



## **Opinion on the notification for prior checking from the Data Protection Officer of the European Commission regarding the temporary employee selection procedure**

Brussels, 4 June 2010 (Case 2008-704)

### **1. Procedure**

In an email sent on 24 November 2008, the Data Protection Officer (DPO) of the European Commission (Commission) submitted to the European Data Protection Supervisor (EDPS) a notification within the meaning of Article 27(3) of Regulation (EC) No. 45/2001 (the Regulation) regarding the case entitled “Temporary employee management – selection procedure”

A request for further information was made on 14 January 2009, with a reminder issued on 6 August 2009. A reply was given on 22 April 2010. On 28 April 2010, a draft EDPS opinion was sent to the DPO for comments. These were received on 1 June 2010.

### **2. The facts**

A procedure to process the data pertaining to the selection and management of temporary employees **was implemented** by the DG HR B2 (data controller).

The **purpose** of the process was to enable the Commission to select the people likely to fill positions as temporary employees to meet temporary staffing needs.

The **data subjects** are applicants for a temporary post at the Commission. The positions to fill as temporary employees are limited to the following: assistant, secretarial employee, clerk, usher. In the event of an applicant being selected via a temporary work agency, the Commission signs a service contract with the agency; in this instance, the temporary employees being employed by the temporary work agency and subject to the national laws that apply to their work contract.

**Data processing** is both automatic and manual. Applications are submitted in both hard and soft copies. The data pertaining to the selected employees is then encoded in computer applications SIRE and SysPer2. The recruitment process of temporary employees can be summarised as follows:

- Regular dispatch of CVs to the DG HR B2 by temporary work agencies. The CVs of secretaries are filed by alphabetical order, distinguishing new

applicants and applicants who have already worked for the Commission. The CVs of ushers and clerks are filed separately in chronological order.

- Checking of each CV by the DG HR B2: checking whether the temporary employee has already worked for the Commission<sup>1</sup> and test results (if the person is new or has not worked for the Commission for more than 5 years, the tests are carried out by the agency).
- The HR managers of each DG request the CVs from the DG HR B2 by email or by phone. HR B2 identifies the best CVs according to a predetermined profile (examples of criteria: professional experience in the field and with the Commission, training, knowledge of working languages).
- The DG HR B2 emails an EXCEL file with the potential applicants' CVs to the DG.
- A recruitment request is then sent by the DGs to the DG HR B2. The recruitment request sent by the DG includes the budget, the name of the selected temporary employee, the job description, the start and end dates of the assignment, the employee's work basis (half-time, full-time) the reason for the recruitment of a temporary employee and the signature of the RRH. The DG is not restricted to the CVs sent by the DG HR B2 and may use other channels (unsolicited applications, recommendations, etc.). In the event of an emergency, the DGs issue a non-nominative recruitment form. In this case, the DG HR B2 chooses the applicant and makes contact directly with him/her with regard to his/her availability.
- Encoding by the DG HR B2 of services relating to selected temporary employees in applications SIRE and SysPer2.
- Requests for temporary employees are submitted to the temporary work agencies by DG HR B2, who faxes the purchase order to the temporary agencies with the following data: Requesting DG, name of the temporary employee, job description, start and end dates of the contract, mention of part time where relevant, appointment time with the DG HR.
- The employees are welcomed by the DG HR B2, who checks the contract drawn up by the agency and the data entered in SIRE, before issuing a pass.
- Invoicing of services by temporary employment agencies: received electronically, proofreading, dispatch to the payroll and archiving of invoices by the DG HR B2.

The management of temporary employees includes the processing of the **following data**:

- for the selection of applicants: identification information, information provided in the CV regarding qualifications and professional experience,

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<sup>1</sup> Under Commission Decision C (2004) 1597 of 28 April 2004, the maximum duration of a temporary contract is six years.

results of tests carried out by the agency when the employee is new or has not worked for the Commission in the past five years, reason of the request by the DG.

- for the drawing up the recruitment request: budget, the name of the selected temporary employee, the job description, the start and end dates of the assignment, the employee's work basis (part-time, full-time) the reason for the recruitment of a temporary employee and the signature of the RRH.

The framework contract drawn up between the Commission and the temporary employment agencies includes the gathering of criminal record/certificates of good conduct by the agencies, which they are to submit to the Commission upon its request. It may occur (very rarely) that if the police records are not clean, the agency may notify the Commission of the fact and the file will be forwarded to the IDOC before authorising the application.

The data relating to applicants for temporary positions is primarily **gathered** indirectly by the Commission through temporary employment agencies; it may also be gathered by other means, such as from direct unsolicited applications sent by the applicants themselves, or indirectly on recommendations.

Within the institution the data may be accessed by managers of the DG HR, heads of human resources in the DG and managers of the PMO who need this data to process the files of temporary employees before or during their assignment. Certain data is communicated outside the institution to the temporary employment agency for the purposes of drawing up a service contract, as described above.

The notification specifies that the CVs of temporary employees are **kept** for two years in the archives of the DG HR B2, for purposes of proper management. The note concerning data protection specifies that the data relating to temporary employees is kept in SIRE for a maximum of 40 years, in order to ensure that anyone has the opportunity to reconstruct the history of his/her career for all types of contracts managed by SIRE.

**A briefing note** on the procedure that applies to outside temporary personnel and a note on data protection are available online on the intranet of the Commission, on a homepage used by non-permanent personnel, a copy of which is submitted by the managers of the DG HR B2 to the temporary employees during the recruitment process. The note relating to data protection also informs data subjects of their **rights to access and rectification**, which they may exercise by contacting the manager in charge of the file of data subject (contact person at the DG HR when the temporary employee joins the Commission).

The supply of temporary employees is the subject of a framework contract between the Commission and the temporary employment agency, with an appended statement indicating the specifications. The contract also includes a clause governing the protection of personal data stating that “any personal data included in the Contract, including its execution, or relating to the Contract or the implementation thereof 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. The data shall be processed solely for the purposes of the performance, management and monitoring of the Contract by ADMIN.A.1 without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in application of Community law. The Contractor shall have the right of access to his/her personal data and rectify any such data. Should the Contractor have any queries concerning the processing of his/her personal data, he/she shall address them to ADMIN.A.1. The Contractor shall have right of recourse at any time to the European Data Protection Supervisor.”

With regard to **security measures**, [...].

### **3. Legal considerations**

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

Prior checking relates to the processing of personal data within the meaning of Article 2(a) of Regulation (EC) No. 45/2001 (hereafter "the Regulation") by the European Commission in the context of temporary employee selection. The EDPS specifies that this opinion does not extend to the processing of data by temporary employment agencies, as these are subject to the provisions included in Directive 95/46/EC on the protection of personal data.

The processing of data subject to this prior checking is carried out by an institution, the European Commission, and is implemented in the context of activities that pertain to what was formerly known as “Community Law” (Article 3(1) of the Regulation)<sup>2</sup>. The processing of data relating to temporary employees is both automatic and manual. Article 3(2) of the Regulation is therefore applicable in this instance.

The said processing is thus subject to Regulation (EC) No. 45/2001.

Article 27(1) of the Regulation requires prior checking by the EDPS of all *"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 includes a list of operations that are likely to present such risks. In particular, Article 27(2)(b) of the Regulation states that the EDPS is to carry out prior checks on any data processing intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct, which is the case in this instance, since the processing is intended to select, on the basis of information pertaining to skill and experience, the employees who have the best profiles for the positions for which there is a temporary need for personnel.

In principle, checks by the EDPS are carried out before the processing operation is implemented. Otherwise the checking necessarily becomes ex post. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

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<sup>2</sup> The concepts of “Community institutions and bodies” and of “Community Law” were abolished when the Treaty of Lisbon came into effect on 1 of December 2009. Article 3 of Regulation 45/2001/EC must be read in a post-Lisbon treaty context.

The notification from the DPD was received on 24 November 2008. According to Article 27(4), the present opinion must be delivered within a period of two months following receipt of the notification. Due to the 497 days suspension for additional information and comments, the EDPS will submit its opinion on 5 June 2010 at the latest.

### **3.2. Legal basis and lawfulness of the processing operation**

The lawfulness of the processing operation must be examined in the light of Article 5(a) of the Regulation. This article provides that the processing can only be carried out if "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities... or in the legitimate exercise of official authority vested in the Community institution*". The processing of personal data carried out for the performance of tasks in the public interest includes the "*the processing of personal data necessary for the management and functioning of those institutions and bodies*" (recital 27).

This processing is carried out on the basis of Commission Decision C(2004) 1597 of 28 April 2004 relating to the maximum duration of employment of non-permanent staff in the services of the Commission (6-year rule) and to resulting contracts agreed between the Commission and temporary employment agencies (subject to Belgian civil law). In this instance, the processing is necessary to select the applicants to fill the positions as temporary employees in order to meet temporary staffing needs.

In the case of the recruitment of temporary employees on the basis of unsolicited applications, the processing may be based on Article 5(c) of the Regulation, insofar as "*processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract*".

### **3.3. Processing of specific categories of data**

Under Article 10, paragraph 1 of the Regulation (EC) No. 45/2001, "*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.*" This prohibition only ceases to apply on the basis of the legal grounds stated in Article 10(2) and (3) of the Regulation. These legal grounds include, among others, the consent of the data subject under Article 10(2)(a).

The notification makes no mention of the data gathered with regard to the categories stated in Article 10(1). Given the end objective of the Commission when it processes data for purpose of selecting temporary employees, the EDPS understands that in the context of the aforementioned selection, the institution does not intend to collect specific categories of data. The gathering of such data does not seem useful for the selection of applicants, since this data is not relevant in terms of selecting the best-qualified applicant. However, the EDPS believes that, in the context of applicant selection, the applicants may nevertheless disclose information pertaining to possible disabilities or other types of data that belong to special categories. In this case, it should be considered that the applicants have given their consent for the processing of such data, and consequently, the condition stated under Article 10(2)(a), is respected.

Furthermore, if this data is relevant, its processing is lawful in the context of staff management (recruitment) in order to enable the Commission to comply with specific obligations to which it is subject under labour law pursuant to Article 10(2)(b) which provides that the prohibition does not apply when the processing is “necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof”.

Under Article 10(5) of the Regulation (EC) No. 45/2001, the “*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*”. As mentioned in the facts, the framework contract entered into between the Commission and the temporary employment agencies includes the gathering of a criminal records/certificate of good conduct by the agency, which is made available to the Commission on request. The gathering of this information is carried out on behalf of the Commission, which is considered to be the data controller.

With regard to criminal records, this point is subject of a specific follow up in a case filed with the Commission (opinion of the EDPS of 5 June 2009, pertaining to the processing of data in the context of recruitment – 2008-755). It should be ensured that the recommendations adopted in this context are followed.

Appropriate safety measures should be implemented with regard to this (see 3.10 hereunder).

### **3.4. Quality of the data**

Article 4 of the Regulation lays down certain obligations as regards the quality of personal data. “*Personal data must be...adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*” (Article 4(1)(c)).

The EDPS considers that the processed data that is described at the beginning of this opinion fulfils these conditions in terms of the purposes of the processing explained above. In this regard, the EDPS considers that Article 4(1)(c) of the Regulation is satisfied.

Furthermore, the data must be processed “*fairly and lawfully*” (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already undergone analysis (see above, point 3.2). As to the fairness of the processing, it pertains primarily to the information given to the applicants (see below, point 3.7).

Finally the data must be “*accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that 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*” (Article 4(1)(d) of the Regulation). The data is primarily gathered indirectly via temporary employment agencies, and it is therefore important that the data subject may enjoy full access and rectification rights (see below point 3.7 concerning access and rectification rights).

### **3.5. Data retention**

Article 4(1)(e) of the Regulation lays down the principle that the data should 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 CVs of successful applicants are kept for two years in the archives of the DG HR B2, for the purposes of good management. The CVs of unsuccessful applicants are only kept during the selection phase, for a maximum period of six months. The EDPS is satisfied with the fact that specific conservation periods have been adopted for application data depending on whether the applications are successful or not. The EDPS considers that the conservation periods of temporary employees’ CVs are reasonable and not excessive in view of the purpose for which they were gathered.

Furthermore, the note relating to data protection specifies that the data relating to applicants which is made available to the Commission is kept in SIRE and Sysper 2 for a maximum of 40 years, in order to ensure that anyone has the opportunity to piece together his/her career history for all types of contracts managed by SIRE. The EDPS reiterates that the only data that is to be kept is that which is necessary for this purpose (for example, to issue a copy of a temporary work certificate), and not all the data relating to the temporary work contract. The EDPS may consider that the 40-year conservation period is satisfactory, so long as the data that is kept is the data that is needed for the purpose(s) for which the data is kept.

### **3.6. Data transfer**

Personal data processed in the context of the processing which is being investigated is subject to transfers (i) within or between Community institutions and bodies (Article 7(1) of the Regulation), and (ii) to recipients other than community institutions and bodies as per Directive 95/46/EC (Article 8 of the Regulation).

The notification reveals that personal data, especially the data contained in the application, is transferred within the institution: to the Commission’s HRM, to the heads of unit concerned by the selection, to the services of the DG HR B2 tasked with managing temporary employee files. Furthermore, the DG HR B2 forwards certain identification data (name/last name, nationality, dates of work, assignment DG, temporary employment agency) to the Commission’s Security Directorate. Finally, in the case of the criminal record not being clean, the records in question will be transferred to IDOC for its opinion, before authorizing the application. Therefore, it is imperative that the terms of Article 7(1) are satisfied.

In this instance, as far as internal institution transfers are concerned, this mission involves the competences of the various services of the Commission (HRM, heads of units, staff of the DG HR B2) that need to access this data to proceed with the selection of applicants, and the handling of their files. The transfer of identification data of applicants to the Commission’s Security Directorate is also necessary in order to issue badges for accessing the buildings. Finally the transfer of the criminal record to the IDOC for its opinion in the event of it not being clean also falls under the competence of the IDOC and is in compliance with Article 7. These transfers are

therefore still legal insofar as their purpose falls within the competence of the recipients. Article 7(1) is therefore satisfied.

Article 7(3) also provides that the “*recipient shall process the personal data only for the purposes for which they were transmitted*”. Any person who takes part in the selection process of temporary employees and who processes the data within the Commission should be warned that the data cannot be used for other purposes.

The data pertaining to temporary employees is also transferred outside European institutions to the temporary employment agency of the applicant, in order to draw up a service contract between the Commission and this temporary employment agency. The temporary agencies are located in Belgium and subject to Belgian law. Therefore, it is imperative that the terms of Article 8 of the Regulation are satisfied.

In this instance, the temporary employment agency is required to receive the data of the applicant because the agency is the employer of the applicant. Furthermore, the transfer does not harm the legitimate interest of the applicant insofar as the transfer is aimed at enabling the proper execution of the work contract between the temporary employment agency and the applicant in the context of carrying out the applicant’s assignment as a temporary employee of the Commission. Therefore, Article 8(b) of the Regulation is satisfied.

### **3.7. Right of access and rectification**

Article 13 of the Regulation makes provision, and sets out the rules, for right of access at the request of the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and of any available information as to their source.

The note pertaining to the protection of personal data that is online on the Internet states that the data subject is entitled to access and to rectify his/her data, as well as the contact person with whom this right may be exercised. This satisfies Articles 13 and 14 of the Regulation.

The EDPS reiterates that the applicant in question should have access to the results of his/her evaluation at each step of the selection procedure, unless the exception stated in Article 20(1)(c) of the Regulation (provided in more depth under Article 6 of appendix III of the status) is applicable. The EDPS outlines that once the selection procedure is over, the temporary employee must be allowed to exercise his/her right to rectify any data about him/her (encoded data on the SIRE and SYSPER 2 database), including the data processed by the temporary employee on behalf of the Commission.

### **3.8. Information to be given to the data subject**

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items of information. The optional items are applicable insofar as, having regard to the specific circumstances of the



processing operation, they are required to guarantee fair processing in respect of the data subject.

In this instance, the data is primarily gathered indirectly, via the temporary agencies, and therefore Article 12 of the Regulation is applicable. It may also occur that the data is gathered directly from the data subject, especially in case of unsolicited applications, in which case Article 11 of the Regulation is applicable (*Information to be supplied where the data have been obtained from the data subject*).

An information note was posted on the intranet of the Commission and is submitted to the candidates during recruitment. This information note contains information relating to the data controller, the purposes of the processing, the recipients of the data, the retention period of the data, the access and rectification rights and the right to refer the case to the European Data Protection Supervisor at any time. This note must however be amended to take into account the retention times reassessed in the light of section 3.5 above.

Furthermore, the information note is only accessible to the applicants for a temporary position who have been selected by the Commission. It is therefore not accessible to the applicants whose CVs were gathered by the Commission, but who were not selected. The EDPS reiterates that the duty to inform the data subjects is also applicable when the data is not gathered directly from the applicant. The Commission should ensure that the selected applicants who are not recruited receive an information note.

### **3.9. Processing on behalf of the data controller**

The temporary agencies gather and process data on behalf of the Commission with regard to the selection of applicants who are likely to be selected for a temporary employment contract.

If such processing is carried out on behalf of the data controller, Article 23 of the Regulation states that he/she should select a processor who offers adequate guarantees in terms of technical security measures and organisational measures, as stated in the Regulation. The processing operation carried out by a processor should be governed by a contract or legal decision that binds the processor to the data controller, and that states that the processor is only to act on instructions given by data controller.

A framework contract has been drawn up between the Commission and the temporary work agency, as stated in the above facts. The contract contains a clause governing the protection of personal data. The EDPS is satisfied with the inclusion of this clause, but has certain reservations as to the content of the clause. Indeed, the reference to the right of access and of appealing to the EDPS mentions the contractor as the beneficiary of this right, when it should benefit any data subject. Furthermore, the clause should specify that with regard to the processing of personal data, the processor only acts upon instructions by the data controller, i.e. the Commission. The EDPS therefore invites the Commission to review the clause relating to the protection of personal data.

Under Article 23(2)(b), the duties of confidentiality and of security relating to the processing of personal data generally fall upon the processor, unless the processor is already bound by confidentiality and security obligations under the laws applicable in a member State. In this particular instance, temporary employment agencies are subject to Belgian law and therefore are subject to the security and confidentiality duties established under Belgian law.

### **3.10. Security**

Under Article 22 of the Regulation (EC) 45/2001 concerning the security of processing, *“the controller shall implement 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”*

[...]

### **Conclusion**

The proposed processing does not seem to entail any breach of the provisions stated in Regulation (EC) No. 45/2001, insofar as it takes into account the observations made above. In particular, this implies the following:

- any person who takes part in the selection process of temporary employees and who processes the data should be warned that the data cannot be used for other purposes;
- the gathering of criminal records is to be carried out in accordance with the provision of point 3.3 above;
- the 40-year retention period of data for selected applicants only applies to data that is necessary to piece together the career of the applicants in question;
- the applicant’s access to the data processed during the selection is guaranteed, as well as during the applicant’s assignment after he/she is selected to fill a position as a temporary employee of the institution;
- the note pertaining to personal data protection is amended following the recommendations set forth in this opinion;
- the selected candidates who are not recruited should also receive an information note;
- the Commission reviews the clause governing the protection of personal data in view of the considerations stated above.

Done at Brussels, 4 June 2010

**(signed)**

Giovanni Buttarelli  
The Assistant European Data Protection Supervisor