



Opinion on the notification for prior checking from the Data Protection Officer of the European Environment Agency concerning "Grant and procurement award procedures including call for expression of interest"

Brussels, 18 April 2011 (case 2011-0103)

1. Proceedings

On 31 January 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Environment Agency (EEA) a notification for prior checking concerning "*Grant and procurement award procedures including call for expression of interest*". The notification was accompanied by the following documents:

1. Model invitation to tender and Model invitation to submit proposals;
2. Model privacy statement;
3. Model contractual provision on data protection contained in procurement contract, Model contractual provision on data protection contained in Framework Partnership Agreement and Model contractual provision on data protection contained in grant agreement; and
4. Model declaration of confidentiality and absence of conflict of interest.

The draft opinion was sent to the DPO for comments on 30 March 2011. These were received on 15 April 2011.

2. Facts

The **purpose** of the processing in question is the management and administration of the procurement/grant award procedures or of the call for expression of interest for the selection of contractors or beneficiaries.

The **controller** is to be considered the EEA as a whole, represented by the Procurement officer at the Administrative Services Programme (ADS) of the EEA.

Data subjects are (natural) persons willing to participate in procurement/grant and related selection procedures and responding to calls for expression of interest (applicants, candidates and tenderers, including their staff and/or subcontractors).

The following **data categories** may be processed within procurement/grant award procedures or of the call for expression of interest at the EEA:

- Name, function, contact details (company and department, postal address, country of residence, business telephone number, mobile telephone number, fax number, e-mail address and internet address);
- Certificates for social security contributions and taxes paid and extract from judicial records;
- Bank account reference (account number, name of the account holder, address of the bank, IBAN and BIC codes);
- Company registration number (legal persons) or Passport/ID number (natural persons), VAT number and membership in a trade or professional organisation;
- Information for the evaluation of selection criteria: financial and economic capacity (bank statement, professional risk indemnity insurance, balance sheet, statement of turnover), expertise, technical and language skills, education background and professional experience, including details on current and past employment;
- Declaration of honour that they are not in one of the exclusion situation referred to in Articles 93 and 94 of the Financial Regulation;
- Other personal data contained in the application or offer (hourly/daily rate and credentials).

Since the information is not provided on standard forms, the candidates/tenderers/applicants, their staff and subcontractors, may supply information which might not be necessary for the purpose of selection or the award of grant or contract, for instance gender, age and nationality.

The following **retention policy** applies:

- Files relating to the selection of candidates including personal data are to be retained in the group/programme in charge of the call for expression of interest concerned until the end of the procedure for which it is submitted, and in the archives for a period of 5 years following the closure of the call for expression of interest;
- Files relating to procurement/grant award procedures including personal data are to be retained in the group/programme in charge of the procedure until it is completed, and in the archives for a period of 10 years following the signature of the contract/grant agreement. However, tenders/applications from unsuccessful tenderers/applicants shall only be kept for a period of 5 years following the signature of the contract/grant agreement in question;
- Files might be retained until the end of a possible audit if one started before the end of the above periods.

Personal data is provided by submission of an application or tender and is **processed manually**. All applications and tenders shall be kept by the appointed members of the evaluation committees and stored in locked cupboards/offices during the evaluation process. After completion of the procurement or grant award procedure, the collected personal data and all related information are stored on the premises of the EEA in conformity with the **EEA security policy and provisions**.

Data processed within the processing operations may be disclosed to the following **recipients**:

- Staff of operational, financial and/or legal groups participating in the management of the selection of candidates/contractors/beneficiaries and staff of the bodies entrusted with a monitoring or inspection task in application of European Union law (e.g. internal audit);
- External experts and contractors participating in the evaluation of applications/tenders when external expertise is required, on the basis of Article 179a of the Financial Regulation;

- Staff of OLAF, IAS (Internal Audit Service), COA (Court of Auditors), the Legal Service of the European Commission, and staff of other Commission services (DG ENV, DG BUDG, Secretariat General) upon request if necessary in the context of official investigations or for audit purposes;
- Members of the public in accordance with the EEA's obligation to publish information on the outcome of procurement and grant award procedures deriving from the budget of the European Union (Articles 30(3), 90 and 110(2) of the Financial Regulation). The information concerns in particular the name and address of the contractors/beneficiaries, the amount awarded and the name of the project or action. It will be published in supplement S to the Official Journal of the European Union and/or on the external website of the EEA. Additionally, candidates selected in the framework of a call for expression of interest are listed in the intranet of the EEA.

Applicants and tenderers have a **right to access** their data and the **right to update or correct** their personal data at any time during the grant or procurement award procedure. The right to rectify information already provided can only apply to the factual data processed within the concerned grant or procurement award procedure. The right to rectify can only be exercised up to the closing date for submission of applications or tenders. However, inaccurate identification data may be rectified at any time during and after the grant or procurement award procedure.

Any request for access or rectification of personal data shall be addressed in writing to the controller by email or by mail.

Information to data subjects is provided at different stages of the respective procedure in the following documents:

- Model invitation to tender or to submit a proposal containing a standard clause on data protection;
- Model contractual provision on data protection contained in the procurement contract, grant agreement and framework partnership agreement;
- Model privacy statement attached to the tender documents.

The *Model invitation to tender or to submit a proposal* provides information about:

- purpose of the processing;
- certain categories of data processed;
- certain data recipients;
- existence of rights of access and rectification and the procedure to follow;
- existence of a right to have a recourse to the EDPS.

The *Model privacy statement* provides information about the following details:

- identity of the controller;
- legal basis of the processing;
- purpose of the processing;
- recipients of the data processed;
- whether replies to the questions are obligatory or voluntary, as well the possible consequences of failure to reply;
- categories of data processed;
- modalities for the processing operation;
- security measures;
- retention policy;
- right of access and rectification;
- right to have recourse to the DPO and the EDPS.

Further, *the three model contractual provisions on data protection contained in the procurement contract, grant agreement and framework partnership agreement* specify that personal data included in or related to the contract/grant agreement/framework agreement shall be processed pursuant to Regulation (EC) 45/2001 and solely for the purposes of the performance, management and follow-up of the contract/grant agreement/framework agreement by the entity acting as data controller within the EEA without prejudice to possible transmission to the bodies charged with a monitoring or inspection tasks in conformity with Union law. Information on the right to access and rectify personal data and the right to have recourse to the DPO and the EDPS is also provided.

Where the procurement contract or grant agreement require **processing of personal data on behalf of the controller**, the selected contractor/beneficiary has to agree with data protection provisions included in the respective procurement contract or grant agreement.

The *model contractual provisions on data protection contained in the procurement contract and the grant agreement* state that the contractor/beneficiary may act only under the supervision of the data controller, in particular with regard to the purposes of processing, the categories of data which may be processed, the recipients of the data, and the means by which the data subject may exercise his rights. The contractors/beneficiaries are required to limit access to the data to the staff strictly necessary for the performance, management and monitoring of the contract/grant agreement. The contractors/beneficiaries have to agree also to adopt appropriate technical and organisational security measures as required by Article 22 of Regulation (EC) 45/2001.

Where external expertise is required on the basis of Article 179a of the Financial Regulation, **external experts and contractors** participating in the evaluation of applications/ tenders sign a *declaration of confidentiality and absence of conflict of interest*. The following statement is included: *"I also confirm that I will keep all matters entrusted to me confidential. I will not communicate outside the committee any confidential information that is revealed to me or that I have discovered or any information relating to the views expressed during the evaluation. I will not make any adverse use of information given to me"*.

3. Legal aspects

3.1. Prior checking

The processing of personal data related to grant and procurement procedures including call for expression of interest falls within the scope of Regulation (EC) 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(a) and (b) since it clearly relates to the evaluation and ranking of information relating to the legal, financial, economic, technical and professional capacity of applicants/tenderers with a view to select the proposal(s)/ application(s)/offer(s) which is/are the most economically advantageous in terms of the criteria set in the call for proposals/call for tenders/call for expression of interest. It also involves processing of data relating to (suspected) offences and criminal convictions.

In principle, prior checks by the EDPS should be carried out before the processing operation is implemented. Since the relevant data processing operations have already been established, the check has to be carried out *ex post*. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

The notification of the DPO was received on 31 January 2011. According to Article 27(4) of Regulation (EC) 45/2001, the EDPS opinion must be delivered within a period of two months.

The procedure was suspended for 16 days to allow for comments on the draft opinion. Therefore, the present opinion must be delivered no later than 18 April 2011.

3.2. Lawfulness of the processing

The legal basis of the processing of personal data within grant and procurement procedures, including call for expression of interest at the EEA can be found in the Financial Regulation and its implementing rules¹, in particular Articles 134, 136 and 137 of the implementing rules of the Financial Regulation with regard to procurements, and Article 173 (2) of the same regulation with regard to grants, and Articles 74 and 75 of the EEA Financial Regulation².

As further clarified in the EEA's comments on the draft opinion for prior checking, for the organisation and implementation of its calls for tenders and calls for expression of interest the EEA refers also to the Vade-mecum on public procurement procedures drafted by the Central Financial Service of DG BUDG (last updated version March 2011).

Processing of respective personal data can clearly be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned regulations and to ensure compliance with obligations arising from them. Thus, processing of personal data in the case at hand is lawful within the meaning of Article 5(a) of Regulation (EC) 45/2001 (read together with its recital 27).

3.3. Processing of special categories of data

Processing of personal data contained in the extracts from judicial records, other certificates to this respect³ or the above mentioned declarations of honour is explicitly authorised in Article 93(1) of the Financial Regulation. Thus, the condition for processing of data relating to (suspected) offences and criminal convictions set out in Article 10(5) of Regulation (EC) 45/2001 is met.

3.4. Data quality

The collection of personal data listed above seems to be necessary either for the identification of candidates or tenderers within the procurement/grant and related selection procedure, or for the evaluation of their eligibility and/or capacity pursuant to the respective provisions of the Financial Regulation, as well as its Implementing Rules.

Data are provided by the respective data subjects; hence the procedure itself helps to guarantee accuracy of data being processed. The rights of access and rectification contribute further to ensure that the data processed are accurate and up to date (cf. point 3.7. below).

¹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248/1 of 16.9.2002) and the subsequent regulations and corrigenda amending and correcting that regulation; Commission 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 (OJ L 357/1 of 31.12.2002) and the subsequent regulations and corrigendum amending and correcting that regulation.

² EEA Financial Regulation (Decision EEA/MB/52/15 - written procedure) of 19 December 2008, in particular Article 74 as regard procurement and Article 75 as regard grants.

³ As mentioned in Article 134(3) of the Implementing Rules to the Financial Regulation.

As already mentioned in section 2, information is not provided on standard forms and the candidates/tenderers/applicants may supply data (such as gender, age, nationality and others) which might not be necessary for the respective procedure. Provided that the controller does not process data that are irrelevant and excessive to what is requested for the purpose of the respective procedure, compliance with the principles relating to data quality as stipulated by Article 4 (1)(c) of Regulation (EC) 45/2001 will be ensured.

3.5. Data retention

As indicated above, the following time limits are applicable to the storage of files containing personal data (in the archives):

- Files relating to the selection of candidates including personal data are to be retained in the group/programme in charge of the call for expression of interest concerned until the end of the procedure for which it is submitted, and in the archives for a period of *5 years* following the closure of the call for expression of interest;
- Files relating to procurement/grant award procedures including personal data are to be retained in the group/programme in charge of the procedure until it is completed, and in the archives for a period of *10 years* following the signature of the contract/grant agreement. However, tenders/applications from unsuccessful tenderers/applicants shall only be kept for a period of *5 years* following the signature of the contract/grant agreement in question;
- Files might be retained until the end of a possible audit if one started before the end of the above periods.

The EDPS is of the opinion that keeping files relating to successful candidates/tenderers for seven years following the end of the contract/grant agreement would correspond to the maximum time period for which personal data is necessary for control and audit purposes in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation⁴. Therefore, the EDPS would recommend to the EEA to reconsider the data retention period in regard to the data in point *from ten years following the signature of the contract/grant agreement to seven years following the end of the contract/grant agreement* in order to comply with Article 4(1)(e) of Regulation (EC) 45/2001.

In any case, the EDPS would like to point out that according to Article 49(3) of the Implementing Rules as modified by the Commission Regulation 478/2007 of 23 April 2007 *"personal data contained in supporting documents [relating to the budget implementation measures] shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes"*.

3.6. Transfer of data

As indicated above, within the respective procurement and award procedures and calls for expression of interest, intra -and inter- institutional transfers of personal data take place. Pursuant to Article 7 of Regulation (EC) 45/2001, the transfers within the EEA and to other institutions have to be *"necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1) and the recipients can process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

In the present case, the transfers of personal data to the EEA staff participating in the selection of candidates/contractors/beneficiaries are considered necessary for the administration and

⁴ cf. case 2007-222 – EDPS Comments on the Draft Common Conservation List (CCL) of 7 May 2007 as well as EDPS Note concerning the CCL adoption of 12 October 2007.

management of the respective procedures. Similarly, the transfers to the staff of OLAF, IAS (Internal Audit Service), COA (Court of Auditors), the Legal Service of the European Commission, and to staff of other Commission services (DG ENV, DG BUDG, Secretariat General) are considered necessary in the context of official investigations, control or audit.

The EDPS takes note that all members of the EEA staff participating in the opening and evaluation committees shall sign a declaration of confidentiality and absence of conflict of interest before starting their work. As stated in the notification, other intra-institutional transfers may take place in case for instance of an internal audit or other monitoring and inspection tasks. Provided that all intra- and inter- institutional recipients of data are reminded of the purpose limitation of the transfer in question and the obligation of confidentiality, compliance with Articles 7 (3) and 21 of Regulation (EC) 45/2001 seems to be ensured.

Further, the notification for prior checking specifies that external experts and contractors may participate in the evaluation of applications/tenders when external expertise is required in accordance to Article 179a of the Financial Regulation. Consequently, data are transferred to recipients subject to national law adopted pursuant to Directive 95/46/EC. Such a transfer will be covered by Article 8 (a) of Regulation (EC) 45/2001 which provides that 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*". In this case, external experts and contractors process the data on behalf of the EEA in connection with tasks described above which are carried out in the public interest. Given that the data are not requested by the recipient but rather are transferred on the basis of a decision by the controller, it is for the latter to establish the "necessity" of the transfer. The "necessity" of the processing for the purposes of performing the Agency's tasks was established in section 3.2. The recipients should be always reminded of the purpose limitation of the transfer in question and the obligation of confidentiality according to Articles 7 (3) and 23 (2) read together with Article 21 of Regulation (EC) 45/2001.

3.7. Right of access and rectification

As already mentioned, data subjects are granted rights of access and rectification upon a request to the controller. The right to rectify however is subject to certain limitations and can only be exercised up to the closing date for submission of applications or tenders. The EDPS considers that this limitation of the rectification right could be considered as justified in light of Article 148(3) of the Financial Regulation aiming to ensure transparency and equality of treatment; hence it is in compliance with Article 20(1) (b) and (c) of Regulation (EC) 45/2001.

With regard to the right for data subjects to have access to their evaluation results, the EEA clarifies in its comments on the draft opinion for prior checking that the Agency abides by the provisions of Article 100(2) of the Financial Regulation and Article 149 of its implementing rules (in respect of procurement)⁵. The standard template for notification of the results of the evaluation of a call for tenders contains the following paragraph:

“Without prejudice to any legal appeal, you may obtain additional information on the grounds for the rejection of your bid.

If you so request in writing, you may be informed of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract has been awarded. However, certain details will not be disclosed if disclosure would hinder application of the law, would be contrary to the public interest, would harm the legitimate

⁵ Article 116 of the Financial Regulation and Article 179 of its implementing rules (in respect of grant agreement)

business interests of public or private undertakings or could distort fair competition between those undertakings”.

The EDPS would like to remind that all data subjects, including those participating in the calls for expression of interest, should be given access to their evaluation results regarding the respective selection procedure unless a restriction provided for by Article 20 (1) is imposed. This restriction 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 evaluation or selection committees if such access would undermine the rights of others applicants or the freedom of members of the evaluation/ selection committees. In any case the data subjects should be provided with aggregated results and informed of the principal reasons on which the application of the restriction of their right of access is based and of their right to have recourse to the EDPS as required by Article 20 (3) of Regulation (EC) 45/2001.

3.8. Information to the persons concerned

The EDPS notes that the model privacy statement contains necessary information to be supplied to data subjects as prescribed by Regulation (EC) 45/2001. In addition, information related to different aspects of the data processing operations is provided in the model invitation to tender or to submit a proposal and the model contractual provision on data protection contained in the procurement contract, grant agreement and framework partnership agreement. Thus, the data processing under review seems to guarantee the right to information in the light of Articles 11 and 12 of Regulation (EC) 45/2001.

3.9. Processing of data on behalf of the controller

The present case implies two different aspects of processing of data on behalf of the controller:

a) processing of data on behalf of the controller where external experts and contractors participate in the evaluation of applications/ tenders within the grant and procurement award procedure, including call for expression of interest.

In this specific situation the external experts and contractors who work on behalf of the EEA for the purpose of evaluation of applications or tenders sign a *declaration of confidentiality and absence of conflict of interest* binding the signatories to respect confidentiality and to not communicate confidential information revealed to them or discovered by them or relating to the views expressed during the evaluation or to make any adverse use of such information. Therefore, compliance with Articles 21 and 23 of Regulation (EC) 45/2001 seems to be ensured;

b) processing of data on behalf of the controller where the procurement contract/grant agreement to be signed with the selected contractor/beneficiary involves such processing.

According to Article 23 of Regulation (EC) 45/2001, the carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating that the processor should act only on instructions from the controller. The processor should provide sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and comply with the obligation set out in Article 21 of Regulation (EC) 45/2001.

As already mentioned, the procurement contract and the grant agreement that have to be signed with the selected contractor/beneficiary contain a provision on data protection which refers to the obligations set out in Articles 21 and 22 of Regulation (EC) 45/2001. The security obligation in terms of applicable technical and organisational measures is explicitly

mentioned and the obligation to act only under the supervision of the data controller is included. The EDPS considers that this data protection provision guarantees compliance with Articles 21-23 of Regulation (EC) 45/2001.

3.10. Security measures

On the basis of the information available, the EDPS has no reason to believe that the measures implemented by the EEA are not adequate in light of Article 22 of Regulation 45/2001.

4. Conclusion

The processing under review does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that:

- the ten years time limit for storage of personal data contained in files relating to procurement/grant award procedures should be reduced in line with section 3.5 of the present opinion (Article 4(1)(e) of the Regulation);
- data subjects should be given access to their evaluation results in line with section 3.7 of the present opinion (Article 20 (1) and (3) of Regulation (EC) 45/2001);
- intra- and inter- institutional data recipients should be reminded of the purpose limitation of the transfer in question and the obligation of confidentiality (Articles 7 (3), 21 and 23 (2) of Regulation (EC) 45/2001);
- the controller should not process data supplied by the data subjects but irrelevant or excessive to what is requested for the purpose of the respective procedure (Article 4 (1)(c) of Regulation (EC) 45/2001).

Done at Brussels, on 18 April 2011

(signed)

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