

Opinion on the notification for prior checking received from the Data Protection Officer of the Council on the "Selection of permanent and temporary staff at the General Secretariat of the Council of the European Union"

Brussels, 28 September 2009 (Case 2009-197)

1. Procedure

On 24 March 2009, the European Data Protection Supervisor (EDPS) received notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (hereinafter "the Regulation") from the Data Protection Officer (DPO) of the Council concerning the selection of permanent and temporary staff at the General Secretariat of the Council of the European Union.

Questions were submitted by e-mail on 17 April 2009 and replies given on 23 June 2009. On 23 July 2009, the European Data Protection Supervisor's draft opinion was sent to the DPO for comment. The comments were received on 28 September 2009.

2. The facts

This notification describes the processing of data relating to the organisation and running of selection procedures by the General Secretariat of the Council (hereinafter "GSC"). The different categories of permanent and temporary staff that can be recruited or engaged by the GSC are officials, temporary staff, contract staff and seconded national experts (SNEs). When a competition to recruit officials is organised by EPSO or by another European institution, candidates are identified on reserve lists that have already been drawn up. In such cases, the GSC does not set up selection committees or competition boards.

When the GSC itself organises a selection procedure within the framework of a competition for officials or a selection process for contractual staff, temporary staff or SNEs, a competition board or selection committee is set up to evaluate the applications received /consulted¹. This opinion does not cover the procedure for recruiting personnel following a selection procedure².

Two scenarios are possible: selection from a reserve list of successful candidates drawn up by EPSO or by another European institution; and the organisation and running of selection procedures by the GSC, with the nomination of a competition board (for GSC competitions) or of a selection committee for the selection of temporary staff, contractual staff and SNEs, and for senior management posts.

¹ The selection procedure for trainees at the Council has already been the subject of an opinion from the EDPS: case 2007-217 of 12 June 2007 (see website).

² See Opinion 2007-194 of 25 January 2008 on the EDPS website.

1. Selection of candidates from a reserve list of successful candidates

When the GSC selects successful candidates from the reserve lists of competitions organised by EPSO with a view to possible recruitment or engagement, the collection of applications, the organisation of tests and the selection of candidates is delegated to EPSO by the European institutions. EPSO makes the reserve lists from competitions available to the institutions by means of the eRL (electronic reserve list) consultation and reservation tool. In this case, the processing of data concerns candidates identified by the recruitment service in the eRL and notified to the requesting department with a view to filling a post as an official.

The processing of data at the GSC is therefore limited to the following stages:

1. First, once the list of suitable applicants has been published, the interested institutions identify and reserve candidates in accordance with the quotas requested. This reservation is carried out electronically using the eRL online tool.
2. Candidates are then selected on the basis of the description of the vacant post at the GSC.
3. The files of the candidates selected are sent to the GSC department with a vacant post (requesting department) with a view to possible interviews with the requesting and recruiting departments.
4. Interviews are arranged between the candidates and the requesting and the recruitment departments.
5. The results are communicated to the candidates.
6. The decision is communicated to Personnel Administration in order to recruit the successful candidates.

2. Selection by the GSC

When the GSC organises its own selection procedures, the stages of the personal data processing are as follows:

– Collection of applications:

- For posts as official and for certain posts as temporary staff member, applications are collected and encoded following the publication of a competition or vacancy notice.
- For contractual staff and certain temporary staff posts, candidates are identified in the EPSO CAST database and other similar databases.

• For SNEs,

1. Publication and collection of applications through the Permanent Representations.
2. Setting up competition boards or selection committees.
3. Evaluation and classification of applications, invitation to written tests (where applicable) and interviews; deliberations of selection board.
4. Drawing up of a reasoned report establishing a reserve list of the best candidates.
5. Submission of the report to the appointing authority or the authority authorised to conclude contracts of employment.
6. Communication of results to the candidates.
7. Forwarding of the files of selected candidates to the GSC department with a vacant post (requesting department) with a view to arranging interviews with the requesting and recruiting departments.
8. Organisation of interviews between the candidates and the requesting and recruitment departments.
9. Communication of results to the candidates.

10. Communication of the decision to Personnel Administration in order to recruit the successful candidates.

The **categories of persons concerned by**, or involved in, the processing of data within the framework of the recruitment procedure are successful candidates from competitions and candidates in selection processes organised by the GSC.

The **personal data processed** in the context of the recruitment procedure are as follows:

The categories of data submitted by candidates are chosen to enable boards to evaluate and select candidates:

1. Personal data that make it possible to identify the candidate (surname, first name, date of birth, sex)
2. Information supplied by the applicant to facilitate the practical organisation of the tests (postal address, email address, telephone number). Information supplied by the applicant to make it possible to assess whether he/she meets the admission conditions laid down in the notice of competition (nationality; languages; diploma and the year it was awarded, type of diploma/degree, name of awarding body; detailed professional experience) – If appropriate, information relating to the type and validity of security clearance held by candidates. The reference to security clearance is included in vacancy notices only if the nature of the post so requires.

There is an application form for specific competitions organised by the GSC, a standard form for those who have passed EPSO competitions and a form used for contract staff applications (CAST). There is no specific form for applications for SNE posts. Following a call for expressions of interest addressed to the Ambassadors, the Permanent Representations collect and send the CVs of applicants in any format they choose, though the European CV format is widely used.

In the case of selection procedures organised by the GSC, the board draws up a report containing a reserve list of the best candidates. This report is submitted to the appointing authority or the authority authorised to conclude contracts, and includes the following data: surname and first name of candidate, nationality and order of merit and points obtained, if applicable.

Information supplied to data subjects:

The following text is included in the competition/vacancy notices published by the GSC:

"As the institution responsible for organising the selection procedure, the General Secretariat of the Council ensures that applicants' personal data is treated as required by Regulation (EC) No 45/2001 of the European Parliament and 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 (OJ L 8, 12.1.2001, p. 1).

This applies in particular to the confidentiality and security of such data. The selection procedure is conducted under the responsibility of the Human Resources Directorate (DGA IA), Selection and Recruitment Department, of the General Secretariat of the Council. Information submitted by applicants will be accessible to members of staff in the General Secretariat involved in the selection of applicants for the vacancy in question.

At the end of the selection procedure, applications and supporting documents will be kept by the General Secretariat of the Council for a maximum period of two years. In the event of a dispute, any complaints may be addressed to the European Data Protection Supervisor.

The procedures guaranteeing the rights of data subjects comply with the provisions of Section 5 of Decision 2004/644/EC of 13 September 2004. Moreover, in the case of CVs kept in EPSO databases (successful candidates in competitions, contract staff applicants – CAST, temporary staff applicants), the interested parties may check their personal data at all times and modify them online.

The **recipients of the data** are the recruitment department (including its hierarchy, i.e. head of unit, the Director of Human Resources and the Director-General of Personnel and Administration. However, the latter only receive the final reports as part of the process of harmonising and monitoring the procedures), members of the board, the requesting department, the legal service (where appropriate), the appointing authority/ authority authorised to conclude contracts, personnel administration (DGA IB) and, for SNEs, the Permanent Representations of the Member States to the European Union.

Other information arising from the notification

Medium on which data are stored: The paper files of candidates are kept in locked cupboards in an office with secure doors. – The electronic EPSO dossiers are kept in the Data Center of DIGIT in Luxembourg. – Non-EPSO electronic files are kept on servers and software which belong to the GSC and are accessible only to members of the recruitment department.

Data storage: In the case of applications received but not selected: the paper dossiers are classified and kept in the files for a period of two years. – In the case of candidates on a reserve list but not recruited: the storage period depends on the length of time for which the list is valid. Storage for a period of two years after the expiry of the reserve list. – In the case of candidates recruited: the applications are kept in their personal files with Personnel Administration (DGA IB). Storage for up to ten years after the date of termination of employment or the last pension payment.

The reasoned reports from boards (containing the reserve lists from competitions) submitted to the appointing authority / authority authorised to conclude contracts are kept in the files.

Blocking and erasure: any request received for data to be blocked or erased is answered within 15 working days as from the date on which the recruitment department receives the letter; however, it may issue a duly justified holding reply. The time-limit for blocking or erasing data is a maximum of 10 working days for computerised data, with the period starting only as from the date on which the competent authority takes the final decision on the request to block or erase data (an administrative decision taken by EPSO or, in the event of dispute, a decision taken by the European Data Protection Supervisor or the competent court). The same maximum time-limit is applied for data in paper form.

Security measures [...].

3. Legal aspects

3.1. Prior checking

The notification received on 24 March 2009 relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a) of Regulation (EC) No 45/2001). The processing of personal data includes collection, storage and consultation. 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)). The processing of the dossiers examined is manual in part, but the data processed are contained in a file (collected and then encoded in a computer application). The data processing is partially automated. Article 3(2) is thus applicable in this case.

The processing therefore falls within the scope of Regulation (EC) No 45/2001.

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) of the Regulation sets out a list of processing operations likely to present such risks, such as "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). Clearly, the recruitment procedure involves the processing of personal data intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct, and is therefore subject to prior checking by the EDPS.

In principle, checks by the EDPS should be carried out before processing. Otherwise the checking necessarily becomes *ex post*. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

Notification from the Council DPO was received by post on 24 March 2009. A number of questions were put to the DPO in an e-mail dated 17 April 2009. Answers were given on 23 June 2009. On 23 July 2009, the EDPS's draft opinion was sent to the DPO for his comments. The DPO forwarded his reply on 28 September 2009. The EDPS will therefore deliver his opinion by 6 October 2009 (21 March + 77 days' suspension + 36 days for comments).

3.2. Lawfulness of the processing operation

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

The procedure for evaluating and possibly selecting officials and other servants falls within the legitimate exercise of official authority vested in the institutions, in particular in order to recruit suitably skilled staff in the interests of the service. The processing operation proposed is therefore lawful.

The legal basis for the data processing in question can be found in Articles 4 and 29 of the Staff Regulations, and in Articles 12 to 15 and 82 to 84 of the CEOS. The legal basis, which is sufficiently clear, raises no particular issues.

The legal basis in the Staff Regulations is therefore valid and supports the lawfulness of the processing operation.

3.3. Data quality

Article 4(1)(d) of the Regulation stipulates that data must 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*".

The procedure itself must ensure that data are accurate. In the case under review here, the system requires candidates to submit most of the data necessary for the selection procedure. The data subject, who provides the information voluntarily, therefore considers that the data are adequate, relevant and not excessive. However, the EDPS would warn the Council about using the CV to collect data. The EDPS notes that the data usually included in a CV have already been supplied on the application form that applicants must fill in. In order to prevent superfluous and/or excessive data from being collected, the EDPS recommends that the Council should not ask candidates to supply a CV in addition to an application form, except in specific duly justified cases. If necessary, the application form could be expanded. The application form must also inform the applicant of the compulsory or optional nature of the replies to be given.

The rights of access and rectification represent the second means of guaranteeing the quality of the data (see point 3.6 below on the rights of access and rectification).

Under Article 4(1)(c) of Regulation (EC) No 45/2001, data must be "*adequate, relevant and not excessive*". The processed data described in this opinion should be regarded as satisfying these conditions. The data required are necessary to assess the skills and abilities of the candidates. Article 4(1)(c) of Regulation (EC) No 45/2001 thus seems to be duly complied with in this respect.

Under Article 4(1)(a) of Regulation (EC) No 45/2001, the data must also be "*processed fairly and lawfully*". The lawfulness of the processing has already been discussed (see point 3.2 above). Fairness relates in particular to the information given to the data subjects. On this point, see point 3.7 below.

3.4. 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*".

According to the notification, the storage of data takes place as follows:

- In the case of applications received but not selected: the paper dossiers are classified and kept in the files for a period of two years.
- In the case of candidates put on a reserve list but not recruited: the storage period depends on the length of time for which the list is valid. Data are kept for a period of two years after the expiry of the reserve list.

- In the case of candidates recruited: the applications are kept in their personal files with Personnel Administration (DGA IB). The data are kept for up to ten years after the date of termination of employment or the last pension payment.

The EDPS considers that the data retention period for applicants not chosen is proportional to the purpose of the processing operation. No purpose is served by keeping the files on unsuccessful applicants for more than a few years.

In the case of selected candidates, the personal data processed during the selection process serve as the basis for their personal file. On recruitment, the candidate selected is required to provide the originals or certified copies of the documents already submitted at the application stage.

The long-term retention of data in the personal file should be accompanied by appropriate safeguards. The data kept are personal. The fact that they are archived for long-term storage does not divest them of their personal nature. For that reason, data kept over a long period must be covered by adequate measures for transmission and storage, as with any other personal data.

The data are not used for historical, statistical or scientific purposes. The reasoned reports from boards (containing the reserve lists from competitions) submitted to the appointing authority / authority authorised to conclude contracts are kept in the files. In accordance with Article 4(1)(b) of the Regulation, these reports must be rendered anonymous.

3.5. 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 other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

As already mentioned, the recipients of the data are the recruitment department (including its hierarchy, i.e. head of unit, the Director of Human Resources and the Director-General of Personnel and Administration. However, the latter only receive the final reports in order to ensure that procedures are harmonised and monitored), members of the board, the requesting department, the legal service (where appropriate), the appointing authority/ authority authorised to conclude contracts, personnel administration (DGA IB) and, for SNEs, the Permanent Representations of the Member States to the European Union.

In this case, the data are for circulation among various departments within the General Secretariat of the Council. Personal data may be transferred within an institution only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient. The transfers mentioned above come within the legitimate performance of the tasks of the various parties.

In addition, the European Ombudsman, the EDPS and the Council's internal auditor and DPO may also receive those data. Finally, the European Union Civil Service Tribunal and the Court of First Instance may receive these files in the context of legal proceedings³. In this case such

³ Jurisdiction lies with the European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), instead of with the Court of First Instance. **The latter is the appeal body.**

transfers are justified since they are necessary for the legitimate performance of the tasks within the competence of the recipient.

Article 7(1) of Regulation (EC) No 45/2001 is complied with in this case.

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*". There must be an explicit guarantee that no person receiving and processing data in the context of the recruitment procedure can use them for other purposes. In the context of the implementation of Article 7(3) of the Regulation, the European Data Protection Supervisor would like the Council to pay particular attention to the fact that the personal data should be processed only in the context of recruitment. This should be emphasised to the staff concerned.

Transfers to the Permanent Representations of Member States to the European Union for the selection of SNEs are covered by Article 8(a) of the Regulation "*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 exercise of public authority*". If data are transferred at the request of a national authority, it must therefore establish the "necessity" for the transfer.

3.6. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for the right of access at the request of the data subject. Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification.

The procedures guaranteeing the rights of data subjects (right of access, rectification, blocking, erasure and right to object) are provided for in Section 5 of the Council Decision of 13 September 2004: 2004/644/EC (OJ L 296, 21.9.2004, p. 20). They fulfil the conditions of Articles 13 and 14 of the Regulation, which are therefore duly complied with.

Nevertheless, the EDPS recommends that the Council mention the possibility of exercising these rights in the information text (see below).

3.7. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 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. 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 (*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 official himself completes the application form. 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 such information is obtained from EPSO and from persons participating in the selection process.

Information is provided to data subjects through the insertion of a text (see page 3 above) in the competition/vacancy notices published by the GSC. In the case of the recruitment of officials or other servants on the basis of EPSO lists, there is no provision for information to be communicated to candidates, as it is assumed that they are informed directly by EPSO.

The EDPS welcomes the inclusion of information on data processing in calls for expressions of interest and vacancy notices. However, the EDPS would recommend the inclusion of information on the legal basis of the processing, a specific reference to the controller, information on whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply under one of the headings in the application form, and on the data subject's rights of access and rectification, in particular by referring to the Council Decision of 13 September 2004 (see point 3.6 above).

3.8. Security

Pursuant to Article 22 of Regulation No 45/2001, the controller must ensure that security measures are implemented to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and prevent all other forms of unlawful processing.

The processing operation as described seems to comply with the Regulation. However, the EDPS would point out that, under Article 22 of Regulation (EC) No 045/2001 on the security of processing, *"the controller shall 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"*.

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 Council should:

- reconsider its requirement for a CV in collecting applications
- in the context of the implementation of Article 7(3) of the Regulation, pay particular attention to ensuring that personal data are processed only in the context of recruitment. This should be emphasised to the staff concerned.
- mention in the information note for applicants the possibility of exercising the rights of access and rectification, the legal basis of the processing, specific reference to the controller, and whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply under one of the headings in the application form.

Done at Brussels, 28 September 2009.

(Signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor