



Opinion on the notification for prior checking received from the Data Protection Officer (“DPO”) of the European Medicines Agency (“EMA”) regarding EMA's “Access” recruitment database and selection and recruitment procedures

Brussels, 19 June 2008 (Case 2007-422)

1. Proceedings

On 19 June 2007, EMA's DPO informed the European Data Protection Supervisor (“EDPS”) via e-mail about EMA's “Access” recruitment database. On 25 June 2007, the EDPS received the formal prior checking notification (“**Notification**”) by regular mail.

On 26 July 2007, the EDPS requested additional information from EMA. EMA replied on 19 October 2007. On 7 November 2007, the EDPS requested further information. EMA responded on 15 February 2008.

On 20 February 2008, the EDPS sent to EMA's DPO a summary of his understanding of the facts, to ensure the accuracy of the information received from EMA. Until EMA's written confirmation of the facts on 7 March 2008, the case remained suspended.

On 11 March 2008, the EDPS and EMA agreed to extend the scope of the Notification to cover not only the “Access” recruitment database but the entire selection and recruitment procedure at EMA. Accordingly, the EDPS handles all of EMA's selection and recruitment procedures in a single opinion, and it is considered that EMA's initial notification covers not only the Access recruitment database but also all aspects of EMA's selection and recruitment procedures.

To facilitate EMA to fill in the gaps in the information that had already been provided to the EDPS, the EDPS sent to EMA a set of questions requesting additional information on 11 March 2008. EMA provided the requested information on 15 April 2008. On the same day, the EDPS requested additional information. EMA replied on 9 June 2008.

Finally, the EDPS sent to EMA his draft Opinion for comments on 10 June 2008. The procedure was suspended until 17 June 2008, when EMA provided its comments.

2. The facts

2.1. Scope of the Notification and purpose of the processing. The Notification initially concerned EMA's “Access” recruitment database. This database contains data of applicants who applied for a temporary agent¹ position with EMA in the framework of the various

¹ EMA does not have any permanent officials.

selection procedures organised by EMEA. The applicants' personal data are recorded in the database to enable EMEA to process the applications in the framework of the advertised selection and recruitment procedures, leading up to the creation of reserve lists and the actual recruitment for vacant positions.

As discussed under Section 1 above, the scope of the Notification is extended to cover all aspects of the selection and recruitment of EMEA's temporary staff referred to in Article 2(a) of the Conditions of Employment of other servants of the European Communities ("**Conditions of Employment**").

There are two distinct procedures covered by the extended Notification: (i) a selection and (ii) a recruitment procedure.

During the selection process, a selection committee established by EMEA selects a number of applicants to be included on a reserve list. The recruitment procedure consists of the recruitment of candidates from the reserve list for specific vacancies within EMEA.

2.2. Legal basis of the selection and recruitment procedures. Articles 8 and 12 of the Conditions of Employment provide for the engagement and selection of temporary staff.

The general conditions for the selection and recruitment procedures are set forth in a document entitled "Recruitment at the EMEA – General information", which is publicly available at <http://www.emea.europa.eu/pdfs/general/admin/recruit/043104en.pdf>.

2.3. Selection Process

2.3.1. Candidate profiles and advertisement of the selection procedures. The selection is carried out on the basis of a profile established by EMEA. This profile lays down the requirements for applicants in terms of education and professional training, professional experience, and linguistic knowledge. EMEA describes the requirements of the profile in a call for applications. The call is published in the Official Journal as well as on the websites of EMEA and EPSO. Notices of selection procedures may also be advertised in specialist journals or internet sites, depending on the nature of the positions for which recruitment is planned.

2.3.2. Establishment of the selection committee. The selection procedure is conducted by a selection committee. The committee's task is to establish a list of successful candidates ("**reserve list**") from which the persons to be engaged are to be drawn.

The selection committee is composed of a chairperson, a recruiting/technical sector representative and a staff representative. The first two categories of members are appointed by the Executive Director and the third on a proposal from the Staff Committee.

EMEA explained that the principle of confidentiality is enshrined in Article 6 of Annex III to the Staff Regulations of the European Communities ("**Staff Regulations**"), which states that the proceedings of the selection board must be secret. It works in two ways: first, it imposes obligations to ensure equal treatment for candidates; and second, it seeks to protect the selection board to ensure that its decisions are impartial.

2.3.3. Applications. The next step is the receipt of applications. The data are entered into the database by the candidates themselves, who need to apply on-line. For the selection procedure, a registration number is allocated to each applicant. This number helps identify the

candidates in the database and also helps ensure that the correction of the written tests is performed on an anonymous basis.

2.3.4. Content of the application and data stored in the recruitment database; additional data collected outside the database. EMEA's "Access" database contains all information submitted by the applicants on the on-line application form when they apply for selection procedures advertised by EMEA.

The on-line application form requires the following information:

- name,
- address,
- date, place and country of birth,
- gender,
- nationality,
- contact information,
- indication of where the candidate heard about the selection procedure, and
- disability, if any (for reasons of accommodation during the tests).

In addition, the form requires the following information about the applicants' education and training:

- start date and end date,
- qualification,
- principal subject or occupational skills covered,
- educational level,
- university/organization name, and
- level in national classification.

The applicants' work experience also needs to be indicated:

- start date and end date,
- full or part time,
- occupation or position held,
- main activities and responsibilities,
- employer name,
- address,
- reason for leaving,
- business sector,
- period of notice required to leave present post.

The application form also requires information regarding knowledge of languages as well as personal skills and competences, including knowledge of computer programmes (e.g. Word, Excel, MS Access, PowerPoint).

Finally, under "additional information", applicants are asked to specify in which foreign countries they spent at least 3 months. The form requires the indication of the countries visited, dates, as well as the "reasons for stay". The form also requires the name, address and telephone number of persons who can be contacted should the applicant not be available. The applicant must also state whether or not he has ever been convicted or found guilty of any offence by any court.

Although the application form does not specifically state so, EMEA confirmed to the EDPS that information regarding stay over three months in foreign countries is optional and serves only as one possible element to support that the applicant has multicultural experience. EMEA further explained that all fields in the application form which are mandatory are marked in red. The application form, however, does not specifically state that the "red" entries are mandatory and the rest are optional.

EMEA confirmed that no other information is collected at this stage. For example, the applicants are not required to attach their photographs, their curriculum vitae, references, diplomas, motivation letters, or any other documents. EMEA does not, at this stage, require a copy of the criminal records of the candidates. Nor does EMEA use any database for background check or carry out any background research on its own on the candidates.

Some additional information, however, will be required at a later stage when an applicant is invited to an interview. These include proof of nationality, diplomas, and proof of prior and current employment. A copy of the candidate's criminal record also needs to be submitted subsequently only, after the candidate has actually been offered a job.

Finally, prior to the interview, candidates are also requested to complete a "psychometric questionnaire". The evaluation of the candidates' response on the questionnaire is outsourced to a private company. This is discussed in more detail in Section 2.3.8 below.

2.3.5. Reception of applications by the selection committee. The members of the selection committee do not have on-line access to the Access recruitment database. Instead, they receive hard-copies of the applications from EMEA's "recruitment coordinator". The recruitment coordinator is the secretary of the selection committee member from EMEA's human resources unit ("**EMEA HR**"). The recruitment coordinator has password-protected access to the applicants' on-line applications via the "Access" database. The hard-copies are distributed at the preparatory meeting of the selection committee.

2.3.6. Admission to the selection procedure. Before any interviews or tests are organized, the selection committee examines each and every application received and decides which applications meet the requirements set forth in the call for applications. These requirements are of two types: eligibility and qualification.

The eligibility requirements (essential criteria for admission) include that

- candidates must be citizens of one of the Member States, and enjoy full rights as citizens,
- the application form has been sent before the deadline,
- the candidate has agreed to the terms and conditions, and that
- the candidate must have a thorough knowledge of one of the official languages of the European Union and a working knowledge of English, French, and/or German.

Evaluation forms and minutes. During the examination of applications, the selection board draws up an evaluation form with respect to each applicant who submitted an application. The evaluation form is a sheet established for the purpose of checking the compliance of the candidate with the eligibility and qualification requirements as set forth in the call for applications. The fulfilment of each requirement is separately evaluated. The evaluation sheets are drawn up prior to the preparatory meeting and are continued to be used and gradually completed and signed at the different stages of the selection process.

Applicants who do not fulfil all essential criteria for admission are automatically excluded from the selection procedure.

As for the qualification criteria, a more nuanced approach is taken. The selection board compiles a list containing a number of candidates specified in the call for applications who “best meet the requirements”.

The selection board adheres strictly to the conditions of admission laid down in the Official Journal when deciding whether or not candidates are to be admitted.

The evaluation form lists each eligibility criteria (e.g. citizenship). However, it does not list or otherwise discuss the qualification criteria, the results of the written test, the results of the psychometric tests or the specific reasons for granting the interview, or selecting the candidate at the end of the interview. That being said, the evaluation sheet refers to an additional document called “separate assessment and decision document signed by Chairperson - on behalf of committee”. This document supports the interview decision, and justifies whether the candidate has relevant experience or knowledge in the requested field and meets desirable (but non-essential) criteria.

There are also minutes drawn up during the preparatory meetings and interviews.

2.3.7. Written tests. In the framework of the selection procedures, the selection board may decide to organize a written test that takes place before the interviews. The candidates are informed in advance on the existence and content of the tests.

The criteria applied for the selection of the candidates are published in the call for applications.

Each candidate is assigned an identification number by the secretary of the selection committee who is the only person in the committee who knows the cross reference between the names and the numbers. The test is therefore rendered anonymous to the members of the selection committee who will know the identity of the candidates only after the points are assigned.

2.3.8. Psychometric testing. Candidates selected for an interview are required to fill out an on-line psychometric questionnaire, which is evaluated by an external specialist company. The questionnaire collects information about the working style and the personality traits of the candidates relevant to their employment with EMEA. The test consists of a series of 24 multiple choice questions in which the individual selects one adjective "most like them" and one "least like them" per line. It takes ten minutes or less to complete the questionnaire.

The external company will then produce a report to the selection board about each candidate. It bases its assessment solely on the questionnaire, without meeting the candidates in person or making other enquiries. The standard report is two or three pages long. In addition to distribution among the members of the selection board, a copy of the report is also given to the candidate. EMEA will keep one copy of the report in the candidate's file.

The candidates are informed, at the time they are invited to the interview, that they will receive an email message from the external company inviting them to complete an on-line questionnaire in advance of the interview.

No one at EMEA has access to the completed questionnaires. (In fact, EMEA does not even have access to the text of the questions themselves, due to copyright reasons.)

The external company to whom EMEA outsourced this service is based in the UK and is bound by national data protection laws. Additionally, there is a contract in place between EMEA and the external company. Pursuant to this contract, the external company will destroy their electronic version of the questionnaires after six months and will send EMEA an email listing the names of the candidates whose questionnaires have been destroyed. This email must be placed on the master file of the selection procedure.

When the EDPS requested further information regarding psychometric testing, EMEA noted that it is currently revising its practice and after a short interim period, it will no longer use psychometric testing as part of the selection process. Indeed, EMEA had already given notice to terminate the contract and confirmed that no other psychometric evaluation will be requested in the framework of the selection procedure in the future.

2.3.9. Interview. The interview aims to verify the applicants' capacity to carry out the functions noted in the job description in the call for applications.

2.3.10. Creation of reserve lists. Once all candidates have been interviewed, a reserve list is drawn up. Depending on the decision of the selection committee, merit classes can be established within the reserve list. The list is kept by EMEA's HR unit. The reserve list includes the name, surname and registration number of the successful candidates.

The reserve lists are used to recruit candidates for vacant posts. This second stage of the procedure, recruitment of individual candidates for individual posts, is discussed briefly under the heading "recruitment process" in Section 2.4 below.

Each candidate will be informed by letter whether or not he/she has been placed on the reserve list. Reserve lists are valid for a limited period of time. Candidates are also informed that inclusion on the reserve list does not guarantee appointment.

2.4. Recruitment process. As and when funds and a post become available, candidates on the reserve list will be considered and the reserve list will be drawn on to fill vacancies. After a letter of intention is provided to a particular candidate, the candidate must undergo a compulsory medical examination to establish that he/she meets the standard of physical fitness necessary to perform the duties involved. The candidate must also provide original or certified copies of some of the documents submitted earlier in photocopies only (e.g. diplomas) as well as an extract from the criminal records.

2.5. Access rights. An EMEA document, the so-called EMEA implementing rules, details the procedures for accessing and reviewing personal data. There is an online request form for accessing personal data and a complaints procedure to the DPO in case of unauthorised processing of personal data. This, however, can only be accessed from the EMEA intranet and not also from EMEA's website open to the general public.

The access request form requires the provision of the following information by the person requesting access:

- name and surname,
- place and date of birth,
- nationality,
- home address,
- postcode
- telephone and/or fax number,

- email address,
- ID number.

The form also states that a data access request may be refused if it is not made on the form. The form is currently under revision due to previous recommendations made by the EDPS in prior opinions.

Access to applications. EMEA confirmed that candidates can always request access to their own applications. However, once a candidate submitted his application, he will have no on-line access to it. Should he wish to modify the information, he needs to either send a separate, new application or contact EMEA HR.

Access to test results and other internal documents. The psychometric test results (report) are available to candidates after the interview.

Information is given in writing to candidates following the three stages of the selection procedure:

- first, information is provided on whether they are admitted based on the essential criteria,
- second, candidates are informed whether they are invited to interview, and
- third, information is provided on whether they are placed on the reserve list.

For any of the three stages above, and on request, EMEA provides candidates additional information in writing explaining the reasons why they were not successful at any of the stages. EMEA has not specified whether this includes access to any internal documents (e.g. minutes or evaluation sheets) or the results of the eventual written tests. EMEA also has not specified whether access is also given to successful candidates.

2.6. Information provided to data subjects. A general data protection notice called “Data Protection Declaration” is only available on EMEA's intranet and not on its external webpage. There is no link to this document from the application form, either, and thus, applicants remain unaware of this notice.

However, a specific notice is provided to applicants with respect to the selection procedure. This notice forms part of the official announcement of the selection procedure published in the Official Journal and on the website of EPSO and EMEA. The notice includes the following information:

- purpose of the processing
- recipients
- conservation periods, and
- reference to Regulation 45/2001 (“**Regulation**”).

2.7. Conservation period. EMEA retains recruitment-related data for five years as of the date of the expiry of the reserve lists. EMEA explains the need to keep all data until the expiry of the five-year period by the need to comply with audit requirements and to allow processing of appeals. Data of candidates who filed an application but who were not ultimately placed on the reserve list are also kept for the same period of time.

Further processing for statistical or scientific purposes is also envisaged. There are statistics regarding the number of applications received, prepared once every six months for the

Management Board. There are also statistics on individual selection procedures. These statistical data include only data in anonymized form.

2.8. Recipients and data transfers. EMEA does not make public the names of successful candidates on the reserve lists.

On-line access to the recruitment database is limited to those members of the human resources department who deal with recruitment. Off-line access (print-outs) is given to members of the selection board and management (the recruiting head of unit as well as the executive director) when needed in the selection/recruitment procedure.

No data are transferred to any other recipients, except that (i) the name of the applicants attending the written tests or interviews are transferred to the security unit, to facilitate access to the building, and (ii) the name, contact information, and travel details for the applicants who submitted a request for reimbursement with respect to participation in the interviews are transferred to the unit which deals with the reimbursement of expenses.

2.9. Security. All EMEA staff sign a confidentiality agreement as part of their contract. This duty of confidentiality is defined in the EMEA Guidance on Confidentiality and Discretion and continues even after a staff member has left employment with EMEA.

In addition, on-line access to the recruitment database is password-protected and given to the competent staff members only on a need-to-know basis. EMEA uses the IT infrastructure provided by the European Commission and the standard security measures apply.

3. Legal aspects

3.1. Prior checking

Scope of Notification. As discussed under Sections 1 and 2.1 above, the scope of the Notification and of this Opinion covers the selection and recruitment of EMEA's temporary staff.

Applicability of the Regulation. The Regulation 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” (Article 3).

All elements that trigger the application of the Regulation are present here:

First, the notified selection and recruitment process entails the collection and further processing of personal data as defined under Article 2(a) of the Regulation.

Second, the personal data collected undergo automatic processing operations as well as manual data processing operations, which form part of a filing system (Article 3(2) of the Regulation).

Third, the processing is carried out by EMEA, a Community body, in the framework of Community law (Article 3(1) of the Regulation).

Based on the foregoing, the Regulation is applicable.

Grounds for prior checking. Article 27(1) of the Regulation subjects to prior checking by the EDPS all “processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes”.

Article 27(2) contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (b), “processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.” The notified processing operation involves evaluation of the applicants’ ability to perform the job functions for which the selection and recruitment procedures have been organized. Therefore, the notified processing operation requires prior checking by the EDPS.

Additionally, the processing operation also involves some processing of (i) health-data (data are requested regarding disabilities to provide appropriate accommodation for the selection tests or the interview) and (ii) data on criminal offences and convictions (criminal records are requested at the final stage of recruitment). Therefore, Article 27(2)(a) serves as a supplementary ground for prior checking.

Notification and due date for the EDPS Opinion. The Notification was received on 25 June 2007. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The procedure was suspended for a total of 298 days. Thus, the Opinion must be rendered no later than 19 June 2008 (26 August 2007 + suspensions for 85 days + 100 days + 16 days + 90 days + 7 days for comments).

Ex-post prior checking. The processing operations started before the EDPS had been notified. Since prior checking is designed to address situations that are likely to present risks, the opinion of the EDPS should normally be requested and given prior to the start of the processing operation. However, taking into account that a large number of processing operations were already in place before the EDPS was established and became functional in the year 2004, these prior checking operations need to be carried out ex-post.

3.2. Lawfulness of the processing

General comments. Article 5(a) of the Regulation provides that personal data may be processed if “processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties ... or other legal instrument adopted on the basis thereof”.

The first issue under Article 5(a) is to determine whether there is a specific legal basis for the processing: a Treaty provision or another legal instrument adopted on the basis of the Treaties. The second issue is to determine whether the processing operation is necessary for the performance of a task carried out in the public interest. To address this second issue in the present case, Recital 27 of the Regulation needs to be taken into account, which specifies that “processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies”. Thus, the second issue in the present case is whether the processing is necessary and proportionate for the management and functioning of EMEA.

With regard to the first issue, the selection and recruitment procedure for temporary agents is based on the provisions of Article 8 of the Conditions of employment of other servants of the European Communities. Thus, specific legal instruments adopted on the basis of the Treaties allow for the notified processing operations. With regard to the second issue, the EDPS is also

satisfied and does not challenge that the notified processing operation is necessary and proportionate for the management and functioning of EMEA.

To conclude, the EDPS considers that the notified processing operations are lawful, so long as the recommendations made in this Opinion are followed.

3.3. Processing of special categories of data

Applicable provisions of the Regulation. 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 unless an exception can be found in Articles 10(2) -(4) of the Regulation.

The prohibition is lifted among others where the data subject has given his/her express consent to the processing (Article 10(2)(a)) and where the 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, or as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards (Article 10(2)(b) of the Regulation).

Further, Article 10(5) provides that processing of personal data relating to offences, criminal convictions or security measures may be carried out only if authorized 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 safeguards.

Special categories of data collected during the selection and recruitment procedures. During the selection and recruitment procedures certain “special categories of data” are systematically collected, including (i) health related data concerning disability (to provide accommodation at tests), and (ii) information regarding criminal records.

In addition, the applicant's application form, in particular the section covering additional information, may reveal additional sensitive data. These may include, among others, trade union membership or membership or activities in religious or political groups that may reveal political opinions, religious or philosophical beliefs.

Disability. When an applicant reveals information on his/her disability, it should be considered as if he/she was giving his/her consent to the processing of that data, thus the condition of Article 10(2)(a) is met. In addition, this consent is given in order to enable the employer to comply with its specific obligations in the field of employment law to provide for extra time and to provide specific IT equipment for the test (Article 10(2)(b) of the Regulation).

Criminal records. Article 12(2) of the Conditions of Employment provides that a member of the temporary staff may be engaged only on condition that: “(a) he is a national of one of the Member States ... and enjoys his full rights as a citizen” and that “(c) he produces the appropriate character references as to his suitability for the performance of his duties”. This legal instrument provides the basis to process data related to criminal convictions, pursuant to Article 10(5) of the Regulation. However, as will be discussed under Section 3.4 discussing proportionality, the position of the EDPS is that information should not be requested with regard to past periods that do not appear any longer on the applicant's criminal record.

Additional sensitive data. When an applicant reveals additional sensitive information, without this being specifically requested or the volunteering of information being encouraged by EMEA, it should be considered that the candidate gave his/her consent to the processing of that data, thus the condition of Article 10(2)(a) is met. With that said, it is important to emphasize that a valid consent can only be given by the candidate if EMEA does not put pressure on the candidate to provide such optional, additional information. In any event, the data quality principle, in particular, that no excessive or irrelevant information should be collected, must also be taken into account.

3.4. Data Quality

Adequacy, relevance, and proportionality. According 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.”

Apart from the exceptions noted below, based on the information provided to him, the EDPS does not challenge the adequacy, relevance and proportionality of the data collected in the database.

Past convictions. As also noted in Section 3.3 discussing processing of special categories of data, the question “have you ever been convicted or found guilty of any offence by any court?” is excessive and goes beyond what is necessary to support that the applicant “enjoys his full rights as a citizen” and that “he produces the appropriate character references as to his suitability for the performance of his duties”. The question, if EMEA desires to keep it, should be revised to limit the request only to data which are indicated on a current criminal record.

Foreign travel. In addition, the EDPS also notes that EMEA should reconsider whether it should collect information about foreign travel on the application form. An alternative could be to raise issues regarding multicultural experience during the interview in an open form which allows candidates to mention certain experiences abroad and not certain others. If EMEA decides to keep the question on its application form, in any event, the application form should clearly specify that the information provided is optional and is included with the sole purpose of supporting the applicant's multicultural experience. By “clearly indicating as optional” the EDPS means that it should be specified on the application form, and not merely implied by the use of a different colour, that the applicant is not required to complete that particular entry.

Psychometric questionnaires. The information provided to the EDPS about the activities of its outside contractor is insufficient to conclusively establish whether the data collected on the on-line form, or the data communicated to the selection board members on the reports provided by the contractor are adequate, relevant, and proportionate.

Considering, however, that (i) the EDPS has not received any complaints from data subjects regarding the recruitment practices of EMEA in relation to psychometric testing and has found no other indication that the questionnaires would be collecting inadequate, excessive or irrelevant data, and that (ii) EMEA, in any event, plans to abandon the practice of psychometric testing in the near future, the EDPS does not question, in the framework of this prior checking procedure, the adequacy, relevance and proportionality of the practice of psychometric testing.

However, the EDPS recommends that if EMEA decides to continue with its practice of psychometric testing (in its current form or in a modified form), it should submit such processing activity to the EDPS for prior checking. When designing any such future procedure, EMEA should keep in mind that the choice of test should be clearly linked to role-related competencies. The evaluation of the tests must be carried out by recognized and trained specialists to ensure the accuracy of the evaluation. The test results should be properly weighted with other information about the applicant, such as the candidate's past experience, training and qualifications. Appropriate security measures must be taken and notice must also be provided to the test-taking candidates as early as in the announcement of the application procedure.

Fairness and lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 3.8 below).

Accuracy. According to Article (4)(1)(d) of the Regulation, personal data must be “accurate and, where necessary, kept up to date”, and “every reasonable step must be taken to ensure that 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.”

Based on the information provided to him, the EDPS does not challenge the accuracy of the data collected during the selection and recruitment procedures. The EDPS notes, however, as discussed in Section 3.7 below, that procedures allowing exercise of rights of rectification should be improved.

3.5. Conservation of data. The general principle in the Regulation is that personal data may 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) of the Regulation).

The EDPS recommends that EMEA evaluates the necessity of keeping all data for a period of five years as of the date of the expiry of the reserve lists. During this assessment it must bear in mind that conservation periods should closely match the periods during which access to the personal data may be necessary for clearly specified purposes. EMEA should, in particular, assess how long it needs to keep the data in case of an eventual challenge to a selection or recruitment decision, or for the possibility of an eventual audit.

In addition, even if certain documents may need to be kept to facilitate future audits, others, which are not indispensable for purposes of the audit, should be deleted earlier. In this respect, the EDPS specifically calls the attention of EMEA to a recently added last paragraph to Article 49 of the Implementing Rules of the Financial Regulation², which provides the following: “Personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes.”³

² Commission Regulation (EC, Euratom) No 2342/2002 of 23/12/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

³ This recent amendment was adopted following the recommendations provided in paragraphs 33-47 of the "Opinion of the EDPS of 12 December 2006 on proposals for amending the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules (COM(2006) 213 final and SEC(2006) 866 final), OJ C 94, 28.04.2007, p. 12".

Accordingly, a case-by case analysis is recommended with respect to each type of data collected in connection with selection and recruitment, to determine whether the data are necessary for budgetary discharge, control and audit purposes.

The EDPS is especially concerned about keeping highly sensitive data, such as those regarding requested accommodations for disability or information regarding criminal records for longer than absolutely necessary for purposes of selection and recruitment. These data should be deleted after the shortest possible timeframes following the lapse of deadlines open to challenge the selection or recruitment procedure (or following the date when any follow-up procedure on that challenge has been completed).

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 EMEA. For example, if a candidate on a reserve list withdraws his/her application and specifically requests EMEA to delete his/her name, CV, and supporting documents from its database (both in paper and in electronic form), EMEA should accommodate such a request, unless exceptional circumstances (e.g. an ongoing litigation) warrant otherwise.

3.6. Recipients and data transfers. The EDPS welcomes the fact that on-line access to the recruitment database is limited to those members of the human resources department who deal with recruitment and that off-line access (print-outs) are only given to members of the selection board and management (the recruiting head of unit as well as the executive director) when needed in the selection/recruitment procedure, as described in Section 2.8 above.

The external specialist company which carries out the outsourced task of psychometric testing is subject to UK law, and thus, subject to Directive 95/46/EC. The limited amount of data transfer to this company is lawful pursuant to Article 8 of the Regulation.

The EDPS additionally calls EMEA's attention to the requirement that if unforeseen data transfers are requested by any third party, EMEA should allow transfers subject to (i) either the unambiguous (with respect to sensitive data, explicit) and informed consent of the data subject, or (ii) as otherwise specifically allowed by the Regulation. The EDPS also emphasizes that pursuant to Article 7(3), the recipients may only process the personal data transferred for the purposes for which they were transmitted.

In case of doubt, the EDPS recommends that the head of EMEA HR consults EMEA's DPO before he/she makes the requested data transfer.

3.7. Right of access and rectification. Article 13 of the Regulation grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

Formal requirements for exercising right of access. As mentioned in Section 2.5, EMEA produced a form to be used for all access and rectification requests concerning personal data processed. The EDPS already recommended the revision of the Personal Data Access Request Form in his Opinion on a notification for Prior Checking received from the EMEA DPO on the public declaration of interests dated of 6 December 2007 (Case number 2007-0419). In particular, the EDPS has requested that the statement on mandatory use of the Personal Data Access Request Form is replaced by a simple recommendation to use the form, as well as that the identification data required on the form are limited to name, surname, telephone and/or fax number, email address and the ID number. The EDPS is satisfied that if the

recommendations set forth in this prior Opinion in case 2007-0419 are put into practice by EMEA, this will address any issues relating to the form of exercising access rights in the framework of the selection and recruitment procedures as well.

Specific issues related to selection and recruitment procedures. The Notification confirms that upon request, EMEA provides access to certain of their personal data to candidates and staff members.

At the same time, however, EMEA also restricts access to certain documents that it deems to be necessary to safeguard the confidentiality of the deliberations and decision-making of the selection board. It was unclear from the facts of the case whether EMEA does allow access to the evaluation sheets or the minutes drawn up by the selection board. Neither it is clear whether the “separate assessment and decision document signed by Chairperson - on behalf of committee” documenting the final decision of the selection board is made available to candidates.

The EDPS does not challenge the principle that certain restrictions on access may be necessary pursuant to Article 20(1)(c) of the Regulation to protect “the data subject or the rights and freedoms of others”. These restrictions, however, as the EDPS pointed out in previous prior checking procedures regarding EPSO's practices⁴, should not be interpreted to arbitrarily limit access of data subjects to their test results. The acceptable restrictions, in principle, are of two kinds:

- restrictions on giving access to candidates of individual personal data of competing candidates; and
- restrictions on giving access to candidates of certain confidential internal documents of the selection board, where such access would jeopardize the confidentiality of the deliberations and decision-making of the selection board.

In line with the previous opinions of the EDPS on EPSO selection procedures and the follow-up of these opinions with EPSO, the EDPS recommends that EMEA should ensure that it does not restrict access more broadly than it is justified on grounds of safeguarding the confidentiality of the deliberations and decision-making of the selection board or safeguarding the rights of other candidates.

During this reconsideration EMEA must bear in mind that (i) the objective of any confidentiality requirement is to ensure that the selection board is able to maintain its impartiality and independence and is not under undue influence from EMEA, candidates, or others, and (ii) any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective.

Therefore, the EDPS recommends that EMEA should provide access, upon request, to the (i) evaluation sheets drawn by the selection boards, (ii) the “separate assessment and decision documents signed by Chairpersons - on behalf of committees” documenting the final decision of the selection board made available to candidates and to the (iii) minutes of the selection boards⁵.

⁴ See EDPS opinions on recruitment of permanent staff, temporary staff, and contract staff for EU Institutions, agencies and bodies (cases 2004-236, 2005-365 and 2005-366).

⁵ If necessary to safeguard the confidentiality of the deliberations and decision-making of the selection board, certain information may be deleted from the minutes. For example, if opinions varied about a candidate's performance at the interview, it is not always necessary to indicate which selection committee member favoured and which did not favour the applicant. Any deletions, however, should be assessed on a case by case basis.

Protection of the impartiality and independence of the selection board, which is the reason behind the requirement of confidentiality, would be unlikely to be prejudiced if the selection board disclosed to candidates, in a transparent manner, the criteria based on which it evaluated candidates and the actual detailed marks or comments a particular candidate received with respect to each criterion.

3.8. Information to the data subject. Articles 11 and 12 of the Regulation require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 is applicable to data obtained from the data subject, which is the case, for example, with regard to data contained in the candidate's on-line application form. Article 12 applies when the data have not been obtained from the data subject. This is the case, among others, of the marking and evaluation data contained in documents prepared by the selection board or EMEA HR.

Although the official announcement of the selection procedure published in the Official Journal and on the website of EPSO and EMEA contains some of the items, much of the information required to be provided to data subjects under Article 11 is only available in documents to which the applicants have no easy access to:

- *Internal EMEA policy on the practical operation of access to EMEA documents;*
and
- *the Data protection declaration on the EMEA intranet.*

The EDPS, first, recommends that these documents be made available to applicants. For example, they may be posted on EMEA's external website, and a link can lead to them from the application form.

Second, inasmuch as some items under Article 11 are not specified in either these general documents or in the specific notice in the application form, those should be included. For example, Article 11 requires that data subjects should be informed whether replies to questions are obligatory or voluntary as well as what will be the possible consequences of failure to reply. In this respect, the EDPS recommends that any optional data entries should be clearly marked as such. This applies, in particular, to information about foreign travel which some candidates may decide to include in their applications.

Third, as already noted in previous prior checking opinions⁶, the content of the general data protection declaration should be amended as follows:

- There should be an introductory paragraph which states that this is a general data protection statement, and that further information on specific processing operations can be found in the links in an annex to this document.
- An annex should be added to the document with a link to a *specific “Data protection declaration” on selection and recruitment procedures.*⁷

⁶ See, for example, the EDPS Opinion on a notification for Prior Checking received from the EMEA DPO on the public declaration of interests dated of 6 December 2007 (Case number 2007-0419)

⁷ Previously, the email address provided in the data protection declaration did not correspond with that provided on the personal data access request form. During the course of the prior checking procedure EMEA confirmed that this inconsistency has been corrected.

3.9. Security measures. According to Article 22 of the Regulation, 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 unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The EDPS has not encountered any facts which would suggest doubts about the adequacy of the security measures for data processed in the framework of EMEA's selection and recruitment procedures. In any event, the EDPS calls attention to the fact that EMEA should ensure that applicant data in the database are not accessible by and disclosed to anyone other than those specified in this Opinion.

Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations noted in Sections 3.2 through 3.9 are fully taken into account. The recommendations of the EDPS include, most importantly, the following:

- **Proportionality:**
The questions relating to past convictions should be limited in time to those which actually appear on the applicant's criminal record at the time of applying for the position.
- **Optional data entries:**
EMEA should more clearly indicate on the application form the provision of what information is optional.
- **Psychometric testing:**
Should EMEA continue to use psychometric testing as part of its selection procedures, it should submit this aspect of the recruitment procedure for prior checking by the EDPS.
- **Conservation of the data:**
EMEA should reconsider the conservation periods to ensure that data are kept no longer than necessary for the purposes initially contemplated. In particular, when data are conserved for budgetary discharge, control and audit purposes, personal data contained in supporting documents shall be deleted where possible when those data are not necessary for these purposes. Special attention should be paid to highly sensitive data such as information regarding disability and criminal records.
- **Rights of access:**
EMEA should revise its procedures to ensure that no access request is turned down merely because it is not submitted on the form specified. Further, EMEA should reconsider the restrictions it has put in place in order to preserve the confidentiality of the deliberations of the selection panel in view of reconciling this interest with the candidates' right of access.

- Information to data subjects:
Specific notice should be provided with respect to all items under Article 11 and 12 of the Regulation in a specific and clear manner, in addition to the availability of EMEA's general "Data Protection Declaration".

Done at Brussels, on 19 June 2008

(signed)

Peter HUSTINX
European Data Protection Supervisor