

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Maritime Safety Agency regarding "Recruitment of Trainees within the Traineeship scheme in EMSA"

Brussels, 29 September 2008 (Case 2008-384)

1. Proceedings

On 17 June 2008, the European Data Protection Supervisor (EDPS) received by electronic mail from the Data Protection Officer (DPO) of the European Maritime Safety Agency (EMSA) a notification for prior checking the recruitment of trainees within the traineeship scheme at the agency. The notification contained the "Decision No 2007/030 of the Executive Director Relating to the Rules Governing the Traineeship Scheme of EMSA" and a form on "Request for a Trainee".

On 1 July 2008, the EDPS requested further information. On 2 July 2008, the EDPS received the text of the privacy notice from the DPO. He received the responses to his information request on 30 July 2008.

On 25 September 2008, the EDPS sent the draft opinion for comments to the DPO of EMSA. The EDPS received the comments from the DPO on 26 September 2008.

2. Examination of the matter

2.1. The facts

On 31 October 2007, the Executive Director of the European Maritime Safety Agency passed a decision 2007/030 "Relating to the Rules Governing the Traineeship Scheme of EMSA" (hereinafter: "Decision"). The agency offers a traineeship period from three to five months to interested individuals. The first call for applications has already been launched and EMSA is currently in the process of selecting the first trainees who should start their traineeship period in the autumn of 2008.

According to the privacy notice the **purpose of the processing operation** is to organise selection procedures within the traineeship scheme in EMSA.

In the process of selecting trainees, the European Maritime Safety Agency processes personal data of applicants. The **categories of personal data** processed are the following:

- Information required for the *European Curriculum Vitae*,¹ namely: first name, surname, telephone, fax, email, nationality, date of birth, gender; work experience; education and training; personal skills and competences (mother tongue and other languages as self-assessment, social, organisational technical, computer, artistic and other skills and competences, driving licence), additional information that may be relevant (contact person, references) and annexes (see below copies required).

-*Motivation letter*

-*Copies of diplomas and certificates* and possibly *copies of employment transcript* (if a trainee is recruited, *certified copies* need to be submitted²)

- For those selected for the traineeship a *legal entity and financial identity forms* are required.

- The *form requesting a trainee* for a unit of the agency contains the general criteria concerning the preferences as to knowledge, skills, languages and diploma of the unit concerned.

Submitting *photos* with the CV is an option for the applicants. No applications are rejected if photos are not annexed.

Article 6.3 of Decision No 2007/030 provides for a *disability allowance*: "Upon presentation of the proper justification, disabled trainees may receive a supplement to their grant to a maximum of 50% of the amount of the grant. Human Resources section may consult the medical service of EMSA of necessary before any decision on granting this supplement is given." EMSA explained that the justification for disability allowance is requested when the applicant accepts the traineeship offer. The justification is sent to the human resources and it remains confidential. The purpose is to establish whether the trainee needs financial support for example in relation to recurrent medical costs and/or special requirements regarding the accommodation. It was stressed that the EMSA is currently in the process of recruiting its first group of trainees, and since they do not have yet experience on this matter, they will seek the advice of European Commission.

The **data subjects** are those individuals who apply for a traineeship period at EMSA.

Selection procedure: A Selection Committee is created for each training period. The Selection Committee's task is to propose a list of suitable candidates to be considered. The list is forwarded to EMSA's units for selection. The final nomination is confirmed by the Executive Director. The work of the Selection Committee is confidential.

Upon receipt of the application, the Selection Committee will examine all the applications on the basis of the criteria established, as published on the agency's website. Prior to the final selection, candidates can be contacted by phone by the Members of the Selection Committee to check availability and to discuss mutual expectations. Candidates can also be invited for an interview or to take part in a written test.

If an application is unsuccessful, candidates may re-apply for another training period, but in that case a new application should be submitted together with supporting documents.

Withdrawal is possible at any stage of the selection procedure by informing the agency in a mail sent to the address stated on the website.

¹ Available at:

<http://europass.cedefop.europa.eu/europass/home/vernav/Europass+Documents/Europass+CV/navigate.action>

² Last sentence in Article 2.2. of Decision

The Decision specifies that "Applicants are selected on the basis of qualifications; an appropriate geographical distribution and gender balance will be maintained."³

The following **information** is provided to **data subjects** in the form of a disclaimer placed on the "Vacancies" site of the Human Resources (<http://www.emsa.europa.eu/end179d006.html>): *"Any personal data provided by the Applicant shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data. It shall be processed solely for the purposes of the recruitment exercise. The Applicant shall have the right of access to his/her personal data and the right to rectify any such data that is inaccurate or incomplete. Should the Applicant have any queries concerning the processing of his/her personal data, (s)he shall address them to the delegated controller of the data, the Head of Human Resources section. The Applicant shall have the right of recourse at any time to the European Data Protection Supervisor. For more information on personal data and related documents see the Personal Data Protection page."* A link navigates the individuals further to the EDPS website and to the site of EMSA's DPO for more detailed information on data protection (<http://www.emsa.europa.eu/end179d008.html>) In addition, the EMSA website on traineeship vacancies contains a link to Decision 2007/030 and to the European CVs.

Further, a link navigates individuals from the recruitment site to the privacy notice which is placed on the DPO's site. The notice contains information on the identity of the controller and delegate controller, purpose of processing operation, types of data concerned (data are freely given by candidates), legal basis, recipients of data, exercise the rights of data subjects, starting date of processing operation ("date of application"), contact information (a postal address is given) and contact information for recourse to the EDPS. The DPO site provides for the email address of the DPO, who can be contacted by anyone on various questions, including the email address of the controller if necessary or the DPO can contact herself the controller.

In addition, the "Contact" site of EMSA (<http://www.emsa.europa.eu/end803.html>) provides for two email addresses and telephone numbers in the context of external communications.

The notification states that in order to exercise their **right of access and the right to rectify** their own data, applicants can always contact the head of human resources sector or the data protection officer. Applicants can inform EMSA about any change in their data. The privacy notice introduces certain restriction on these rights: "(...) On the other hand, data demonstrating compliance with the admissibility criteria may not be updated or corrected after the closing date for the respective selection procedure. (...)"

The applicants' personal data **may be disclosed to:**

- persons in charge of supporting the Selection Committee in the human resources sector,
- Members of the Selection Committee,
- heads of units or heads of sectors who select a trainee or other persons who would work with a trainee,
- Executive Director (who would receive a list of admitted trainees),
- the relevant persons in human resources, EMSA financial cell and Accounting Officer (grants and travel expenses contained in the Legal Entity and Financial Identity Forms for those who were selected for a traineeship).

³ Last sentence of Article 1 of Decision

The **processing operation is mainly manual but there is also an automatic element in the processing**. Applications are primarily received by email. The CVs are printed out and archived only in hardcopy format. The file is kept in a locked storage room together with all other recruitment files. Only the human resources department has access to the archive room. No electronic copies are made of applications sent by post. Those are kept in a paper format following the same procedure.

A **file is created** of the applicants containing the CVs and supporting documents (copies of diplomas), relevant minutes of the selection meetings, traineeship contracts and the related correspondence with the applicants.

A **retention period for the various data categories is not yet set**. As it was explained in the prior checking notification form, EMSA is a young agency, and this issue needs to be addressed in the future. The first selection process of trainees is ongoing for the time being and so far EMSA keeps all the documents relating to this processing operation.

The following **security measures** are put in place [...].

2.2. Legal aspects

2.2.1. Prior checking

Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (hereinafter referred to as "the Regulation") applies to data processing activities by Community institutions and bodies. The Regulation applies to the data processing activities by EMSA in the context of recruiting trainees for the reasons enumerated below.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The trainee recruitment procedure processes various data (identification, education, training, skills and experiences) related to applicants for a traineeship. Those therefore qualify as personal data under Article 2(a) of the Regulation.

The processing of applicants' personal data is carried out by an agency in its activity which clearly falls under Community law. Article 3(1) of the Regulation therefore applies.

The processing operation is mainly manual, where CVs and other documents obtained during the selection procedure are intended to form part of a filing system. The processing operation falls under Article 3(2) of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 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) of the Regulation contains a list of processing operations that are likely to present such risks, among those processing operations intended to evaluate personal aspects relating to the data subject, including his/her ability, efficiency and conduct (Article 27(2)(b)) and processing of data relating to health (Article 27(2)(a)). The recruitment scheme of trainees at EMSA falls under Article 27(2)(b) as a recruitment procedure and is designed to assess the candidates'

professional ability and skills. Moreover personal data on disability of the trainees is collected when the applicant accepts the traineeship offer, therefore the processing operation falls under Article 27(2)(a) of the Regulation.

The first selection procedure of trainees has already been launched and trainees will actually start their traineeship in the autumn 2008. Indeed, EMSA's site gives the status of applying for the first traineeship period as "closed." It means that the processing operations with regard to applicants' personal data have already been started. The EDPS draws the attention of the controller to the requirement under the Regulation that a prior check by the EDPS is necessary for the launching of any processing operations which are likely to present a specific risk. The prior checking notification should arrive at the EDPS sufficiently prior to the launching of the system so that any recommendations made by the EDPS could be implemented before the start of the data processing activities. Nevertheless, in the present case the EDPS does not consider the launching of the system as an insurmountable problem, because his recommendations can still be implemented.

The notification of the DPO was received on 17 June 2008. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 18 August 2008. The prior checking procedure has been suspended for a period of 29 days + for the month of August 2008+ 1 day for comments on the draft opinion. Thus, the Opinion should be rendered not later than 20 October 2008 (18 of October being a Saturday).

2.2.2. Lawfulness of the processing

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. One of this criteria is stipulated in Article 5(a) stating that "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof...*". Recital 27 further notes 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*".

The legal basis of the processing operation is interlinked with its lawfulness: Decision No 2007/030 of the Executive Director Relating to the Rules Governing the Traineeship Scheme of EMSA lays down the detailed rules about the traineeship scheme.

In addition, Regulation (EC) No 1406/2002 of the European Parliament and of the Council establishing a European Maritime Safety Agency⁴ as amended by Regulation (EC) No 1644/2003 and Regulation (EC) 724/2004 and Regulation (EC) No 2038/2006⁵ provides the basis for decision 2007/030 of EMSA Executive Director. Article 1 establishes EMSA, Article 6 provides for more details as to the governing rules on its staff (Staff Regulations and Conditions of Employment), Article 15(2)(e) confers powers to the Executive Director in respect of the agency's staff. Article 6(2) reads as follow: "...the powers conferred on the appointing authority by the Staff Regulations and the Conditions of employment of other servants shall be exercised by the Agency in respect of its own staff."

4 Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (Text with EEA relevance) *OJ L 208, 5.8.2002, p.1-9*

⁵ The consolidated non authentic version is available at: http://www.emsa.eu.int/Docs/legis/regulation_1406-2002_-_consolidated.pdf

The EDPS is convinced that the processing of applicants' personal data to select them for traineeship is necessary for the performance of the agency's task carried out in the public interest on the basis of Decision No 2007/030 of EMSA Executive Director. Thus, the processing operation is lawful under Article 5(a) of the Regulation.

2.2.3. Processing of special categories of data

Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life in principles is prohibited by the Regulation. Any exceptions are narrowly tailored in Article 10(2) of the Regulation.

In the present case, trainees reveal their disability for the purpose of receiving a supplement to their grant, which means that in order to get that grant they give their express consent for the processing of this sensitive information. Article 10(2)(a) of the Regulation is therefore met. Further, Article 10(2)(b) of the Regulation is also respected as EMSA should comply with its obligations in the field of employment law to provide sufficient support for people with disability, where it is necessary. Nevertheless the data quality principle should be respected (see below in part 2.2.4.) and access rights to that sensitive data should be limited (see in parts 2.2.6.. and 2.2.9.).

Further, photographs submitted together with the application form may reveal racial or ethnic origin. As the submission of photos is optional for the applicants, the applicants themselves can freely decide if they submit it or not. In case of submitting a photo therefore, Article 10(2)(a) applies, as well.

2.2.4. Data Quality

Data must be adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed (Article 4(1)(c) of the Regulation). The personal data collected for the purpose of selecting trainees and to provide grant and travel expenses to them overall meet the criteria of Article 4 (1)(c). With regard to the proper justification for disability grant, and due to the lack of experience on that matter, the EDPS would like to draw the controller's attention to the principles in Article 4(1)(c). Namely, that the justification requested from trainees (or from the Medical service as consulted by the human resources section) should not be excessive for the purposes of determining the need and the amount of the disability allowances.

Personal data must be accurate and where necessary kept up to date (Article 4(1)(d) of the Regulation). The system further ensures the quality of data in these terms as applicants always have the possibility to inform EMSA about the change of their data.

The data subject has the right to access and the right to rectify his/her own data, so that the file can be as complete as possible. This also ensures data quality, but this issue will be addressed in part 2.2.7. of this opinion.

Article 4(1)(a) of the Regulation requires that personal data are processed fairly and lawfully. The lawfulness has already been discussed in part 2.2.2. and fairness relates to the information provided to data subjects (see point 2.2.8. below).

2.2.5. Conservation of data

Personal data can be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected and/or further processed. (Article (4)(1)(e) of the Regulation).

As explained in the facts, EMSA is a young agency, and the rules for retention of data are not clarified yet. The EDPS finds it compelling that EMSA is considering specific retention periods for the various categories of data involved by the trainee selection. In developing a retention policy, EMSA should take into regard the earlier recommendations given by the EDPS in the context of recruitment of trainees.

In earlier opinions, the EDPS has already laid down some guiding criteria:

In general, the EDPS requires a **different storage period for personal data (CVs, copies of supporting documents) of unsuccessful applicants than that of successful applicants**. In other opinions he accepted to keep personal data of unsuccessful candidates for two years *following the recruitment procedure* as that period was derived from the length of time during which a complaint may be brought to the European Ombudsman.⁶

The EDPS gave some guidelines **on the calculation of the starting period for the storage**: In the case of *pre-selected but not recruited* candidate the EDPS recommended that the starting date for computing the storage period (*dies a quo*) should be the immediate official starting date of the traineeship period (and *not* the end of the traineeship period to which the application relates).⁷

As to the storage period of personal data of successful candidates: The controller may need to keep all financial documents for a minimum of 5 years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate⁸ for audit purposes. The EDPS concluded in another case that **personal data necessary for discharging the budget may be retained for up to 5 years after the traineeship budget is discharged** in accordance with the Financial Regulations.⁹

Once the above 5 years period is completed, only the data necessary for providing a copy of the trainee certificate i.e. information on the duration of the traineeship, the department to which the trainee was assigned, the name of supervisor and the nature of work performed should be stored.¹⁰

Any further data needed **for statistical purposes** (Article 4(1)(e) of the Regulation) must be extracted and the **remaining personal data should be destroyed**.

⁶ See Opinion of 31 July 2007 on a notification for prior checking on the recruitment of translation trainees (Case 2007-324) and Opinion of 31 July 2007 on a notification for prior checking on Trainee Recruitment (Case 2007-208). Available at: www.edps.europa.eu

⁷ Opinion of 27 October 2005 on a notification for prior checking on the management of applications for paid traineeships (Case 2005-214) and Opinion of 15 December 2005 on a notification for prior checking on the management of applications for paid traineeships (Case 2005-297) Available at: www.edps.europa.eu

⁸ Article 49 of the Financial Regulation

⁹ See Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on the recruitment of translation trainees (Case 2007-324) and Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on Trainee Recruitment (Case 2007-208)

¹⁰ Id

Finally, it needs to be noted that the EDPS welcomes that Article 2.2. of Decision 2007/030 **does not require the collection and storage of original supporting documents**, rather copies, certified copies or official certified translations.¹¹

Having said this, the EDPS recommends that EMSA sets a time-frame within which it will compile the necessary experience and revise its retention policy (for example in the sixth year after the discharge of the first traineeship budget).

2.2.6. Transfer of data

Article 7(1) of Regulation 45/2001 states that *"personal data shall only be transferred within or to other Community Institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

As described in the facts above only those within EMSA receive the CVs and data contained in the application or data for handling financial matters who needs to perform their duties: persons in charge of supporting the Selection Committee in the human resources sector, Members of the Selection Committee, heads of units or heads of sectors other persons who would work with a trainee, Executive Director, the relevant persons in human resources, EMSA financial cell and Accounting Officer. The EDPS is therefore satisfied on a general level that the criteria in Article 7(1) of the Regulation are met, with one further point to be made below.

Section 6.3 of the Decision states that the human resources section may consult the medical service of EMSA if necessary before making any decision on granting the disability supplement is made. Even if on a more abstract level, the transfer of disability data can be seen necessary for the tasks of the human resources section (meeting the requirement of Article 7(1) of the Regulation), a special criteria (or form) should be developed determining what data may be exactly requested by the human resources from the medical service, in order to meet the necessity requirement in each and every case.

Further, the EDPS welcomes the practice at EMSA that whenever heads of units or eventually heads of sector are granted access to applicants' CV for a few days, they are reminded that they can use the information only for the purpose of the trainee selection. It is a good practice under Article 7(3) of the Regulation. This is why the EDPS would encourage such a reminder whenever data contained in applications are transferred internally (also to members of the Selection Committee) such a reminder is made.

2.2.7. Right of access and rectification

Article 13 of the Regulation provides for the right of access to one's own personal data being processed. Article 14 of the Regulation grants the right to rectification of inaccurate or incomplete personal data without delay.

Applicants can contact the head of human resources sector or the data protection officer for exercising their right of access and the right to rectify to their own data. Candidates have a right to update or correct their identification data. Data demonstrating compliance with the admissibility criteria may not be updated or corrected after the closing date of the respecting

¹¹ For the recommendation on handling original documents see, Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on Trainee Recruitment (Case 2007-208) and Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on the recruitment of translation trainees (Case 2007-324)

selection procedure. As a principle, this restriction on the right to rectification can be justified under Article 20(1)(c) of Regulation (EC) No 45/2001 as it can be seen as a necessary measure to safeguard the "rights and freedoms of others" (i.e. other applicants in a selection procedure).

Thus, the right of access and rectification is respected.

2.2.8. Information to the data subject

Article 11 of the Regulation provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 provides for certain information to be given to data subjects when personal information has not been obtained from the person concerned.

In the course of selecting trainees, personal data are supplied by the applicants themselves for the purposes of being recruited for a limited period for training. Article 11 of the Regulation needs therefore to be complied with.

The disclaimer placed on the vacancies website contains general information on the recruitment exercise. A privacy notice is placed on the DPO site. A number of contact points are given on the sites of EMSA (postal address of controller, email of DPO and emails and telephones of people in charge of external communications) for applicants to contact EMSA with their requests or enquiries. As listed above in the "Facts" part of this opinion, most of the information required by Article 11 is mentioned in it. Nevertheless, the information on data storage needs to be provided, as soon as the internal policy is developed.

Further, Article 11(1)(f) of the Regulation requires that any further necessary information regarding the specific circumstances in which data are collected to guarantee fair processing in respect of the data subject be supplied. It needs to be noted that applicants are selected on the basis of their qualifications; and an appropriate geographical distribution and gender balance will be maintained. Fair processing towards the persons concerned therefore requires that trainees are informed that the personal data on gender and nationality might be used for achieving the agency's policy defined in the Decision.

2.2.9. Security measures

Article 22(1) of the Regulation requires that "Having regard to the state of art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure the level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Such measures shall be taken in particular 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."

No indication exists to believe that EMSA has not applied the above described security measures, though one further point about data on trainees disability needs to be made. According to the Decision, when the human resources section consult the medical service, the medical service will provide health related information with a view to decide about the amount of disability grant. It is planned that trainees send their justification to the human resources directly, which will remain confidential. Due to the sensitivity of this information, people in charge of handling that data in the human resources section should be made aware

that they are processing sensitive information and they should respect the confidentiality requirement.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing that the above considerations are fully taken into account, namely:

- the justification requested from trainees should not be excessive for the purposes of determining the need and the amount of the disability allowances,
- the human resources section should limit its request to the medical service to disability related data which is strictly necessary for making a decision about the needs of the trainee and the amount of the additional grant to be supplied to disabled trainees; a criteria or a form should be developed to that aim,
- all recipients of personal data in the course of internal transfers are reminded that they can use the information only for the purpose of the trainee selection,
- EMSA should consider specific retention periods for the various categories of data of pre-selected and recruited trainees and should ensure that in the light of practical experiences and the proven needs that policy is revised,
- the information notice is revised: the retention policy is added, and trainees should be informed that the personal data on gender and nationality might be used for achieving the agency's defined policies,
- people in charge of handling that data in the human resources section should be made aware that they are processing sensitive information and they should respect the confidentiality requirement.

Done at Brussels, 29 September 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor