



Opinion on the notification for prior checking from the Data Protection Officer of the Commission regarding the "*Selection procedure of SNEs at JRC*".

Brussels, 30 May 2011 (Case 2008-0141)

1. Proceedings

On 4 March 2008, the European Data Protection Supervisor (EDPS) received a notification from the Data Protection Officer (DPO) of the European Commission (Commission) for prior checking relating to the processing of personal data for the purpose of selecting seconded national experts (SNEs) in the Joint Research Centres (JRC) located at Ispra, Sevilla, Geel, Petten and Karlsruhe.

Questions were raised on 11 April 2008 to which the Commission replied on 14 July 2008. Some more clarifications were sought on 29 July 2008. No further information was provided by the JRC to the EPDS since that date. The EDPS decided to conduct an inspection at the JRC from 13 to 15 December 2010. This inspection concerned various recruitment procedures at JRC. On 13 December 2010, the controller sent to the EDPS a reply to the requests made in 2008. It was decided that this information would be taken on board in the inspection report of the EDPS, but that the Opinion itself would be adopted separately from the inspection report. On 17 February 2011, the EDPS submitted a draft of facts of the processing to the controller for verification. On 18 February 2011, the controller explained that since 2008, there have been some changes regarding the procedure on the selection of SNEs and a 2008 Commission Decision. The controller submitted to the EDPS a revised notification on 18 February 2011. On the same day, the EDPS asked the controller send all the attachments indicated in the notification including the privacy statement. On 21 February 2011, these documents were sent by the controller. On the same day, the EDPS sent to the controller a summary of facts with specific questions for further information in the light of the revised notification. The controller provided useful clarifications on the procedure on 14, 15 and 16 March 2011.

The draft Opinion was sent for comments on 18 April 2011 and these were received on 17 May 2011.

2. Facts

The controller of the processing operation is to be considered the Joint Research Center, represented in this case by its Director of Resource Management. The JRC Human Resources Unit (JRC HR Unit) is responsible for establishing the internal procedures and verifying their execution. DG Human Resources and Security (DG HR) establishes the general procedure to be followed according to the legal basis, Commission Decision C(2008) 6866 of 12.11.2008.

The selection of the SNEs is carried out by an ad hoc internal selection panel for each Institute/Directorate, also responsible for the preparation of the SNE's vacancy notice.

In addition, the Director-General of JRC and the Director-General of DG HR have a joint Appointing Authority on the SNEs' selection procedure.

Legal basis

The legal basis of the processing operation is the Commission Decision C(2008) 6866 of 12 November 2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training, entered into force on 1 January 2009 ("the SNE Rules").

As stated in article 25 of the above-mentioned Commission Decision, both JRC and DG HR have a joint Appointing Authority (AIPN) on the SNEs files.

Data subjects

The data subjects are all candidates who apply for the position of national experts at the JRC.

Purpose

The purpose of the processing operation is to select a candidate for the position of SNE in a JRC Institute/Directorate. A file is constituted and managed within the framework of the selection procedure.

Procedure of the processing operation

The different steps of the selection and secondment procedure, as indicated in the notification are as follows:

- Publication of each JRC vacancy notice at the Permanent Representations or Diplomatic Missions of third countries to the E.U, via DG HR.B.2 in Brussels once a month,
- Reception of CVs (Europass model) by DG HR.B.2 which then sends them to the JRC HR Unit; the applications are then forwarded to the Management Support Unit ("the MSU") of the Institute/Directorate that published the vacancy notice,
- Final selection of candidates for SNE position based on a CV or interview (the ad hoc internal selection panel consists of a MSU representative and Unit representatives),
- Secondment request file preparation by the MSU of the interested Institute/Directorate,
- Proposal for the selected candidate as a SNE is sent to the JRC HR Unit
- File verification by the JRC HR Unit,
- First letter sent by the JRC HR Unit to the employer requesting documents and declarations (if necessary, before the first letter to the employer, the JRC HR Unit requests a nationality derogation (for third country nationals) and/or employer authorisation to DG HR),
- Reception by the JRC HR Unit of all the requested documents from the employer and the SNE,
- Request of medical aptitude to the Medical Services (Ispra or Luxembourg),
- Request for "Nulla Osta" to the JRC Ispra Security Service,
- Preparation of the letter to Permanent Representation/Diplomatic Mission requesting officially the selected SNEs secondment by the JRC Director-General,
- File check and agreement by DG HR.B.2,

- Letter sent by the JRC Director-General to the Permanent Representation/Diplomatic Mission requesting officially the selected SNE's secondment,
- Reception of the agreement by the Permanent Representation/Diplomatic Mission,
- Preparation of the entry into service by the JRC HR Unit.

Selection panel of each Institute, their minutes and evaluation sheet

According to the procedure, the MSU of each Institute/Directorate transfers the original of the minutes and evaluation sheet of the selection panel to JRC HR Unit. The JRC HR Unit, being responsible for the secondment procedure, needs to check that the selection procedure has been followed in accordance with the rules in force. At the end of the secondment procedure the official secondment request letter addressed to the Permanent Representation/Diplomatic Mission has to be agreed by DG HR, which has a joint AIPN with JRC. In order to agree on the secondment request letter, the DG HR needs to check all the documents related to the selection of the candidate. For this purpose JRC HR Unit transfers copies of all the documents to DG HR, including the minutes and evaluation sheet of the selection panel. Only the JRC HR Unit keeps the original of the minutes and evaluation sheets.

Interested candidates are requested to send only their CVs to the Permanent Representation/Diplomatic Mission of their country who will forward them to DG HR.

Once the candidates are selected by each Institute/Directorate, they are required to provide the following data:

- Personal details' form signed and dated (this form asks for identification data, diplomas awarded and date, working languages, current professional activity with description of work, name and address of employer, any allowances received from the current employer in relation with the secondment and the amount, other professional activities during the last three years and whether the candidate has a physical handicap that requires special measures to be taken to be able to carry out his/her work),
- Updated CV with the list of publications,
- Certified true copy of university diplomas,
- Original criminal record extract(s),
- Copy of the passport/ ID card (if applicable also for family members),
- Family/civil status certificate,
- Marriage certificate and children's birth certificates (where applicable),
- Medical certificate of good health,
- Proof of cover of expenses both for medical treatment and hospitalisation in the country where the expert will be seconded, valid for the whole period of secondment (ex: E111/E106 form, European Health Insurance Card, private insurance coverage, etc.),
- Statement on the expert's honour according to Articles 6 and 7 of the SNE Rules,
- Declaration of the employer according to Article 6(5) of the SNE Rules,
- Declaration of the employer stating that he/she has been their employee during at least the 12 months preceding the date of the application, according to Article 1 (1) of the SNE Rules,
- Declaration of the employer according to Articles 17 to 19 of the SNE Rules,
- Declaration of the employer on the nature of the employer according to Article 1(2) of the SNE Rules.

In addition, for Karlsruhe:

- Recent criminal records extract issued by the competent authorities of each country in which the candidate has lived for more than 3 months over the last 10 years,
- Declaration concerning the personal reliability screening ("Sicherheitsüberprüfung" form), which should be filled in and signed in original for a mandatory security check carried out by the competent German authorities and required for all staff working in nuclear installations¹. There is a detailed information note at the back of the document about the security purpose of submitting this document and other important elements. Data subjects are entitled to refuse the execution of a personal reliability screening.

Manual and Automatic processing operation

The procedure for the selection of candidates as SNEs and the secondment procedure in all JRC Institutes/Directorates is both manual and automatic. Different templates are used for the management of the paper version of the SNE's file. Furthermore, a number of data (data of the selected candidates only) are registered in the SIRE system for the exclusive use of the file managers: gender, civil status, maiden name, marital name, usual name, first name, second name, birth date, birth country, birth town, nationality, mother tongue, other languages, address in the place of origin, address in the "affectation" place (new workplace), DG, site, job number, personnel number, name of the employer, working place (town and country), country of the permanent representation, starting date and ending date of secondment, kind of contract, rights to be used by the PMO for the salary payment.

All external correspondence is scanned and saved in ARES (Advanced REcords System).

Internal Recipients

- DG HR.B.2. Before the selection of the candidate, it receives the vacancy notice and a copy of the CV of all the candidates. After the selection (concerning the candidates who are selected only), it receives the vacancy notice, a copy of the CV, the personal details' form, all the declarations from the employer, the statement on the expert's honour, the minutes of the selection panel and evaluation sheet, a form "*Demande de détachement d'un expert national détaché*", the letter to the Permanent Representation or Diplomatic Mission to be agreed by DG HR.B.2,
- The JRC HR Unit for all the Institutes receives the vacancy notice, a copy of all the CVs received for the selected candidates only, a copy of all the documents required to be submitted by the selected candidate, the minutes of the selection panel and evaluation sheet, proposal for the admission of a national expert on secondment to the JRC, a form "*Demande de détachement d'un expert national détaché*". The JRC HR Unit stores the SNEs data in the SIRE system and in paper files),
- The MSU of each JRC Institute/Directorate receives a copy of all the CVs of the selected candidates, if applicable a copy of the note requesting the derogation of the nationality and/or the authorisation for the employer, a copy of the letter to the employer and a copy of the letter to the Permanent Representation/Mission,
- The JRC Director-General receives with the letter to the Permanent Representation/Diplomatic Mission which he should sign, a copy of the CV of the selected candidate,

¹ In this case the German nuclear security regulation applies, namely Article 12b of the "Atomgesetz and Atomrechtliche Zuverlässigkeitstueberprüfung" which asks for specific documents and security examination for people working with nuclear material.

the personal details' form, all the declarations from the employer, the statement on the expert's honour, the minutes of the SNE's selection panel and evaluation sheet, a form "*Demande de détachement d'un expert national détaché*", the letters from the Permanent Representations/Missions accepting or not the proposal for secondment,

- The Medical Services of Ispra and Luxembourg receive the original medical certificate and "*Professional Hazards Sheet*" in order to issue the medical aptitude certificate. The Medical service in Luxembourg also requests blood tests and a urine analysis, which they receive directly from the candidate,
- the JRC Ispra Security Service receives the original criminal record extract, copies of the passport, the CV, the personal details' form and the job description in order to issue the Nulla Osta,
- the Welcome Desk in Ispra receives notification of the arrival of the SNE. The other remote sites (Management Support Units) are informed of the arrival of the SNE by the JRC HR Unit
- PMO 8 can visualise the data inserted in the SIRE system by the JRC HR Unit. The data and rights of the SNEs are recorded only by the JRC HR Unit. The PMO uses another part of the SIRE system for the payments.

External recipients

- The German competent authority for security controls (for Karlsruhe only)
- The Permanent Representations receive a letter requesting the expert's secondment, which contains the name and surname of the SNE, the name of the employer the foreseen dates for the secondment the duration of the secondment and a copy of the SNE Rules,
- The Diplomatic Missions for third country candidates receive the same letters for their candidates.

Right of access and rectification

The data subject may consult his/her data at any time. In case of rectification, modification, blockage and erasure, duly motivated requests must be submitted to the functional mailbox address of the controller: JRC-RECRUITMENT-DATA-PROTECTION@ec.europa.eu.

Data are evaluated on a case-by-case basis and where the request is accepted, the relevant modifications are done within 14 days from the corresponding request.

Right of information

According to the notification, data subjects are informed of their rights by a "*privacy statement*" document which is sent to them as soon as they are contacted by e-mail or letter. The privacy statement is also available on the JRC website. This document indicates the identity of the controller, the purpose of the processing operation, the recipients involved in the processing, the existence of the right of access to and the right to rectify the data concerning him/her, the legal basis of the processing, the time-limits for storing data of the recruited candidates and the right to have recourse to the EDPS.

Furthermore, the first paragraph of the privacy statement is entitled "*What is a staff file?*" and it also indicates that "*The Director for Resource Management of the Joint Research Centre (JRC) has taken the responsibility, as Controller of the processing operations on personal data covered by the notification DPO-652. The Human resources Unit and the Management Support Unit (MSU) Heads in the Institutes/Directorates of the Joint Research Centre (JRC) act as Personal Data Processors*".

Retention policy

According to the privacy statement, the electronically stored secondment files of selected SNEs are kept for 10 years after the entrance into service of the selected candidate.

Data of non-selected candidates are kept for 2 years after the entrance into service of the selected candidates.

The minutes and evaluation sheet for each candidate, selected and non-selected ones are kept according to the above retention periods respectively.

The paper files of SNEs are classified and stored for a period of 10 years after they leave the service.

The medical aptitude certificate which is delivered by the medical service is kept in the SNE's personal file on recruitment.

The original of the criminal record extract is sent to the JRC Security Service where it is kept following the rules in force in the Security Service.

In the case of Karlsruhe, criminal record extracts and health certificates (only with regard to the national legislation on radiation protection - no general health certificates) are sent to the competent Ministry following German national laws. The MSU of Karlsruhe only keeps track of the dates when these documents were received/transmitted to the Physical Protection Group at ITU which interacts then with the Ministry. The MSU of Karlsruhe also keeps track of the Ministry's decision, via formal information from the Physical Protection Group, without any details. The MSU only encodes "*giving access*", or "*limited access*", or "*refusing access*".

Security measures

All data collected are electronically stored on the servers located in the JRC Data Centre which fulfil the JRC security decisions and provisions.

Paper documents are archived in physical files which are stored and locked at the premises of the JRC HR Unit Only authorised staff members who are in charge of managing the SNE's files have access to the premises.

Access to SIRE and ARES is allowed by authorised staff with a username and password.

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 the JRC Institutes/Directorates, European Union bodies in the exercise of activities which fall within the scope of EU law². The processing of the data is done partly by automatic means (databases SIRE and ARES) and when the processing is manual (use of different templates, evaluation sheets etc.), it forms part of a filing system. Therefore, the Regulation is applicable.

² 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.

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 that occurs in the framework of the SNE's selection in JRC aims at evaluating the capacity of each candidate for a post as a SNE. In order to carry out such an evaluation, the data controller will perform various assessment activities. The data processing operations therefore fall within Article 27(2)(b) and must be prior checked by the EDPS.

In addition, since all selected candidates have to provide an original criminal record extract which may reveal their involvement in criminal activity, the processing is also subject to prior checking under Article 27(2)(a) (processing of data relating to [...] offences, criminal convictions). Furthermore, the fact that medical aptitude certificates are processed, the processing operation qualifies for prior checking under Article 27(2)(a) ("processing of data relating to health").

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. 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 4 March 2008. However, due to the fact that a revised notification was sent to the EDPS on 18 February 2011, the EDPS considers this date as the date of receipt of the notification. 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 23 days for further information from the controller and 29 days for comments. Consequently, the present Opinion must be delivered no later than on 10 June 2011.

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 SNEs are found in the SNE Rules mentioned in the facts. This legal instrument serves as legal basis for the selection procedure of SNEs in the JRC Institutes.

As concerns the condition of necessity under Article 5(a), the collection of CVs and other detailed information related to the candidates' academic and professional background should be considered as "*necessary for performance of a task carried out in the public interest*" of selecting the most suitable SNEs according to the requirements of each JRC Institute/Directorate and the SNE rules. The EDPS notes that the selection procedure is considered necessary for the management and functioning of the JRC. The processing should therefore be considered as lawful.

The collection of personal data in the declaration concerning the personal reliability screening for the Karlsruhe site ("Sicherheitsüberprüfung" form) is based on a legal obligation the nuclear site is subject to (Article 5(b)).

3.3 Processing of special categories of data

Article 10(1) of the Regulation establishes that "*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*". In the present case, the prohibition may be lifted if grounds can be found in Articles 10(2) and 10(5) of the Regulation.

i) Medical certificate of good health

According to the notification and the privacy statement, the selected candidates are requested to provide a medical certificate of good health. This information, although not directly medical data, must be considered as data relating to health in terms of Article 10 of the Regulation. The legal basis for processing medical certificates regarding officials and other servants can be found in Articles 28(e) and 33 of the Staff Regulations, and Articles 12(d) and 13 of the Conditions of Employment of Other Servants which require that a candidate may be recruited as a member of the staff only on condition that "*he is physically fit to perform his duties*". Although the Staff Regulations and Conditions of Employment of Other Servants are not directly applicable to SNEs, by analogy, it can be considered that the reasons for requesting such a medical certificate can be applied to SNEs. Thus one can consider that the collection of a medical certificate can be justified on the basis of Article 10(2)(b) of the Regulation according to which the prohibition shall not apply where the processing is "*necessary for the purpose 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*".

As to the blood and urine results requested by the medical service of Luxembourg and the processing of aptitude certificates in both Ispra's and Luxembourg's medical services, the EDPS refers to his recommendations in the two following Opinions: Opinion on the management of the activities of the medical service in Brussels and Luxembourg (case 2004-232) and Opinion on processing of medical data by the medical service at Ispra/Seville (2007-0329). Both Opinions are applicable concerning the processing of data related to health in the context of the selection of SNEs by the JRC.

ii) Disability

In the Personal details' form, the selected candidate is requested to communicate to JRC information related to any of his/her physical disability, which would require special measures in order to be able to carry out his/her work. Such processing is considered necessary for the JRC to comply with its specific obligations in the field of employment law,

namely to adjust the selection procedure according to the special needs of the candidates (extra time, building and room accessibility where the interview will be conducted etc). Therefore the condition of Article 10(2)(b) of the Regulation seems to be satisfied. Furthermore, on the basis of Article 10(2)(a) of the Regulation, the EDPS considers that since the candidate voluntary provided information about his/her physical disability and signed the personal details' form, he/she has given his/her consent.

iii) Other special categories of data

Candidates through their CV and the list of their publications may reveal information about them which can be of a sensitive nature, namely political opinions, religious or philosophical beliefs, or trade union membership. If this occurs, it should be considered that candidates have given their consent to the processing of such data, thus, the condition of Article 10(2)(a) of the Regulation would be met.

iv) Original criminal record extract

According to the notification and privacy statement, selected candidates are required to provide an original criminal record extract. The legal basis for processing a criminal record extract is found in Article 28 of the Staff Regulations, which requires that a candidate may be recruited as a member of the staff only on condition that he "*enjoys his full rights as a citizen*" and "*he produces the appropriate character references as to his suitability for the performance of his duties*"³. This legal instrument provides the basis to process data related to criminal convictions⁴. Whereas these articles are not directly applicable to SNEs but only to officials and other servants, the EDPS considers, like in the case of aptitude certificates that given the *rationale* behind the same Articles, they could be applied *mutatis mutandis* to SNEs. The reasons that justify the processing of this category of data from officials/other servants also apply to SNEs who are expected to ensure the same guarantees. The processing of a criminal record extract can therefore be justified on the basis of Article 10(5) of the Regulation, according to which 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*".

v) "Sicherheitsüberprüfung" form for Karlsruhe Institute

Requests for security clearance at the Karlsruhe site ("*Sicherheitsüberprüfung*" form ") may lead to the processing of special categories of data to the extent that the refusal of a security clearance may give an indication of the presence of an offence committed by the person concerned. The EDPS considers that this processing may be authorised on the basis of Article 10(5) of the Regulation since the processing occurs in order to respect a national legal obligation to which the site is subject (Article 12.b. of the German Atomic Act (*Atomgesetz* and *Atomrechtliche Zuverlässigkeitüberprüfung*).

3.4. 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*".

Following an exchange of e-mails with the controller of the processing under analysis, it has been confirmed that the interested candidates submit only their CVs for the vacancy notice

³ See also Articles 12 (2) and 82 (3) of the Conditions of Employment of Other Servants.

⁴ In French the Staff regulations read "*garanties de moralité*".

and the selected candidates are required to provide all the documents listed in the facts of the present Opinion. The EDPS recommends that this information is clearly stated in the notification as well as in the privacy statement (see further, point 3.8 on "*Right to information*").

On the basis of the information from the controller, the EDPS considers that the data processed in pre-selection and selection phase 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 requirements of the JRC Institute's/Directorate's vacancy notice for a SNE position, the JRC must necessarily know their academic background and professional experience, relevant publications etc., in order to be able to select the most suitable candidates for the published position. As for the documents submitted by the selected candidates, they are relevant and proportional for the management of the SNEs files, their rights and obligations in conformity with the SNE Rules and Staff Regulations. The EDPS therefore considers that the data processed in the context of the processing in question, comply with Article 4(1)(c) of the Regulation.

Accuracy: Article 4(1)(d) provides that personal data must be "*accurate and, where 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 further analysis on "*Right of access and rectification*", point 3.7). In this way, the JRC ensures that the data processed are accurate, complete and up to date under Article 4(1)(d) of the Regulation.

Selected candidates are requested to provide criminal record extracts. Even if it is in principle lawful for the JRC to collect this data at the moment of recruitment for transmission to the Ispra Security Service, the data contained in this criminal record can no longer be considered as accurate after the date of reception of the document. On this basis, the JRC should find a system whereby information about crimes that have expunged should be deleted. A solution would be a "*standard form*" stating that the person is suitable for the performance of his duties kept in the file whereas the criminal record would be returned to the person.

Fairness and Lawfulness: Article 4(1)(a) also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 3.2) and fairness will be dealt with in relation to information provided to data subjects (see point 3.8).

3.5. Conservation of data

Article 4 (1) (e) of the Regulation 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*".

Retention periods of selected and non-selected candidates

The EDPS notes that the retention periods of both categories of data subjects, selected and non-selected ones, as indicated in the facts are considered reasonable and necessary for the purposes for which the data are collected under Article 4(1)(e) of the Regulation.

However, the EDPS notes that the data retention period of 2 years in the case of non-selected candidates is indicated, neither in the notification nor in the privacy statement. This information should be added to both documents accordingly.

Retention period of the criminal record extracts

According to the notification, the original of the criminal record extract is sent to the JRC Security Service where it is kept following the rules in force in the Security Service. The JRC HR Unit does not therefore retain the criminal record extract in the SNE files. The issue of the retention period of such files is examined in the EDPS Opinion 2007-380 "ARDOS"⁵ and in the ambit of the EDPS inspection at JRC (case 2010-834).

Retention period of other special categories of data

Sensitive data, such as data on disability in the case of selected candidates, can be kept to the personal file, in case special arrangements are required, throughout the whole period of employment⁶.

3.6. 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 to (i) 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 data subjects in question are carried out among different responsible units and services of the JRC, DG HR, the Institute's/Directorate's selection panel, medical services, the Welcome Desk etc. Furthermore, other potential recipients could be the Court of Auditors, the Internal Audit Service, OLAF and the EDPS. These are transfers within JRC or between EU institutions and bodies, thus Article 7(1) of the Regulation applies. This provision 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 Article 7(1) of the Regulation, 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 JRC for the purposes described in the facts 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, determine the aptitude of the selected candidates etc. As for the potential recipients between JRC and 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.

As to the transfers regarding data sent to the JRC Ispra Security Service, please also refer to the Opinion 2007-380 "ARDOS". The legitimacy and necessity of this transfer will depend on the competence of the JRC ISPRA Security Service.

⁵ The Opinion was issued on 15 December 2008.

⁶ EDPS Opinion of 2 February 2007 on recruitment procedure by the Community Plant Variety Office, (case 2006-351).

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 the German Ministry for security controls, in the case of Karlsruhe only and the Permanent Representations (PRs). These recipients are external recipients who are in principle subject to the national law adopted for the implementation of Directive 95/46/EC. The transfer of data to the German Ministry for security controls and to the PRs requesting the SNEs secondment may be justified under Article 8(a) of the Regulation 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*". The transfer to the recipients in question is indeed considered necessary for the performance of a task carried out in the public interest based on national legislation.

ii) Article 9

According to the notification, the Diplomatic Missions for third country candidates receive data regarding their SNE's secondment. These external recipients are not subject to national law adopted pursuant to Directive 95/46/EC. In such cases, the transfer of data may be justified under Article 9 of the Regulation, if JRC 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, the JRC should ensure respect for Article 9.

3.7. 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 and privacy statement, SNEs candidates are granted such rights. They may submit their request at any time to obtain access to their file to the functional mailbox address of the data controller.

Right of access

The EDPS recalls that candidates should also be able to have access to their entire file, comprising the merit points and evaluation sheet concerning them drafted by the selection panel of the Institute concerned. This principle has been underlined in the Guidelines on staff recruitment.

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 selection panel.

However, as concerns the candidates, the EDPS highlights that in the context of the processing under analysis, the candidates' right of access to the merit points, notes and assessment comments by the selection panel 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, enables candidates to see which elements were taken into account for the overall assessment and to see that the selection panel 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 of the selection panel, the JRC 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.

The JRC should therefore ensure that it does not restrict access more broadly than is justified on grounds of safeguarding the confidentiality of the deliberations and decision-making of the selection panel. 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/she received regarding his/her competences.

In the light of the above, the EDPS recommends that JRC sets up procedures to ensure that candidates have access to their own personal evaluation data⁷ after 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

Furthermore, the EDPS recalls JRC that, as it has been highlighted in the Guidelines on staff recruitment, it should grant the right of rectification to the SNE candidates regarding identification data at any time and it should introduce limitations regarding the rectification of eligibility and selection data after the deadline of the vacancy notice. 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*").

3.8. 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 provides for certain information to be supplied where the data have not been obtained from the data subject.

⁷ See also Working Party 29 Opinion no 4/2007 on the concept of personal data, pages 11 and 12.

During the selection procedure under analysis, personal data are obtained directly from the data subject (CV, various documents to provide) and from other parties involved in the procedure (selection panel, medical service, PRs/Diplomatic Missions etc.). 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 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 JRC should inform all candidates about:

- all the recipients as described in the facts,
- the data retention period of the non-recruited candidates,
- the procedures in place in view of granting access to the evaluation results of the candidates upon request and any limitation thereof,
- the right of rectification in the case of identification data, the limitations regarding eligibility and selection data after the deadline of the vacancy notice and the scope of restricting the right of rectification under Article 20(1)(c) of the Regulation in the case of such limitations.

The privacy statement should therefore be amended accordingly and a revised copy should be sent to the EDPS.

Other elements to be included/modified in the privacy statement and notification

The privacy statement and notification list various data to be submitted by the candidates but it is unclear as to what stage of the procedure these data are processed and for what purpose. The EDPS would like to draw the attention to this important lack of information and clarity and invites JRC to make a distinction between pre-selected and selected candidates in view of avoiding any confusion. The EDPS therefore recommends that the notification and privacy statement clearly indicate that the interested candidates should submit only their CVs for the vacancy notice and only the selected candidates are required to provide the documents listed in the facts of the present Opinion. In this regard, JRC should also mention in the privacy statement whether the data collected are mandatory or voluntary, as well as the possible consequences of failure to provide the data requested.

Moreover, the EDPS finds the title of the first paragraph "*What is a staff file?*" of the privacy statement irrelevant to the purpose of the privacy statement. It is more reasonable to dedicate the very first paragraph of the privacy statement to a clear and detailed explanation of the selection procedure of SNEs and the various actors involved. An information which is missing and should be included in the description of the procedure concerns the fact that the selection of candidates for the SNE posts is carried out by an internal ad hoc selection panel of the Institute/Directorate concerned. This information should be mentioned in the notification as well.

The EDPS points out that the following information in the privacy statement can be misleading: "*The Director for Resource Management of the Joint Research Centre (JRC) has taken the responsibility, as Controller of the processing operations on personal data covered by the notification DPO-652. The Human resources Unit and the Management Support Unit (MSU) Heads in the Institutes/Directorates of the Joint Research Centre (JRC) act as Personal Data Processors*".

With regard to the issue of "controller", despite the notification form which indicates a specific person as the controller, the EDPS clarifies that the controller of a processing operation, under the meaning of Article 2(d) of the Regulation, is to be considered the

institution itself and not a person appointed in it, who is a representative of the same institution.

As to the issue of "processor", according to Article 2 (e) of the Regulation a "*processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller*". Furthermore, when processors are involved in a processing operation, Article 23 should in principle be applied, namely a legal act or contract should be concluded between the controller and processor and the requirements of confidentiality and security under Article 23(2) of the Regulation should be complied with. Taking into consideration that the JRC HR Unit and the MSU are services/units within the JRC, they do not seem to fall under the definition of a processor as the Regulation defines it.

In the light of the above, the EDPS would therefore recommend that

- it is explicitly indicated in the privacy statement that the controller is the JRC, represented in this case by its Director of Resource Management and
- the above paragraph in the privacy statement is re-formulated explaining the role of the JRC HR Unit and MSU within the processing operation under analysis.

3.9. Security Measures

According to Articles 22 and 23 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 JRC do not comply with Article 22 of the Regulation.

Nevertheless, the EDPS draws the attention to the sensitivity of the data related to the minutes of the selection panel of each Institute and the evaluation sheets regarding the SNE candidates. The EDPS recommends that JRC sets up a procedure according to which:

- the selection panel transfers the minutes and evaluation sheet to the JRC HR Unit in a sealed envelope indicating "strictly confidential" and
- both selection panel and DG HR destroy the minutes and evaluation sheets immediately after they are no longer necessary for the purpose for which they were transmitted to them.

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 the JRC should:

- indicate the 2-year retention period of non-selected candidates in the notification and privacy statement,
- keep any data related to disability to the personal file, in case special arrangements are required, throughout the whole period of employment,

- explicitly reminds all recipients that they should process the personal data they receive only for the purpose for which they were transmitted,
- set up procedures to ensure that candidates have access to their own personal evaluation data during the selection procedure taking into account any restriction that may be applicable under Article 20(1)(c), as described in section 3.7 above,
- grant the right of rectification in the case of identification data and introduce limitations in the case of eligibility and selection data after the deadline of the vacancy notice,
- revise the privacy statement and include all the recommendations made in point 3.8 and sent a copy to the EDPS accordingly,
- set up a procedure according to which:
 - the selection panel transfers the originals of the minutes and evaluation sheet to the JRC HR Unit in a sealed envelope indicating "strictly confidential" and
 - both selection panel and DG HR destroy the copies of the minutes and evaluation sheets immediately after they are no longer necessary for the purpose for which they were transmitted to them.

Done at Brussels, 30 May 2011

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