

## **Opinion on the notification for prior checking from the Data Protection Officer of the European Commission concerning "List of participants on examination for proofreaders to work under contract"**

Brussels, 6 September 2010 (case 2010-400)

### **1. Proceedings**

On 26 May 2010, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Commission a notification for prior checking concerning "List of participants on examination for proofreaders to work under contract". The notification was accompanied by information about the applicable "policy of equality of chances", as well as the "Personal data protection notice".

On 2nd July 2010, the EDPS sent a request for additional information to the DPO which was provided on 8 July 2010. The comments on the draft opinion sent to the DPO on 15 July 2010 were submitted on 30 July 2010 and were accompanied by a modified "Personal data protection notice".

### **2. Facts**

This prior checking opinion deals with selection of external proofreaders by the Publication Office (OP) of the European Commission.

The purpose of the processing is to evaluate the competence of the persons wanting to work as interim or freelance proofreaders in order to ensure good quality of the service. In the interest of efficiency and to decrease the probability of passing the test by chance, only two tests per year and three tests over a period of three years can be taken.

The controller is the European Commission represented by the Head of the Human Resources Unit of the Publication Office.

The following data are being processed within the selection of the external proofreaders:

- contact data: name, email, phone number, residential address,
- CV,
- candidate number (individual number to identify the test results), date and results of the first, second and third test (passed or not, as well as the actual marks), number of tests taken within a year.

The actual test results (marks) and candidate numbers are being kept separately from the names until the expiration of the complaint period (i.e. for one month after the actual test).

The contact data and CVs of successful candidates are being kept for two years after the test, except if there is continuous work given to the particular proofreader. If no work has been given for two years, an email is sent to the respective proofreader requesting consent for the eventual further use/storage, as well as inviting him/her to rectify or update the actual data in question. Also, a list of names of successful candidates is being kept in electronic form.

As to unsuccessful candidates, their contact data and the facts of passing or failing the tests (global test results) are being kept for three years after the failed third test.

(...)

Personal data processed in this context may be transferred to the following recipients:

- three officials of the Publication Office organising the tests (HR staff and a proofreader involved in evaluation),
- bodies in charge of monitoring or inspection task in accordance with EU law such as internal audit, European Court of Auditors (ECA), European Anti-Fraud Office (OLAF), as well as Investigation and Disciplinary Office of the Commission (IDOC).

"Personal data protection notice" is being distributed upon registration for a particular test and contains the following information:

- identity of the controller,
- purpose of the processing,
- categories of data processed,
- some data recipients,
- existence of rights of access and rectification to the contact data processed,
- time limits for storage of the data processed,
- possibility to lodge a complaint with the EDPS.

According to the modified "Personal data protection notice", data subjects have the right to obtain from the controller a copy of their contact data processed and the overall evaluation of their test in order to check their accuracy, as well as obtain rectification if necessary. A functional mailbox ([OPOCE-INTERIM@PUBLICATIONS.EUROPA.EU](mailto:OPOCE-INTERIM@PUBLICATIONS.EUROPA.EU)) should be used to this respect.

### **3. Legal aspects**

**3.1. Prior checking:** The processing of personal data for the purpose of selection of external proofreaders by the Publication Office of the European Commission falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(b) since it clearly intended to evaluate the ability of persons wanting to work for the Office<sup>1</sup>.

The notification of the DPO was received on 26 May 2010. 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 21 days (6 + 15) to allow for provision of additional information, as well as comments on the draft opinion. Due to the fact that the month of August does not count in the calculation of the deadline, the present opinion must be delivered no later than on 17 September 2010.

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<sup>1</sup> It may also involve processing of health related data resulting in its prior-checkability in terms of Article 27(2)(a) of Regulation 45/2001 (cf. in detail below).

**3.2. Lawfulness of the processing:** The selection of interim and freelance proofreaders is based on Articles 1(1) and 5(1)(b) of the Decision on the organisation and operation of the Publication Office of the EU of 26 June 2009<sup>2</sup>.

The respective processing of personal data is also necessary for the performance of a public interest task, namely the publication of the Official Journal and other EU publications in good quality and within appropriate deadlines. Thus, the processing is lawful in accordance with Article 5(a) of Regulation 45/2001 (read together with its recital 27).

**3.3. Processing of special categories of data:** According to the submitted information about "policy of equality of chances", information about candidate's disability may be collected in order to allow for special arrangements for such candidate. Also, a photograph revealing racial or ethnic origin may be communicated on a CV.

Processing of data concerning health, as well as data revealing racial or ethnic origin is prohibited unless it could be justified on grounds mentioned in Article 10(2) of Regulation 45/2001. These data may be processed on a basis of an express consent of the data subject or in case it is necessary to comply with controller's obligation in the field of employment law.

As regards the processing of the disability data, it should be considered that by communicating this information, the data subject is giving his/her consent to the processing of this type of data in terms of Article 10(2)(a) of the Regulation. Also, this information is given in order to enable the Commission to adopt special organisational measures in line with Article 10(2)(b) of the Regulation.

The spontaneous communication of the photograph should be considered as authorised in terms of Article 10(2)(a) of the Regulation. In fact, by communicating this non-requested data, the data subject is providing his/her consent to its processing<sup>3</sup>.

**3.4. Data quality:** Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate.

As to the proportionality of the data processed, the EDPS notes that the contact and evaluation data referred above are necessary for either organisation or execution of the selection procedure with a view of attribution of the respective proofreading work. He also welcomes the differentiated approach adopted with respect to the processing of the test results. Thus, Article 4(1) (c) of the Regulation is being duly complied with.

The accuracy of the data processed is partly ensured by the fact that some data are provided by the respective data subjects. In addition, the invitation to make use of the rights of access and rectification (cf. point 3.8 below) helps to ensure that the processed data are accurate and up to date, as it is particularly foreseen in relation with contact data of successful candidates who are given continuous work.

Lawfulness of the data processing has been already discussed (cf. point 3.2), whereas fairness has to be assessed in the context of information provided to data subject (cf. point 3.9 below).

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<sup>2</sup> Decision of the European Parliament, the Council, the Commission, the Court of Justice, the European and Social Committee and the Committee of Regions 2009/496/EC, Euratom on the organisation and operation of the Publication Office of the European Union, OJ L168/41 of 30 June 2009

<sup>3</sup> cf. also the EDPS Guidelines concerning the Processing Operations in the Field of Staff Recruitment of 10 October 2008

**3.5. Data retention:** According to Article 4(1)(e) of Regulation 45/2001, personal data may be kept in a form enabling the identification of data subjects for no longer than necessary for the purposes for which they were collected or further processed.

The EDPS welcomes the differentiated storage policy described above, in particular the fact that the actual tests results are being kept only for a month to allow for handling of eventual complaints.

He also approves the three years storage period for the data of unsuccessful candidates as it is necessary for the efficient execution of this selection procedure.

As to the data of successful candidates, the EDPS acknowledges that setting of a maximum time limit for storage of these data may not be possible given the nature of the continuous work attribution. In this respect, he welcomes the fact that a review mechanism is being put in place to seek consent for the eventual further use, as well as rectification of the data processed two years after the last work attribution.

**3.6. Compatible use:** Pursuant to Article 4(1)(b) of Regulation 45/2001, personal data must be collected for specified, explicit and lawful purposes and not further processed in a way incompatible with those purposes.

As indicated above, the data are collected for the purpose of selection and recruitment of competent external proofreaders. The use of their data for attribution of continuous work is therefore fully within the initial purpose and in due respect of the Regulation.

**3.7. Transfer of data:** The internal and inter-institutional data transfers mentioned above are subject to Article 7 of Regulation 45/2001. They should be necessary for legitimate performance of the task covered by the competence of the particular recipient who can process the data only for the purposes for which they were transmitted.

The EDPS notes that the transfers within the Publication Office of the European Commission are considered as necessary for the execution of the selection and recruitment procedures, whereas the transfers to internal auditors, OLAF and IDOC, as well as ECA are necessary for the performance of the respective supervisory task.

As to the purpose limitation, the Personal data protection notice mentions that the internal and inter-institutional recipients are required not to use the data for any other purposes other than the tasks carried out in the exercise of their respective competences. Thus, Article 7(1) and (3) of the Regulation is duly complied with.

**3.8. Right of access and rectification:** Articles 13 and 14 of Regulation 45/2001 provide for data subject's rights of access and rectification with respect to their personal data processed. These rights may be restricted in terms of Article 20(1) of the Regulation, in particular when it would be necessary to for the protection of rights and freedoms of others, including the evaluators in terms of Article 6 of the Annex III to the Staff Regulations.

According to the modified Personal data protection notice, data subjects have a right to obtain from the controller a copy of their contact data and the overall evaluation of their test, as well as rectification or update of these data if necessary.

The EDPS welcomes the fact that the data subjects are provided access to all data categories processed within this particular procedure (factual and aggregated evaluation data). At the same time, he would like to point out that the right of rectification can apply only to the factual data processed. This inherent limitation should be reflected by the European Commission, in particular in the context of provision of information to data subjects as outlined below.

**3.9. Information to the person concerned:** As indicated above, the "Personal data protection notice" provide for certain information as required in terms of Articles 11 and 12 of Regulation 45/2001.

In order to ensure full compliance with the Regulation, the EDPS requests that information about all possible data recipients, as well as the legal basis of the processing is being added to the existing notice.

In addition, information about the right of rectification should be revised in order to reflect its inherent limitation to factual data processed.

(...)

#### **4. Conclusion**

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

- a mechanism enabling data subject's access to evaluation data should be put into place in terms of Article 13 of the Regulation;
- "Personal data protection notice" should be modified according to the recommendations provided above as to guarantee compliance with Articles 11 and 12 of the Regulation.

Done at Brussels, 6 September 2010

**(signed)**

GIOVANNI BUTTARELLI  
ASSISTANT SUPERVISOR