



Opinion on a notification for Prior Checking received from the Data Protection Officer of European Parliament on the Selection of a Director for the European Institute for Gender Equality (EIGE)

Brussels, 8 December 2009 (Case 2008-0785)

1. Proceedings

On 23 December 2008, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the European Parliament (EP) a notification for prior checking relating to the processing of personal data in the procedure of selection of a Director for the European Institute for Gender Equality (EIGE). The documentation supplied included a covering note from the DPO placing the processing operation in context, the Article 25 notification from the controller to the DPO, a copy of the letter from the controller to the European Commission in order to inform candidates of the procedure and processing of personal data, a copy of the vacancy notice and a print out of the publication for a vacancy with the application form and a copy of Regulation (EC) 1922/2006 of the European Parliament and of the Council on establishing the EIGE.

The procedure for selection of a Director of the EIGE being a joint procedure between the European Parliament and the European Commission, the EDPS requested notification from the Commission on the selection procedure within the Commission. On 6 January 2009, the EDPS therefore suspended the prior checking procedure pending notification of the processing of personal data by the European Commission in the frame of this procedure. On 28 September 2009, the EDPS was notified of the selection procedures of senior management for the European Commission and the Community Agencies. This notification is only an amendment of a previous notification received from the European Commission on the selection of senior management at the European Commission so as to include the Community Agencies.

On 29 September 2009 further questions were sent to the EP concerning the notification received from EP. Answers were received on 14 October 2009.

A draft opinion was sent to the EP for comments on 24 November 2009. Comments were received on 7 December 2009.

2. The facts

According to Article 12(1) of Regulation (EC) 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, "The Institute shall be headed by a Director appointed by the Management Board on the basis

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of a list of candidates proposed by the Commission (DG EMPL) after an open competition, following publication in the Official Journal of the European Union and elsewhere of a call for expressions of interest. Before being appointed, the candidate(s) selected by the Management Board shall be asked to make a declaration before the competent committee(s) of the European Parliament and answer questions from its/their members."

The procedure within the European Parliament is as follows:

As regards the appointment of the EIGE Director, the Committee on Women's Rights and Gender Equality (FEMM Committee) requests the following information from the European Commission:

- a description of the selection criteria used during the procedure, with justification of the selection methodology chosen,
- the number of applications received, broken down according to Member State and sex, with information on how many of the applicants were not eligible to apply,
- documentation provided by the Commission's selected candidate (in addition to the CV).

DG EMPL informs the FEMM Committee that the Commission had other candidates for interview by the Management Board, but does not disclose the name of the candidates who are not selected and indicates that it does not have the authority to disclose the CV of this person.

On the basis of the information received, the FEMM Committee gives its opinion about the candidate(s). The recommendation of the FEMM Committee is submitted to the Conference of Presidents of the EP, who takes the final decision. The President of the EP communicates the EP opinion to the EIGE Management Board. The FEMM Committee publishes the CVs of the selected candidate(s).

The **criteria for selection** are provided in the vacancy notice. Notably the candidate should be a national of a Member State, possess a thorough knowledge of at least one of the Community's official languages and a satisfactory knowledge of another of these languages; hold a university degree giving access to post graduate studies, preferably in a field relevant to the mission of the Institute and have at least 15 years of professional experience at a level corresponding to the above mentioned qualifications.

The vacancy notice further elaborates these criteria:

1. applicants should enjoy full rights as a citizen; it is stipulated that before recruitment, the successful candidate will be asked to provide a certificate issued by the competent authority attesting the absence of any criminal record.
2. applicants should have fulfilled any obligations imposed by the national laws concerning the military service;
3. before recruitment the applicant will be medically examined for the purposes of Article 12(2) (d) of the Conditions of employment of Other servants of the European Communities.

Data conservation: The EP keeps the data relating to the selection procedure for five years from the date of the FEMM Committee meeting when the candidacy is considered.

Information: At the request of the FEMM Committee the European Commission informs candidates that the information provided by them in the frame of the selection procedure, including their CV, would be sent to the FEMM Committee and will be made public. Candidates are also informed that the hearing may require the Parliament to record the personal data received in a file, which may be communicated to the members of the Parliament. Candidates, other than the selected one(s), are informed that their data may be processed confidentially if the candidate so wishes. The FEMM Committee has also requested that the Commission inform candidates of their rights to request further information or exercise their rights to the data controller at the EP.

Rights of data subjects: At the EP, the notification to the EDPS provides that the rights of the data subjects can be exercised in accordance with the EP Bureau decision of 22 June 2005 (Articles 8-13) which provides the procedures for a right of access, rectification, blocking and erasure.

Security: In the specific selection exercise, the CV and letter of motivation were not put on the Committee website, but included in a paper file which was given to the Members and political groups' advisors during the Committee meeting. Unused copies of the file were destroyed. The FEMM Committee has indicated that it is prepared to treat on a confidential basis the details of unsuccessful candidates.

3. Legal analysis

3.1. Prior checking

Regulation (EC) 45/2001 applies to the processing of personal data by Community institutions and bodies.

In order to appoint the Director of the EIGE, the EP collects, processes and stores personal data relating to candidates who apply for these positions. The data notably relate to the professional and personal profile of candidates (i.e. curriculum vitae and accompanying documents: motivation letter, copies of certificates, references...).

The processing of personal data is carried out by a Community institution in activities which fall within the scope of Community law.

Regulation (EC) 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. The processing is carried out both electronically and in a structured paper filing system.

Regulation (EC) 45/2001 therefore applies.

Article 27(1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS "processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of selecting candidates for the position of Director of the EIGE precisely aim at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, the data controller will perform various assessment activities. Clearly the

data processing operations fall within Article 27(2) (b) and must therefore be prior checked by the EDPS.

The present opinion does not cover the actual recruitment of the selected person and processing of personal data in that context.

The selection of a Director for the EIGE takes place in the light of a joint procedure of the European Commission and the EP. As concerns the prior checking of the processing of personal data in the frame of the procedure at the European Commission, the EDPS refers to his opinion of 17 September 2007 on the Selection of Senior Officials at the European Commission (2007-193).

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operations related to the specific selection exercise were already taking place at the time of notification by the European Parliament. The EDPS regrets that he was not notified prior to the processing operation. The EDPS invites the EP to consider the recommendations made in the frame of this opinion for all future similar selection procedures.

The Notification from the European Parliament was received on 23 December 2008. The deadlines to provide an opinion were suspended for 280 days. The opinion must therefore be issued by 13 December 2009.

3.2. Lawfulness of the processing

Article 5 of Regulation (EC) 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the *"processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof"*.

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) 45/2001 two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

As mentioned above, Article 12(1) of Regulation (EC) 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, provides that the Director of the EIGE shall be appointed by the Management Board on the basis of a list of candidates proposed by the Commission and after a hearing before the competence Committee of the European Parliament.

The procedures in place at the European Parliament and the Commission are based on this provision.

It must then be assessed whether the processing which occurs in the context of the procedure to select a Director of the EIGE is "necessary" for the performance of this task. To put Article 12 1) of Regulation (EC) 1922/2006 into practice, it is necessary for the European Parliament and the Commission to collect and further process personal information of candidates. The

data processing by the European Parliament that takes place in the frame of this procedure is therefore considered as necessary to ensure the selection of candidates.

Public access to personal data in the context of the procedure at the EP due to the fact that the Committee sessions are open to the public is in accordance with the criteria which the EDPS has developed in the context of the tension between Regulation (EC) 1049/2001 and Regulation (EC) 45/2001¹. This approach implies a balance of the interests at stake: on the one hand, the need to inform the public and, on the other, the protection of the persons concerned. In this particular case there is an obvious public interest in the transparency of the procedure and the privacy of the individuals concerned is not at stake. This is all the more so since the persons concerned should be informed by the Commission of the fact that the data could be made available to the public and, save for the selected candidate, may make a request for confidentiality. Making the data available to public access is therefore considered as lawful.

The processing of personal data by the European Parliament in the frame of the procedure of selection of the Director of EIGE is therefore considered as lawful.

3.3. Processing of special categories of data

Article 10(1) of Regulation (EC) 45/2001 establishes that "the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject (Article 10(2)(a)).

The EDPS considers that in the context of selecting the Director of EIGE, applicants may reveal information revealing special categories of data. Notably candidates are requested in their application form to mention any disabilities necessitating special arrangements during the selection procedure. Should this occurs, it will be considered that candidates have given their consent to the processing of that data, thus, the condition of Article 10(2) (a) would be met.

3.4. Data Quality

According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed*".

The personal data collected and processed by the EP and Commission in the frame of this procedure, are all personal data included in the CV, application form and motivation letters of the candidates and any further data submitted by them in the frame of their candidacy. The EDPS considers in principle that this data complies with the Regulation.

Article 4(1)(d) of the Regulation provides that the data must be accurate and kept up to date. The fact that the personal data are collected from the data subjects themselves and the right of access of the candidates to their data (see below 2.2.7. Right of access and rectification) both serve to guarantee the accuracy of the data. However, other information is not provided directly by the individual but generated by the various bodies involved in the procedure. In this regard, as further developed below, it is important for the candidate to be able to exercise

¹ See EDPS background paper series "Public access to documents and data protection", July 2005

his right of access and rectification insofar as this enables individuals to control whether the data held about them are accurate. In this respect, see also Section 2.2.7.

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

3.5. Conservation of data

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

According to the information received, the EP keeps the data relating to the selection procedure for five years from the date of the FEMM Committee meeting when the candidacy is considered.

The period of conservation of the data appears to be justified in the light of Article 4(1)(e) of Regulation (EC) 45/2001.

The notification mentions that the data are not kept for any historical reasons. Should the data be kept for historical reasons, the EDPS reminds the EP that this conservation should be subject to a specific selection and verification process on the basis of criteria determined at an institutional level so as to only retain data of historical value. In accordance with Article 4(1)(b), appropriate safeguards must be put into place to ensure that the data kept on the basis of their historical value are not processed for any other purposes or used in support of measures or decisions regarding a particular individual. Furthermore, the notification form should reflect this conservation period and data subjects should be informed accordingly of the conservation of certain data for historical purposes.

3.6. Transfer of data

Articles 7, 8 and 9 of Regulation (EC) 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made (i) to or within Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

According to the notification of the EP, data are transferred to the members of the FEMM committee and their assistants, staff in the FEMM Committee secretariat and of the political groups and other persons present during the FEMM Committee meeting (FEMM Committee sessions are public). The FEMM Committee opinion on the selected candidate will be communicated to the EIGE Management Board and the Conference of Presidents of the EP.

For the transfers within or between Community institutions and bodies, Article 7 of the Regulation applies. Article 7 of Regulation (EC) 45/2001 requires personal data to be transferred only "for the legitimate performance of tasks covered by the competence of the recipient". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the data are necessary for the performance of this competence.

The EDPS considers that the transfers of information to the recipients within the EP for the purposes stated comply with Article 7(1). Indeed, all the recipients have the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the candidates. The level and concrete tasks vis-à-vis the assessment varies depending on the recipient, but all the recipients, at some point of the procedure, have the obligation to assess the candidates. The transfer of the personal data is therefore considered as falling within the tasks covered by the competence of the recipient.

As to the necessity of the data transferred, these are considered as necessary in accordance with the Regulation.

Article 7(3) states that "*The recipient shall process the personal data only for the purposes for which they are transmitted*". The EDPS underlines that at all stages of the procedure, the recipients to whom the data are transferred must be reminded that they can only process the data for the purposes of the selection candidates for the position of Director of the EIGE.

The communication to the public in general due to the fact that the FEMM Committee sessions are open to the public is considered to be lawful as well as the publication of the data on the Internet, which does not qualify as a transfer² (see point 2.2.2.).

3.7. Right of access and rectification

According to Article 13 of Regulation (EC) 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

The notification of the EP refers to the general rights of the data subjects according to the Bureau decision of 22 June 2005 (EP). The EDPS is satisfied that the right of access is therefore recognised, but also underlines that certain restrictions to this right may exist on the basis of Article 20§1(c) of Regulation (EC) 45/2001. This provision specifies that "The Community institutions and bodies may restrict the application of Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others". This may imply that information comparing the data subject with other applicants should not be provided and information regarding the particular remarks or evaluations of members of the selection boards or committees may be limited. Should these restrictions be applied in practice, the persons concerned will need to be informed of such restrictions and of the possibility of recourse to the EDPS.

Article 14 of Regulation (EC) 45/2001 provides data subjects with the right to rectify inaccurate or incomplete data. This right can obviously apply only to factual data. Merit points allocated or individual assessments, for example, could not under any circumstances be open to a right or rectification by the data subject, except in the context of an appeal lodged according to an established appeals procedure.

3.8. Information to the data subject

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the selection procedure of the Director of the EIGE at the EP and

² Lindqvist case, Judgement of the European Court of Justice of 6 November 2003 (C-101/01)

Commission, personal data are obtained directly from the data subject and from other persons. Thus Articles 11 and 12 will apply.

The EDPS has been informed that the FEMM Committee explicitly requested the Commission to inform candidates on the processing of their personal data by the Committee and of their right of access and right to further information. The EDPS is satisfied that the EP has put into place mechanisms to inform data subjects on the processing of their data. Having said this, in future procedures, the EDPS urges that information is also provided on the right to recourse to the EDPS and the conservation periods for keeping the data.

3.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the appropriate technical and 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.

[...].

3. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the European Parliament ensures that in future selection procedures, candidates are adequately informed of their right to recourse to the EDPS and of the time limits of the processing of personal data.

Done at Brussels, 8 December 2009

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