

Opinion on the notification for prior checking from the Data Protection Officer (DPO) of the Court of Auditors of the European Communities regarding the "selection procedures for the recruitment of officials, temporary staff and contract staff" case.

Brussels, 23 July 2009 (Case 2008-313)

1. Procedure

By letter received on 22 May 2008, the European Data Protection Supervisor (EDPS) received notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the Court of Auditors concerning selection procedures for the recruitment of officials, temporary staff and contract staff. Questions were sent to the DPO on 23 May 2008. The replies were provided on 9 October 2008. On 14 November 2008 the EDPS asked the DPO to withdraw the notification and replace it by a joint notification with case 2008-433. On 12 March 2009 the DPO replied that these processing operations should in the data controller's opinion be notified separately and that the examination of prior checking 2008-313 could resume where it had been left on 9 October 2008.

Further questions were put to the DPO on 20 March 2009, and answers were received on 29 June 2009.

The draft opinion was sent to the DPO on 13 July 2009 for comments by the DPO and the data controller. Comments were provided on 22 July 2009.

2. The facts

The competition unit of the Court of Auditors introduced a set of procedures for the recruitment of officials, temporary staff and contract staff. These selection procedures serve to establish lists of successful candidates in order to assist Court of Auditors departments in the recruitment of officials and other staff. The procedures mainly involve external competitions. The Court has not organised any external competitions since the creation of EPSO. The procedures therefore relate mainly to screenings for the recruitment of temporary and contract staff. The last internal competition organised by the Court was in May 2006.

Candidates in these different competition/screening procedures are therefore the data subjects of the processing operation.

The procedures are based on Articles 27, 29(1) and 30 of the Staff Regulations of officials of the European Communities (the Staff Regulations) and on Annex III thereto. Different decisions were adopted internally for each category of recruitment. The decisions concerning the recruitment of officials, temporary and auxiliary staff (Decision No 13-2000 in staff note

No 28-2002) and of contract staff (Decision No 26-2005 in staff note No 33-2005) are currently being revised.

Data are collected for the purposes of identifying the candidate, practical organisation of the tests (including data on any disabilities) and evaluating whether the candidate meets the admission requirements set in the notice of competition/screening¹.

A paper file is composed for each candidate. The file contains the application form completed by the candidate, together with the supporting documents, the admission sheet, their pre-selection tests, their written tests and evaluation sheet, their CV and all correspondence exchanged during the procedure. The processing of certain data is also automated in the form of electronic files.

The paper and electronic files are kept for five years starting from the date when the reserve list or list of successful candidates is drawn up. This storage time limit applies both to candidates who fail and to those placed on reserves lists and lists of successful candidates. According to additional information supplied by the data controller, names on the reserve lists/lists of successful candidates are systematically kept beyond the five-year time limit as it must be possible to check at any time that a staff member's name appears on a given list.

It is worth highlighting that it is explained in the prior checking concerning the use of reserve lists and lists of successful candidates for the recruitment of officials, temporary staff and contract staff (case 2008-0433) that the data needed to use the reserve lists and lists of suitable candidates to recruit candidates who have been successful in selection procedures are kept for as long as the lists are valid and therefore usable.

The Appointing Authority, members of the selection board/committee, any interpreters and assessors required to take part under the procedure provided for under Annex III to the Staff Regulations, as well as the Court's Legal Service in the context of a dispute, are the recipients of all or some of these data insofar as it is strictly necessary for them to perform their individual tasks. Court departments seeking to recruit successful candidates (following the publication of the reserve lists) will receive their CVs.

The EDPS points out that procedures safeguarding the rights of data subjects should take account of Appointing Authority Decision No 77-2006 of the Court implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data in the context of the human resources policy. There is no reference to this Decision in the notification under examination. The data controller indicated that Decision No 77-2006 would be updated upon receipt of the EDPS opinion on the present notification.

The notification states that candidates may amend all data concerning them up to the deadline for registration. After that date, only identifying data (surname, forename, nationality, date of birth, address) may be amended by written request. Also, the notice of competition informs candidates of their right to consult information concerning them directly and individually. By virtue of this right, the Court may, at their request, supply them with additional information on their participation in the selection procedure. Requests will be dealt with in such a manner as to take account of the confidential nature of the proceedings of selection boards. The information which may be provided in this context is as follows: if the competition has multiple-choice-type written tests, applicants can obtain a copy of their answers and a copy of the sheet of correct

¹ Selection procedures for temporary and contract staff are announced in "notices of screening" and for officials in "notices of competition".

answers on request. For the other written tests, they can also obtain a copy of their answer paper on request and the individual assessment sheet showing the selection board's assessment of that test. For the oral test, they can obtain on request their overall mark plus the individual marks scored in the different parts of the test.

The following is published in the notices of competition/screening: "*As the institution responsible for organising the selection procedure, the Court of Auditors ensures that applicants' personal data are treated in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council 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. This applies in particular to the confidentiality and security of such data (Official Journal of the European Communities, L 8, 12.01.2001).*"

Security measures [...]

When members of selection boards/committees are appointed, they are reminded of their duty of confidentiality.

3. Legal aspects

3.1. Prior checking

The prior checking relates to the processing of personal data within the meaning of Article 2(a) of Regulation (EC) No 45/2001 (hereinafter "the Regulation") by the Court of Auditors for the selection of officials, temporary staff and contract staff. The processing consists of operations to collect, consult, store, etc., data.

The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation). The processing of data concerning the selection of officials and other staff is both manual and automated. Article 3(2) is therefore applicable in this case.

This processing therefore falls within the scope of the Regulation.

Article 27(1) of the Regulation 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.

Article 27(2)(b) makes data processing operations intended to evaluate personal aspects relating to the data subject (including his or her ability, efficiency and conduct) subject to prior checking by the EDPS; this is the case here, as processing is designed to select candidates for inclusion on the Court's reserve lists/lists of successful candidates on the basis of information regarding their ability and experience.

In principle, checks by the EDPS should be performed before the processing operation is implemented. Otherwise the checking necessarily becomes *ex post*. 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 22 May 2008. According to Article 27(4), the present opinion must be delivered within a period of two months. Owing to the 358-day suspension

pending additional information plus 8 days for comments, the EDPS will deliver his opinion by 23 July 2009 at the latest.

3.2. Lawfulness of the processing

The lawfulness of the processing operation should be scrutinised in the light of Article 5(a) of the Regulation. That Article provides that personal data may be processed only if "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)*".

The processing operation under examination relates to the collection of data concerning candidates taking part in competitions or screening procedures with a view to being recruited at the Court. The procedure for selecting officials and other staff falls under the scope 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, in this case, the Staff Regulations. The purpose of the task is in particular to secure for the Court the services of officials and other staff of the highest standard of ability, efficiency and integrity. The processing operation introduced by the Court is necessary to perform the task of selecting the most suitable officials and other staff. The processing operation is therefore lawful.

The legal bases for the processing operation are Articles 27 to 30 of the Staff Regulations as well as Annex III thereto and the corresponding Articles of the Conditions of Employment of other servants of the European Communities (CEOS). The legal basis is valid and supports the lawfulness of the processing.

3.3. Processing of special categories of data

Personal data relating to health may be collected as part of the processing operation introduced by the Court. Under Article 10(1) of the Regulation, the processing of personal data relating to health is prohibited unless grounds can be found in Article 10(2) and/or (3) of the Regulation.

Article 10(2)(b) applies to the present case: "*Paragraph 1 (prohibiting the processing of health-related data) shall not apply where 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 ...*". According to Article 1d(4) of the Staff Regulations of officials of the European Communities, there should be no employment discrimination on the ground of disability provided that the person with a disability can perform the essential functions of the job when reasonable accommodation is made. General implementing provisions for this Article were adopted in Commission Decision C(2004)1318 of 7 April 2004 requiring European institutions to execute the reasonable accommodation which their disabled staff need in order to be able to perform their duties properly.

The Court's processing of health-related data concerning a candidate's disability meets the requirements of Article 10(2)(b) of the Regulation insofar as it is a measure necessary for the employer to fulfil its obligations in the field of employment law enshrined in the legislative acts adopted on the basis of the Treaties.

Nonetheless, the EDPS would draw attention to the fact that since disability-related data are sensitive, they should be disclosed only to those individuals who really need to know (for

example, those responsible in HR for ensuring that the provisions relating to non-discrimination in recruitment are complied with, heads of unit who must be informed that an accommodation might need to be made, and the Court departments that must make the accommodation needed for the individual with the disability).

3.4. Data quality

Article 4 of the Regulation lays down certain obligations as regards the quality of personal data. 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)).

The EDPS considers that the processed data described earlier in this opinion meet these requirements in relation to the purpose of the processing operation explained above. The EDPS is satisfied that Article 4(1)(c) of Regulation No 45/2001 is therefore duly complied with in this respect.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 3.2 above). The issue of fairness is linked to the information given to the data subject (see point 3.8 below).

Lastly, the data must be "*accurate and, where necessary, kept up to date; 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) of the Regulation). The system itself helps to ensure that the data are accurate since it is up to the data subject himself to provide the documents for processing. Moreover, the data subject is made aware of his or her right of access to and right to rectify data, in order to ensure that the file remains as comprehensive as possible. This is a second way of ensuring the quality of the data. (See point 3.7 below regarding the rights of access and rectification.)

3.5. Data storage

Under Article 4(1)(e) of the Regulation, 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*".

The procedure for storing data makes a distinction between individuals selected and individuals not selected (i.e. not placed on the reserve list or list of successful candidates). As regards the candidates selected, for the purpose of recruitment data from the application file and selection must be kept until the reserve list is no longer valid. However, as regards candidates who are not placed on the reserve list or list of successful candidates, the EDPS considers that a storage period of two and a half years is reasonable given the purpose: retaining the data makes it possible to justify why candidates have failed, to deal with any complaint addressed to the European Ombudsman or the EDPS, and to handle appeals to the Court of Justice. The EDPS advises the Court to review its storage policy in the light of the above.

Article 4(1)(e) of the Regulation establishes that "*the Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only*

with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes".

The EDPS would point out that any data stored for statistical purposes must be made anonymous. Thus, the storage of reserve lists/lists of successful candidates in competitions and other selection procedures for historical and statistical purposes beyond the initial time limit must be in compliance with Article 4(1)(e).

3.6. Transfer of data

Under Article 7(1) of the Regulation, personal data may only be transferred within or to other Community institutions or bodies if the data are "*necessary for the legitimate performance of the tasks covered by the competence of the recipient*".

The EDPS believes that transfers of data under the circumstances specified are necessary for the legitimate performance of the recipients' tasks. The requirements of Article 7(1) of the Regulation are therefore met.

The EDPS would point out that access may also be granted to the bodies authorised to carry out external checks, such as OLAF or the EDPS. The Civil Service Tribunal² and the European Ombudsman may also receive copies of items from those files on request, in connection with appeals to the Civil Service Tribunal or complaints to the Ombudsman. In the case of selection, such proceedings are a frequent occurrence. Such transfers are legitimate as they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

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*". It is therefore important that all those receiving and processing data in the context of selection procedures for officials and other staff are reminded that they may not use them for other purposes.

3.7. Right of access and rectification

Article 13 of the Regulation 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.

With regard to the right of access for data subjects, the EDPS notes that for multiple-choice-type tests they have access to a copy of their answers as well as a copy of the sheet of correct answers. If candidates are not allowed to take the questions with them from the test, the Court must also provide access to the question sheet. Communication of the results alone is not intelligible to the data subjects and so does not comply with Article 13(c), which states the right to "*communication in an intelligible form of the data undergoing processing and any available information as to their source*". Moreover, Article 13(d) specifies that the data subject must also be provided with "*knowledge of the logic involved in any automated decision process concerning him or her*". If this is not the case, the Court must

² The European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), has jurisdiction, rather than the Court of First Instance. The latter is the appeal body.

make the communication of results intelligible and explain the logic behind the processing operation.

When disclosing the individual assessment sheet showing the selection board's assessments, the Court must also ensure that the comments made by individual board members are not revealed in order to preserve the independence of the board and comply with Article 20(c) of the Regulation (protecting the rights and freedoms of others).

The right of rectification provided for in Article 14 of the Regulation is safeguarded by the Court both before and after the deadline for registration.

3.8. Information to be given to the data subject

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items of information. 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.

In this case, since data are obtained directly from data subjects, Article 11 of the Regulation applies (*Information to be supplied where the data have been obtained from the data subject*). Article 12 also applies insofar as candidates will be assessed throughout the entire selection procedure (*Information to be supplied where the data have not been obtained from the data subject*).

The information notice relating to Regulation (EC) No 45/2001 published in the notices of competition/screening is very general and does not in any way cover the different categories of information provided for in Articles 11 and 12 of the Regulation.

The EDPS recommends that Court Decision No 77/2006 (see above) be expressly mentioned in the notices of competition/screening so that data subjects (usually from outside the Court) have access to it. However, a simple reference is not enough. The EDPS regards it as necessary to specifically spell out the content of Articles 11 and 12 in the relevant notices of competition/screening.

3.9. Security

Under Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements "*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*".

On the basis of the information supplied, the EDPS does not have any reason to believe that the Court has not complied with the security measures set out in Article 22 of the Regulation.

Conclusion

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means in particular that the Court of Auditors should:

- review its storage policy for data from the files of candidates not selected;

- store reserve lists/lists of successful candidates in competitions and other selection procedures in compliance with Article 4(1)(e);
- make the communication of results intelligible and explain the logic behind the processing operation;
- refer to Court Decision No 77/2006 in the notices of competition/screening, make it available to candidates and update it to include this processing operation;
- spell out the details contained in Articles 11 and 12 in the notices of competition/screening themselves.

Done at Brussels, 23 July 2009

[Signed]

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor