred: Unit B1 (Human Resources) is competent for the uploading of the information into Sysper 2. The financial departments of the relevant Institutes/Directorates have the competence for the payment of the invoices. Furthermore, the transfer of the information in the two cases is necessary for the performance of such tasks. The EDPS, however, emphasises that pursuant to Article 7(3), the recipients shall process the personal data they received from JRC only for the purposes for which they were transmitted⁶.

In addition, data concerning hours worked will also be sent to the interim agency. In this case, the EDPS considers that such transfer complies with Article 8(b) of Regulation (EC) No 45/2001. This is because the recipient has the necessity to have such data insofar as the agency is the employer of the concerned interim staff. Also because the subject legitimate interests are not prejudiced insofar as the goal of the transfer is to enable the proper execution of the employment contract between the interim agency and the interim staff concerned.

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 (EC) No 45/2001 provides the data subject with the right to rectify inaccurate or incomplete data.

According to the Notification and privacy statement, individuals are granted such rights. No further information is given about how and at which stages this can be done. Whereas the Notification refers to the possibility to correct wrong information stated in papersheets describing the hours effectively worked there is no reference in the statement to the possibility to access the decisions and information regarding the selection procedure carried out within JRC. The EDPS is not convinced that JRC has put in place a procedure whereby candidates

⁶ The transfer of information to the security office to manage the access requests to the facilities is not addressed in this Opinion. Instead, the EDPS will evaluate this and other data processing activities in which the security office is engaged in a separate prior check Opinion that deals exclusively with the data processing of JRC's security office.

will be able to access their entire file, comprising the notes that may reflect the outcome of interviews and other selection procedures.

The EDPS recalls that candidates should be able to have access to their entire file, comprising the assessment notes concerning them drafted by the human resources sections of the MSU and selection committee competent for their assessment. Because part of the assessment procedure is based on answers given in oral interviews, candidates should also 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. 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 members themselves and their need to have their independence reinforced and the right of other applicants to be treated fairly and in like fashion.

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 has carried out 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 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 established appeals procedures.

In the light of the above, the EDPS recommends that JRC sets up procedures to ensure access to candidates' personal data as described above within the scope of the data processing carried out at JRC (see point 2.2.1. first paragraph).

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 is given to candidates. This will take place when interims are called for interviews. The EDPS considers the provision of information is appropriate.

The EDPS 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 are processed, to whom the data are transferred,

etc. The EDPS considers that the privacy statement contains the information required under Articles 11 and 12 of the Regulation (EC) No 45/2001. However, he considers that section 5 of the privacy statement could be amended. In particular, the EDPS considers that this section should include a sentence acknowledging, as it does regarding the right to correct inaccurate information, the individual's right to access their personal data, including data provided during the selection process.

2.2.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller must implement the 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing. JRC confirms that it adopted the security measures required under Article 22 of the Regulation. The EDPS has no reason to believe that JRC has not implemented 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.

3. Conclusion

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

- Replace the collection of certificates of good conduct by other tools that demonstrate the prior criminal behaviour (criminal records, for example).
- Ensure that highly sensitive data requested accommodations for disability are kept for no longer than absolutely necessary for purposes of selection and recruitment.
- Put in place a flexible approach to accommodate candidates who wish to withdraw their applications and wish to request that their data be deleted earlier than the general timeline provided by JRC.
- Ensure that applicants have access to their evaluation data including the assessment notes concerning them drafted by the selection committee and Human Resources staff of the relevant Management Units. This applies without prejudice to the application of Article 20(1) (c) of Regulation 45 /2001.
- Amend the privacy policy as recommended in this Opinion.

Done at Brussels, 9 June 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor