



Opinion on the notification for prior checking from the Data Protection Officer of EFSA regarding the "Selection and Appointment of members of EFSA's Scientific Committee and Panels".

Brussels, 21 March 2011 (Case 2010-0980)

1. Proceedings

On 9 December 2010, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data for the purpose of selection and appointment of members of the Scientific Committee and Panels by the European Food Safety Authority (EFSA) from the agency's Data Protection Officer (**DPO**).

Questions were raised on 21 January 2011 to which EFSA replied on 18 February 2011. Some further clarifications were requested on 23 February 2011 and the DPO replied on the following day. The draft opinion was sent to the DPO for comments on 7 March 2011. The EDPS received a reply on 18 March 2011.

2. Facts

Every three years, following a call for expression of interest, EFSA carries out a selection procedure for the selection and appointment of members of the EFSA Scientific Committee and Panels.

Data subjects

The data subjects are all candidates applying to the advertised call for expression of interest for membership and renewal of the Scientific Committee and Panels.

Purpose

The purpose of the processing operation in question is to organise pre-selection and selection procedures for membership in EFSA's Scientific Committee and Panels and to appoint them for a 3-year term of office that may be renewed twice and/or to expand the general reserve list of the Scientific Committee and Panels.

The Scientific Committee is composed of the Chairs of each Scientific Panel and six other scientific experts. The Committee has the task of supporting the work of EFSA on scientific matters of a horizontal nature and providing strategic advice to EFSA's Executive Director. The Scientific Committee is also responsible for general co-ordination to ensure consistency in the scientific opinions prepared by the Scientific Panels.

Each Scientific Panel is composed of up to 21 independent scientific experts. At present, EFSA has 10 Scientific Panels in place¹.

Legal basis

The processing operation is covered by:

- EFSA's Founding Regulation 178/2002 (Articles 28 and 37),
- EFSA's Management Board Decision of 17 December 2009 concerning the establishment and operations of the scientific committee, scientific panels and their working groups and
- the Decision of the Executive Director concerning the selection of members of the scientific committee, scientific panels and external experts to assist EFSA with its scientific work.

Procedure

The processing is largely carried out by means of an automated tool.

The procedure is explained in articles 2 till 8 of the Decision of the Executive Director concerning the selection of members of the Scientific Committee, Scientific panels and external experts to assist EFSA with its scientific work, available on EFSA's website.

Candidates should submit their application forms on-line with declarations of commitment and interest through the EFSA's website: www.efsa.europa.eu. Upon submission of an on-line application, an automated confirmation message is returned to the e-mail account of the applicant.

The mandatory data that the applicant should fill in the application form are the following:

- his or her choice concerning either the Scientific Committee or a Panel;
- name, surname, e-mail, title, date of birth, gender, nationality, address for correspondence;
- employment record relevant to the call for expression of interest;
- main field(s) of expertise and how they gained relevant experience;
- education, publications, level of knowledge of English language;
- availability to attend meetings mainly in Parma;
- whether they agree that EFSA considers their profile for other Panels/Scientific Committees different from the one of the applicants' choice;
- whether they allow EFSA to include their personal data in the EFSA's external expert database, by clicking on two options, "yes" or "no"²;
- declaration of interest;
- declaration of honour;
- how the applicants were informed about the present call of interest.

According to the notification, no photo or other sensitive data under Article 10 (1) of the Regulation are processed.

Check of validity and eligibility of applicants

The validity and eligibility check of each application form is carried out by the Human Resources (HR) Unit.

¹ For a presentation of the EFSA Scientific Committee and Panels, please consult EFSA's website:

<http://www.efsa.europa.eu/en/panels.htm>

² The EDPS already issued an opinion on "EFSA's Expert Database" on 11 November 2008 (case 2008-0455).

Composition of the Evaluation Team and evaluation of eligible candidates

The results of this check are reported to the agency's Evaluation Team set up by the Executive Director. The Evaluation Team is chaired by the Director of Risk Assessment and comprises the Director of Scientific Cooperation and Assistance, the Heads of all relevant Units of the Risk Assessment Directorate, the Head of Scientific Committee and Advisory Forum Unit and a Project Coordinator representing the HR Unit.

The Evaluation Team carries out the evaluation findings of the valid and eligible candidates on the basis of the Evaluation Guidelines set up by the agency (this document provides the Team with an interpretation of various criteria, guidance with specific elements to evaluate and grading).

External review of the evaluation by three independent experts

In order to confirm that the evaluation and scoring of all eligible candidates is done in a fully independent and consistent manner, three independent external evaluators are chosen by the Executive Director to review the internal evaluation procedure.

These independent experts are selected on the basis of their internationally recognised scientific expertise and experience, their knowledge of EFSA and its scientific working procedures and their not current participation in or application to any of EFSA's scientific activities.

Their task is to first assess individually and then jointly the candidates' applications applying the selection criteria of the call for expression of interests and the grid drawn up by the Evaluation Team.

Shortlist of the best candidates

Following the positive outcome of the review, the Evaluation Team establishes a shortlist of the best candidates.

In order to be able to select the best candidates, the shortlist with the application forms of those candidates is shared, on a confidential basis, with the Advisory Forum Unit for possible comments.

Selection of candidates from the shortlist

Upon receipt of advice from the Advisory Forum, the Evaluation Team submits to the Executive Director a report with candidates proposed for appointment along with a justification for these nominations.

Adoption of the list by the Management Board and appointment of the candidates

The Executive Director submits to the Management Board an evaluation and analysis report including a proposal listing the most suitable candidates to be appointed as members of the relevant Scientific Committee and Panel and the reserve list.

It is mentioned in the Call of expression of interest that all candidates are informed in writing on the outcome of the selection process. Nominated candidates are informed by letter from the relevant Heads of Units about their appointment. Reserve list and successful candidates are informed by e-mail from the HR Unit about the outcome.

Recipients

The recipients of the data processed are the:

- HR Unit in charge of supporting the selection procedure;
- EFSA Evaluation Team assisted by the scientific staff of the agency;
- Three independent external evaluators;
- EFSA Advisory Forum and Management Board with access to a limited number of data, namely to a printed list indicating the selected applicant's name, surname, nationality and affiliation of the proposed Scientific Committee or Panel;
- Bodies entrusted with a monitoring or inspection task, such as the European Court of Auditors, the Internal Audit Service, OLAF, the EDPS.

Right of access and rectification

Candidates have a right to access their data by contacting EFSA's HR Unit. The automatic message reply indicates an ID number that can be used by the candidates to have access to their own application form and to modify on-line until the indicated deadline for submission of applications.

Candidates have a right to update or correct their identification data at any time. However, data demonstrating compliance with the eligibility criteria and selection criteria may not be updated or corrected after the closing date for the respective call for expressions of interest or of the closing date for applications for the respective selection procedure duly communicated by EFSA.

Data subjects can exercise their rights of blocking and erasure at any time by contacting the EFSA's HR Unit. Justified requests for blocking and erasure are handled within 5 working days.

Right of information

Paragraph 20 (entitled "*Note on the processing of personal data in the context of the experts selection*") of the on-line application form as well as Article 10 (entitled "*personal data protection in relation to the selection*") of the Decision of the Executive Director, which is also available on-line, contain the following information:

- reference to Regulation 45/2001,
- identification of the data controller,
- indication of the purpose of the data processing,
- information on the data recipients,
- explanation about which data are mandatory and the consequence of not replying to the compulsory data;
- some information on the right of access and rectification;
- reference to the legal basis at the beginning of the Decision and
- reference to the right of data subjects to have recourse at any time to the EDPS.

Retention policy

Data related to appointed candidates in the Scientific Committees and Panels are kept with the HR Unit for a period of 5 years after the appointment terminates.

Data regarding successful candidates in the reserve list are kept as long as the reserve list remains valid, which is a period of 3 years.

The data of unsuccessful candidates are erased after 2 years following completion of the selection procedure.

EFSA produces comparative statistics on volume applications received for the calls for expressions of interest every 3 years. These statistics are uploaded on the EFSA website.

Security measures

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3. Legal aspects

3.1. Prior checking

Applicability of Regulation 45/2001 ("the Regulation"): The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*"-Article 2 (a) of the Regulation). The data processing is performed by an agency of the European Union, EFSA, in the exercise of activities which fall within the scope of EU law³. The processing of the data is done mostly by automatic means (applications forms on-line stored in EFSA databases) and when the processing is manual (documents to be submitted by applicants in the framework of the selection process), it forms part of a filing system. Therefore, the Regulation is applicable.

Grounds for prior checking: Article 27 (1) of the Regulation subjects to prior checking 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*" by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subjects*" (Article 27 (2) (b) of the Regulation).

The processing operation in question aims at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, different parties involved in the processing will perform various assessment activities, such as weighing up whether the individual in question meets the eligibility requirements of the calls for expression of interest, making a comparative evaluation on the basis of the selection criteria set out by EFSA, setting up a shortlist of the best candidates and finally selecting the most appropriate candidates from the shortlist to be appointed to the Scientific Committees and/or Panels. Taking the above into account, clearly the data processing operation falls within Article 27(2) (b) of the Regulation 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, the EDPS regrets that the processing operation has already been established prior his prior-checking opinion. However, all recommendations given by the EDPS in the present opinion should be duly implemented.

Notification and due date for the EDPS Opinion: The notification of the DPO was received on 9 December 2010. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 28 days for further information from the controller and 11 days for comments. Consequently, the present opinion must be delivered no later than on 21 March 2011.

³ The concepts of "Community institutions and bodies" and "Community law" can not be any longer 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 light of the Lisbon Treaty.

3.2. Lawfulness of the processing

The lawfulness of the processing operations has to be examined in light of Article 5 of the Regulation. Pursuant to Article 5 (a) of Regulation 45/2001, the processing is lawful if it 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 or in the legitimate exercise of official authority vested in the Community institutions or body*". The processing of personal data for performance of tasks carried out in the public interest includes "*the processing necessary for the management and functioning of those institutions and bodies*" (recital 27).

It follows that the first issue under Article 5 (a) is to determine whether there is a specific legal basis for the processing and the second issue is to verify whether the processing in question is necessary for the performance of a task carried out in the public interest.

The rules governing the selection of members of the Scientific Committees and/or Panels are found in the Decision of the Executive Director. The establishment and operations of the Committees and Panels are set up on the basis of EFSA's Decision on this issue which is in line with Articles 28 and 37 of EFSA's Founding Regulation 178/2002. These legal instruments serve as legal basis for the selection procedure of members of EFSA's Scientific Committees and/or Panels.

As concerns the condition of necessity under Article 5(a), the collection of applications forms and other detailed information related to the candidates' expertise and the short listed candidates must be considered as "*necessary for performance of a task*" of selecting the most suitable members of a Scientific Committee and/or Panel. The processing should therefore be considered as lawful.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*".

The EDPS considers that the mandatory information that candidates need to provide in the context of the selection procedure, as described in point 2, are adequate and relevant in relation to the purposes for which they are intended to be used. Indeed, in order to determine whether a candidate complies with the minimum conditions of eligibility for the Scientific Committee or Panel, the agency must necessarily know for instance the years of experience of the candidates, their main fields of expertise, relevant publications etc., in order to be able to pre-select and finally select the most suitable candidates for the published position. The EDPS considers therefore that the information collected from the candidates in the context of the processing in question, complies with Article 4(1)(c) of the Regulation.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*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*". The personal data are collected from the data subjects themselves and the candidates have a right of access to their data (see below point 3.6 on "*Right of access and rectification*"). In this

way, EFSA ensures that the data processed are accurate, complete and up to date under Article 4(1)(d) of the Regulation.

Fairness and Lawfulness: Article 4 (1) (a) of Regulation 45/2001 provides that personal data must be "*processed fairly and lawfully*". The issue of lawfulness was analysed above (see point 3.2). The issue of fairness is closely related to what information is provided to data subjects, which is further addressed in point 3.7.

3.4. Conservation of data

Article 4 (1) (e) of Regulation 45/2001 states that personal data must 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 EDPS notes that the specific retention periods of data regarding the three categories of data subjects concerned are reasonable and not excessive in conformity with Article 4 (1) (e) of the Regulation.

According to the notification, the data are used for statistical purposes. The EDPS draws the attention to EFSA that these data should be kept in an anonymous form in compliance with Article 4(1)(e) of the Regulation.

3.5. Transfer of data

Articles 7, 8 and 9 of the Regulation 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 (i) to or within Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

Internal Transfer

According to the notification, the transfers of the candidates' personal data, either fully or partially are made to the Evaluation Team, the Executive Director and the Management Board of EFSA. Furthermore, other potential recipients could be the Court of Auditors, the Internal Audit Service, OLAF and the EDPS. These are transfers within EFSA or between Community institutions and bodies, thus, Article 7 of the Regulation applies. Article 7 of the Regulation requires personal data to be transferred only "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 data controller should ensure that (i) the recipient has the appropriate competences and (ii) the data are necessary for the performance of this competence.

The EDPS considers that the transfers of data to the recipients within EFSA for the purposes described in the facts above comply with Article 7(1). Indeed, these recipients have the competences to perform the task for which the data are transferred, namely to assess the competence of the candidates at different levels of the procedure. As for the potential recipients between EFSA and the other institutions and bodies, their tasks concern for instance audit, budgetary discharge, and/or complaints. The transfer of the personal data is therefore considered as falling within the tasks covered by the competence of each of the recipients.

However, the EDPS recommends that in accordance with Article 7 (3) of the Regulation, each of the recipients is explicitly reminded that they should process the personal data they receive only for the purpose for which they were transmitted.

External transfer

i) Article 8

The processing operation in question involves also three independent experts whose main task is to assess individually and jointly the candidates' applications in order to ensure the independence and consistency of the internal selection procedure. These recipients are external recipients who could be subject to the national law adopted for the implementation of Directive 95/46/EC. If it is the case, the transfer of data to the three experts may be considered to be necessary under Article 8(b) of the Regulation, since it is necessary for their independent review of the evaluation of candidates. Furthermore, in view of the tasks performed by the recipients, there is in principle no reason to assume that the candidates' legitimate interests might be prejudiced (see further, point 3.8 on confidentiality and security requirements under Article 23 of the Regulation).

ii) Article 9

It might be the case that the independent experts are not subject to national law adopted pursuant to Directive 95/46/EC. In such cases, the data may be transferred to the experts, if EFSA assesses the adequacy of protection in view of the criteria set forth in Article 9(2) of the Regulation. Exceptional cases are provided for in Article 9(6). In all cases of transfers to recipients which are not subject to Directive 95/46/EC, EFSA should ensure respect for Article 9.

3.6. Right of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

According to the notification, candidates have the right of access to their data until the deadline of the call for interest for submitting their application. They also have a right to rectify their identification data at any time, whereas their right of rectification related to eligibility and selection criteria can only be exercised until the closing date of the call.

Right of access

The EDPS recalls that candidates should also be able to have access to their entire file, comprising the merit points and assessment notes concerning them drafted by the various parties at EFSA competent for their assessment (Evaluation Team, independent experts, Executive Director, Management Board). As it was underlined in the Guidelines on staff recruitment, candidates should be given access to their evaluation results regarding all stages of the selection procedure.

It is true that Article 20 (1) (c) of the Regulation provides for an exception to the principle of access by stating that *"The Community institutions and bodies may restrict the application of Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others"*. This exception may imply that certain information comparing the data subject with other candidates should not be provided and no information should be given regarding the individual remarks or evaluations of the members of the Evaluation Team or other evaluators involved.

However, as concerns the candidates, the EDPS highlights that in the context of this data processing, the candidates' right of access to the merit points, notes and assessment comments by the evaluators concerning them should not be restricted more broadly than it is necessary under Article 20 (1) (c) of the Regulation. Granting the right of access, it enables candidates to see which elements were taken into account for the overall assessment and to see that the Evaluation Team has acted fairly and objectively. Any restrictions to the right of access to such information on the basis of Article 20(1) (c) should therefore be applied restrictively.

As to the protection of the individual opinions of the evaluators, EFSA should take into consideration that:

(i) the objective of any confidentiality requirement is to ensure that the evaluators are able to maintain their impartiality and independence and are 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.

EFSA should therefore ensure that it does not restrict access more broadly than it is justified on grounds of safeguarding the confidentiality of the deliberations and decision-making of the Evaluation Team, independent experts etc. The principle of confidentiality cannot be prejudiced if the evaluators disclose in a transparent manner to candidates the criteria according to which the candidate concerned has been evaluated as well as the actual detailed marks and comments he received regarding his competences and the profile of expert sought.

In the light of the above, the EDPS recommends that EFSA sets up procedures to ensure that candidates have access to their own personal evaluation data⁴ throughout the selection procedure ; this right of access may be limited on the basis of Article 20(1)(c) only in cases where this is absolutely necessary, namely no disclosure of comparative results when this is necessary to protect others and no disclosure of individual opinions of the evaluators in order to protect the independence of the evaluators. In such cases, data subjects should be informed of the principal reason for restricting the right of access and the right of recourse to the EDPS, in accordance with Article 20(3).

Right of rectification

The EDPS notes that EFSA grants the right of rectification regarding identification data at any time and it introduces limitations regarding the rectification of eligibility and selection data. This policy is in compliance with the Guidelines on staff recruitment. The EDPS considers this limitation necessary to ensure objective, certain and stable conditions for the selection procedure, and essential to the fairness of the processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others. It is however important that all candidates are informed about the scope of this restriction at the time of the processing operation (see below "*right of information*").

3.7. Information to the data subject

Article 11 of the Regulation provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of the Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the selection procedure under analysis, personal data are obtained directly from the data subject on the application form and from the different evaluators at different levels of the procedure. Thus Articles 11 and 12 will both apply. Both provisions provide a list of general and additional items. The latter apply insofar as they are necessary in order to

⁴ See also Working Party 29 Opinion no 4/2007 on the concept of personal data, pages 11 and 12.

guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

In this processing operation, the EDPS notes that candidates are informed at the time of the processing of most of the elements provided in Articles 11 and 12 of the Regulation. Moreover, the EDPS recommends that EFSA should inform all candidates through the on-line application form and in the Decision of the Executive Director about the:

- retention periods of the data related to the three categories of data subjects of the processing, namely successful candidates, reserve list candidates and unsuccessful ones,
- procedures in place in view of granting access to the evaluation results of the candidates upon request and any limitation thereof, and
- scope of restricting the right of rectification under Article 20(1)(c) of the Regulation in the case of eligibility and selection data after the deadline of submitting applications.

3.8. Processing data on behalf of controllers

Article 2 (e) of the Regulation 45/2001 states that "*processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller*". Article 23 of the Regulation stipulates on one hand, the role of the processor and on the other hand, the obligations of the controller in ensuring sufficient guarantees in respect of the technical and organisational security measures and ensuring compliance with those measures.

The three independent experts have as task to review the impartiality and consistency of the evaluation procedure carried out by the Evaluation Team. In order to be able to carry out this task, they need to evaluate themselves individually and jointly the candidates' application forms. They should therefore be considered as processors who are processing the candidates' data on behalf of EFSA, the controller.

The EDPS therefore recommends that EFSA, after choosing the three processors for a specific selection procedure should also guarantee that Article 23 is respected. This means that EFSA should prepare an act which binds each processor to the controller. This act should stipulate the following two issues:

- the processor shall act only on instructions from the controller (Article 23(2)(a)) and
- the obligations set out in Articles 21 (related to confidentiality of the processing) and Article 22 (related to the security of the processing) of the Regulation should be incumbent on the processor, unless the processor is already subject to a national law of one of the Member States; in such case the processor should be bound by the obligations with regard to confidentiality and security by virtue of Article 16 or Article 17(3), second indent of the Directive 95/46/EC (Article 23(2)(b)).

3.9. Security Measures

According to Article 22 of the Regulation 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*". These security measures should in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

After review of the security measures described in the notification, there is no reason to believe that the measures implemented by EFSA do not comply with Article 22 of the Regulation.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the following considerations are taken into account. In particular EFSA should:

- ensure that the data used for statistic purposes are in an anonymous form in compliance with Article 4(1)(e) of the Regulation,
- explicitly informs each of the recipients that they should process the personal data they receive only for the purpose for which they were transmitted,
- ensure respect for Article 9 of the Regulation, in case the three independent experts are not subject to the national law adopted pursuant to Directive 95/46/EC,
- set up procedures to ensure that candidates have access to their own personal evaluation data throughout the whole selection procedure taking into account any restriction that may be applicable under Article 20(1)(c), as described in section 3.6 above,
- inform all candidates through the on-line application and the Decision of the Executive Director about the
 - retention periods of the data related to the three categories of data subjects of the processing, namely successful candidates, reserve list candidates and unsuccessful ones,
 - procedures in place in view of granting access to the evaluation results of the candidates upon request and any limitation thereof,
 - scope of restricting the right of rectification under Article 20(1)(c) of the Regulation in the case of eligibility and selection data after the deadline of submitting applications,
- prepare an act binding each independent expert and ensure that the obligations provided in Article 23(2) of the Regulation are incumbent on them, as explained in point 3.8 of the Opinion.

Done at Brussels, 21 March 2011

(signed)

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