

Opinion on the model notification for prior checking from the Data Protection Officer of the European Commission concerning "Procurement procedures and Call for expression of interest for selection of experts"

Brussels, 15 April 2010 (case 2009-570)

1. Proceedings

On 3 September 2009, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Commission a model notification for prior checking concerning "Procurement procedures including call for expression of interest for selection of experts, covering the execution of contract and additional purposes such as statistic, reporting and auditing". The notification was accompanied by the following documents:

- model data protection clauses for invitations to tender;
- model privacy statement to be used as part of the tender documents;
- model confidentiality clause to be inserted in every contract;
- model Note to Directors and Heads of Units on Protection of personal data in DG XXXX procurement procedures.

On 8 October 2009, the EDPS sent a request for additional information to the DPO. The replies were provided on 7 December 2009, as well as 14 January 2010 and were accompanied by the modified model notification (version 2) and annexes listed above¹ covering "public procurement procedure up to the signature of the contract only". Also provided was the model contract for external experts (including the confidentiality declaration and the code of conduct for expert evaluators), as well as the Vademecum on public procurement in the Commission of March 2008.

A second information request was sent on 28 January 2010. The replies were provided by email dated of 2 February 2010, as well as during a bilateral meeting with the DPO and DG BUDG on 17 February 2010. The revised version of the model notification (version 3) was submitted on 4th March 2010 and was accompanied by the following annexes:

- model privacy statement on processing of personal data related to selection of experts and procurement procedures;
- model invitation to tender;
- model data protection clause for contracts;

¹ the modified model confidentiality clause to be inserted in every contract entitled "model data protection clause to be inserted in every contract" and the modified privacy statement entitled "model privacy statement for processing of personal data related to selection of experts and procurement procedures"

- model Note to Directors and Heads of Units on Protection of personal data in procurement procedures and calls for expression of interest for the selection of experts.

The draft opinion was sent to the DPO for comments on 11 March 2010. These were received on 25 March and 9 April 2010 and were accompanied by the following documents:

- revised version of the model Note to Directors and Heads of Units on Protection of personal data in procurement procedures and calls for expression of interest for the selection of experts (version 4),
- General Conditions of the Contract applicable in particular to contract for purchase of low-value services and supplies (containing the revised model data protection clause referred above),
- Outline of notice of a call for expression of interest,
- Summary of the benefits for the Data Controller when using a Model Notification.

2. Facts

This prior checking opinion addresses the approach adopted by the DPO in terms of model notification for the most recurring data processing operations carried out within the institution².

The purpose of the processing in question is the management and administration of the following two procedures at the European Commission:

- decentralised public procurement procedures up to the signature of the contract, cancellation or abandonment of the procedure^{3 4 5},
- selection procedure for external experts on a basis of calls for expression of interest in line with Article 179a of the Financial Regulation⁶, read together with Article 265a of its Implementing Rules⁷, for tasks involving assistance in evaluating proposals and grant applications or tenders for procurement procedures, and for providing technical assistance in the follow-up, as well as the final evaluation of projects financed by the budget.

² As it has been explained during the meeting on 17 February 2010, the model notification is meant to optimise the data protection compliance in the European Commission by providing for a model framework to the respective services. The concerned Commission services may then use the model notification and associated documents established by the DPO as guidelines when launching the particular procurement and/or selection procedures. The close cooperation with DG BUDG ensures that the model standard contracts and other model documents used widely within the Commission services in this context are being adapted accordingly.

³ The processing of personal data related to **the execution of contracts** will be subjected to separate notifications.

⁴ Also, the processing of personal data **via a dedicated IT system**, including the Commission accounting system, will be addressed in a separate notification.

⁵ Finally, the related processing within the **Early Warning System (EWS)** at the European Commission has already been examined (EDPS 2005-120: opinion adopted on 6 December 2006 and case closed on 8 November 2007).

⁶ Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.09.2002, p.1) as amended by Council Regulation 1995/2006 of 13 December 2006 (OJ L 390, 30.12.2006, p.1) and Council Regulation 1525/2007 of 17 December 2007 (OJ L 343, 27.12.2007, p. 9)

⁷ Commission Regulation (EC, Euratom) 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2006, p. 1) as amended by Commission Regulation (EC, Euratom) 1261/2005 of 20 July 2005 (OJ L 2001, 2.8.2005, p. 3), Commission Regulation (EC, Euratom) 1248/2006 of 7 August 2006 (OJ L 227, 19.8.2006, p.3) and Commission Regulation (EC, Euratom) 478/2007 of 23 April 2007 (OJ L 111, 28.4.2007, p.13)

It involves evaluation of admissibility of operators and/or potential experts according to the criteria laid down in Articles 93 and 94 of the Financial Regulation⁸, as well as evaluation of their capacity in line with Articles 135 – 137 of the Implementing Rules⁹.

The controller is the European Commission, represented by the Director General, Director or Head of the Unit "Contract"¹⁰ making use of the model notification for the respective procurement and selections procedures.

Data subjects are (natural) persons willing to participate in procurement and related selection procedures, i.e. persons responding to calls for expression of interest (candidates and potential experts), tenderers, their staff and subcontractors.

The following data categories may be processed within procurement and related selection procedures at the European Commission:

- name (first name, family name),
- function,
- contact details (e-mail address, business phone number, mobile phone number, fax number, postal address, company and department, country of residence, internet address),
- certificates for social security contributions and taxes paid,
- extracts from judicial records,
- bank account reference (IBAN and BIC codes),
- VAT number,
- passport number, ID number,
- expertise, technical skills and languages, educational background, professional experience including details on current and past employment (information for the evaluation of selection criteria),
- declaration of honour that the candidates are not in one of the exclusion situation referred to in Article 93 and 94 of the Financial Regulation.

Personal data processed in relation with procurement and related selection procedures are currently being retained in the following manner:

- Files relating to selection of experts are kept in the service in charge of the procedure until up to the end of the multi-annual program for which it is submitted¹¹, and then in the archives for at most five years following the end of the program.
- Files relating to tender procedures are retained in the service in charge of the procedure until it is finalised, and then in the archives for at most ten years following the signature of the contract.
- However, tenders from unsuccessful tenderers are kept only for at most five years following the signature of the contract in question.

⁸ Article 93 of the Financial Regulation refers to bankruptcy, professional misconduct, non-payment of social security contributions and taxes, fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the EU financial interests and administrative penalty; Article 94 to conflict of interest and misinterpretation.

⁹ In fact, evaluation of financial and economic capacity of the operators within the meaning of Article 136 of the Implementing Rules, as well as their technical and professional capacity in terms of Article 137 of the Implementing Rules; respectively evaluation of technical and professional capacity of potential experts within the meaning of Article 137(2)(a) and (b) of the Implementation Rules - cf. point 3.1.1 of the Explanatory document 7.2.14. on External experts provided in the Vademecum on public procurement, p. 237

¹⁰ Depending on the respective financial circuit applicable at the particular DG

¹¹ corresponding to the maximum validity of a list of experts established in accordance with Article 265a(2) of the Implementing Rules to the Financial Regulation

- After the periods mentioned above have elapsed, the files containing personal data are sampled to be sent to the historical archives of the Commission for further conservation (for 25 years or permanently). The non-sampled files are destroyed.

According to the comments provided on the draft opinion, the retention period for successful tenders in the archives will be reduced to maximum seven years after the signature of the contract.

The paper files are stored in operational and financial units of the DG in locked cupboards and/or storage offices with limited access.

The electronic files are stored on servers of the Commission's computer centre, of the either DG DIGIT or the operational DG, under the control of DG DIGIT or the respective DG. Only designated staff has access to these files via user ID and password.

Data processed within procurement and related selection procedures may be disclosed (on a need-to-know basis) to the following recipients:

- staff of operational and financial units of the DG participating in management of the selection of experts and/or procurement procedures, as well as involved in further data processing carried out in accordance with other legal requirements, such as internal control and audit;
- staff of the European Court of Auditors (ECA), European Anti-Fraud Office (OLAF), the Financial Irregularities Panel (FIP), the Investigation and Disciplinary Office of the Commission (IDOS), the Internal Audit Service (IAS), the Internal Audit Control of the DG (IAC) and the Legal Service of the Commission, as well as staff of other units (SG, DG BUDG and clearinghouse) upon request necessary in the context of official investigations or for audit purposes.

The model Note to Directors and Heads of Units on Protection of personal data in procurement procedures and calls for expression of interest for the selection of experts provide for an obligation of the "internal data processors" to ensure that the data recipients are reminded of their obligation not to use the data for any other purposes than the one for which they were transmitted.

According to the model privacy statement, access and rectification can be granted upon a request to the controller.

Information to data subject is provided at the different stages of the respective procedure in the following three documents:

- MODEL PRIVACY STATEMENT for processing of personal data related to SELECTION OF EXPERTS and PROCUREMENT PROCEDURES,
- data protection clauses contained in model invitation to tender (clauses 14 and 15),
- model data protection clause for contracts.

Every model invitation to tender and call for expression of interest provides for a link to the model privacy statement posted on the DPO website¹² which contains the following information:

- purpose of the processing,

¹² ec.europa.eu/dataprotectionofficer/privacystatement_publicprocurement_en.pdf

- categories of data processed,
- certain data recipients,
- existence of rights of access and rectification,
- legal basis of the processing,
- time-limits for storage of the data,
- existence of a right to have a recourse to the EDPS.

The actual invitations to tender and calls for expression of interest provide for information about the identity of the controller ("entity acting as data controller").

The model data protection clauses referred to above also provide some information about the purpose of the processing, categories of data processed, data recipients, rights of access and rectification, as well as the recourse to the EDPS.

The model data protection clause for contracts also refers to the contractor acting as processor on behalf of the European Commission and his obligations of confidentiality and security. Annex III to model contract for external experts entitled "Code of conduct for external evaluators" also makes reference to these obligations.

In addition, according to the model Note to Directors and Heads of Units on Protection of personal data in procurement procedures and calls for expression of interest for the selection of experts, the respective Heads of Units, Directors and/or other members of Commission staff in charge of the practical organisation of the particular procedure are also to be considered as data processors subject to the respective confidentiality and security obligations.

3. Legal aspects

3.1. Prior checking: The processing of personal data within public procurement and related selection procedures falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(a) and (b) since it clearly is intended to evaluate personal aspects of the data subjects and also involves processing of data relating to (suspected) offences and criminal convictions.

In principle, prior checks by the EDPS should be carried out before the processing operation is implemented. Since the public procurement related data processing operations have already been established, the check has to be carried out ex post. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

The notification of the DPO was received on 3 September 2009. According to Article 27(4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 162 days (98+35+29) to allow for provision of additional information, as well as comments on the draft opinion. Therefore, the present opinion must be delivered no later than on 15 April 2010.

3.2. Lawfulness of the processing: Processing of personal data within public procurement and related selection procedures at the European Commission can clearly be considered as being necessary for the performance of a public interest task, namely the management and functioning of this institution within the meaning of Article 5(a) of Regulation 45/2001 (read together with its recital 27).

Legal basis confirming the lawfulness of the respective processing operations can be found in Articles 93, 94 and 97(1) of the Financial Regulation, as well as Articles 135 - 137 and 179a of the Implementing Rules to the Financial Regulation.

3.3. Processing of special categories of data: The processing of personal data contained in the extracts from judicial records, other certificates to this respect¹³ or the above mentioned declarations of honour is explicitly authorised in Article 93(1) of the Financial Regulation. Thus, the condition for processing of data relating to (suspected) offences and criminal convictions set out in Article 10(5) of Regulation 45/2001 is fully met.

3.4. Data Quality: The collection of personal data listed above seems to be necessary either for the identification of candidates, tenderers or potential experts within the procurement and/or related selection procedure, or for the evaluation of their eligibility and/or capacity pursuant to the respective provisions of the Financial Regulation, as well as its Implementing Rules.

The EDPS also welcomes the assurance that neither the previous family name, nor the national insurance number is being processed in this context¹⁴.

The accuracy of the factual data processed is ensured by the fact that they are provided by the respective data subjects so that the procedure itself helps to guarantee the accuracy of the personal data. Also, the rights of access and rectification helps to ensure that the data processed are accurate and up to date (cf. point 3.7. below).

3.5. Data retention: As indicated above, the following time limits are currently applicable to the storage of public procurement files containing personal data (in the archives):

- five years following the end of the respective program for files relating to the selection of external expert evaluators,
- five years following the signature of the respective contract for unsuccessful tenders,
- ten years after the signature of the contract for successful tenders. The reduction of this time to seven years is being considered.

The EDPS is of the opinion that the five years time limits are in compliance with Article 4(1)(e) of Regulation 45/2001. He also welcomes the announced reduction of the maximum storage time for successful tenders. The seven years time limit would also correspond to the maximum time period for which personal data necessary for control and audit purposes can be kept in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation¹⁵.

In any case, he would like to point out that according to Article 49(3) of the Implementing Rules as modified by the Commission Regulation 478/2007 of 23 April 2007 "personal data contained in supporting documents [relating to the budget implementation measures] shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes".

¹³ mentioned in Article 134(3) of the Implementing Rules to the Financial Regulation

¹⁴ According to the additional information provided on 7 December 2009, 14 January and 4th March 2010 respectively

¹⁵ cf. case 2007-222 – EDPS Comments on the Draft Common Conservation List (CCL) of 7 May 2007 as well as EDPS Note concerning the CCL adoption of 12 October 2007

Should it be necessary to keep personal data for historical purposes, the further processing of sampled public procurement files can be considered as in full compliance with Article 4(1)(b) and (e) of Regulation 45/2001 on condition that the European Commission makes sure that the personal data contained in these files are not processed for any other purposes and/or used in support of measures or decisions regarding any particular individual¹⁶.

3.6. Transfer of data: As indicated above, within the respective procurement or related selection procedure, intra- and inter-institutional transfers of personal data are taking place. Pursuant to Article 7 of Regulation 45/2001, the transfers within the European Commission and to other institutions have to be necessary for the legitimate performance of the task covered by the competence of the recipient (paragraph 1) and the recipients can process the data only for the purposes for which they were transmitted (paragraph 3).

In the present case, the transfers of the personal data to the staff of operational and financial units of the respective DG, SG, DG BUDG and clearinghouse are necessary for the administration of the respective procurement or related selection procedure. The transfers to the staff of Legal Service, IAC, IAS, IDOC, FIP, OLAF and ECA are necessary in the context of official investigations, control or audit.

The revised model Note to Directors and Heads of Units on Protection of personal data in procurement procedures and calls for expression of interest for the selection of experts (version 4) mentions that the "internal processors" have to ensure that the data recipients are reminded of their obligation in terms of Article 7(3) of the Regulation.

Provided that all the above mentioned recipients are always reminded of the purpose limitation of the transfer in question, full compliance with the Regulation is ensured.

3.7. Right of access and rectification: As mentioned above, data subjects are granted rights of access and rectification upon a request to the controller.

Pursuant to Article 20(1) of Regulation 45/2001, these rights can be restricted if it is necessary to safeguard, *inter alia*, an important economic interest of the EU, including budgetary matters, or the protection of the rights and freedoms of others (points b) and c)).

Clearly, the limitation of the rectification right after the opening of tenders foreseen in Article 148(3) of the Financial Regulation aiming to ensure transparency and equality of treatment can be considered as justified in light of Article 20(1) of the Regulation.

3.8. Information to the person concerned: The EDPS notes that some information set out in Articles 11 and 12 of Regulation 45/2001 are mentioned in the model privacy statement, as well as the respective model data protection clauses referred to above.

In order to ensure full compliance with the Regulation, the EDPS requests that comprehensive information about all the possible recipients is provided in relation to every procurement and related selection procedure at the respective service of the European Commission.

3.9. Processing data on behalf of controllers: As indicated above, two categories of actors may be involved in processing of personal data within procurement procedures on behalf of the (respective service of the) European Commission. They both have to be considered as

¹⁶ cf. case 2007-222 - EDPS Comments on the Draft Common Conservation List of 7 May 2007

processors within the meaning of Article 2(e) of Regulation 45/2001 and have to comply with obligations set out in its Article 23.

As to the "external processors", Annex III to the MODEL CONTRACT FOR EXTERNAL EXPERTS entitled Code of conduct for expert evaluators provides for obligations "to follow any instructions given by the Commission" and to sign a confidentiality declaration to this respect.

Article 20 of the General Conditions for low value Contract mentions that when processing personal data, the contractor "may act only under the supervision of the data controller, in particular with regard to the purposes of the processing, the categories of data which may be processed, the recipients of the data and the means by which the data subject may exercise his/her rights" and that "the data shall be confidential within the meaning of Regulation 45/2001". The security obligation in terms of applicable technical and organisational measures is also mentioned.

The revised model Note to Directors and Heads of Units on Protection of personal data in procurement procedures and calls for expression of interest for the selection of expert (version 4) mentions that the "internal processors" should "comply with requirements of Regulation 45/2001, including those relating to confidentiality and security of the data processing (Articles 21 and 22 of the Regulation)".

The EDPS notes that this "instruction note from the data controller to data processors" should be legally binding in itself since it is a formal instruction from the hierarchy and that it also should avoid establishing a separate legal act possibly creating an excessive administrative burden.

Due to the fact that the model contracts, as well as the revised model Note both constitute legal documents binding the respective processors to the controllers and clearly provide for confidentiality and security obligations imposed on the processors, Article 23 of the Regulation is complied with.

(...)

4. Conclusion

In order to ensure that there is no breach of the provisions of Regulation 45/2001, the above considerations have to be fully taken into account. In particular,

- the ten years time limit for storage of personal data contained in successful tenders related documents should be actually reduced as announced (Article 4(1)(e) of the Regulation),
- all data recipients should be reminded of their obligation not to use the data received for any further purpose than the one for which they were transmitted (Article 7(3) of the Regulation);
- comprehensive information about all possible recipients should be provided to data subjects in relation to every procurement and selection procedure (Articles 11 and 12 of the Regulation).

In practical terms, **the DPO has to make sure that** within three months after the reception of this opinion,

- the model notification, as well as all model documents referred above are adapted in accordance to the recommendations provided in this opinion,
- the final version of the model notification together with the model documents and/or links to BUDG WEB, as well as the EDPS opinion are made available on his website¹⁷,
- a register of all General Directorates of the European Commission using the model notification for procurements and selections procedures is created.

Done at Brussels, on 15 April 2010

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

¹⁷ <http://intracomm.cec.eu-admin.net/dataprotectionofficer/>