

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission on 5 March 2008 regarding the recruitment procedure for contract agents at the Joint Research Centre.

Brussels, 9 October 2008 (Case 2008-142)

1. Proceedings

On 5 March 2008, the European Data Protection Supervisor (“EDPS”) received from the Data Protection Officer (“DPO”) of the European Commission a notification for prior checking relating to the processing of personal data relating to the "recruitment procedure for contract agents at the Joint Research Centre (“JRC”)”. The notification was accompanied by 35 annexes.

On 11 April 2008 the EDPS requested additional information from JRC. The replies were received on 8 May 2008. The EDPS made an additional request for information on 22 May 2008, which was replied on 11 July 2008. The draft Opinion was sent to the European Commission for comments on 15 July 2008 and these have not been received before the adoption of this Opinion.

2. The facts

2.1 The scope of the Notification: the notification concerns the selection and recruitment of JRC's contractual staff referred to in Title IV of the Conditions of Employment of other servants of the European Communities (“CEOS”). The main **purpose** of the processing is the constitution and management of Contract Agent (“CA”) recruitment files. The recruitment files collect all the information needed in order to start, process and finalize the recruitment procedure, which, at different stages, involves DG JRC Institutes/Directorates (Management Support Units –“MSUs”- and scientific staff), the Human Resources Unit of the Resource Management and the candidates concerned.

2.2 The selection process: The principal steps of the above-mentioned recruitment process are as follows:

1. Units' request of a specific job description created (or already existing) in SYSPER 2.
2. Research in CARL¹ Database (Contract Agent Results List) or exceptionally in ELSA (External staff Online Submission Application)² provided by JRC Management Support Units (MSUs).

¹ The user manual for the CARL database describes how searches for candidates with specific profiles are performed. The specific profile to be sought is based on the description of the job to be performed.

3. Selection process: Interview Organization (Selection Panel) and Interview (Managed by JRC Institutes/Directorates MSUs). For candidates who have passed the full EPSO selection process for contract agents an interview is not compulsory and the candidate may also be selected on the basis of their CV. However in the majority of cases an interview is performed.
4. File preparation (Managed by JRC Institutes/Directorates MSUs).
5. File verification and composition (managed by Human Resources Unit for Ispra/Brussels and by the MSU in the other sites)
6. Constitution and finalisation of the file (managed by the HR Unit for Ispra/Brussels and by the MSU in the other sites).
7. Entrance into service of the selected contract agent.

JRC MSUs organise interviews and finalise the report of the selection panel. The evaluation sheets are filled in for the candidates' appraisal.

2.3 The data subjects are the candidates for a "contract agent" at the Joint Research Centre (JRC).

2.4 The data processed: An application form for employment as contractual agent has to be filled by candidates to a contractual position. In this application form, besides education and working experience, the following information is processed: forename, surname, country and place of birth, date of birth, nationality, nationality at birth, marital status (single, married, widowed, divorced, separated), private address, telephone numbers, sex, links to dependants, a photo.

The list of requested documents to selected candidates³ is as follows:

- recent certificate of good conduct/criminal records certificate⁴
- 2 passport photos
- application form + professional experience form
- updated curriculum vitae
- birth certificate
- document proving the candidate's nationality (passport or I.D. card)
- document proving the fulfilment of any obligations imposed on the candidate by the laws concerning military service
- diploma giving access to the relevant Function Group
- all other diplomas considered relevant
- all previous working contracts/certificates with exact dates and functions plus salary slips⁵

² ELSA is a database managed by DG RTD allowing the storage of spontaneous CVs. In April 2008, DG RTD announced that it no longer maintains this database. A final decision has yet to be taken, but most probably ELSA will be eliminated and the notification will be modified.

³ The above mentioned documents are requested only from selected candidates to whom a contract will be offered if the provided documentation demonstrates they have satisfied the eligibility criteria for that specific contract.

⁴ Contradictory information has been repeatedly given on this point, the last information received by the Human Resources Unit from JRC ISPRA being that a certificate of good conduct is requested for following categories of staff: Officials, Temporary agents, Contract Agents, Seconded National Experts, Trainees and Grant holders.

⁵ As candidates do not generally have a reference from their current employer the salary slip is used for the following:

- To verify the candidate's employment status, in order to calculate the amount of work experience as precisely as possible. The grade is dependant on this.
- To evaluate if the employment is full time or not as experience is considered on a "pro rata" basis

- Legal Entity form
- Financial identification form and Bank account
- Reimbursement of travel and subsistence expenses form

Only for Karlsruhe site:

- a certificate of good conduct for each country in which they lived for more than 6 months over the last 10 years is needed.
- a "Sicherheitsüberprüfung" form (Declaration concerning the personal reliability screening), which should be filled in and signed in original for an obligatory security check carried out by the competent German authorities (Ministry of Environment) and required for all staff working in nuclear installations. This form contains information such as the names of person; birth date and place; nationality; personal ID card or passport number; address; name and address of present employer; domicile and stays of more than three months during last five years/ten years. The persons concerned will be requested to give their informed consent to the personal reliability screening and automatic processing and saving of his/her personal data by the Ministry of Environment, state criminal investigation department, state office for the purpose of the protection of the constitution and nuclear plant. The German authorities, after proceeding with the necessary research, will subsequently issue a security clearance as appropriate.

Further, if selected, the letter to the candidates contains a request of documentation. The candidates have to provide the following data:

- civil status certificate
- residence certificate
- marriage certificate and/or divorce or legal separation judgments, and/or official declaration of partnership recognition (if applicable)
- birth certificate of children (if applicable)
- declaration concerning professional income of spouse/partner and declaration of eventual family allowances received from other sources (if applicable)
- professional income spouse/partner
- divorce/legal separation judgements
- partnership recognition
- entry VISA for non-EU citizens (if applicable)

Other items collected: - references from previous employers

2.5. The recipients:

For every recruitment file:

1. A master file collecting all documents pertaining to the recruitment process is available (i.e. candidate's documents, exchange of e-mails, relevant acts) and registered via NOMCOM (NOMCOM was used to indicate that the recruitment file is registered under the name/number of the COM in the ADONIS system. NOMCOM is not a database) and ADONIS (document management system).
2. A file for transmission to the personal dossier is available and registered in SYSPER2 via NDP (NDP stands for "Numérisation Dossiers Personnels" and DG ADMIN B3 is responsible). The same file is previously processed by PMO/06 (Office for administration

and payment of individual entitlements) in order to establish the candidate's individual rights.

A specific filing plan is under discussion and finalisation with a view to improving the above-mentioned filing process.

To the Medical Services and the JRC ISPRA Security Service

In the framework of the recruitment procedure, specific documents have to be provided to the Medical Services (Ispra, Brussels and Luxembourg) and to the JRC Ispra Security Service (except for candidates to work with the JRC, Karlsruhe site) as follows:

To the Medical Services (Ispra/Brussels/Luxembourg):

- Request for medical visit
- Workplace exposure sheet (WES)

(plus application form and CV for Geel site)

Regarding all data collected by the JRC Ispra Security Service, in the framework of a request for security clearance for recruitment, please refer to the EDPS opinion related to ARDOS⁶.

Requests for medical examinations are submitted as soon as the selected candidate confirms his/her interest in the proposed job. Requests for security clearances are submitted as soon as the selected candidate provides his/her certificate of good conduct.

Based on the above-mentioned documents, the Medical Service and the JRC Ispra Security Service/German Competent Authority issue the medical aptitude and the security clearance respectively.

The JRC ISPRA Welcome Desk (or equivalent service on the other Institute sites) receives personal data of contract agents on the occasion of the entrance into service.

According to the notification and information received, data are not transferred to third countries.

2.6 Manual and/or automatic processing:

* As regards manual processing:

Templates for the management of the paper version of the file are available as follows:

At MSU (Management Support Unit) level:

- "CSAC" report (selected candidates from CARL/ELSA database)
- Call for interview letter
- Selection committee "Compte rendu" (if applicable)
- Evaluation sheet
- Invitation letters to selected candidates
- Negative letters to not selected candidates
- Legal entity
- Financial identification
- Contract staff request and extension form

⁶ file 2007-380 ARDOS: in process at the time of adoption of the present opinion

- Application Form
- Professional experience form
- Transfer request form

At HR level (for Ispra/Brussels sites) and at MSU level (for the other sites):

- Internal file list
- Request for medical visit
- Request for security clearance
- Fiscal Code ("Codice Fiscale") request (available for Ispra site)
- Negative letters to candidates considered not apt
- Acknowledgement of receipt of Staff Regulation and Conditions of employment of other servants of the European Communities and of the Commission decision C(2004)1313 about grading criteria
- Acknowledgement of receipt of information for the transfer of pension rights
- Declaration on external activity/RAA/previous auxiliary activity
- Acknowledgement of receipt of the contract
- Declaration of Discretion
- Contract
- Annex 1 to the contract: Declaration of entry into service
- Accompanying letter of the contract
- Extension letter or amendment
- Letter of end of the contract
- Letter of resignation of the contract
- "Information on entry into service" form for Ispra or equivalent form for the other sites

* As regards automatic processing:

- There is an Excel table containing the candidate's data for the exclusive use of the file managers: name, personal number, nationality, grade, assignment, contract duration and presence on site.

- Moreover, a monitoring Excel table detailing all the recruitment steps is available for the use of the file managers and the MSUs of Ispra/Brussels sites.

2.7 Conservation period: The notification makes the distinction between paper and electronic files but a conservation period of 10 years applies to both:

- The recruitment files on paper are classified and stored for a period of 10 years in accordance with Commission SEC(2007)970 of 4 July 2007 ((Common Commission level retention list for European Commission files).

- Electronically stored recruitment files are kept for 10 years after the nomination of the candidate or after the closure of the recruitment procedure for the non-selected candidates in accordance with Commission SEC(2007)970 of 4 July 2007

The EDPS, in his comments on the draft Common Conservation List⁷, has approved this kind of retention period.

⁷ Cf. letter of 7 May 2007, file 2007-222, on EDPS website, Supervision / administrative measures.

As regards the CARL database, the personal data are stored according to the retention period of CARL⁸, which is the following: "The database for pre-selected applicants remains valid for two years whereas the database for applicants who are successful at all stages of the selection process is three years. On the other hand, where applicants have not been successful in the pre-selection tests or the written or oral tests, their data are deleted and are no longer accessible via CARL once the period of validity expires".

Finally, it has to be noted that, according to the notification, all the external correspondence is also registered in ADONIS.

Regarding the time limit to block/erase data: duly motivated requests (addressed to the following Functional Mail Box: jrc-recruitment-data-protection@ec.europa.eu) submitted by the relevant candidate with regard to the integration, modification and/or deletion of personal data, shall be evaluated on a case by case basis. Where acceptable, the relevant integrations, modifications and/or deletions will be done within 14 days from the corresponding request.

2.8 Information to data subjects: The notification states that the data subjects will be informed by a Privacy Statement at the first time they, as candidates, are contacted by e-mail or letter.

The Privacy Statement has been provided to the EDPS. It contains: the description of the processing operation; what personal information is collected, for what purpose and through which technical means; the identity of the controller and of the processors; the categories of recipients of the data; the security measures to protect the data; the right of access to and rectification of the personal data; the conservation period; the contact information and the right to have recourse to the EDPS.

2.9 Right of access and rectification: The notification states that the procedure is foreseen in the Privacy Statement.

The Privacy statement contains a paragraph on "how can you verify, modify or delete your information?" which includes a contact information functional Mail Box. Moreover, the notification also foresees that personal data of recruited candidates are stored in SYSPER2 and NDP, which may be consulted at anytime as provided for in Article 92 of the CEOS, which shall apply by analogy Article 26, paragraph 7 of the "Staff Regulations of Officials of the European Communities". Duly motivated requests submitted by the relevant candidate regarding integration, modification and/or deletion of personal data shall be evaluated on a case by case basis. Where accepted, the relevant integrations, modifications and/or deletions will be done within 14 days from the corresponding request

Any person to whom the Conditions of employment apply may submit to the relevant authority a request to take a decision relating to him in accordance with the Article 117 of the above-mentioned CEOS.

2.10. Security

The paper documents are archived in physical files which are stored at the personnel premises and are accessible only for authorised officers of the HR and MSUs. This refers to the member of staff in the management support unit that deals with initial preparation of the file

⁸ See Prior-checking 2005-0366 (Selection of contract staff - EPSO) available on the EDPS Website.

and to the member of staff in the human resources unit who finalises the file. Each file would normally be attributed to only one manager.

For electronic data stored, a specific notification deals with the security aspects (DPO-1946). The draft privacy statement specifically foresees that recruitment files are electronically stored on the servers located in JRC Data Centre and that paper documents are archived in physical files which are stored at the personnel premises.

In the event of any particular risk of a breach of the security of the network and terminal equipment, JRC has foreseen a mechanism or procedure to inform by mail message users of the existence of that risk and of any possible remedies and alternative means of communication. A broadcast is foreseen. If the JRC's network is under attack from external sources or there is a specific virus risk, an e-mail broadcast will be sent to all staff warning them of the risks involved and giving any pertinent instructions.

3. Legal aspects

3.1. Prior checking

This Notification relates to the procedure that takes place within JRC, towards managing the recruitment files for contract agents. The recruitment procedures collect all the information needed in order to start, process and finalize the recruitment procedure, which, at different stages, involve DG JRC Institutes/Directorates (Management Support Units –MSUs- and scientific staff), the Human Resources Unit of the Resource Management and the candidates concerned.

Applicability of Regulation (EC) 45/2001: Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

First, the management of data contained in the applications and personal files for contract staff posts 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 a contractual post are collected and further processed. 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 one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. Data relate to a person, for instance, if they concern the identity, characteristics or conduct of a person or if that information is used to determine or influence the way in which that person is treated or evaluated; this is clearly the case of recruitment procedures. Indeed, the recruitment procedure of contractual agents explained above involves the processing of data of applicants for a post. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

Second, the processing of personal data is carried out by a Community institution or body, in this case JRC, in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation).

Finally, Regulation 45/2001 shall apply 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 or are intended to form part of a filing system. In this case

the processing is carried out both manually and automatically. Regulation 45/2001 therefore applies. The processing of the data contained in the applications is manual, but the data form a part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: 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. This list includes Article 27(2)(b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct*".

The processing operations that occur in the context of managing the recruitment files for contract agents to be recruited in JRC aim at evaluating the capacity of each candidate for a particular position. In order to carry out such an 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, Article 27(2)(a) is also applicable for the processing to be subject to prior checking as the selected candidate has to provide a certificate of good conduct/police record/criminal record which may reveal his/her involvement in criminal activity, and also has to provide to the Medical service the request for the medical visit and the Workplace exposure sheet (WES) which may reveal data relating to health.

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 operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

Deadlines: The notification of the DPO was received on 7 March 2008. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 77 days for further information and since 15 July 2008 to allow the data controller to answer to questions, review the draft Opinion and provide comments. In the absence of such comments, this Opinion is signed today.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that 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 or in the legitimate exercise of official authority vested in the Community institutions or body*".

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 JRC.

With regard to the first issue, the selection and recruitment procedure for contractual agents is based on the provisions of Title IV of the Conditions of employment of other servants of the European Communities and on Commission decisions C(2004) 1313, 2862, 4952 and C(2005) 5411⁹. Thus, specific legal instruments adopted on the basis of the Treaties allow and provide the detailed conditions 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 JRC. The processing is necessary for performance of a task carried out in the public interest. Indeed, in the case in point, the procedure for selecting contract staff with a view to their recruitment by the European institutions is part of the legitimate exercise of official authority vested in the institutions and, in this case, in JRC.

Therefore, the EDPS considers that the notified processing operations are lawful under article 5 (a), as long as the recommendations made in this Opinion are followed.

The collection of personal data in the declaration concerning the personal reliability screening for the Karlsruhe site ("Sicherheitsüberprüfung" form) is based on a legal obligation the nuclear site is subject to (Article 5(b)) and on the informed consent of the data subject (Article 5(d)) and is therefore also considered as lawful.

3.3. Processing of special categories of data

Applicable provisions of the Regulation. Pursuant to Article 10 (1) of the Regulation, *"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"* is prohibited except in specific predefined circumstances.

In particular, the prohibition is lifted among others where the *"data subject has given his/her express consent to the processing"* (Article 10(2)(a)) or if *"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)).

Further, Article 10(5) provides that *"the processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards"*.

⁹ - Commission decision C(2004)1313 of 7 April 2004 entered into force on 1 May 2004.
- Commission decision C(2004)2862 of 27 July 2004 entered into force on 28 July 2004.
- Commission decision C(2004)4952 of 17 December 2004 entered into force on 17 December 2004.
- Commission decision C(2005)5411 of 16 December 2005 entered into force on 16 December 2005.

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:

- health-related data (information about applicant's disability necessary for the organisation of the selection or in the request of a furnished flat close to the JRC of ISPRA [on a voluntary basis] - data within the Workplace exposure sheet called WES - medical aptitude certificate),
- data revealing racial or ethnic origin (communication of 1 photo in the application form and 2 photos for selected candidates),
- data revealing political opinions, religious or philosophical beliefs, or trade union membership (spontaneous communication of such data perceived as "social, organisational and other skills and competences" in the European CV),
- data relating to offences and criminal convictions (declaration that the applicant enjoys his/her full rights as a citizen; recent certificate of good conduct/police record/criminal record).

Health related data: 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 adjust the selection procedure to the special needs of such applicant (extra time, specific IT equipment for the written tests etc.) in line with Article 10 (2) (b) of the Regulation. This last point also applies to the medical aptitude certificate.

Additional sensitive data. When an applicant reveals additional sensitive information, without this being specifically requested or the volunteering of information being encouraged by JRC, 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 JRC 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.

Moreover, the spontaneous communication of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership should also be considered as authorised in terms of Article 10 (2) (a) of the Regulation. In fact, by communicating this non-requested data, the data subject is providing his/her consent to the processing of these special categories of data. In this specific framework, it has to be noted that the communication of a photo is not necessary for the purpose of selection, but necessary for the purpose of recruitment (issuance of badges). During the selection procedure, this is considered as excessive (see point 3.4 below).

Criminal records and Security clearance. 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 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, certificates of good conduct/criminal records/police records are collected from selected candidates. As further illustrated below, the EDPS considers that existing legislation justifies that JRC collects such a document. However, the precise content of this document must be assessed in the light of the data quality principle (see discussion under section 3.4 Data Quality).

The legal basis for processing of a recent extract from the police register regarding officials and other servants can be found in Article 28 of the Staff Regulations, which require that a candidate may be recruited as a member of the staff only on condition that he "*enjoys his full rights as a citizen*" and "*he produces the appropriate character references as to his suitability for the performance of his duties*"¹⁰. This legal instrument provides the basis to process data related to criminal convictions¹¹.

Requests for security clearance at the Karlsruhe site (Sicherheitsüberprüfung") may lead to the processing of special categories of data to the extent that the refusal of a security clearance may give an indication of the presence of an offence committed by the person concerned. The EDPS considers that this processing may be authorised on the basis that the processing occurs in order to respect a national legal obligation to which the site is subject (Article 12.b. of the German Atomic Energy Act).

3.4. Data Quality

Adequacy, Relevance and Proportionality: Pursuant to Article 4(1)(c) of Regulation (EC) 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 includes a list of requested 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.

However, after careful examination of the application form, the EDPS is of the opinion that the data listed in the notification and collected from the data subject for the purposes of the recruitment of contractual agents does not comply with the criteria set out in Article 4(1)(c). The EDPS considers that some information requested in the application form is not necessary for the processing operation. For instance:

- It is irrelevant for the application's process to require the nationality "at birth" from applicants;
- The EDPS does not see the need to request the marital status of the candidate, as this status should not have consequences in the application process;
- The EDPS has doubts on the proportionality of the salary slip. Whenever a work certificate exists for each different type of work done (depending of the national country), it is excessive to ask directly the salary slips. If those work certificates do not exist, the EDPS accepts the need of requesting the salary slip, but recommends the JRC to clearly explain it in the information given to the data subject.

Furthermore, regarding information provided to the Medical Services (Ispra/Brussels/Luxembourg), it is mentioned that application form and CV for Geel site are also asked. The EDPS finds this request excessive for the use by the Medical Services and therefore asks these requests to be removed.

A distinction should also be made between the selection and the recruitment procedures. In the context of selection, asking a photo (or a marriage or birth certificates for instance) are excessive as a photo could lead to discrimination (and a marriage or birth certificates is only

¹⁰ See also Article 82 (3) of the Conditions of Employment of Other Servants

¹¹ In French the Staff regulations read "garanties de moralité".

relevant for the purpose of establishing the data subject's individual rights). The purpose of asking a photo in the context of a security clearance will be assessed in the framework of the opinion 2007-380 "ARDOS" (in process).

As for the adequacy and the necessity of the processing of police record/criminal record/certificate of good conduct, the EDPS is concerned about the collection of those documents. It should be noted that those documents have a very diverse content in different Member States and carry diverse denominations. In certain Member States, they contain information that goes beyond a lawful finality for their collection, namely to establish if the selected candidate *"enjoys his full rights as a citizen"* and has *"the appropriate character references as to his suitability for the performance of his duties"* (see Section 3.3 above)¹². Even if, in principle, the EDPS considers that the collection of those documents is lawful, a case by case analysis of the content of the national police record/criminal record/certificate of good conduct should be carried out so as to collect only relevant data in the light of the Staff Regulation requirements. The JRC recruitment services should be particularly careful not to collect excessive and irrelevant data in this context. The rules for recruitment of Contractual agents and the Privacy Statement should also be modified accordingly

Fairness and Lawfulness: Article 4(1)(a) of Regulation (EC) No 45/2001 requires that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (see point 3.2 and fairness will be dealt with in relation to information provided to data subjects (see point 3.9).

Accuracy: Article 4(1)(d) provides that 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 so far as most of the personal data supplied during the recruitment process is provided by the data subject, the EDPS is of the opinion that this helps to ensure that the data are accurate and kept up to date during recruitment and also because the Human Resources ask the applicants to inform JRC about any change on his data.

The MSU and Human Resources Unit also request a criminal record which is kept for as long as the personal file is kept. Even if it is legitimate for the JRC to collect this data at the moment of recruitment for transmission to the Ispra Security Service, the data contained in this criminal record can no longer be considered as accurate after the date of reception of the document. On this basis, the JRC should find a system whereby information about crimes that have expunged should be deleted. This may be achieved through the right of access and rectification, as described below under 3.8. Another solution would be a "standard form" stating that the person is suitable for the performance of his duties kept in the file whereas the criminal record would be returned to the person

3.5. Conservation of data/ Data retention

Article 4(e) of Regulation 45/2001 states that personal data must be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed"*.

As explained above, according to the notification, recruitment files on paper are classified and stored for a period of 10 years in accordance with Commission SEC(2007)970 of 4 July 2007.

¹² In French version *"ne jouit de ses droits civiques"* and *"les garanties de moralité requises pour l'exercice de ses fonctions"*.

Electronically stored recruitment files are kept for 10 years after the nomination of the candidate or after the closure of the recruitment procedure for the non-selected candidates in accordance with Commission SEC(2007)970 of 4 July 2007.

As regards the CARL database, the EDPS has already analysed its retention policy¹³, which is the following: "The database for pre-selected applicants remains valid for two years whereas the database for applicants who are successful at all stages of the selection process is three years. On the other hand, where applicants have not been successful in the pre-selection tests or the written or oral tests, their data are deleted and are no longer accessible via CARL once the period of validity expires". The EDPS recommends that this specific period be also mentioned in the privacy statement. In this respect see point 3.9 below.

The EDPS in his comments on the draft Common Conservation List has approved this kind of retention period in general terms. Nevertheless, as for the conservation of data, the EDPS would like to raise the attention on the differences of retention period that should be implemented for the candidates who have not been recruited and those who have been recruited. Concerning the candidates who have not been recruited, the retention period should derive from the length of time during which: (i) a complaint may be brought to the European Ombudsman, (ii) an appeal may be lodged before the Court of Justice, (iii) auditing services may need to consult recruitment files in the frame of Article 49 of the Implementing Rules of the general Financial Regulation, etc. Concerning the candidates who have been recruited, the EDPS would like to recall that in similar cases, a data retention period of ten years as of the termination of employment or as of the last pension payment was considered as reasonable¹⁴.

Without prejudice of the general conclusions of the DPOs-EDPS working group on time limits and blocking, which is about to conclude its work, the specific criteria described above should be taken into account

3.6. Compatible use / Change of purpose

Article 4(1)(b) of Regulation 45/2001 provides that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

Data collected during the recruitment procedure may be used for various reasons (for payment of allowances and expenses to contract agents for instance) and are transferred into the personal file. Data are retrieved from or entered in the staff databases. The processing being reviewed involves no overall change to the specified purpose of staff databases, the recruitment procedure being merely a part of that purpose. The EDPS is satisfied that these various purposes are compatible with the purposes for which the personal data are obtained; the recruitment is a part of the human resources management. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) are fulfilled.

¹³ See Prior-checking 2005-0366 available on the EDPS Website

¹⁴ cf. the following opinions concerning evaluation of personnel: EDPS **2007-406** of 3 August 2007 (European Ombudsman - staff), EDPS **2006-297** of 19 October 2006 (ECOSOC - officials and temporary agents), EDPS **2005-218** of 15 December 2005 (Commission - staff appraisal), EDPS **2004-293** of 28 July 2005 (OHIM - staff appraisal), EPDS **2004-281** of 4 July 2005 (ECJ - staff report)

3.7. Transfer 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).

Article 7(1) of the Regulation stipulates that "*without prejudice to Articles 4, 5, 6 and 10 personal data shall only be transferred within (...) Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.*"

During the recruitment of contract agents, data might be transferred to:

- ADONIS (document management system)
- DG ADMIN
- PMO.6
- Medical Services (Ispra, Brussels, Luxembourg)
- JRC Ispra Security Service
- German Competent Authority for security checks (for Karlsruhe only)
- JRC Ispra Welcome Desk (or equivalent service on the other sites)

The EDPS notes that the internal transfers referred to above fall within the legitimate performance of the tasks covered by the competence of the respective recipient. Indeed, all the recipients have the competences to perform the task for which the data is transferred: DG ADMIN is competent for the uploading of the information. Medical services have the competence to issue the medical aptitude. Furthermore, the transfer of the information is necessary for the performance of such tasks. Consequently, Article 7 (1) of the Regulation is being complied with concerning those specific transfers.

As to the transfers regarding data sent to the JRC Ispra Security Service, please also refer to the opinion 2007-380 "ARDOS". The legitimacy and necessity of this transfer will depend on the competence of the JRC ISPra Security Service.

Article 7(3) states that "*the recipient shall process the personal data only for the purposes for which they are transmitted*". It would be good practice to ensure that the recipients be reminded when they receive the personal data of candidates that they should not use the data for any further purposes beyond that of contract agents' recruitment.

The procedure also foresees the transfer of the data to the German Competent Authority for security checks (for Karlsruhe only). Therefore, an authority must receive personal data of the individuals concerned according to the German legislation. This authority in principle is subject to German legislation implementing Directive 95/46/EC, and it is the recipient who is subject to the exercise of public authority under Article 8(a) of the Regulation.

Article 8(a) also applies as data are transmitted for the nuclear centres to national security authorities and to the German Ministry for security checks for the Karlsruhe JRC site. This provision stipulates that the data may be transferred if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the public authority. The transmission to the national security authorities is justified by a task carried out by these authorities in the public interest, based on national legislation mentioned above.

Article 9 does not apply to the current processing, as no additional transfers are foreseen.

3.8. 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 provides the data subject with the right to rectify inaccurate or incomplete data.

The rights of access and rectification may be restricted in terms of Article 20 (1) of the Regulation, in particular "*where such a restriction constitutes a necessary measure to (...) the protection of the rights and freedoms of others*".

According to the Notification and privacy statement, individuals are granted such rights. The Privacy statement contains a paragraph on "how can you verify, modify or delete your information?" which include a contact information functional Mail Box. Moreover, the personal data of recruited candidates are stored in SYSPER2 and NDP, which may be consulted at anytime as provided for in Article 92 of the Conditions of Employment of Other Servants of the Communities (by analogy of Article 26 paragraph 7 of the Staff Regulations of Officials of the European Communities). Duly motivated requests regarding modification and/or deletion of personal data shall be evaluated on a case by case basis. Where accepted, the relevant integrations, modifications and/or deletions will be done within 14 days from the corresponding request.

The EDPS would like to underline that - in principle - the data subject shall be granted access to all his personal data processed within the particular selection procedure. In particular, the data subject shall be given access to his/her **evaluation results**¹⁵ from the selection procedure in order to provide someone to a vacant post (interviews with the panel members), as evaluation results are personal data.

No further information is given about what is the scope of the access to the evaluation results. 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-ratio/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 the 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 member themselves and their need to have their independence reinforced and the right of other applicants to be treated fairly and in like fashion. In any case, data subjects shall be provided with aggregated results.

¹⁵ See third paragraph above of point 3.1 "prior-checking".

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 without that interfering in any way with the principle of the secrecy of selection board proceedings, as set out in Article 6 of Annex III to the Staff Regulations, since the marks or ratios given would be overall averages. Access to such data should be offered, to selected and non selected candidates, 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 been 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 or ratios allocated could not under any circumstances be open to a right of 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.

3.9. Information to the data subject

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

Article 11 of Regulation 45/2001 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 supplied where the data have not been obtained from the data subject. The personal data processed during the selection procedure of contractual agents are obtained directly from the data subjects through the documents which they provide as part of the procedure and through the CARL database (and exceptionally from the ELSA database) as well as from the interview process. Thus Articles 11 and 12 will both apply to the procedure.

The data subjects will be informed by the Privacy Statement at the first time they, as candidates, are contacted by mail or letter. The information provided to the applicant includes: the description of the processing operation, the purpose for which the data are intended, the identity of the controller and of the processors, the categories of data processed, the categories of recipients of the data, the security measures to protect the data, the right of access and rectification to the personal data, the conservation period and the recourse to the EDPS (including a link to his functional mailbox).

In order to ensure full compliance with Articles 11 and 12 of the Regulation, the EDPS recommends:

- mentioning the legal basis;
- it should be clearly stated that salary slip is only necessary when no work certificate exists
- indicating the existence of the rights of access to assessment reports;
- completing by the exact retention period of CARL, the information about the time limits for storing the data.

3.10. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented 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 to prevent all other unlawful forms of processing"*.

Security measures relate to the personal and recruitment procedure data which are collected.

Regarding the paper documents that are archived in physical files and stored at the personnel premises, they are accessible only for authorised officers of the HR and MSUs. This refers to the member of staff in the management support unit that deals with initial preparation of the file and to the member of staff in the Human Resources unit that finalises the file. Each file would normally be attributed to only one manager. The EDPS welcomes this limited access to a manager.

Regarding electronic data stored, JRC is also referring to a specific notification (DPO-1946) on the security aspects. The EDPS sees this notification as a generic one in the sense that it is applicable to all processing operations, including the current one under analysis. No new IT system will be used for the purpose of this specific processing.

JRC confirms that it adopted the security measures required under Article 22 of the Regulation, also in the case of particular risk of breach of the security of the network and terminal equipment. A mechanism of mail message is foreseen regarding the information of users in the existence of that risk and of any possible remedies and alternative means of communication. The EDPS needs to receive more detailed information on the specific measures taken so as to conclude that appropriate technical and organisational measures have been adopted..

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:

- ask for salary slips only when work certificates do not exist;
- remove, as explained in the opinion, the request for some information in the application form of candidates (photo, marital status, nationality at birth) as well as remove information requested to selected candidates for the medical services of Geel site;
- modify the Rules for recruitment of contractual at JRC and the Privacy Statement so as to refer only to the collection of an extract of the police register of the candidate's country and not a certificate of good conduct;
- Carry out a case by case analysis of the content of the different police records/criminal records/certificates of good conduct in order to collect only relevant data in the light of the Staff Regulations requirements;
- Find a system whereby information contained in the police record/criminal record/certificate of good conduct should be deleted;

- as to the non-recruited applicants, set out the time-limit for storage of data in relation to the time-limits set out for the possible review of the decision taken in the selection procedure (complaint to the European Ombudsman, appeal with the Civil Service Tribunal), as well as in accordance with Article 49 of the Implementing Rules to the Financial Regulation (audit);
- use the sealed envelope in a mandatory way when forwarding to the Ministry of the Environment Baden-Württemberg data of the data subject;
- remind to all recipients of their obligation not to use the data received for any further purposes than the one for which they were transmitted;
- ensure that applicants (both selected and non selected candidates) have access to their file including the assessment notes concerning them drafted by the panel members. 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.
- Provide the EDPS with more detailed information on the specific security measures adopted.

Done at Brussels, 9 October 2008

(signed)

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