

## **Opinion on a Notification for Prior Checking received from the Data Protection Officer of the European Training Foundation Regarding the Processing Operations to Manage Calls for Tenders**

Brussels, 22 April 2010 (Case 2009-0037)

### **1. Proceedings**

On 15 January 2009, the European Data Protection Supervisor ('EDPS') received from the Data Protection Officer of the European Training Foundation ('ETF') a notification for prior checking regarding the data processing operations that take place in the context of managing call for tenders ('**the Notification**').

On 9 March 2009, the EDPS requested complementary information from ETF regarding the data processing operations. ETF provided the information on 18 March 2009. On 20 March 2009, the EDPS sent the draft Opinion to ETF for comments. ETF did not provide comments.

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

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

The *purpose* of the data processing operations is to manage calls for tenders between ETF on one side and third parties on the other side. On the ETF side the contracts and tenders are managed by the Financial, Contract and Procurement Support Unit (FINCOP Unit).

The *primary responsibility* for the data processing lies within the Administration Department, which the FINCOP Unit is part of.

The data processing operations can be summarised as follows:

(i) Individuals who reply to invitations to tender provide personal information in the context of such replies. The information is provided in paper form. The replies are sent to the FINCOP Unit.

(ii) Upon receiving such information the FINCOP Unit transfers this information to the Opening and Evaluation Committee with the purpose to evaluate the eligibility of the tenderer and to evaluate the content of the offer. The Opening and Evaluation Committee drafts evaluation reports on the results of the evaluation. The Authorising Officer takes the final decision on the winning tender, which is communicated to the Opening and Evaluation Committee.

(iii) After the contract is awarded, the data is processed by the FINCOP Unit for the purposes of performance, management and follow-up of the contract.

The *types of data subjects* whose data are collected include all persons whose personal data are included in the submitted tenders and in contracts.

The *categories of data* collected and further processed include the following: (i) Identification related information, which may include surname, first name, date (and place) of birth, sex, nationality, telephone number, email address; copy of passport/national identity card of legal representative; declaration of honour on exclusion criteria, extract from register of bankruptcy or similar proceedings, proof of social security contributions, extract from trade register or proof of status of independent worker, turnover statement, balance sheets, bank account number and bank details. (ii) Data normally included in CVs, which includes education and professional experience. (iii) If the public contract exceeds a certain threshold, a recent extract from the judicial record is required.

Regarding *conservation* of data, according to the Notification, the personal information is kept, both in paper form and in electronic form (scanned). This information is kept for five years from when the budget is discharged. This also includes the personal information of the tenders which have been excluded. Some tenders are retained longer for the purpose of maintaining historical record of the procurement activities.

The data controller may *transfer* personal data gathered in the context of this processing operation to the following types of recipients. Some information is passed to the Procurement Officers in the different departments of ETF in order to make the necessary preparation for the Opening and Evaluation Committee to meet. In addition, data is sent to the Opening and Evaluation Committee to enable the review and analyse the tenders. Finally, the information is also made available upon request to the European Court of Auditors, OLAF and internal auditors.

As far as the *right to information* is concerned, the Notification explains that information is given in the invitation to tender letter and in the contract. In particular, the information included in the invitation to tender is the following: "In the general implementation of its activities and for the processing of tendering procedures in particular, ETF observes the following EU regulations: EU Council Directive 95/46 of 24 October 1995 and EU Council Regulation 45/2001 of 18 December 2000 on the protection of individuals with regard to processing of personal data by the Community institutions and the free movement of such data...".

In the contract, the following article is included: "*Any personal data included in or relating to the Contract, including its execution, shall be processed pursuant to Regulation (EC) No 45/2001 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. It shall be processed solely for the purposes of the performance, management and follow-up of the Contract. The Contractor shall have the right of access to his personal data and the right to rectify any such data that is inaccurate or incomplete. The Contractor shall have right of recourse at any time to the European Data Protection Supervisor*".

The data controller acknowledges that rights of *access and rectification* are recognised.

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 to prevent all other unlawful forms of processing.

## 2.2. Legal Aspects

### 2.2.1. Prior Checking

**Applicability of the Regulation.** The processing of data at stake constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the selection of the tenderers entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described in the Notification, personal data of individuals who are named in the answer for calls for tenders are collected and further processed. Second, as described in the Notification, the personal data collected undergo "*automatic processing*" operations, as defined under Article 2(b) of Regulation (EC) No 45/2001 as well as manual data processing operations. Indeed, some of the personal information is collected on paper and processed to assess the most adequate tender. Finally, the data processing is performed by an EU body (former Community body), the ETF, in the exercise of activities which fall within the scope of former "Community law"<sup>1</sup> Therefore, all the elements that trigger the application of the Regulation are present.

**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 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. The processing operations that occur in the context of selecting tenders aim at evaluating tenders, including the professional capacity of the individuals mentioned in each tender, to carry out the tasks that are the object of the tender. In order to carry out such evaluation, the data controller will perform various assessment activities such as weighing up whether the individuals that are associated with a given tender are suitable to perform the tasks that will be required under the contract. In addition, prior checking is also necessary per application of Article 27 (1)(a) which subjects to prior checking the processing that concerns data relating to health and to suspected offences, offences, criminal convictions or security measures. In this case the processing may imply keeping information included in criminal records received from the tenderers. In sum, taking the above into account, clearly the data processing operations fall within Article 27(2) (a) and (b) and must therefore be prior checked by the EDPS.

**Ex-post 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. In this case, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

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<sup>1</sup> The concepts of "Community institutions and bodies" and "Community law" can no longer be used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in the light of the Lisbon Treaty.

**Notification and Due Date for the EDPS Opinion.** The Notification was received on 15 January 2009. The period within which the EDPS must deliver an opinion was suspended for a total of 408 days to request complementary information and to allow for comments on the draft EDPS Opinion.

### **2.2.2. Lawfulness of Processing**

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, the grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if 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) No 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.

**Legal Basis.** In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations notified for prior checking, the EDPS takes note of the following legal instruments:

(i) Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 and Council Regulation (EC) No 1525/2007 of 17 December 2007 L 343 9 27.12.2007 ("Financial Regulation"). (ii) Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, Amended by Commission Regulation (EC, Euratom) No 1261/2005 of 20 July 2005 and Commission Regulation (EC, Euratom) No 1248/2006 of 7 August 2006; and Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (hereinafter "Implementing Rules"). (iii) Financial Regulation of the EDT of 15 January 2003, in particular Title V on Procurement.

Upon analysis of the above legal framework, the EDPS has no reason to believe that it does not provide an adequate legal basis for the processing at stake. These legal instruments foresee the data processing carried out by the ETF for the purposes of selecting tenders. More particularly, these legal instruments foresee that the contracting authorities, in this case ETF, may require information to prove the capacity of candidates within the scope of a tender<sup>2</sup> which will include the information normally provided in a CV. In particular, Article 137 of the Implementing Rules establishes that "*Evidence of the technical and professional capacity of economic operators may, depending on the nature, quantity or scale and purpose of the supplies, services or works to be provided, be furnished on the basis of one or more of the following documents: (a) the educational and professional qualifications of the service provider or contractor and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services or carrying out the works*". Furthermore, Article 134 of the Implementing Rules also foresees, for certain contracts, the

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<sup>2</sup> This legal framework also authorises the data controller to require information to prove other aspects such as financial, economic, and technical.

collection of evidence, confirming that the individuals who will become contractual parties in a procurement procedure are not engaged in situations referred to in Article 93 or 94 of the Financial Regulation<sup>3</sup> for which a criminal record is an appropriate instrument.

**Necessity Test.** According to Article 5(a) of Regulation (EC) No 45/2001, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing is "*necessary*" for the performance of a task, in this case, for the selection of the best tenders and managing contracts.

As outlined above, the Financial Regulation and Implementing Rules foresee the launching of tendering procedures; the mandate of the ETF foresees this explicitly for the ETF for the purposes of purchasing goods and services. To put these procedures into practice, it is necessary and also foreseen for the ETF to collect and further process personal information of tenderers. Unless the ETF collects CVs and other relevant information, it would not be possible for it to verify the qualities of each of the tenders, including the professional capacity of the individuals who will perform tasks within a given tender in order to select the most suitable one.

In conclusion, the data processing that takes place in the context of selecting tenders and managing contracts as described in the Notification appears necessary towards ensuring the selection of the best tenders in a fair and transparent way.

### **2.2.3. 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 *ex* Article 10(2)(a).

The Notification states that no data falling under the categories of data referred to in Article 10.1 are processed in the context of the data processing operations notified for prior checking.

Article 10.5 of Regulation (EC) No 45/2001 establishes that "*[processing 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.*" According to the Notification, if the public contract exceeds a certain threshold, a recent extract from the judicial record is required. The EDPS considers that this processing is authorised by Article 93(1)(b) of the Financial Regulation and thus the requirement of Article 10(5) is met.

### **2.2.4. Data Quality**

**Adequacy, Relevance and Proportionality.** Pursuant to Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This is referred to as the data quality principle.

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<sup>3</sup> It includes situations such as if individuals are convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*; if they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify; they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests.

The type of information requested to answer calls for tenders which includes details of qualification and experience seem appropriate for the purposes sought by the data processing. Only if the ETF have information on the education and professional experience of the individuals who are associated with a tender, will the ETF be able to select the best suited tender.

***Fairness and Lawfulness.*** 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.

***Accuracy.*** According to Article 4(1)(c) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date, and "every reasonable step must be taken to ensure that the data which are inaccurate or incomplete , having regard to the purposes for which they were collected or for which they are further processed , are erased or rectified"*". The implementing rules of the Financial Regulation, which indeed are of full application during the public procurement procedure, guarantee that data subjects have the right to access and to rectify data relating to them, so that the file can be as complete as possible. These rights are the means of ensuring that data are accurate and kept up to date. Thus the procedure guarantees the quality of the data. In this respect, see also Section 2.2.7.

### **2.2.5. 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.

Regarding *conservation* of data, according to the Notification, personal information related to the tenders that have been successful and have resulted in a contract, is kept for five years for the purpose of discharging the budget of the Committees for the year in which any resulting contract is concluded. The EDPS considers the conservation period of five years to be reasonable as this is the approximate period during which supporting documents are required to be kept by the Financial Regulation. Indeed, Article 49 of the Financial Regulation, as amended in 2007, establishes that "*The management systems and procedures concerning the keeping of original supporting documents shall provide for: (d) such documents to be kept for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate. Documents relating to operations not definitively closed shall be kept for longer than provided for in point (d) of the first subparagraph, that is to say, until the end of the year following that in which the operations are closed"*". However, the EDPS would like to draw data controllers' attention to the last paragraph of Article 49 of the Financial Regulation according to which "*Personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes"* and ask the data controller to assess whether this case allows for the deletion of the personal data (mainly judicial records, CVs) contained in the winning tender.

The EDPS does not see the need to keep tenders that have not been successful for such long period of time. The EDPS calls upon the ETF to provide reasons supporting this need or otherwise shorten the conservation period.

According to the Notification, the ETF appears to store some tenders (or part of the information contained in the tender) for statistical or scientific reasons. In such cases, the EDPS reminds the ETF that *ex* Article 4(1)d of the Regulation (EC) No 45/2001, the personal information must be kept either in an anonymous or encrypted form.

### **2.2.6. 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 differ depending on whether the transfer is made to (i) 'former' Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46/EC (based on Article 8), or (iii) to other types of recipients (based on Article 9).

According to the Notification, the data are transferred to former community institutions or bodies, in particular, to the Procurement Officers in the different departments of ETF in order to make the necessary preparation for the Opening and Evaluation Committee to meet. In addition, information may be transferred to the European Court of Auditors, to the Financial Irregularities Panel and to OLAF. The purposes of the transfers are to safeguard the financial interest of the Communities.

Article 7 of Regulation (EC) No 45/2001 applies insofar as the above recipients are Community institutions/bodies. This Article requires personal data to be transferred "*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 controllers must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary. All the recipients have the competences to perform the tasks for which the data are transferred, which varies from authorising payments, fighting fraud, etc and the transfer of the data seems necessary for the recipients to carry out their respective tasks. Therefore the conditions of Article 7(1) appear to be fulfilled.

As described in the facts, information about tenders, including the personal information, is transferred and further processed by members and observers of opening and evaluation committees which may be composed of external experts which will be located within the EU. Accordingly, Article 8 applies pursuant to which data may be transferred "*if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". This transfer appears necessary for carrying out public procurement procedures. Consequently, Article 8 of the Regulation is respected. Nevertheless, the EDPS recommends that the data controllers remind the recipients that the data must be kept confidential and must be used only for the purposes for which they were transferred.

### **2.2.7. 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 data controller communication in an intelligible form of the data undergoing 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.

According to the Notification, individuals have such rights. The EDPS suggests that individuals are given a contact point to exercise these rights. The EDPS notes that the Implementing rules are of full application during the whole public procurement procedures

which ensure that the right of access and the right of rectification can be exercised by the data subjects. The EDPS consequently considers that Articles 13 and 14 of the Regulation are complied with.

### **2.2.8. 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, information to candidates is given with the invitation to tender letter and in the contract. The EDPS considers the provision of information through these channels as appropriate. It is necessary to provide information before collecting any information from individuals, with the invitation to tender and also in the contract.

The EDPS reviewed the content of the information provided in the contract and invitation to tender. He considers that the information provided in the contract contains most of the information required under the Articles 11 and 12 of Regulation (EC) No 45/2001. However, he considers that the information provided in the invitation to tender should be amended as follows:

- (i) The identity of the data controller, and the purpose of the processing (the assessment of the tenders) should be added.
- (ii) A reference to the existence of the right of access and to rectify and the right to have recourse to the EDPS should be included.
- (iii) A reference to the conservation period should be added as well as to the recipient of the data.

### **2.2.9. Security measures**

The ETF acknowledges that they have adopted the security measures required under Article 22 of the Regulation. Among others, (...). On the basis of the available information, the EDPS does not see any indication to believe that the ETF has not 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 the considerations in this Opinion are fully taken into account. In particular, the EDPS calls upon the ETF to:

- Consider whether it may be possible to delete the personal data (mainly CVs) contained in the winning tender earlier than the five years conservation period;
- Reconsider the need to keep the information about tenders that have not been successful for five years
- Keep personal information to be used for statistical either in an anonymous or encrypted form;
- Remind the observers and experts who evaluate tenders that the information received must be kept confidential and must be used only for the purposes for which it was transferred;



- Update the information notice as suggested in this Opinion.

Done at Brussels, 22 April 2010

**(Signed)**

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