

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the EU Agency for Fundamental Rights regarding the selection procedures for the selection of Confidential Counsellors**

Brussels, 10 February 2010 (Case 2009/857)

### **1. Proceedings**

On 21 December 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer of the EU Agency for Fundamental Rights (FRA) a notification for prior checking regarding the data processing operations that take place in the context of the selection of Confidential Counsellors.

### **2. Examination of the matter**

This prior check analyses the data processing operations carried out by FRA in order to select and appoint confidential counsellors for the purpose of dealing "informally" with cases of psychological and sexual harassment. FRA adopted a policy on protecting the dignity of the person and preventing psychological and sexual harassment where confidential counsellors will play an essential role. The data processing operations start with the collection of application forms. They continue with the assessment of candidates and finalize with the selection and the appointment of the most suitable applicants. This Opinion will therefore not address data processing operations put in place by the counsellors to accomplish their new tasks once appointed.

#### **2.1. The Facts**

The **purpose** of the data processing operations is to manage the selection of **confidential counsellors in FRA** in order to select the most appropriate persons (3) to deal with cases of psychological and sexual harassment.

The data processing operations that take place in the context of selecting and appointing **confidential counsellors to the FRA** can be summarized as follows:

- Further to the receipt of application forms, CVs, motivation letters and the solemn declaration via internal mail, the staff dedicated from the Human Resources and Planning Department will check whether applications comply with the eligibility conditions and incompatibility criteria. Applicants whose applications are rejected at this stage will be notified by internal mail.

- A consolidated list of eligible candidates and their application files will then be sent to the members of the selection panel, together with an assessment grid prepared by Human Resources. The selection panel is composed of the agency's representatives of different department, the Human Resources and the Staff Committee.
- The selection panel will hold an individual interview with each eligible candidate. This interview is intended to assess applicants on the basis of the selection criteria established in the call for expression of interest. The deliberations of the panel are confidential.
- The selection panel will then draw up the list of candidates to be submitted to the Director who, as appointing authority, will accept or reject each proposed appointment.
- The persons appointed must attend compulsory and specific training modules on how combating harassment. The final list of confidential counsellors will be drawn up taking into consideration the assessment of the trainer and will be circulated to all staff by way of the FRA's Intranet.

The **data subjects** are temporary or contract agents (having completed their probationary period) at FRA who send an application following the call for expression of interest.

The **categories of data** collected and further processed include the following: *(i)* identification data, which may include surname, first name, sex, office phone number, office number, department, team, current function, status, starting date at the FRA, *(ii)* relevant trainings, *(iii)* languages spoken, *(iv)* previous working experience; *(v)* personal data provided by the candidates in their motivation letter or CV, *(vi)* data related to the suitability of a candidate for a confidential counsellor, which may include the assessment by the selection panel, and the assessment of the trainer.

The above information is partially provided directly by the candidate by filling up the application forms and drafting CV and motivation letter and partially by the selection panel and the human resources in the context of the selection procedure, and finally by the trainer in the context of the specific training.

As far as **the conservation** of the data is concerned, the selection dossiers (application form, CV, motivation letter and assessment of the selection panel and trainer) are kept until the end of the term of office of any confidential counsellor appointed. Data from the candidates not appointed are destroyed one year after the end of the panel's proceedings starting from the date on which the panel ends its work.

The data controller **transfers personal data** gathered to the selection panel. The Selection panel will send a list of selected candidate to the Director for appointment.

As concerns the **rights of the data subject**, the applicants may request access to their data by sending an e-mail to a specific functional mailbox. The proceedings of the selection panel are confidential. However, candidates have a right of access to their overall final assessment of the selection process. To obtain access, they must send a written note or e-mail to the chairperson of the panel. Candidates have the right to rectify factual and objective data given in their application until the closing date of the call. The data subject's right of rectification does not cover subjective data such as the assessments made by the selection panel. Candidates have also the right to block data at any time and the right to have their data erased if the processing operation is unlawful. FRA also mentioned the data subject's right to object foreseen in Article 18 of the Regulation.

As far as the **right to information** is concerned, an extensive information note is available on FRA's Intranet. The call for expression of interest provides information on the selection procedure itself and gives the instructions for applying. The information note contains information on the data controller, the purpose, the legal basis, the rights of the data subject (access, rectification, blocking, object, erase, right to obtain notification to third parties and the right to have recourse to the EDPS) and the entities, which will have access to the data. It provides also a conservation period. The information note also provides an address where candidates can exercise such rights.

As far as **security measures** are concerned, the data controller acknowledges that it has put technical measures in place to ensure the level of security appropriate to the risks and to prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss or alteration, and prevent all other unlawful forms of processing. In particular, it is explained that all applications are received in a sealed envelope marked "confidential" where restricted number of HR staff member has access to. Physical files are stored in secured cabinets accessible by the Human Resources staff only.

### **3. Legal Aspects**

#### **3.1. Prior Checking**

**Applicability of the Regulation.** Regulation (EC) No 45/2001 applies 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" and to the processing by a body of the EU (former "community body") insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of former "Community law" (Article 3 of Regulation (EC) No 45/2001, in the light of the Lisbon Treaty).

First, the selection of confidential counsellors entails the collection and further processing of personal data as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, personal data of agents who apply for confidential counsellors' position in FRA are collected and further processed. Second, as described in the notification, the personal data collected undergo "manual processing" operations where personal data form part of a filing system, as stated under Article 3(2) of the Regulation (EC) No 45/2001 (the Regulation). Indeed, the personal information of the applicants are structured in "selection files" accessible according to the name of the applicant, as defined in Article 2 (c). Finally, the processing is carried out by FRA, in the framework of former "Community law" (Article 3(1) of the Regulation).

**Grounds for Prior Checking.** Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*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. 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 confidential counsellors in FRA precisely aim at evaluating the capacity of each candidate to ensure this specific position. Therefore, the data processing operations fall within Article 27(2)(b) and must be prior checked by the EDPS.

**Prior Checking.** 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. Any recommendations made by the EDPS must be fully taken into account prior to the collection and subsequent processing of personal data.

Finally, the EDPS welcomes the fact that when drafting its policy, FRA took note of previous recommendations made by the EDPS in similar Opinions issued for other EU institutions.

**Notification and Due Date for the EDPS Opinion.** The Notification was received on 21 December 2009. The Opinion must therefore be adopted no later than 22 February 2010.

### **3.2. Lawfulness of the Processing**

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. 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 or in the legitimate exercise of official authority vested in the institutions or bodies. The selection of confidential counsellors is one of the three elements put in place by FRA to combat psychological and sexual harassment in the Agency. Fight against harassment is a task carried out in the public interest based on Article 12 (a) of the Staff Regulations. This Article and the FRA Decision 2009/02, concerning the policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment provide the legal basis for the selection and the appointment of confidential counsellors at the FRA.

### **3.3. Processing of Special Categories of Data**

Article 10.1 of Regulation 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 as foreseen in Article 10(2)(a).

The notification specifies that FRA intention is not to collect special categories of data. However the possibility that applicants provide for sensitive data in their CV or motivation letter can not be excluded. If this occurs, it should be considered that candidates have given their express consent to the processing of that data, so that the condition of Article 10(2) (a) would be met.

### **3.4. Data Quality**

**Adequacy, Relevance and Proportionality.** According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". In the light of the information collected by FRA, as described in the notification, it appears to the EDPS that the data listed in the notification and collected from the data subject for the purposes of the selection of confidential counsellors complies with the criteria set out in Article 4(1)(c).

Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". The system itself ensures that the data are accurate and kept up to date as much of the personal data supplied during the selection process is provided by the data subject. However, other information is not provided directly by the individual but generated by the selection panel and the trainer. In this regard, as further developed below, it is important for the applicant to be able to exercise the right of access and rectification insofar as it enables

individuals to control whether the data held about them is accurate. In this respect, see also Section 3.7.

**Fairness and Lawfulness.** Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analyzed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 3.8.

### **3.5. Conservation of Data**

Pursuant to Article 4(1)(e) of Regulation (EC) No 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.

As stated in the facts, the selection dossiers are kept until the end of the term of office of any confidential counsellor appointed. Data from the candidates not appointed are destroyed one year after the end of the panel's proceedings starting from the date on which the panel ends its work.

The EDPS welcomes the retention periods adopted.

### **3.6. Transfers of Data**

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules applicable to transfers to Community institutions or bodies (based on Article 7) apply in this case. Article 7(1) establishes that data shall only be transferred if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The EDPS considers that the transfers of information to the recipients described in the notification for the purposes stated seem to comply with the Article 7(1) requirement.

FRA must also ensure that the recipients process the personal data only for the purposes for which they were transmitted, in compliance with Article 7(3) of the Regulation.

### **3.7. Right of Access and Rectification**

According to Article 13 of Regulation (EC) No 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. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

FRA ensures the possibility for individuals to exercise such rights by sending an e-mail to a specific functional mailbox.

The EDPS is aware that there is a limitation to the right of access of the data subject; this is the principle of the secrecy of selection committee's proceedings, as set out in Article 6 of Annex III to the Staff Regulations. So, the EDPS takes note that FRA limits the application of the right of access concerning data related to assessment to the overall final assessment of the selection process. This principle should nevertheless be read in the light of Article 20 (1)(c)

"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". The EDPS therefore notes that in the area in which the selection panel is covered by the principle of secrecy, the right of access may not apply even though personal data are processed, if that area is covered by the exception in Article 20 (1)(c) for the protection of the right of others, in this instance the right of selection panel member themselves and their need to have their independence reinforced. This implies that according to this rule it is possible on a case-by-case approach to exclude from personal data requested by a data subject exercising his right of access information regarding particular remarks made by the members of the selection panel.

Furthermore, Article 20 (1)(c) may in certain cases also be applied to protect the right of other applicants. In cases where comparative data is involved, FRA may assess on a case by case basis whether full access to the data should be granted to the data subjects or whether certain restrictions should be applied in order to protect the rights and interests of others. The EDPS reminds FRA that Article 20(1)(c) should be applied restrictively; limitation to the right of access of the data subject should only be applied when strictly necessary to protect the rights and freedom of others.

The EDPS welcomes the fact that FRA distinguished objective and subjective data in granting the right of rectification. Furthermore, the EDPS notes that limitations to the right of rectification of candidates' data, after the deadline for the sending of documents regarding a given selection may be necessary for different reasons, including those of a practical nature. In this regard, the EDPS considers that these limitations can be seen as necessary to ensure objective, certain and stable conditions for the selection, and essential to the fairness of processing. Thus it can be recognized as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

### **3.8. Information to the Data Subject**

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. 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.

In order to comply with this obligation, FRA drafted an information note which includes all the information necessary to comply with Articles 11 and 12. The note is posted on FRA Intranet. The EDPS considers this is a good practice. A link at the bottom of the call for expressions of interest would contribute to provide proactive information to the data subject.

### **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 organizational 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 unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing. FRA acknowledges that it has adopted the security measures required under Article 22 of the Regulation. On the basis of the available information, the EDPS does not have any indication suggesting that FRA would not have applied the security measures required in Article 22 of the Regulation.

### 3. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations in this Opinion are fully taken into account. In particular, FRA must:

- Ensure that limitation to the right of access of the data subject is only applied when strictly necessary to protect the rights and freedom of others;
- Ensure the right of access of the data subject to the data provided by the trainer;
- Ensure that the recipients process the personal data only for the purposes for which they were transmitted, in compliance with Article 7(3) of the Regulation;
- Evaluate the best way to provide proactive information to the data subject.

Done at Brussels, 10 February 2010

(signed)

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