



Opinion on a notification for Prior Checking received from the Data Protection Officer of the EU Agency for Fundamental Rights regarding the selection procedures for seconding national experts

Brussels, 27 April 2009 (Case 2008/747)

1. Proceedings

On 5 December 2008, the European Data Protection Supervisor ('**EDPS**') received from the Data Protection Officer of the EU Agency for Fundamental Rights ('**FRA**') a notification for prior checking regarding the data processing operations that take place in the context of the selection of national experts for seconding ('**the Notification**').

On 2 February 2009, the EDPS requested complementary information from FRA regarding the data processing operations. FRA's Data Protection Officer provided the information on 5 February 2009. On the same day, the EDPS sent the draft Opinion to FRA for comments. FRA's Data Protection Officer responded on 22 April 2009.

2. Examination of the matter

This prior check analyses the data processing operations carried out by FRA in order to select national experts for secondment in FRA. The data processing operations start with the collection of CVs and motivation letters. They continue with the assessment of candidates and finalize with the selection of the most suitable candidates. Taking this into account, this Opinion will assess the extent to which the data processing operations described below carried out by FRA with the purpose of selecting the best candidates are in line with Regulation (EC) No 45/2001 of 18 December 2000 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 ('**Regulation (EC) No 45/2001**'). This Opinion will not address data processing operations that go beyond this scope such as the data processing that takes place after the selected candidate has accepted the position.

2.1. The Facts

The *purpose* of the data processing operations is to manage the selection of **national experts in FRA** in order to select the best candidates for each particular position.

The *primary responsibility* for the data processing lies within the Human Resources and Planning Department. The data processing operations are carried out by the Human Resources and Planning Department and the Selection Board, which is a committee set up in accordance with Article 7 of the FRA Decision 2006/02 concerning FRA's recruitment procedures.

The data processing operations that take place in the context of selecting **national experts for secondment to the FRA** can be summarized as follows:

- Further to the receipt of CVs and motivations letters through an e-recruitment on-line tool, the staff dedicated from Human Resources and Planning Department sends to the members of the Selection Board the applications for them to carry out an eligibility check and evaluation. The applications are accompanied with an evaluation sheet. This information is sent by regular paper in sealed envelopes ensuring the security of the information during the transfer.
- The Selection Board analyses the applications to verify the eligibility of the candidates and assess their compliance with the requirements/qualifications specified in the concerned publication. The Selection Board will select the most suitable candidates (those obtaining at least 60% of the total points) and will invite them for an interview.
- The Selection Board carries out oral interviews with each candidate in order to assess their suitability for each specific position. The interviews are carried out on the basis of pre-defined questions decided by the Selection Board. The Selection Board fills in an evaluation form for each candidate and writes a report including the marks given by each member of the Board.
- The representative of the Human Resources and Planning Department drafts a "Process Verbal" regarding the selection outcome including the list of successful candidates, which is approved and signed by each member of the Selection Board. It is then passed on to the Appointing/Contracting Authority for approval. The Appointing/Contracting Authority will then request the secondment of the successful candidate.
- Once the final decision has been taken, all applicants are informed of the outcome of their application.

The **types of data subjects** whose data is collected in the course of the selection of candidates include external applicants who wish to be seconded in FRA.

The **categories of data** collected and further processed include the following: (i) Identification data, which may include surname, first name, date (and place) of birth, sex, nationality, telephone number, email address; and passport or national ID number; (ii) Education and professional experience, which may include the degree/diploma giving access to doctoral studies, date of award of degree, length of professional experience, length of management experience, languages spoken and level, previous working experience; (iii) Status regarding the military service; (iv) Data related to the suitability of a candidate for a particular vacancy, which may include the assessment by the selection panel, including the performance during the interview(s) and, (v) Financial information to recover travel expenses.

The above information is partially provided directly by the candidate in different ways: (i) By providing copies of several documents (such as passport, education diplomas or and working experience); (ii) By filling up several forms such as the Financial Identification Form or Legal Entity form as well as the CV in Europass Format and motivation letter. The remaining information, in particular the marks given to each candidate, is produced by the Selection Board in the context of the selection procedure.

As far as **the conservation** of the data is concerned, according to the Notification, the selection dossiers are destroyed 3 years after the end of the selection procedure. The privacy statement refers to 5 years. The data controller informed the EDPS that this time has been reduced to 1 year after "the operational purposes are closed".

The data controller ***transfers personal data*** gathered to the Selection Board. The Selection Board Members sign a declaration of absence of conflict of interest and confidentiality form. In addition, some information is given to staff members of the Human Resources and Planning Department competent for the reimbursement of financial expenses.

As far as the ***right to information*** is concerned, the Notification explains that information is given first in the FRA Web site, under the recruitment section for National Experts. A copy of the privacy statement was annexed to the Notification. In addition to the privacy statement, a copy of the "*Work Opportunity as Seconded National Expert*" document was also provided. This document contains some data protection information such as the reference to the purpose of the processing and information on access rights. The privacy statement contains information on the data controller and members/entities, which will have access to the data. It refers to the rights of access, rectification and blocking and provides an address where candidates can exercise such rights. It refers to the possibility to have recourse to the EDPS and provides a conservation period. A member of the EDPS staff accessed FRA Web site in order to check how information was provided to candidates. The document "*Work Opportunity as Seconded National Expert*" was easily available. The privacy statement was not found but later on was made available under the "Recruitment Section" as it applies to recruitment in general (not only recruitment of national experts). In addition, in the section dedicated to recruitment of National Experts an excerpt of the privacy policy was added which refers to the purposes of the processing and provides an email address to exercise the rights of access and rectification.

As far as ***access rights and rectification*** are concerned, as described in the privacy statement, the application of such rights is recognized and individuals are informed that these rights can be exercised by contacting the data controller.

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

2.2. Legal Aspects

2.2.1. Prior Checking

Applicability of the Regulation. Regulation (EC) No 45/2001 applies to the "*processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system*" and to the processing "*by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law*"¹. For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the selection of national experts 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 national experts positions in FRA are collected and further processed. Second, as described in the Notification, the personal data collected undergo "*automatic processing*" operations, as defined under Article 2(b) of the Regulation (EC) No 45/2001 as well as manual data processing operations. Indeed, some of the personal information is collected electronically directly from candidates. Other information is created by the selection board on the basis of the candidates' performance. Finally, the processing is carried

¹ See Article 3 of Regulation (EC) No 45/2001.

out by a Community institution, in this case by FRA, in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001).

Grounds for Prior Checking. Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*processing operations likely to present specific risks to the rights and freedoms of data 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, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of selecting national experts in FRA precisely aim at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, the data controller will perform various assessment activities such as weighing up whether the individual in question 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, clearly the data processing operations fall within Article 27(2)(b) and must therefore be prior checked by the EDPS.

Ex-post Prior Checking. Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

Notification and Due Date for the EDPS Opinion. The Notification was received on 5 December 2008. The period within which the EDPS must deliver an opinion was suspended for a total of 79 days to request further information from FRA and allow for comments on the draft EDPS Opinion. The Opinion must therefore be adopted no later than 27 April 2009.

2.2.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. The grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if the processing is "*necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*". The Decision 2004/07 regarding Detached National Experts and, by analogy, Decision 2006/02A concerning the recruitment procedures of the FRA provide the legal basis for the recruitment of National Experts at the FRA. This Decision defines the principles and procedures for the selection of national experts.

2.2.3. Processing of Special Categories of Data

Article 10.1 of Regulation 45/2001 establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject ex Article 10(2)(a).

The Notification states that no data falling under the categories of data referred to in Article 10.1 are processed in the context of the data processing operations notified for prior checking. Taking into account the overall purpose pursued by FRA when it engages in data processing operations to select national experts, the EDPS understands that the collection of special categories of data is not FRA's intention in the context of such selection. Indeed, the gathering of special categories of data does not seem very helpful towards selecting candidates insofar as such

data may be irrelevant for the purposes of selecting the best suited candidate. However, the EDPS considers that in the context of selecting candidates, applicants may spontaneously reveal information on their disability or other types of special categories of data. If this occurs, it should be considered that candidates have given their express consent to the processing of that data, so that the condition of Article 10(2) (a) would be met. In addition, such data may be processed in the context of staff management (recruitment) in order to enable the employer to comply with his specific obligations in the field of employment law to provide for extra time and to provide specific IT equipment for the tests *ex* Article 10(2)(b) of the Regulation according to which the prohibition shall not apply where the processing is "*necessary for the purpose of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorized by the treaties establishing the European Communities or other legal instruments adopted on the basis thereof*".

2.2.4. Data Quality

Adequacy, Relevance and Proportionality. According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". In the light of the information collected by FRA, as described in the Notification, it appears to the EDPS that the data listed in the notification and collected from the data subject for the purposes of the recruitment of national experts complies with the criteria set out in Article 4(1)(c).

Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". The system itself ensures that the data are accurate and kept up to date as much of the personal data supplied during the recruitment process is provided by the data subject. However, other information is not provided directly by the individual but generated by the selection board such as it is the case with the individual evaluation forms. In this regard, as further developed below, it is important for the candidate to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data held about them is accurate. In this respect, see also Section 2.2.7.

Fairness and Lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analyzed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.8.

2.2.5. Conservation of Data

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

As stated in the facts, there is a certain ambiguity concerning the storage periods. According to the Notification, the selection dossiers are destroyed 3 years after the end of the selection procedure. However, according to the privacy statement the retention period is 1 year after "the operational purposes are closed". Furthermore, the EDPS finds the reference to the latter moment a bit ambiguous as it is uncertain when this period will start.

In the light of the above, the EDPS suggests (i) clarifying the conservation period, in particular the reference to the starting of this period; (ii) Regarding the length of the conservation period, the EDPS considers that 1 year period after the selection procedure is finished would be an appropriate time length regarding the information of candidates who have not been recruited. This is because this time period is in line with the length of time during which: (i) a complaint may be brought to the European Ombudsman or to the EDPS, (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, FRA includes the relevant document in the personal file of the data subject and therefore the retention period policies of the personal file apply. The EDPS reminds FRA that the personal file should also have a retention time limit.

Without prejudice to the general conclusions of the working group on time limits and blocking, the specific criteria described above should be taken into account.

2.2.6. Transfers of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules applicable to transfers to Community institutions or bodies (based on Article 7) apply in this case. Article 7.1 establishes that data shall only be transferred if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The EDPS considers that the transfers of information to the recipients described in the Notification for the purposes stated seem to comply with the first requirement. Indeed, all the recipients are supposed to have the competences to perform the task for which the data is transferred. First, the Selection Board is supposed to have the competence to assess the adequacy of the candidates. The EDPS welcomes the practice consisting in the signature by Selection Board Members of a declaration of absence of conflict of interest and confidentiality. Second, staff members of the Human Resources and Planning Department competent for the reimbursement of financial expenses are supposed to have the competences to reimburse the financial expenses incurred by candidates.

2.2.7. Right of Access and Rectification

According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

According to the privacy statement, FRA ensures the possibility for individuals to exercise such rights. Individuals are informed that these rights can be exercised addressing to recruitment@fra.europa.eu. No further information is given about how and at which stages this can be done.

The EDPS recalls that candidates should be able to have access to their entire file, comprising any assessment notes concerning them drafted by the selection board competent for their assessment. Because part of the assessment procedure is based on answers given in oral interviews, candidates should be able to receive the marks/comments obtained in this type of test. For example, written feed-back could be a re-transcription of the parts of the selection file which concern the evaluation of performances of each candidate.

The EDPS is aware that there is a limitation to this rule; this is the principle of the secrecy of selection committee's proceedings, as set out in Article 6 of Annex III to the Staff Regulations. Accordingly, no marks and assessment given by individual members of the selection board 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 has limited application even though personal data are processed, if that area is covered by the exception in Article 20(1)(c) for the protection of the

rights of others, in this instance both the right of selection board members themselves and their need to have their independence reinforced and the right of other applicants to be treated fairly and in a similar fashion. Article 20 (1) states that "*The Community institutions and bodies may restrict the application of () Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others*". This means that information comparing the data subject with other applicants should not be provided and no information should be given regarding the particular remarks of members of the committees. The EDPS calls upon FRA to ensure the application of the right of access as described above.

The EDPS considers that in the context of this data processing, the applicant's right of access to information concerning him or her directly and individually must be strictly complied with. It enables applicants to see which elements were taken into account for the overall assessment. Access to such data should be offered on the basis of Article 13 of the Regulation, thus not implying any right of rectification. Right of access under Article 13 does not serve the same purpose as under Article 14 of the Regulation (right of rectification). The applicant's right of access enables them to see that the selection board has acted 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 obviously apply only to factual data. Marks and assessment 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. Furthermore, the EDPS notes that limitations to the right of rectification of candidates' data, after the deadline for the sending of documents regarding a given selection may be necessary for different reasons, including those of a practical nature. In this regard, the EDPS considers that these limitations can be seen as necessary to ensure objective, certain and stable conditions for the selection, and essential to the fairness of processing. Thus it can be recognized as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

In the light of the above, the EDPS recommends that FRA sets up procedures to ensure access to candidates' personal data as described above.

2.2.8. Information to the Data Subject

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

In order to comply with this obligation, the Notification explains that information is given in the FRA Web site, under the recruitment section for National Experts. A member of the EDPS staff accessed FRA Web site and could not find the privacy statement. However, during the period within which the EDPS drafted his Opinion, the privacy statement was placed in the "Recruitment Section" and in the section dedicated to National Experts an excerpt of the privacy policy was added. The EDPS considers this is a good practice. To provide for more visibility of the full privacy policy he recommends adding a link to the privacy statement nearby the extract. This would contribute to provide full visibility of the privacy policy to those individuals who only access the section dedicated to National Experts.

The EDPS also reviewed the content of the information provided in the privacy statement and the "*Work Opportunity as Seconded National Expert*" document to verify whether the content of both documents satisfies the requirements of Articles 11 and 12 of Regulation (EC) No 45/2001. The EDPS considers that the privacy statement contains most of the information required under Articles 11 and 12 of the Regulation; however, he considers that it would be appropriate to

provide more detailed information regarding the purposes and how the data is processed. In addition, the following should be clarified (a) The Selection Board has access to the data; (b) that the Finance Department has access to the information insofar as it is necessary for the reimbursement of expenses. In addition, (c) it would be appropriate to refer to the Decision 2004/07 concerning the recruitment procedures of the FRA, which legitimizes the data processing.

2.2.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the appropriate technical and organizational 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 prevent all other forms of unlawful processing. FRA acknowledges that it has adopted the security measures required under Article 22 of the Regulation. On the basis of the available information, the EDPS does not have any indication suggesting that FRA would not have applied the security measures required in Article 22 of the Regulation.

3. Conclusion

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

- Clarify the conservation period taking into account the recommendations provided in this Opinion;
- Set up a procedure for data subject's access to personal data, including assessment notes of the selection board, within the limits described in this Opinion;
- Include a link to the full privacy statement in FRA Web site in the section/notice dedicated to National Experts which they have to access when they complete the on-line application forms;
- Amend the privacy statement as recommended in this Opinion.

Done at Brussels, 27 April 2009

(signed)

Peter HUSTINX
European Data Protection Supervisor