

Opinion on the notification for prior checking from the Data Protection Officer of the Committee of the Regions regarding the "recruitment of contract staff"

Brussels, 16 June 2009 (Case 2008-696)

1. Procedure

In a letter dated 20 November 2008, the Data Protection Officer (DPO) of the Committee of the Regions sent the European Data Protection Supervisor (EDPS) notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "recruitment of contract staff".

The notification form was accompanied by:

- Decision No 307/04 of the Secretary-General of the Committee establishing general implementing provisions on the criteria applicable to step classification on appointment or on taking up employment;
- Decision No 037/05 of the Secretary-General of the Committee establishing general implementing provisions on the procedure governing the engagement and the use of contract staff;
- the evaluation grid for applicants used at recruitment interviews.

Some questions were addressed to the DPO on 19 December 2008. The replies were provided on 12 February 2009. The draft opinion was sent to the DPO for comments on 9 March 2009. Comments were delivered on 9 June 2009.

2. The facts

Purpose and legal basis of the processing

The overall purpose of the processing operation under consideration is to select and recruit contract staff while complying with the provisions on conditions of employment laid down in the Staff Regulations of Officials of the European Communities (Staff Regulations) and the Conditions of Employment of Other Servants of the European Communities (CEOS). These provisions are set out in Article 4 and Chapter 1 of Title III of the Staff Regulations and in Title V of the CEOS (Articles 79 to 88).

The secondary purpose, in the case of a new recruit, is to obtain some of the information needed to establish the rights of the data subject on taking up his or her appointment.

The data controller is the head of the Recruitment and Careers Unit. The department responsible is the Committee's Recruitment Department.

Description of the processing operation

Contract staff, who do not occupy a post in the organisation chart, are paid from the appropriations granted by the budgetary authority for that purpose (CEOS, Article 79). They are recruited either on the basis of a contract of indefinite duration (CEOS, Article 3a, only in function group I, grade 1), or on the basis of a contract for a fixed period (CEOS, Article 3b, in function groups I, II, III or IV).

Irrespective of the legal basis (CEOS, Article 3a or 3b), the following is the procedure for filling a vacant post:

The **first stage** is to preselect applicants on the basis of the CVs on the CAST database (which contains those who have passed the selection procedures for contract staff organised by EPSO), or of the CVs on the "spontaneous applications" database maintained by the Recruitment and Careers Unit. This preselection is on the basis of the profile sought. Vacancy notices are not published for contract staff posts.

The Recruitment and Careers Unit is responsible for forwarding CVs it has preselected to the head of the unit seeking staff.

The **second stage** is to select the future contract staff member by making a further selection on the basis of CVs and interviews. That is the responsibility of the unit seeking staff and involves evaluating and comparing the applicants' professional skills. More specifically, the department seeking staff selects applicants for interview on the basis of their CVs. At the request of the department seeking staff, the Recruitment and Careers Unit calls the preselected applicants for interview. The head of the department seeking staff then sends a summary note to the Recruitment and Careers Unit, attaching the standardised evaluation grids for all the applicants interviewed. The applicant selected is then informed by letter and those not selected receive a letter of refusal.

The **third stage** is actual recruitment. It is a purely administrative function carried out by the Recruitment and Careers Unit. A recruitment file is created and will be the basis for future personal file.

The applicant selected is normally asked to send in or fax copies of the necessary documents. He must bring along the originals for checking on the day of his medical.

The applicant selected is called to a medical examination to check his medical fitness (the work done by the medical officer to check that the applicant is fit for work is not covered by this notification), and his contract is drawn up and submitted to the appointing authority (the Secretary-General of the Committee of the Regions) for signing. He is asked to produce official documents so that his eligibility for the grade proposed can be checked, his personal file prepared and his entitlements established. Once those documents have been received and the medical clearance certificate has been forwarded by the Committee's medical officer, the applicant receives a formal offer of employment stating the date on which he is to take up service. He is also assigned an NUP (unique payroll number) in Reto and encoded in the Centurio database.

Even if the applicant selected is already employed in another Community institution, his personal file is not transferred to the Committee and the recruitment procedure is the same as for completely new recruit.

If the applicant is already employed by the Committee and so already has a personal file, he is not required to produce any additional document.

Data subjects

The data subjects of this processing are individuals in the CAST database managed by EPSO, and individuals who have made a spontaneous application for work at the Committee of the Regions.

Personal data processed

All candidates:

The Committee has access to the CAST database and to the data which it contains.

If the candidate has been preselected from the "spontaneous applications" database the Committee already has the following data:

- surname, first name
- address, telephone number, email address
- nationality
- languages (spoken and written)
- level of education
- profile (profession)
- professional experience (open question)
- IT skills
- availability
- the CV and sometimes other documents (a covering letter setting out the reasons for the application, various attestations, etc) provided spontaneously.

Applicants selected for interview:

- standardised evaluation grids
- summary note drafted by the head of the department seeking staff

Successful applicants (with the exception of staff already working for the Committee)

- photocopies of attestations relating to professional experience
- photocopies of diplomas
- the original of a recent extract from criminal records
- medical clearance certificate (supplied by the institution in cooperation with the European Commission laboratory)
- photocopy of identity card or passport
- certificate of nationality (or photocopy of passport)
- proof of residence
- birth certificate
- attestation of military service status
- language knowledge certificates (Article 45(2))
Additional documents to be supplied by applicants who are married and/or have a child at the time of taking up their appointments:
 - birth certificate for each child
 - statement of child benefits received from elsewhere

- marriage (or divorce) certificate
- spouse's recent payslip or statement of annual taxable income
- attestation that the applicant or his/her spouse is not receiving a household allowance from elsewhere

Information to the data subject

The management department does not provide any information to data subjects on the protection of their personal data at the time of the recruitment procedure.

However, there is a note on the protection of personal data on the Committee's website on the spontaneous applications page:

<http://www.cor.europa.eu/pages/PresentationTemplate.aspx?view=folder&id=b3c0a1ba-c996-4236-b480-bcb4a8c17277&sm=b3c0a1ba-c996-4236-b480-bcb4a8c17277>

That note contains information on the processing of spontaneous applications submitted via the application form on line, specifying: the identity of the data controller, the purposes of the processing operation, the legal basis, the data recipients, the security measures adopted, the right to rectify data, the data retention period, the possibility of appealing to the controller, the DPO and the EDPS.

Also, EPSO provides information to persons entered in the CAST database.

Data-storage medium

Documents are kept only on paper.

Some data are extracted from the electronic "spontaneous applications" database and from CAST, but during the selection and recruitment procedure only documents on paper are used.

Recipients or categories of recipient to whom the data may be disclosed

The data recipients are officials and other servants in the Recruitment and Careers Unit. In addition to the department responsible, the head of unit of the department seeking staff and those conducting the selection interview receive applicants' CVs.

The evaluation grids and the summary note are drafted by those conducting the selection interview.

Personal data storage policy

All data relating to all applicants (CVs, internal notes, summary note, evaluation grids) are kept for five years so as to be able to reply to any requests from the Internal Audit department or the court of Auditors.

Data relating to the applicants appointed (personal documents supplied) are put into their personal files and stored by the Recruitment and Careers Unit throughout their career at the Committee.

Storage for historical, statistical or scientific purposes is not envisaged.

Measures taken to ensure security of processing

Security measures have been taken. [...]

3. Legal aspects

3.1. Prior checking

The notification describes processing of personal data. Applicants' personal data are collected and processed within the meaning of Articles 2(a) and 2(b) of Regulation (EC) No 45/2001. The data processing in question is carried out by the Committee in the exercise of activities which fall within the scope of Community law (Article 3(1)). The processing is both manual and automatic, and the data are intended for inclusion in a filing system as defined in Article 2(c) of the Regulation: *"any structured set of personal data which are accessible according to specific criteria"*. The processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of all *"processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes"*.

Article 27(2) contains a list of processing operations likely to present such risks, such as *"processing of data relating to health and to suspected offences, offences, criminal convictions or security measures"* (Article 27(2)(a)) and *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"* (Article 27(2)(b)). In question are personal data processed in order to evaluate personal aspects relating to the data subjects, namely their suitability for employment at the Committee. Furthermore, since data relating to criminal convictions and health will also be collected, the processing operation is likely to present risks under Article 27(2)(a). This processing operation therefore falls within the scope of the prior checking procedure on several grounds.

This prior check is limited to the selection and recruitment of contract staff, i.e. to the filling of contract staff posts by the Committee's departments. This opinion therefore does not cover the medical examination to determine whether applicants are fit, the collection of spontaneous applications, or the operation of the CAST database.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, the check is necessarily *a posteriori*. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The DPO's notification was received on 20 November 2008. Under Article 27(4) of the Regulation, this opinion must be delivered within two months of that date. The period allowed for delivery of the EDPS's opinion was suspended for 55 + 92 days, so the EDPS will deliver his opinion no later than 17 June 2009.

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing must be *"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 or in the legitimate exercise of official authority vested in the Community institution"*.

Recital 27 stipulates that *"(...) the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies."*

For the Committee to be well managed and run smoothly, it is necessary for it to recruit contract staff possessing the highest levels of skills, performance and integrity. These procedures are based on the Conditions of Employment of other servants of the European Communities (CEOS), which are themselves based on the Treaties establishing the European Communities. The processing operation is therefore lawful.

The legal basis for the processing operation appears in Title IV, Chapter 3 (Articles 82 to 84) of the CEOS. The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

Article 10(1) of the Regulation provides that *"the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited"* unless grounds can be found in Article 10(2) or 10(3).

As regards the data relating to health, and more specifically the medical clearance certificate forwarded by the Medical Service, the processing is justified by virtue of Article 28(e) and Article 33 of the Staff Regulations, and therefore complies with Article 10(2) of the Regulation.

If, because of a disability, the applicant requests special facilities for the interview, that data should be deleted once it is no longer necessary for the purposes of recruitment or reimbursement. However, special categories of data in the application file of a successful applicant may be transferred into his personal file if it proves necessary to provide special facilities throughout his or her employment.

In principle, the Committee does not collect other special categories of data; however, applicants may themselves reveal special categories of data, for example if they spontaneously communicate information about their political opinions, religious or philosophical convictions or trade-union membership in the letter setting out reasons for their application or the attached CV. If so, the controller should, as far as possible, delete such information on receipt.

The justification for the processing of data concerning offences, criminal convictions or security measures is taken from Article 82(3)(c) of the CEOS, and therefore complies with Article 10(5) of the Regulation, which stipulates 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."*

3.4. Data quality

Personal data must be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"* (Article 4(1)(c)). In principle, the data required are necessary for the procedure for recruiting officials to be properly run. In this

respect the EDPS considers that the conditions imposed by Article 4(1)(c) of Regulation (EC) No 45/2001 appear to be fulfilled.

As regards the birth certificate, it has not, however, been shown that the data contained in it are adequate and not excessive in relation to the purpose of the processing. The data it contains are in principle redundant given the data appearing on the passport or identity card. If the birth certificate contained other data (e.g. the fact that the data subject was adopted, a change of surname, parents' occupations, etc.), the collection of such data would be excessive in relation to the purpose of the processing. The EDPS therefore requests the Committee not to request birth certificates of persons recruited except where it is impossible to obtain a copy of the passport or identity card.

Particular attention should also be drawn to the obtaining of extracts from criminal records or equivalent documents (certificates of good conduct, certificates from the police, etc.). The EDPS notes that such documents have different names and very different content from one Member State to another. In some Member States, those documents contain information on the behaviour of the data subject that goes beyond the legitimate purpose of the processing (see point 3.3 above). While the EDPS considers the collection of such documents lawful in principle, the controller should analyse in each case whether or not the content of the documents requested is appropriate for the purpose specified in Article 12 of the Staff Regulations.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in point 3.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (point 3.8).

Personal data must also be "*accurate and where necessary kept up to date*". The Regulation further provides that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*" (Article 4(1)(d)). The system itself helps to ensure that data are correct, in that it is the responsibility of the applicants themselves to produce the applications and the responsibility of the successful applicants to produce the documents needed to establish their entitlements. Moreover, the data subject must have the right to access and rectify data in order to ensure that they are kept up to date and that the file is as complete as possible. This is a second way of ensuring the quality of the data. See point 3.7 below on the rights of access and rectification.

3.5. Data storage

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle 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*".

For the record, the procedure for storing data makes a distinction between persons recruited and persons not recruited.

As to the files of applicants not recruited, the EDPS considers that in this particular processing operation the storage period of five years is reasonable in relation to the purpose of the processing. This storage period is necessary to deal with any complaints to the Ombudsman or the EDPS, for appeals to the Court of Justice and for the requirements of audit services that

might need access to the data under Article 49 of the implementing rules for the Financial Regulation.

Some elements of the application files of persons recruited are kept in their personal files. In similar cases¹, the EDPS considered that it was reasonable to fix the storage period at 10 years, starting from the date on which the staff member leaves or the date of the last pension payment. That period would apply to those parts of application files stored in personal files. This long-term data storage in personal files will have to be accompanied by appropriate safeguards. The data kept are personal.

The EDPS requests that a specific period be set for storing extracts from the criminal record or equivalent documents kept in personal files. Any offences committed by the data subject will be gradually deleted from the records of the Member State concerned, according to criteria set by that State. The Committee cannot keep these data longer than the Member State in question. Keeping the data in the long term would not respect the right to oblivion or the right to erasure of criminal records, rights which the Member States share. Furthermore, a clean criminal record is clean at the specific time when it is issued and its acquisition meets a requirement for the staff member's engagement. This condition is laid down in Article 82 of the CEOS, in the "conditions of engagement" chapter.

The criminal record is therefore strictly necessary for the engagement, and once this has taken place, there is no need to keep the criminal record. The EDPS therefore requests that the Committee not keep the extract from the criminal record after recruitment. An attestation like that following the medical examination would be adequate as a supporting document.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The EDPS considers that Article 7(1) is complied with as regards the transfer of applicants' CVs to the head of unit of the department seeking staff and those conducting the selection interview. They need the data in order to select staff.

Access may also be granted to the bodies authorised to carry out external checks, such as the Court of Auditors and OLAF. In addition, the courts with jurisdiction, the European Ombudsman and the EDPS may, on request, receive copies of items from those files in the context of an appeal or a complaint. The EDPS considers that data transfers carried out under the above conditions are necessary for the legitimate performance of tasks assigned to the recipients. The requirements set out in Article 7 of the Regulation are therefore fulfilled.

Moreover, Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". A reminder should be provided that no-one receiving and processing data in the context of the selection procedures for officials of the institutions may use them for other purposes.

¹ Case 2007/406 of 3 August 2007 (Ombudsman), Case 2006/297 of 19 October 2006 (Economic and Social Committee).

3.7. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for right of access at the request of the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to their source. Article 14 of the Regulation allows the data subject a right of rectification. In addition to being given access to their personal data, data subjects may also have the data amended if necessary.

The EDPS notes that the Committee has not set up a formal procedure to make it possible for those rights to be exercised.

The EDPS notes that applicants must have access to their whole file, including the notes and evaluation grids on them drafted by the selection board. The EDPS is aware of the limits on that right of access. Those limits may be justified, in accordance with Article 20(1)(c), by the protection of the rights of others, both other applicants and the members of the various selection bodies. Thus, data relating to individual members of those bodies and any comparative data relating to other applicants cannot be made available to applicants.

As to the right of rectification, it applies only to factual data. Notes and assessments which are made at the discretion of selection bodies may not be "rectified" by the data subject other than through appeal or complaint procedures.

3.8. Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subjects must be informed when their personal data are processed and lists a series of specific items of information that must be provided. Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on informing the data subject applies in the case in point since the data subject provides some of the data collected. Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since information is collected from the different participants in the process, particularly the Medical Service or members of the selection panel.

However, it appears that no specific information on the processing operation in relation to recruitment is provided to the data subjects. The data protection note on the Committee's website relates to spontaneous applications. Even if some of the information in it applies to the selection and recruitment procedure (legal bases, arrangements for rectifying data, data recipients, etc.), other information is specific to the "spontaneous applications" procedure (data storage period). The EDPS therefore asks the Committee to provide all data subjects (applicants for the posts to be filled) with the information listed in Articles 11 and 12 of the Regulation in a comprehensive manner, specifically relating it to the processing operation under consideration. Such information could be provided, for example, in a specific privacy statement enclosed with the call for interview.

3.9. Security

Article 22 of Regulation (EC) No 45/2001 provides that the controller must implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Those security measures must in particular prevent any unauthorised disclosure or access.

Given the available information, the EDPS has no reason to think that the Committee has not implemented the security measures required by Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means, in particular, that the Committee should:

- remind the department responsible of the limits on obtaining extracts from criminal records;
- refrain from collecting the birth certificates of persons recruited;
- not keep extracts from judicial records after the recruitment procedure;
- review the period for which data are kept in personal files, in the light of point 3.5 of this opinion;
- issue a reminder that no-one receiving and processing data in the context of the selection procedures for staff of the institutions may use them for other purposes;
- guarantee the right of access to data, including the evaluations carried out during the recruitment procedure;
- guarantee the right to rectification of factual data;
- provide data subjects in a comprehensive manner with the information listed in Articles 11 and 12 of the Regulation.

Done at Brussels, 16 June 2009

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor