

Opinion on a notification for Prior Checking received from the Data Protection Officer of the Community Plant Variety Office on the processing activities related to the attestation procedure (Article 10(3) of Annex XIII to the Staff Regulations)

Brussels, 15 December 2009 (Case 2009-0092)

1. Proceedings

On 10 February 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer of the Community Plant Variety Office (CPVO) a notification for prior checking concerning the processing activities related to the attestation procedure (Article 10(3) of Annex XIII to the Staff Regulations).

The EDPS requested additional information on 5 March, 6 April and 28 October 2009. The responses were received on 3 April, 28 September and 13 November 2009 respectively. The EDPS sent the draft opinion to the Data Protection Officer for comments on 13 November 2009 which were received on 14 December 2009.

2. Facts

- Purpose of processing

The purpose of processing is the performance of the attestation procedure. This procedure implies the selection of those officials in categories C or D in service before 1 May 2004 who may become a member of the assistants' function group without restriction on the basis of an attestation procedure. The procedure is described in the draft CPVO Decision laying down the rules for implementing the attestation procedure (hereinafter "the draft Decision").

- Description of the procedure
 - a) Stages of the procedure (article 3 of the draft Decision)

The procedure shall only comprise three stages: publication of a call for applications; establishment of a list of admitted applicants; attestation on posts at "Administrative assistant" level.

- b) Call for applications (article 4 of the draft Decision)

Each year the appointing authority shall adopt detailed rules for applying the criteria referred to in Article 5, after consulting the Joint Attestation Committee.

c) List of the admitted applicants (article 5 of the draft Decision)

The officials have to meet the following criteria to be admitted to the attestation procedure:

- a) Have a level of education at least equivalent to that required in Article 5(3)(a) of the Staff Regulations, to be appointed official in the assistants' function group;
- b) Have at least five years' seniority in career stream C or D. If periods of employment in career stream C or D are taken into account in order to meet the criterion mentioned in the above indent, the minimum seniority required shall be increased by the number of months corresponding to those periods of employment;
- c) Have the recognized potential to perform "Administrative assistant" level functions;
- d) Not be in a situation of inadequate performance or insufficiency.

This draft list of admitted applicants shall be submitted to the committee referred supra for an opinion and then published.

The final list of applicants admitted to the attestation procedure shall be adopted and published by the appointing authority.

The benefit of being admitted to the attestation procedure shall not be subject to any time limit.

d) Attestation of admitted officials (article 6 of the draft Decision)

Officials admitted to one of the attestation exercises organized from 2006 onwards shall be appointed to an "Administrative assistant" level post in order to be deemed attested and thus become members of the assistants' function group without restrictions. The attestation shall be granted after the information declared in the application form has been verified.

In order to consolidate the competencies they are required to perform (tasks at a higher level), the officials admitted shall be encouraged to follow a specific training module taking account of the needs of the service to which they are assigned. Participation in this training module may not be considered a prerequisite for attestation itself.

The appointing authority shall publish before 31 March each year the list of officials attested the previous calendar year.

e) Joint attestation committee (article 7 of the draft Decision)

On a regular basis and at least twice a year, on the initiative of the HR unit or at the request of the committee, the latter shall be informed by the appointing authority on the implementation of the attestation procedure. The committee shall monitor in particular:

- the number of officials actually attested under Article 6;
- the breakdown by service and by place of employment;
- the number of posts by service, the functions of which were modified to correspond to "Administrative assistant" level functions;

- the profile of those attested in terms of gender, age, grade, seniority as an official and level of education;
- the number of attested officials from career stream D*;
- the number of admitted officials who participated in the training module referred to in Article 6(2).

On the basis of that information, the committee shall adopt any recommendation which it considers appropriate for transmission to the appointing authority. It may in particular recommend that the appointing authority adapt the application form referred to in Article 5(1) and the procedure for evaluating the potential referred to in the third indent of Article 5(1).

At the beginning of each year, the committee shall adopt an opinion on the implementation of the attestation procedure during the previous calendar year. This opinion shall be transmitted to the appointing authority and to the Staff Committee.

- Data subjects

The data subjects concerned by the processing activity under analysis are the officials who were employed in categories C or D before 1 May 2004, who have been appointed to a permanent post in the CPVO in accordance with Article 1a of the Staff Regulations, and who, on 1 January 2010, were seconded in the interests of the service or who held one of the following positions referred to in Article 35 of the Staff Regulations: in active employment, on parental leave or on family leave.

- Categories of data

The data categories are the following:

- the applicant's surname and forename;
- the applicant's personnel number, grade;
- the department(s)/unit to which the applicant is assigned and the duties performed;
- the applicant's level of education and training;
- the applicant's professional experience and seniority;
- the overall assessment obtained by the official in their career development reports;
- all data from the applicant's last three career development reports.

- Information to the data subjects

The data subjects will be provided by the CPVO with the following information:

- the identity of the controller;
- the purposes of processing;
- the recipients of the data;
- the existence of the right of access and rectification;
- the legal basis of the processing
- the time limits for storing the data
- the right to have recourse at any time to the European Data Protection Supervisor.

- Procedures to grant rights of data subjects

Upon requests, data subjects have the possibility to exercise the right of access and modify their data, except merits and skills, even after the deadline for submitting applications.

- Type of processing (automated and/or manual)

The call for applications is sent electronically by e-mail to the staff, and the applications can be sent by e-mail or in paper form.

- Storage media

The information is collected on paper and stored in the personal files of each staff member concerned, and in Docman (electronic storage of documents).

- Recipient(s) of the Processing

The data are only disclosed to the staff member concerned, the Human Resources service, the Appointing Authority and, in the case of an appeal, the Joint Attestation Committee.

- Retention policy

Data are kept on paper in the personal files, and in Docman, during the career for the staff member and 10 years after the end of contract with the CPVO (in accordance with retention policy adopted by the CPVO).

- Time limit to block/erase data on justified legitimate request from the data subjects

A request to block or erase data would be dealt with on a case-by-case basis.

- Security and organisational measures

(...)

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The activities related to the attestation procedure above described constitute processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed on behalf of a Community body, in this case, the Community Plant Variety Office, in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation). The processing of the data is done partly by automatic means. Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (b): "*processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct*". The activities related to the attestation

procedure clearly represent such a processing operation and are therefore subject to prior checking by the EDPS.

Deadlines: The notification of the DPO was received on 10 February 2009. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 220 days to require additional information and to allow for comments from the data controller. Consequently, the present opinion must be delivered no later than on 17 December 2009.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. 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 or in the legitimate exercise of official authority vested in the Community institutions or body"*. The processing of personal data for performance of tasks carried out in the public interest includes *"the processing necessary for the management and functioning of those institutions and bodies"* (recital 27).

The Staff Regulations (Article 10(3) of Annexe XIII) provides the legal basis for the procedure under analysis. This legal basis has to be implemented by a Decision. The EDPS received a copy of the draft Decision.

The EDPS notes that the processing described is considered necessary for the attestation procedure established by the Staff Regulations, to be implemented by the mentioned draft Decision.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*. The information presented to the EDPS on the data processed appears to meet those requirements.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and that *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*. The applicants can exercise the exercise of the rights of access and rectification (cf. point 3.6). The EDPS is of the opinion that this ensures that the data are accurate and kept up to date throughout the process.

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.7)

3.4. Data retention

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

The EDPS is of the view that the retention period is reasonable *vis-à-vis* the purpose of processing. However, the retention period for the non-admitted candidates should be reduced in the light of Article 4(1)(e). Furthermore, the difference in the retention period has to be expressly mentioned in the Privacy Statement.

3.5. Transfer of data

Article 7(1) of the Regulation provides 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"*.

In the present case, data may be transferred to the Joint Attestation Committee only in case of appeal by the data subject (as specified in Article 5.2 of the draft Decision). The EDPS considers that in this case, the transfer would be necessary for the performance of the legitimate task of the Joint Attestation Committee.

3.6. Right of access and rectification

Article 13 of Regulation 45/2001 grants the data subject the right of access to personal data being processed. Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

As described in point 2 above, the data subject can exercise these rights. Furthermore, a request to block or erase data would be dealt with on a case-by-case basis.

3.7. Information to the person concerned

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed unless the data subject already has this information. Individuals are further entitled to be informed of, inter alia, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

The EDPS received a copy of a draft Privacy Statement, where all the requirements are specified. However, as mentioned above, the retention period for the non-admitted candidates should be reduced in the light of Article 4(1)(e). Therefore, the difference in the retention period has to be expressly mentioned in the Privacy Statement.

3.8. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented 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 to prevent all other unlawful forms of processing"*.

The EDPS has no reason to believe that the measures mentioned are no adequate in light of Article 22 of the Regulation.

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the above considerations are fully taken into account. In particular, the Community Plant Variety Office should:

- reduce the retention period for the non-admitted candidates; as a consequence, the difference in the retention period has to be expressly mentioned in the Privacy Statement.

Done at Brussels, 15 December 2009

(signed)

Giovanni BUTTARELLI
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