

**Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding "Visiting positions as invited persons or unpaid visiting scientists or structural trainees for defined period of time at the JRC".**

Brussels, 12 October 2009 (Case 2007-737)

**1. Proceedings**

On 17 December 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the European Commission a notification for prior checking relating to the processing of personal data regarding "Visiting positions as invited persons or unpaid visiting scientists or structural trainees for defined period of time at the Directorate General Joint Research Center (JRC)".

The notification contained the following documents:

- the request form for an invitation at the JRC, the agreement regarding visiting scientists (to be signed by visiting scientist him/herself);
- the agreement regarding visiting scientists (to be signed with visiting scientist's employer);
- -the application form for invited persons;
- -the privacy statement;
- the Internal directive of the Director General for the JRC applicable to the maximum period of time on site of visiting scientists "72 months rule";
- the Note to JRC Institute Directors on Revised JRC guidelines and rules for the management of collaboration agreements between JRC Institutes and external research institutes (dated 7 February 2007) and
- Commission Decision laying down rules on the secondment of national experts to the Commission - C (2006)2033.

The EDPS requested further information on 08 February 2008. This was provided on 08 July 2008. Supplementary information was requested on 10 July 2008 and the answers were provided on 8 January 2009. In relation to the responses received, the EDPS requested further clarification on 9 January 2009, to which he received the responses on 16 February 2009. The information contained new documents: 1) A Note of 20 December 2006 from the Director General of JRC to the attention of the JRC Institute Directors on "Revised JRC guidelines and rules for the management of collaboration agreements between JRC Institutes and external research institutes" and 2) a Note of 12 April 2007 of the Director General of JRC to the attention of JRC Directors on "Visiting scientists". On 17 February 2009, the EDPS extended the deadline for one month to issue his opinion due to the added complexity of the matter in the light of the information received.

On 10 March 2009, the EDPS sent the facts part of the opinion for verification to the JRC data controller and requested further information related to some outstanding issues. Since the EDPS did not receive any clarification on the questions raised, the draft Opinion was sent to the Data Protection Officer of the European Commission for comments on 16 July 2009. The comments were received on 28/09/2009.

## **2. The facts**

### *2.1. Description and purpose of the processing activity*

The institutes of the Joint Research Centre (JRC) of the European Commission in their sites (Ispra, Petten, Geel, and Seville<sup>1</sup>) collect and use personal data of unpaid persons, unpaid visiting scientists or structural trainees (hereinafter referred as: "visiting scientists" or "invited persons")<sup>2</sup>. The two main purposes of the processing operations are to collect information on persons with a view to evaluating and assessing their competences in order to offer a visiting position as an invited person for a defined period at the JRC sites, and to manage the relationship with the selected candidates during their visit. Selected candidates are treated as "external staff" of the JRC institute concerned.

The Director of "Resources management" of the JRC has taken the responsibility as data controller for the processing operation and the Management Support Unit (MSU) Heads of the different Institutes and sites of the JRC further processes personal data in carrying out their respective duties. It is to be noted that important aspects of the data processing are carried out by the Security services of JRC (see below in "data recipients" part). As stated by the Security service, this processing is comparable with the *'Nulla Osta'* procedure,<sup>3</sup> and the Security service is involved extensively in the process of selecting visiting scientists as the concerned individuals do not fall under the Staff Regulations and these persons are managed in a decentralised way, often directly by the unit concerned.

In the phase of concluding the agreement, it is verified whether the suggested candidate meets the project need. The eligibility criteria depend on what is planned in the Annex on "Technical work" in the collaboration agreement.

The invited persons are to be employed by other organisations. No employment relationship exists between the selected candidates and the concerned institute of the JRC, since the visiting scientist should be employed by a public scientific body, university, research institute or similar organisation.

#### **The main steps in the procedure are the following:**

The Management Support Unit (MSU) of the Institutes of the JRC *collects information* (CV and other personal data) on scientists, structural trainees from other research institutes (third parties) such as scientific public body, university, research institute or similar organisation within and outside of the European Union.

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<sup>1</sup> For the JRC Karlsruhe site, the security procedures are slightly different.

<sup>2</sup> According to the proposal of Mr Schenkel (dated 12 April 2007 as Note for the Attention of JRC Directors) unpaid visiting scientists may make short term stays on JRC sites for up to 12 months, which can be extended by a further 12 months (maximum 5 daily visits per month). If the visiting scientist is to stay for more than 5 daily visits per month, a long term permit based on an agreement entered into the institute and the visiting scientist is to be delivered after the requested documentation have been provided.

<sup>3</sup> The recommendations were issued on 15 December 2008 by the EDPS in the framework of prior checking the "ARDOS" database.

The "visiting scientist" position is offered within the ambit of a *collaboration or a consortium agreement or a visiting scientist agreement* (hereinafter as: "collaboration agreement"), which sets the legal framework for the co-operation between JRC Institutes and those organisations. Such agreements are concluded between the European (Atomic Energy) Community and the invited persons, and between the other organisations. In the framework of concluding the agreement a "*confidentiality clause*", and a "declaration to discharge civil, criminal and fiscal liability form has to be signed. Once the text of the agreement is finalised it must be registered in the Jipsy database<sup>4</sup>. The agreement has to be included with the invitation form and a copy must be sent to the local JRC Security Service.

In the next step, Annex A is concluded. This is the *agreement regarding the invitation of the personnel*: the Head of Unit of the Institute completes section 1 of the "*Request form for invitation at the JRC*" by making a proposal for the particular person to be invited, the number of months of the invitation, the starting date, the unit he/she is invited to, and the person responsible for the invited person. Following this the Head of the MSU signs section 2 of the same invitation form in which he/she approves the period during which the invited person is allowed to visit, stay at the JRC site and the Director of the Institute approves the request in section 3.

The MSU should *inform the medical service and unit B.1 (human resources)* of the presence of the invited person on the site concerned. The invited persons do not need to go through a medical examination by the Medical Service, they only need to provide a certificate of good health (see below in "Categories of personal data").

The *complete dossier is sent to the security service* (see below in "data recipients" part).

After providing his/her certificate of good conduct, the Security Service of JRC requests the *security clearance of the person concerned*.

The invited person has to take care of obtaining a "*permit to stay*" if required by the national laws of the JRC site.

Following the signature of the agreement, an *entry pass valid* for the period authorised will be issued to the invited person. The pass will indicate the facilities which are covered by the invitation. The Security service concerned must draw up the list of information required for such passes to be issued. Before issuing an entry pass, the Security services will verify if a request to obtain a permit to stay has been submitted to national authorities, where legally requested.

The information submitted by third parties is checked by the JRC's Security service in order to issue a valid staff pass for accessing the JRC sites. Copies of the files and personal data are retained locally in each MSU. Those are stored electronically.

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<sup>4</sup> According to the privacy statement for Jipsy (JRC Integrated Processing System): Jipsy is the JRC system that supports the institutes in managing their business processes related to purchase orders, warehouse, contracts, competitive activities, invoices and all related financial transactions. It also allows the scientific users preparing invitations to tender and requests to order and the follow-up of these dossiers.

## 2.2 Data subjects

Any interested person who applies to take up a visiting position following an invitation or unpaid visiting scientist or structural trainees<sup>5</sup> for a defined period of time.<sup>6</sup>

## 2.3 Categories of personal data

In the application form to be filled in by the "invited person", personal data are requested under the following five sections:

### 1. Personal Details:

- recent photograph, surname, first name, second name, address for correspondence, telephone number, residence, nationality, (if dual nationality, both should be stated), date and place of birth, sex, marital status (single, married, widowed and divorced), data of dependants (name, age degree of relationship), relatives employed at the EU (name, relationship, post held), professional activity of spouse and name/address of employer,

2. Education: secondary, higher, thesis, linguistic knowledge

3. Working experience (free space is provided for description)

4. Previous experience at the Commission or in any other European Institution

5. Health Insurance coverage ("Will you be covered by any national or private health insurance scheme during your possible training period?")

The form ends with declarations and undertakings of the person concerned as to the:

-truth and correctness of the information, and

-submitting **any documents supporting the statements.**

**The visiting scientist must enclose** the following supporting documents<sup>7</sup>:

- application form for a stay at JRC
- copy of the passport and visa (when necessary),
- detailed Curriculum Vitae,
- extract from police register (not older than 3 months before the date of start of the stay)
- medical certificate of good health (including the particular requirements for any nuclear, laboratory or other specialized circumstances),
- certificate of employment (the visiting scientist should be employed by a public scientific body, university, research institute or similar organisation proof or retirement from the previous employer),

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<sup>5</sup> The selection and management of "structural trainees" is covered by another notification of DG ADMIN (DPO-889). This involves the submission of applications by National Civil Servants through EU Permanent Representations.

<sup>6</sup> According to ANNEX 2 of the invitation agreement: A "person invited" is understood to mean:

- Either a staff member of an organisation with which the JRC has concluded a scientific or technological collaboration agreement without exchange of funds. Personnel from sub-contractors are excluded.

-Or the recipient of a study or research grant from any organisation with which the JRC has concluded a scientific or technological collaboration agreement without exchange of funds.

-Or a staff member of a partner of the JRC in an indirect action project undertaken as part of the EC or EURATOM Framework Programmes, as far as the Consortium Agreement between the JRC and the partner does not foresee assignment of personnel,

To whom the JRC Directorate grants access, for a specified period of time in the context of the person's activities agreed under the collaboration agreement, to certain JRC facilities and, where appropriate, authorises the person concerned to use certain equipment. Staff of service providers are not covered by this definition.

<sup>7</sup> If the visiting scientist is to stay for more than 5 daily visits per months.

- evidence of coverage for health and accident insurance (including any special coverage that may be required for special laboratories/facilities in which the visiting scientist may work during his/her stay at a JRC site),
- evidence of third party liability insurance
- agreement (consortium/collaboration/visiting scientist) on which basis the person comes to work at JRC.

The **external staff pass layout** always includes a photograph, the contract end date, name (first name and surname), personal number, JRC site and nationality of cardholder.

#### *2.4 Information given to the data subjects*

The data subjects are informed of the processing of their data by a privacy statement which will be displayed on the website of each JRC institute. The privacy statement includes information on the identity of data controller, purpose of the processing, categories of data collected and technical means used, right of access and rectification, legal basis of the processing, conservation periods, the persons having access to the files and to whom the data are disclosed, contact information and the possibility to recourse to the EDPS at any time.

#### *2.5 Rights of the data subjects*

In case the data subject wishes to know whether his/her personal data are stored or wishes to correct or delete his/her own data, an e-mail has to be sent to a functional mailbox. The address is mentioned in the privacy statement under "Contact Information". The prior checking notification states that on justified request from the data subject, the data concerned will be modified, blocked or erased within a maximum period of 14 days.

#### *2.6 Recipients to whom the data may be disclosed*

The personal information of applicants is transferred and stored only on paper. Access to personal files is allowed to MSU Staff and JRC corporate services (security and medical services).

JRC Medical Service receives the medical certificate of good health (including the particular requirements for any nuclear, laboratory or other specialised circumstances that may be necessary).

The Request form for an invitation at the JRC (proposal by the appropriate head of unit) contains a note as to further procedure: *"A copy of this contract/agreement must always be sent to the local JRC Security Service together with all necessary documents."*

JRC Security service receives *the complete dossier*. As stated at the question of the EDPS, this is a pre-requisite for "invited persons" to be permitted on the site. According to the justification given by the security service: the Security Service handled the final document check in the past and does it currently for those staff that are "not really falling under the statutory or non-statutory staff categories and without a direct contact with the Commission." These persons "are managed in a de-centralised way and sometimes even directly by the units concerned." Other staff categories usually have a direct contractual link with the European Commission and those are handled by Human Resources and Management Support Units.

To the question of the EDPS regarding the necessity to send the detailed CV and the medical certificate of good health and the proof that the person is covered by sickness and accident

coverage, the following answer was provided by the Security service: "Security Service should be sure that anyone working at the JRC, even with an indirect contact i.e. covered by collaboration agreement, has all the requisites for performing their assigned tasks according to existing rules and legislation with the aim to reduce any kind of liability for the Commission.

In details:

- (i) A simple certificate of good health is requested as these categories of people are not screened by the medical service and this gives minimal guarantee that they are for pursuing their professional activity.
- (ii) According to current legislation, they should also be covered by a health insurance scheme in order to be adequately supported in case of need.
- (iii) They should also have third party liability insurance coverage in case they cause any damage to Commission property including laboratory and experimental installations."

It is to be noted that the "Security Service concerned must draw up the list of information required" to issue entry passes" (Section 3 of Annex 2 the Note from the Director General to the JRC Institute Directors on "Revised JRC guidelines and rules for the management of collaboration agreements between JRC Institutes and external research institutes (20.12.2006)).

### *2.7 Automated/manual processing*

According to the notification, data such as personal data, project information, action and visit time period are collected directly from the data subjects and are stored in Excel tables using the JRC ICT infrastructure.

The Adonis application registers all paper and electronic master file of the individuals concerned.

Many communications are carried out by email, including the transmission of electronic files.

The entire file containing the Word template, internal circulation fiches and personal dossiers are kept in the paper file and are archived in alphabetical order. The controller states that only a paper file exists. There is no electronic storage of the document of visiting scientists. The data controller states that the paper files are stored locally within the MSU and thereafter in the MSU archives.

### *2.8 Retention policy*

Personal data are retained as long as follow-up actions to visits are necessary. According to the JRC directive "72 month rule" the total duration of presence of invited persons on the JRC site may not exceed 72 months over a twelve year period.<sup>8</sup> As a consequence, the data controller states that all personal data related to the invited persons will be deleted 12 years after the visit.

### *2.9 Security measures*

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<sup>8</sup> Section 3 of Internal Directive of the Director General for the JRC applicable to the maximum period on site of grandholders/fellows/visiting scientists, seconded national experts, auxiliary agents, contractual agents, temporary agents, staff of companies providing services on site (Brussels 27.09.2005 JRC/B00-PRM/FD/mvh/D(05)24256)

### **3. Legal analysis**

#### **3.1 Prior checking**

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 by the Community institutions and bodies and on the free movement of such data (hereinafter referred to as "the Regulation") applies to data processing activities by Community institutions and bodies. The Regulation applies to the personal data processing activities of the institutes of the Joint Research Centre (JRC) of the European Commission for the reasons explained below.

**Personal data are defined** as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The JRC institutes collect and use personal data of unpaid visiting scientists, as described in the facts part above, before their non-paid engagement. Article 2(a) of the Regulation thus applies.

The processing of personal data falls under Community law as it aims at managing resources of the JRC institutes. It is carried out **by the institutes of the Joint Research Centre of the European Commission**. Article 3(1) of the Regulation therefore applies.

The processing operation is carried out **mainly manually** because the documents containing personal information are kept in paper files. Some parts of the processing operation involve **automatic means** (for example, e-mail communications). Article 3(2) of the Regulation therefore applies.

Article 27 (1) of Regulation (EC) 45/2001 **subjects to prior checking** by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks, among those processing operations which are intended to evaluate personal aspects relating to the data subject, including his/her ability, efficiency and conduct (Article 27(2)(b)) and those operations where the processing of data relates to health and suspected offences, offences and criminal convictions (Article 27(2)(a)).

The present processing operation is **subject to prior checking on two grounds**: a) under **Article 27(2)(a) because criminal records** (extract from police register) and **health related data** (medical certificate of good health, evidence of coverage for health and accident insurance and evidence of third party liability insurance) are collected systematically in the process leading to the non-paid engagement of visiting scientists on JRC sites and b) under **Article 27(2)(b) because the competences of the visiting scientists are assessed** to see whether the candidate meets the need of the particular project on the basis of certain eligibility criteria.

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. The data processing operations are already established regarding the handling of data of visiting scientists. The institute of the JRC of the European Commission nevertheless should still implement the recommendations of the EDPS expounded in the current opinion.

The notification was also intended to cover "structural trainees". The processing operation related to "stagiaires structurels" was already prior checked by the EDPS and the opinion was

issued on 30 March 2009 (2008-760).<sup>9</sup> The selection of structural trainees follows different rules than that of the visiting scientists and the Structural Trainees Programme is implemented European Commission-wide in all Directorate-Generals. While the recommendations made in Opinion 2008-760 should be followed by the data controller at JRC, in addition, those aspects of the structural trainee selection, which are common to those of the current processing related to visiting scientists at JRC sites should also follow the EDPS recommendations made in the present opinion.

It was stated to the EDPS that the presently examined data processing operation is comparable to that of the "Nulla Osta" procedure. This opinion will not address in detail those recommendations, which the EDPS issued in the framework of prior checking the "ARDOS database"<sup>10</sup>. To the extent the issuing of "Nulla Osta" applies to the presently examined processing of data of visiting scientist, all EDPS recommendations made in that earlier prior checking opinion on "ARDOS database" should be implemented by the JRC.

The notification of the DPO was received on 17 December 2007. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 18 February 2008. The prior checking procedure has been suspended for a period of 151+184+38+202 days. The procedure was extended for one month due to the complexity of the matter. Thus, the opinion should be delivered no later than 12 October 2009.

### 3.2 Lawfulness of the processing

Personal data may only be processed by the JRC if the processing operation falls under Article 5 of Regulation 45/2001. The JRC bases the processing on Articles 5(a) of the Regulation.

**Article 5(a) of the Regulation** permits the processing of personal data if it 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 provision has three main elements: the principle of necessity, the goal of the processing should be a public interest and it also specifies the nature of the legal basis for the processing. Recital 27 of Regulation 45/2001 specifies the term "public interest" in more detail: the "processing of personal data for 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".

Selecting and engaging invited scientists (without employment relationship) for the benefit of JRC research activities is performed **for the public interest and is needed for carrying out the task** of the JRC. The data controller referred to the following instruments as **legal basis for the processing operation**<sup>11</sup>:

- Title II chapter 1 of the Treaty establishing the European Atomic Energy Community ("promotion of research" regarding the "Provisions for the encouragement of progress in the field of nuclear energy")

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<sup>9</sup> Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

<sup>10</sup> Opinion of 15 December 2008 on a notification for prior checking regarding the database ARDOS (Case 2007-380). Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

<sup>11</sup> As to structural trainees the Commission Decision of 1 June 2006 laying down rules on the secondment of national experts to the Commission (C(2006)2033) was referred as legal basis.



- COM/2005/439: Proposal for a COUNCIL DECISION concerning the Specific Programme to be carried out by means of direct actions by the Joint Research Centre under the 7th Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013)
- JRC rules on short- term stays for unpaid visiting scientists at JRC premises:
  - Internal Directive of the Director General for the JRC applicable to the maximum period on site of Grantholders/Fellows/Visiting Scientists/Seconded National Experts/Auxiliary Agents/Contractual Agents/Temporary Agents/ Staff of Companies providing services on site (27.09.2005),
  - Note from the Director General on visiting scientists dated 07/02/07 (Revised JRC Guidelines and rules for the management of collaboration agreements between JRC Institutes and external research institutes)
  - Note from the Director General to the JRC Institute Directors on "Revised JRC guidelines and rules for the management of collaboration agreements between JRC Institutes and external research institutes (20.12.2006) with annexes.
  - Note from the Director General for the attention of JRC Directors on Visiting scientists (12 April 2007) specifying the list of documents and proofs required from the visiting scientists needed for a long term permit (more than 5 daily visits per months)
- In addition, a collaboration agreement provides the legal framework between the JRC and the other organisation whose staff will be engaged in certain projects and the scientists need to fill in an application form or a request to be a visiting scientist at the JRC (including copy of passport and visa).

The EDPS noted the legal instruments referred to providing for the general legal basis of the processing operation for the selection and non-paid engagement of visiting scientists at JRC on particular projects. The selection and non-paid engagement of invited persons in itself is lawful under Article 5(a) of Regulation 45/2001. In addition, "invited persons" fill in an application form, which can be regarded as giving their consent to the processing operation (Article 5(d) of Regulation 45/2001).

While the EDPS does not question the existing general legal basis for the selection and engagement of visiting scientists, he expresses his serious concerns regarding the extensive data transfers to the security services (see part 3.6 below) and the lack of adequate legal basis for collecting criminal records and carrying out security clearances (see points 3.3 and 3.6).

### **3.3. Processing of special categories of data**

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 in principles is prohibited by the Regulation. Any exceptions permissible under Article 10(2) of the Regulation should be narrowly defined.

In the framework of selecting and inviting scientists, **health related data** are collected. Invited persons are requested to provide a medical certificate of good health (including the particular requirements for any nuclear, laboratory or other specialised circumstances that may be necessary).

In principle, the collection of these data can be seen legitimate under Article 10(2)(b) of Regulation 45/2001, where they are necessary for the purposes of complying with specific rights and obligations of the data controller in the field of employment law as it is authorised by other instruments adopted on the basis of the Treaties. The EDPS nevertheless has certain

concerns regarding the legitimacy of the transfer of these health related data to the security services (see below in part 3.6).

In addition, the data processing obviously includes **data relating to criminal offences and pending investigations**, which is regulated under Article 10.5 of Regulation (EC) No 45/2001. Individuals applying for the position of an invited scientist have to provide an extract from the police register (not older than three months).

In this regard, the EDPS recalls the application of Article 10.5 of Regulation (EC) No 45/2001 which establishes that *"[p]rocessing 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.."*

In the present case, the EDPS has not received any particular justification based on a legal instrument for the collection of criminal records or to carry out a security clearance. Invited scientists clearly do not fall under the Staff Regulations. Annex 5 of the internal Note from the Director General of the JRC the JRC Institute Directors on "Revised JRC guidelines and rules for the management of collaboration agreements between JRC Institutes and external research institutes" (20.12.2006) list the documents to be provided by the invited person, among those requires an "extract from police register" and Section 3 of Annex 2 of the same document specifies that the "Security Service concerned must draw up the list of information required" to issue entry passes".

This note as a guidance document can not be seen as solid legal basis to collect these sensitive data from the invited persons or to carry out a security clearance of these individuals. The EDPS therefore, calls upon the JRC and, in case where it is necessary according to its duties, the European Commission to adopt a solid legal instrument to collect sensitive data related to criminal offences or pending criminal procedures of the data subjects and adopt an appropriate legal instrument explicitly authorising the Security service of the JRC to carry out security clearances of the visiting scientists.

### **3.4 Data Quality**

Personal data must be **adequate, relevant and non excessive** in relation to the purposes for which they are collected and/or further processed (Article 4(1)(c) of the Regulation).

On the basis of the available information, the EDPS has a number of concerns regarding the adequacy and relevance of personal data collected.

Firstly, the *Security service of the JRC receives the complete dossier* of visiting scientists. After an exchange of information with the services, it was stated that such a sharing of information is a pre-requisite for the "invited persons" to be permitted on the site. Such a dossier contains an entire application and many administrative data (CV, proof of insurance coverage medical certificate of good health, etc). In the absence of a clear legal basis, the data collected by the Security service are excessive in relation to the purposes for which they are collected. The application forms and CVs are collected to ensure the appropriate professional performance of the visiting scientists for the benefit of the concerned JRC institute. They are not necessary for the security service to issue the entry pass for the stay of visiting scientists. Similarly, the certificate of good health and proof of insurance coverage are needed for administrative purposes and not for issuing the entry pass after a security check. The EDPS calls upon the JRC to demonstrate to him the necessity of every category of data collected by the Security service

from visiting scientists. The EDPS is seriously concerned about the extensive data collection by the security services (see more details in part 3.6), and expresses that without a clear and precise legal basis this extensive data collection and use of data can not be seen lawful (see above point 3.3).

Secondly, *the application form* of the individuals applying for a non paid visiting position request personal data not only regarding the professional background and competences of the concerned individual but also personal data irrelevant to assess one's professional competences. The relevance to collect data on marital status (single, married, widowed or divorced) and health insurance coverage in the application form is highly questionable under Article 4(1)(c) of Regulation 45/2001. The data controller should consequently reconsider the necessity of including these data in the application form.

The application form also request *professional data of the applicant's relatives in the following terms*:

- 1) "Are any of your relatives by blood or marriage employed at the institutions of the European Union? If yes, please state name, surname, relationship and post held", and
- 2) "Please state the professional activity of your wife/husband and the name and address of the employer."

The EDPS request the data controller to justify the reason why the collection of such data is relevant and necessary under Article 4(1)(c) of Regulation 45/2001.

Further, *a recent photograph is also requested in the application form*. In certain cases, this may contribute to revealing additional information related to the person concerned, in particular related to his/her ethnic origin., The EDPS therefore recommends that the data controller reconsiders the adequacy and relevance of collecting the photograph in the application form as a mandatory item. In case the communication of the photograph is an option, whenever the candidate would communicate his or her photo, it could be considered to give his or her consent to the processing of that data, which would make the processing of that special data lawful under Article 10(2)(a) of Regulation 45/2001.

*Thirdly, collection of extract from the police register*: In part 3.3. above a solid legal basis with adequate justification to collect data related to criminal records of the applying individuals was requested from the data controller. Without prejudice to that requirement, it should be further noted that these documents have a very diverse content in different Member States and carry diverse pieces of information. In some Member States, they contain information about the character of an individual or his/her moral behaviour. Therefore, the EDPS recommends that the data controller always carries out an analysis of the content of the extract from the police register on a case by case basis so that only relevant data are kept and processed.

**Fairness and lawfulness:** Article 4(1)(a) provides that personal data must be "*processed fairly and lawfully*". The lawfulness has already been discussed (see above, parts 3.2 and 3.3) and fairness will be dealt with in relation to information provided to data subjects (see below, part 3.8).

**Accuracy:** Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". The information provided in the application form is supplied by the data subject himself/herself, which ensures that the personal data is the most accurate and updated at the time of the collection of data. The possibility to make use of the rights of access and rectification helps to ensure that the data remain accurate and where necessary up to date (see below, part 3.7 on special concern regarding the updating of criminal records). The data controller states that the data subjects in general have the right to access and the right to rectify

their own data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data.

### 3.5 Conservation of data/ Data retention

Article 4(1)(e) of Regulation 45/2001 states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

As stated above in the "Facts" part, personal data are retained for as long as any follow-up actions to the visits are necessary. According to the JRC directive "72 month rule" the total duration of the presence of invited persons on the JRC site may not exceed 72 months over a twelve year period.<sup>12</sup> The data controller as a consequence stated that all personal data related to the invited persons will be deleted 12 years after the visit.

While the EDPS has noted the justification for setting the retention period in 12 years, he requests the controller to ensure that the implementation of this time limit to store data should cover both paper and existing electronic files consistently.

In addition, the EDPS stresses the point made in his earlier opinion on the "Ardos database"<sup>13</sup> that only the data necessary for the purpose of the administrative management of the 72 months rule should be kept. Managing that rule is not the case regarding the Security service. Consequently, a retention period should be set up for the data dealt with by the Security service with due respect for the principles in Article 4(1)(c) of Regulation 45/2001. The purposes of storing the data by the Security service should be clearly set and a retention period should be established respecting the purposes of the data processing.

*Retention period of the police record or similar official documents:* It does not seem appropriate for the JRC to keep information about offences and suspected offences that have become outdated and which would not be no longer reflected in a criminal record. For this reason, the JRC should find a system whereby information about such offenses should be deleted. This may be achieved through the right of access and rectification, as described below under 3.8. Another solution would be a "standard form" stating that the person is suitable for the performance of his duties kept in the file whereas the criminal record would be returned to the person. The EDPS recommends that the JRC adopts and implements a retention policy related to criminal records as soon as possible.

### 3.6 Transfer of data

**Internal transfer:** Article 7(1) of Regulation 45/2001 states that "*personal data shall only be transferred within or to other Community Institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

As it was explained above under "Facts", there are two main internal recipients of the personal data contained in the application documents of the invited persons: the *medical service*, which

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<sup>12</sup> Section 3 of Internal Directive of the Director General for the JRC applicable to the maximum period on site of grandholders/fellows/visiting scientists, seconded national experts, auxiliary agents, contractual agents, temporary agents, staff of companies providing services on site (Brussels 27.09.2005 JRC/B00-PRM/FD/mvh/D(05)24256)

<sup>13</sup> Part 3.5 of Opinion of 15 December 2008 on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the database ARDOS (2007/380)

receives the certificate of good health and proof of meeting any specific medical requirements for particular activities) and the *Security service* of JRC.

**Medical service:** Visiting scientists do not need to go through any medical check up before taking up their duties. The certificate of good health issued by a medical practitioner within the territory of any of the EU Member States can contain diverse health related information, which therefore should not be transferred out of the medical service of the JRC: The JRC should ensure that any health related data, including the certificate of good health, are directly sent to the medical service. As a good practice the EDPS encourages that the medical service then to issue a standard form providing JRC administration with the information as to whether this condition of the non-paid engagement was fulfilled or not.

**Security service:** As described in the "Facts" part above, JRC Security service receives *the complete dossier*, which also contains the detailed CVs, medical certificates of good health and the proof that the person is covered by sickness and accident coverage. As stated at the question of the EDPS, this is a pre-requisite for "invited persons" to be permitted on the site. According to the justification given by the Security service: the Security Service handled the final documental check in the past and does it currently for those staff who are "not really falling under the statutory or non-statutory staff categories and without a direct contact with the Commission." These persons "are managed in a de-centralised way and sometimes even directly by the units concerned." Other staff categories usually have a direct contractual link with the European Commission and those are handled by Human Resources and Management Support Units.

The justification given to the EDPS for such extensive collection and use of personal data by the security service was that the "Security Service should be sure that anyone working at the JRC, even with an indirect contact i.e. covered by collaboration agreement, has all the requisites for performing their assigned tasks according to existing rules and legislation with the aim to reduce any kind of liability for the Commission.

In details:

- A simple certificate of good health is requested as these categories of people are not screened by the medical service and this gives minimal guarantee that they are for pursuing their professional activity.
- According to current legislation, they should also be covered by a health insurance scheme in order to be adequately supported in case of need.
- They should also have third party liability insurance coverage in case they cause any damage to Commission property including laboratory and experimental installations."

On a separate note, the data controller explained to the EDPS that the recipient of the medical certificate of good health is the Medical Service.

The EDPS recalls Article 7(1) of Regulation 45/2001, which states that "*personal data shall only be transferred within or to other Community Institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

According to the available information, the transfer of the complete dossier of visiting scientists to the Security service does not appear to be proportionate and necessary within the tasks of the security service.

**Legitimate performance of tasks covered by the competence of the recipients:** The EDPS has not been informed of any legal instrument allocating the task to the Security service to

check that individuals covered by collaboration agreement have all the prerequisites for performing their assigned tasks according to existing rules and existing legislation in order to reduce any kind of liability for the Commission.

Not only the lack of legal instrument worries the EDPS but also the allocation of tasks and competences within the European Commission had it been the case that the Security service of ISPRa perform a check of meeting pre-requisites of a stay on the site, instead of the respective administrative unit. Such an arrangement would raise serious concerns regarding the adequacy and relevance of data handled by the Security service (Article 4(1)(c) of Regulation 45/2001). While understanding the special status of the invited scientists, the EDPS requests the European Commission and the JRC to clarify the tasks and competences of its services regarding the present processing operation. Once the administrative and security related tasks are clearly set out, the personal data necessary for the concerned services to carry out their legitimate duties should be further defined.

**Data necessary for the task:** At the same time that the data controller gives due considerations to adopting a solid legal basis providing for the legitimate collection of criminal records and to carry out a security clearance (see above in parts 3.2 and 3.3), the categories of personal data which are necessary to perform the security tasks of the JRC Security service in this regard need to be determined. It should be ensured that only adequate, relevant and necessary personal data are collected by JRC Security service to make the security clearance of the visiting scientists (Article 4(1)(c) and 7(1) of Regulation 45/2001).

**Article 7(3) of Regulation 45/2001** provides that: "The recipient shall process the personal data only for the purposes for which they were transmitted." In order to ensure the full compliance with Article 7 of the Regulation, the controller should remind all recipients of their obligation not to use the data received for other purposes other than the one for which they were transmitted, as it is explicitly stated in Article 7(3) of the Regulation.

### 3.7 Right of access and rectification

According to Article 13 of the Regulation, the data subjects have a right to obtain access to the items listed in the provision upon their request. Article 14 of the Regulation provides the data subjects with "*the right to rectify inaccurate or incomplete data*".

As it was stated by the data controller, in case the data subject wishes to know whether his/her personal data are stored or wishes to correct or delete his/her own data, an e-mail has to be sent to a functional mailbox. The address is mentioned in the privacy statement under "Contact Information". The prior checking notification states that on justified request from the data subject, the data concerned will be modified, blocked or erased within a maximum period of 14 days. Neither the Privacy notice nor the prior checking notification foresees cases of possible restrictions on these rights.

The EDPS notes the procedures set forth to enable the data subjects to exercise their rights but makes the following specific recommendations in accordance with his earlier opinion<sup>14</sup>, regarding the police records (see above point 3.4):

**Police records:** The application of the right to rectify inaccurate data may enable individuals to request the update of the criminal record. Indeed, as noted above in part 3.5, if crimes become outdated after a certain period of time they should no longer be reflected in a criminal record.

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<sup>14</sup> Opinion of 15 December 2008 on the ARDOS database (2007/380)

Under Article 14 of the Regulation individuals have the right to rectify inaccurate or incomplete data, which in the case in point means that individuals should be able to update - provide for an updated version of - their criminal record in order to reflect accurately their current situation. As said above, in keeping information about crimes that have become outdated the JRC would contravene the data quality principle described above according to which personal data must be "*accurate and, where necessary, kept up to date*".

In order to apply Articles 14, 4(1)(d) and 4(1)(e) of Regulation (EC) No 45/2001 (right of rectification, data quality and conservation principles), the JRC should set up a system intended to ensure the effective application of the content of these rights and principles as far as the certificate of good conduct and criminal record are concerned.

In setting up this system, the EDPS notes that it may be difficult and cumbersome for the JRC alone to operate a scheme that deletes information on crimes that have become outdated on its own initiative, particularly because this may differ from country to country. The JRC may not be in a position to verify on an on-going basis whether the crimes contained in the police record of each individual are outdated or not. However, the JRC is in a position to inform individuals of the possibility of providing updated criminal records (or similar official documents) throughout their professional relationship with the JRC.

Thus, the EDPS calls upon the JRC to remind the concerned visiting scientists of this possibility. This can be done in the privacy statement or separately. In providing the concerned individuals with this possibility, the JRC is in fact enabling them to exercise their right of rectification of data that is inaccurate under Article 14 of the Regulation. It also contributes to the application of the data quality principle. Furthermore, it implements the data conservation principle setting a limit to the storage of information when it is no longer necessary for the purposes for which it was processed.

In this regard, the EDPS notes that the JRC may need to keep police records for a certain time in order to have evidence justifying why it took the decision to issue a negative security clearance. This need may justify the keeping of police records or certificates of good conduct until it is no longer possible to challenge a given negative decision. This should nonetheless not prevent the individual from providing an updated police record or certificate of good conduct to be kept alongside the former one, which will be definitively deleted after the above mentioned period.

### **3.8 Information to the data subject**

Articles 11 and 12 of Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items.

In the framework of the present processing operation, Article 11 (*Information to be supplied where the data have been obtained from the data subject*) applies since data have been provided directly by the visiting scientists (invited persons) themselves by submitting their application forms and the supporting documentation.

The data subjects are informed of the processing of their data by a privacy statement which will be displayed on the website of each JRC institute. The EDPS takes note of the suggested **communication channel** but emphasises that the privacy notice should be displayed on the website of the institutions in a clearly visible way. As a good practice to provide personalised information, the EDPS advises the data controller to consider distributing the information notice to visiting scientists at the same time of their invitation.

The EDPS analysed the *content of the privacy statement* and found that most of the items required by Article 11 are provided, except for the missing information on the possible consequences of failing to submit the supporting documents (Article 11(1)(d) of Regulation 45/2001. A revision will be also needed regarding the legal basis to carry out security clearance and collect criminal records once the relevant legislative procedures were finalised and also regarding the data conservation period of criminal records.

### 3.9 Security measures

According to Articles 22 of Regulation (EC) No 45/2001, 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss or alteration, and prevent all other forms of unlawful processing.

The EDPS takes note of the security measures referred to by the data controller.

### Conclusion:

The processing operation as described above appears to be in breach of the provisions of Regulation 45/2001, unless the appropriate implementation of the EDPS recommendations is ensured in order to be in compliance with the Regulation. As described in this opinion, the JRC, and wherever relevant, according to its duties, the European Commission, should:

- **adopt a legal basis** authorising the Security service *to collect criminal records and carry out the security clearances* of non-paid visiting scientists.
- **demonstrate the need to** collect the described categories of personal data by the Security service for its task
- **reconsider the necessity** to include data on marital status (single, married, widowed or divorced) and information on health insurance coverage in the application form
- **justify the reason** why the collection of information on professional data of relatives is relevant and necessary
- **reconsider the adequacy and relevance** of collecting a photograph in the application form as a mandatory requirement
- **implement the retention period** consistently as to paper and electronic document. The purposes of **storing personal data by the Security service should be set** and respectively a retention period to be established for data processed by the Security service.
- **always consider** the submitted content of a criminal record and only keep the relevant data
- **establish a system** where information about offences (in police records) can be updated by the concerned individual **and adopt and implement** a retention policy for criminal records
- **ensure** that only the medical service can receive health related data (medical certificate of good health) and the medical service ensures the administration further if this precondition for non-paid engagement is met
- **clarify the tasks and competences** of the administrative and security services in relation to visiting scientists, and **further define** which categories of data are needed for these services to carry out their respective tasks
- **remind** all data recipients of their obligation not to use the data for other purposes than for which they were transmitted to them



- **distribute** the privacy notice to the concerned visiting scientists in a personalised form at the time of inviting them
- **inform** the concerned individuals of the possibility to provide updated criminal records
- **display the privacy notice** in a clearly visible way on the website
- **revise the content** of the privacy statement as suggested above.

Done at Brussels, 12 October 2009

(signed)

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