



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Robert GEERAERTS
Head of Unit
Administration Unit
Executive Agency for Health and
Consumers (EAHC)
DRB Building A3/045
L-2920 Luxembourg,

Brussels, 24 September 2010
GB/DH/et D(2010)1416 C 2010-0346

Subject: Prior-checking notification, case 2010-0346

Dear Mr Geeraerts,

We reviewed the documents you have provided the EDPS with concerning the notification for prior-checking under Article 27(2) of Regulation 45/2001 (the Regulation) on the selection and the recruitment of staff (temporary agents seconded or not from the European Commission, contract agents, interim staff and trainees) at the Executive Agency for Health and Consumers (the EAHC). The processing operation under examination is subject to prior-checking in conformity with Article 27(2)(b) of the Regulation, since it involves an evaluation of the applicants' ability to perform the functions of the post for which the selection and recruitment procedure has been organised. The processing operation in the present case might also involve data related to health (collection of medical certificate or disability data) and to criminal offences (collection of police record), which would constitute an additional ground for prior-checking in the light of Article 27(2)(a) of the Regulation.

The procedure related to the selection and recruitment of staff, as well as the data protection practices as presented in the notification reveal some similarities to other processing operations regarding selection and recruitment by EU institutions/bodies/agencies. In this regard, the EDPS issued Guidelines on staff recruitment¹ as well as a Joint Opinion on "*Staff recruitment procedures carried out by some Community agencies*"². On 29 October 2009 the EDPS requested the Union bodies and institutions that had not yet notified their recruitment processing operation to do so in the light of the guidelines indicating any differences with the guidelines. In the present case, the notification has been submitted after 29 October 2009 and therefore, the EDPS will first underline, in the light of the EAHC cover letter, the EAHC practices which do not seem to be in conformity

¹ The EDPS Guidelines can be found on the EDPS website under the title "Thematic Guidelines".

² EDPS Opinion issued on 7 May 2009 (case 2009-0287).

with the principles of the Regulation and with the EDPS Guidelines and will then restrict his legal analysis to those practices. It is clear that all the relevant recommendations made in the guidelines apply to the processing operations put in place in the frame of the selection and recruitment of staff at the EAHC.

1. Right of access and rectification

Facts: The candidates are informed via the data protection notices (see below) of the point of contact to which they may submit their request to access and rectify their data.

Reminder:

The rights of access and rectification deserve a special attention. EAHC did not provide the EDPS with comprehensive information as to the implementation of the right of access. The EDPS would like to remind the rules developed in the guidelines.

The EDPS has always recommended in his opinions that data subjects should be given access to their evaluation results regarding all stages of the selection procedure (pre-selection, interview and written tests), unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations are applied. This exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the Selection Committee if such access would undermine the rights of others applicants or the freedom of members of the selection Committee. Nevertheless, data subjects should be provided with aggregated results.

Therefore, it should be clearly established that:

- (i) the objective of any confidentiality requirement is to ensure that the Selection Committee is able to maintain its impartiality and independence and is not under undue influence from the controller, the candidates, or any other factor and
- (ii) any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective.

In a particular case, the EDPS recommended that the EAHC should provide access, upon request, to:

- (i) the evaluation sheets drawn by the selection boards,
- (ii) the “*separate assessment and decision documents signed by Chairpersons - on behalf of committees*” documenting the final decision of the selection board made available to candidates and to
- (iii) the minutes of the selection boards.

Right of rectification: As concerns the right of rectification, the EDPS acknowledges that this right can only apply in the case of factual data processed within the selection procedure. In addition, he points out that any limitation to the right of rectification after the closing date of submitting applications should only apply to data related to the admissibility criteria and not to the identification data that can be rectified at any time during the selection procedure. The EDPS considers this limitation necessary for the fairness of the selection procedure and justified in terms of Article 20(1)(c) of the Regulation. It is however important that all applicants are informed about the scope of this restriction before the beginning of the processing operation (see below “*right of information*”).

2. Information to be given to the data subject

Facts: A data protection information notice is available in the vacancy notices published on the EAHC website. The EDPS has carefully analysed the document. The notice contains information related to the purpose of the processing operation and about the right of access and rectification of the data subject and the right to have recourse at any time to the EDPS. The EDPS also checked the vacancy notice currently available on EAHC website and found out that the information was limited to the purpose of the processing operation and to the quotation of Regulation (EC) No 45/2001. A data protection notice (specific to the implementation of the EU programmes and to the selection and recruitment) is also available on EAHC website. In this section, a more detailed privacy statement is devoted to the selection and recruitment of staff. In the statement additional information is provided on the recipients of the data and on the time-limits for storing the data.

Recommendations:

i) Channels of information: Three documents are available to inform the data subject. The EDPS welcomes the fact that the EAHC informs the data subject at a general level and at a particular one. As to the specific/particular information, the EDPS would be in favour of a more exhaustive approach (see paragraph below).

ii) Content of the vacancy notice: As to the content of the data protection note, the EDPS would like to highlight that all elements listed in both Articles 11 and 12 of Regulation 45/2001 should be clearly and thoroughly indicated in every vacancy notice. The specific time-limit for storing the data, the recipients of the data and whether replies to the questions are obligatory or voluntary as well as the possible consequences of failure to reply are not presently indicated.

iii) Content of the data protection notice and of the privacy statement: Both documents insist on the consent of the data subject: "(...) all applicants are deemed to have unambiguously given their consent for the subsequent processing operations in application of Article 5 (d) of Regulation 45/2001". The EDPS is not in favour of the use of Article 5 (d) as the main legal basis to legitimise the processing operation. The consent in the context of employment is of sensitive nature and deserves special attention with regard to the information given to the data subject. In this case, grounds for lawfulness can be found in Article 5 (a) (Staff Regulations, CEOS, FSC and SLA). The consent may be used as an additional ground to legitimise the processing operation.

Having said this, in the selection and recruitment context, the consent may be used to lift the prohibition to process special categories of data in cases where the data subject provides for data which he/she knows are not obligatory. This is also why information on whether information is obligatory or voluntary (Article 11.1.d.) is so important. Moreover, the consent in the context of sensitive data must be "explicit" following Article 10.2.a³.

iv) Information on the right of rectification: As indicated above, it is important that all applicants are informed about the scope of restriction of this right before the beginning of the processing operation (see below "*right of access and rectification*").

³ On the consent, See the Article 29 Working Party Opinion 8/2001 on the processing of personal data in the employment context.

3. Processing of personal data on behalf of controllers

Facts: An external contractor (Interim agency) collects and processes data on behalf of the EAHC to select the best suitable interim staff. The EDPS received a copy of the "Contrat-cadre de service" between the EAHC and the Interim agency.

Recommendation:

The EDPS is satisfied that a paragraph on data protection is included in the contrat-cadre de service. As to the content of the paragraph however, the right of access and rectification and the right to have recourse to the EDPS are only guaranteed to the contractor. These rights should be ensured to every person concerned by the data processed. Article 23 of Regulation (EC) No 45/2001 foresees that the legal act binding the processor to the controller should stipulate in particular that: "the processor shall act only on instructions from the controller" in this case only on instructions from EAHC. The EDPS therefore invites you to revise the present clause.

Following Article 23.2.b, Article 21 and 22 obligations are also incumbent on the processor unless he is already subject to the same obligations by virtue of the national law of a Member State. In the case in point, the Interim agency is subject to the Belgian national law and therefore confidentiality and security obligations established by virtue of the Belgian law are applicable to the Interim agency.

4. Conclusion

The EDPS recommends that EAHC adopts specific and concrete measures to implement these recommendations regarding the selection and recruitment of temporary agents seconded or not from the European Commission, contract agents, interim staff and trainees within EAHC. As concerns the reminders mentioned in this note, the EDPS would like to be informed about the situation regarding the compliance with the guidelines. To facilitate our follow-up, it would therefore be appreciated if you could provide the EDPS with all relevant documents within 3 months of the date of this letter which prove that the recommendations have been implemented.

Kind regards,

(signed)

Giovanni BUTTARELLI

Cc: Ms Beáta GYÓRI-HARTWIG, Data Protection Officer of EAHC

