

**Opinion on the notification for prior checking
received from the Data Protection Officer (DPO) of the Council of the European Union
relating to the ‘Mobility Procedure’ case**

Brussels, 27 July 2011 (Case 2011-648)

1. Proceedings

On 30 June 2011, the Data Protection Officer (DPO) of the Council of the European Union (**Council**) submitted to the European Data Protection Supervisor (**EDPS**) a notification pursuant to Article 27(3) of Regulation (EC) No 45/2001 (‘Regulation’) on the mobility procedure at the Council.

The EDPS contacted the Council’s DPO on 19 July 2011. On 27 July 2011, the draft opinion was sent to the DPO for observations, which were received on 27 July 2011.

2. Facts

This opinion concerns the new mobility procedure at the General Secretariat of the Council (‘GSC’) organised by the Mobility Department which **enters into force on 1 August 2011**. The **purpose** of the mobility procedure established by Decision No 101/2011 of the Secretary-General of the Council of the European Union¹ (‘Decision No 101/2011’) is to implement Article 29(1) and (2) of the Staff Regulations of Officials of the European Communities by collecting and assessing applications from candidates responding to a vacancy notice and selecting eligible candidates. The new feature of the mobility procedure under examination is that, subject to certain conditions stipulated in Articles 4 and 10 of Decision No 101/2011, the Appointing Authority may decide to proceed simultaneously with publication, and subsequently selection, for internal candidates, officials of other institutions, and successful candidates on relevant open competition reserve lists who submit an application.

The mobility **procedure** comprises a mixed processing operation – paper and computerised documents - consists of the following stages:

- **Publication**
 - Under Article 4(2) of Decision No 101/2011, the Appointing Authority may, under certain conditions, decide to open a post to officials of other institutions at the same time as for internal candidates and, in that situation, under Article 4(3) of Decision No 101/2011, it may also invite successful candidates on relevant open competition reserve lists to submit an application.

¹ Decision No 101/2011 of the Secretary-General of the Council of the European Union of 21 June 2011 on mobility procedures at the General Secretariat of the Council, repealing Decision No 150/83 of the Secretary-General of the Council of 25 March 1983.

- Applications received by the Mobility Department following publication of a vacancy notice are collected at internal and interinstitutional level and following calls for expressions of interest sent to successful candidates in open competitions via the relevant EPSO lists.
 - The eligibility of the candidates is assessed by the Human Resources Directorate (HRD) which, in accordance with Article 5(5) of Decision No 101/2011, draws up the list of eligible candidates on expiry of the publication deadline, the concluding documents containing certain data relating to the candidates (surname, first name, category and grade, nationality).
 - All data relating to the candidates and to their selection are encoded in the 'Etat des positions' [Current status] application on ARIANE.
- **Selection**
 - Applications from eligible candidates are sent to the recruiting department, the members of the HRD responsible for selection and, if appropriate, the members of the selection boards set up by the Appointing Authority. Under Article 10(2) of Decision No 101/2011, the representative of the recruiting department and the HRD official responsible for the selection procedure are authorised to access certain parts of the personal files of eligible candidates for the duration of the procedure.
 - Under Article 10(1) of Decision No 101/2011, applications from internal candidates shall be examined before applications from other candidates. Nevertheless, under Article 10(3) of Decision No 101/2011, where a post has been opened to interinstitutional candidates and to successful candidates on open competition reserve lists, the Appointing Authority is not obliged to reject internal candidates before examining interinstitutional candidates or successful candidates on open competition reserve lists.
 - In principle, pursuant to Article 10(4) of Decision No 101/2011, all candidates whose profile matches that described in the vacancy notice are interviewed, but a prior appraisal of the candidates may be carried out on the basis of the application forms.
 - Following selection, the documents containing the outcome of the selection for each post are drawn up (selection board reports giving the surnames and first names of the candidates and their classification/evaluation, and preparation of evaluation grids for each candidate).
 - Following the Appointing Authority's decision about the candidates, the institution of origin is notified of the name(s) of the selected candidate(s) and the correspondence with the candidates takes place.

The controller is the Council, represented by the Head of DGA 1A - Human Resources, DGA 1A RESS HUM – Staffing and Mobility Unit.

The data subjects are Council officials, officials of other Community institutions, and successful candidates on relevant EPSO competition reserve lists.

The following **categories of data** may be processed in the procedure:

- **For internal candidates:** the data in their online CV for mobility on the ARIANE portal and in the CHORUS database
- **For interinstitutional candidates:** the data on the electronic form attached to the vacancy notice
- **For successful EPSO competition candidates:** the data in their CV and their 'competency passport', and more specifically:
 - personal data identifying the candidate (surname, first name, date of birth, sex, nationality and official number, if any),

- information supplied by the candidate for the purpose of arranging interviews (office address, e-mail address, telephone number),
- information supplied by the candidate for the purpose of assessing whether he or she satisfies the conditions of eligibility stipulated in the vacancy notice (category and grade, educational qualifications, professional experience, proof of official status),
- any other information which the candidate considers relevant for his or her file.

The **information on the data subjects** is communicated via a 'Privacy statement' as follows: identity of the controller, purposes of the processing, type of data processed, legal basis of the processing, recipients of the data, storage periods, right of access and rectification and right of referral to the EDPS at any time. There is a link is available which refers to this 'Privacy statement' on the home page of the 'Internal mobility' website at the GSC and in interinstitutional vacancy notices published by the GSC via the interinstitutional portal, and also in vacancy notices submitted to successful candidates on open competition reserve lists via their EPSO account. .

The data processed in the procedure may be communicated to the following **recipients**:

- *Recipients of the application documents:*
 - authorised members of the GSC Directorates-General requesting publication of the vacancy notices, for posts within their jurisdiction;
 - members of the 'Human Resources' Directorate responsible for selection;
 - members of the selection boards appointed by the Appointing Authority;
 - members of the selection boards designated by the Staff Committee.
- *Recipients of concluding documents, publications and reports of selection boards:*
 - authorised members of the GSC Directorates-General requesting publication of the vacancy notices, for posts within their jurisdiction;
 - the Mobility Department hierarchy;
 - the Appointing Authority;
 - if appropriate, the members of the joint consultative Mobility Committee (in accordance with Article 1(h) of Decision No 101/2011, this is a joint consultative committee on mobility responsible for monitoring the implementation of mobility policy).
- *Recipients of certain administrative data necessary for monitoring procedures concerning reassignment within the institution or interinstitutional transfer:*
 - members of the Staffing Office;
 - members of the Individual Rights Unit (DGA 1B).

The **procedures guaranteeing the rights of the data subjects** shall conform to Section 5 of Council Decision 2004/644/EC of 13 September 2004 (OJ L 296, 21.9.2004, p. 20)².

The **policy on data storage** comprises the following points:

- All candidate CVs are printed; these CVs in paper format shall be destroyed immediately at the end of the selection procedure, except for the CVs of the selected interinstitutional candidates, which are sent to the Staffing Office and to the Individual Rights Unit (DGA 1B).
- CVs in electronic format on the Mobility Department server and all documents concerning the selection procedure, including the evaluation grids and the official correspondence with the candidates, on paper and/or in electronic form on the Mobility Department server shall be stored for **three years** in order to permit a response if a candidate complains to a competent authority.

² http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_296/l_29620040921en00160022.pdf .

- The lists of selected candidates and, if appropriate, the opinions of the joint Mobility Committee, shall be stored for a period of *five years*.

The following **security measures** apply to the mobility procedure: the data are encoded in the 'Etats des positions' [Current status] application on the ARIANE portal for administering and monitoring the various stages of the procedure and for the compilation of statistics (the data are rendered anonymous). The electronic files are stored on the Mobility Department server. Communication with candidates and with the departments concerned takes place by e-mail from an office address (office e-mail address service.mobilite@consilium.europa.eu), use of the address and access to it being reserved for Mobility Department staff. Data in paper form are kept on the premises of the Mobility Department (cabinets which are locked each evening). Access to these premises is restricted to Mobility Department staff via personalised electronic access keys.

3. Legal analysis

3.1. Prior checking

Prior checking concerns the processing of personal data within the meaning of Article 2(a) of the Regulation for the purpose of implementing Article 29(1) and (2) of the Staff Regulations by the collection and evaluation of applications from candidates replying to a vacancy notice and the selection of eligible candidates within the framework of the mobility procedure at the Council.

Pursuant to Article 27(1) of the Regulation, 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 shall be subject to prior checking by the European Data Protection Supervisor'. The processing operation in the present case is subject to prior checking by the EDPS in accordance with Article 27(2)(b) of the Regulation, since the selection of staff is the primary purpose of the processing and the processing operations are intended to evaluate personal aspects relating to the data subjects, such as their ability, efficiency and conduct.

Some parts of the files are processed manually (e.g. all the candidates' CVs are printed), but the processed data are intended to form part of a filing system within the meaning of Article 3(2) of the Regulation (all data relating to the candidates and to their selection are encoded in the 'Etat des positions' [Current status] application on ARIANE). This processing therefore falls within the scope of the Regulation.

Following notification on 30 June 2011, the new mobility procedure enters into force on 1 August 2011. In principle, pursuant to Article 27(4) of the Regulation, the European Data Protection Supervisor delivers his opinion within two months following receipt of the notification, and for that reason would have preferred notification permitting a check during the two months preceding establishment of the processing operation. In this case, the two-month period ends after entry into force on 1 August 2011, and the check inevitably becomes an ex-post check. That makes it no less desirable to implement the recommendations made by the European Data Protection Supervisor.

The notification was received by e-mail on 30 June 2011. Pursuant to Article 27(4) of the Regulation, the EDPS is to deliver his opinion within two months. The draft opinion was sent to the Council on 27 July 2011 so the Council could submit observations, and those were communicated on that same day. This opinion must therefore be delivered by 30 August 2011 at the latest.

3.2. Lawfulness of the processing

The lawfulness of the processing has to be examined in the light of Article 5(a) of the Regulation which stipulates that data may be processed only if the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the European Union institution or body.

The processing operation involves the processing of the data of candidates responding to a vacancy notice and the selection of eligible candidates for the implementation of Article 29(1) and (2) of the Staff Regulations of Officials of the European Communities in the Council. That task is intended in particular to ensure ‘fair and equal treatment of all candidates’ (see Article 2 of Decision No 101/2011), which according to the communication to GSC staff on the new mobility procedure dated 22 June 2011 (CP 58/11) takes ‘due account of the importance of ensuring adequate career and professional development opportunities for GSC officials’. The processing of the data of candidates responding to a vacancy notice and the selection of eligible candidates seems necessary to perform that task.

The processing operation relating to the mobility procedure is based on Articles 235(4) and 240(2) of the Treaty on the Functioning of the European Union, Article 29(1) and (2) of the Staff Regulations of Officials of the European Communities and Decision No 101/2011 of the Secretary-General of the Council of the European Union. The lawfulness of the processing is therefore respected in terms of Article 5(a) of the Regulation since it is ‘necessary for the 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’.

3.3. Processing of special categories of data

Article 10(1) of the Regulation states 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’. For candidates who were successful in EPSO competitions, the transfer of data from their CV and their ‘competency passport’ permits the transmission of ‘any other information which the candidate considers relevant for his or her file’. The possibility that a candidate may supply sensitive data covered by Article 10(1) of the Regulation cannot be ruled out. However, the spontaneous communication of such data may be considered justified in terms of Article 10(2)(a) of the Regulation³. One can in fact legitimately consider that the candidate has given his or her explicit consent to the processing of these particular categories of data which he or she has supplied him/herself.

3.4. Data quality

Pursuant to Article 4(1)(a), (c) and (d) of the Regulation, personal data must be processed fairly and lawfully, they must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. The data must also be accurate and, where necessary, kept up to date.

³ Guidelines concerning the processing operations in the field of staff recruitment (‘Guidelines’), in: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf, page 3.

The *accuracy* of the data processed is guaranteed in part by the fact that certain data are supplied by the candidates concerned. Also, the invitation to make use of the rights of access and rectification (see point 3.8) helps to ensure that the data processed are accurate and kept up to date.

Adequacy, relevance and proportionality. In the case of interinstitutional candidates, the data are taken from an electronic form attached to the vacancy notice ('Application for a transfer'), which contains a section entitled 'Personal skills and competences acquired in the course of your life and career but not necessarily covered by formal certificates and diplomas'. When such an application form is used, the questions on the form must be analysed in the light of Article 4(1)(c) of the Regulation⁴, which stipulates that 'the personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed'.

The parts of the question concerning 'personal skills and competences acquired in the course of your life...' on page 3 of the 'Application for a transfer' form merits special attention⁵. The EDPS notes that in the form this question is clarified as follows: 'If necessary, make a distinction between skills and competences which are professional (knowledge, know-how), social (communication, sense of duty, teamwork) or organisational (coordination and administration of people, projects and budgets)...'. Nonetheless, the question may very well lead candidates to supply information about skills, interests or activities which have no connection with the job for which they are applying and are therefore *not work-related*. The EDPS recognises that a question of this type may generate information useful to staff members participating in the recruitment procedure, but still considers that such a question is not entirely appropriate in the light of the purpose of the application form⁶.

The EDPS recommends making it clear that the parts of the question relating to 'personal skills and competences acquired in the course of your life...' (page 3 of the 'Application for a transfer' form) are purely **optional** and ensuring that candidates who have not answered the optional questions will not be penalised on that account.

3.5. Data storage

Article 4(1)(e) of the Regulation provides 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'.

According to the notification, CVs in *paper format* are destroyed immediately at the end of the selection procedure, except for those of the selected interinstitutional candidates, which are forwarded to the Staffing Office and to the Individual Rights Unit (DGA 1B), while CVs in *electronic format* on the Mobility Department server are kept for three years in order to permit a response in cases where a candidate complains to the competent authority.

The EDPS would point out that it is necessary to make a distinction between three categories of data subjects, namely recruited candidates, non-recruited candidates and non-recruited candidates whose names are placed 'on the reserve lists'⁷.

⁴ Guidelines, page 3.

⁵ Guidelines, page 4.

⁶ Guidelines, page 4.

⁷ Guidelines, page 5. In the procedure being assessed, Article 13 of Decision No 101/2011 of the Secretary-General of the Council of the European Union of 21 June 2011 provides for 'a ranking list of suitable candidates'.

According to the notification, the procedure distinguishes between selected candidates (for whom the lists and, where appropriate, the opinions of the joint Mobility Committee, are kept for five years) and all other categories of candidates and documents (which are kept for three years in order to permit a response if a candidate complains to a competent authority).

The EDPS notes that these specific periods for data storage are reasonable and not excessive in accordance with Article 4(1)(e) of the Regulation in regard to the categories of (1) recruited candidates and (2) non-recruited candidates, and (3) non-recruited candidates whose names are placed on the 'ranking list of suitable candidates'.

The EDPS asks the Council to examine the possibility of destroying documents concerning non-recruited candidates (whose names were not placed on the 'ranking list of suitable candidates') as early as possible.

3.6. Transfer of data

The Mobility Department forwards the data to the recruiting department, the authorised members of the GSC Directorates-General, the members of the HRD responsible for selection and the members of the various selection committees and other recipients in the Council (members of the Staffing Office and the Individual Rights Unit). In the case of internal transfers within the Council, the EDPS considers that transfer of the data to the recipients indicated conforms to the requirements of Article 7(1) of the Regulation.

The EDPS also notes that the recipients of these data may include the European Ombudsman, the EDPS, the internal auditor and the Council's DPO, together with the Civil Service Tribunal (CST) and the General Court in connection with appeals. In that case, the transfers are justified since they are necessary for the legitimate performance of tasks within the sphere of competence of the recipient.

In accordance with Article 7(3) of the Regulation, the EDPS recommends that the recipients be explicitly reminded at the time of the transfer that the data should be processed only for the purposes for which they were transmitted.

3.7. Processing including an identification number

In the case of candidates who were successful in an EPSO competition, the data processed include the official number, where appropriate. Under Article 10(6) of the Regulation, 'the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body'. The official number of a candidate who was successful in an EPSO competition may be obtained from the Council in the course of the mobility procedure, because the EDPS considers that the official number is used in that connection to permit identification of the successful candidate and to facilitate the correct monitoring of the file. There is no reason to determine other conditions in this case.

3.8. Right of access and rectification

Article 13 of the Regulation gives the data subject a right of access to the personal data concerning him or her which are stored. Article 14 establishes the right to rectify the data. The right of access may be restricted in order to ensure that the deliberations concerning the selection of candidates remain secret. That restriction should be viewed in the light of

Article 20(1)(c) of the Regulation whereby the European institutions and bodies may restrict the application of Article 13 where such restriction constitutes a necessary measure to safeguard the protection of the rights and freedoms of others. Article 20(1)(c) of the Regulation may also apply in order to protect the rights of other candidates. In the context of selection, the right of rectification is restricted to the data classed as objective, as opposed to 'subjective' data concerning the evaluation of the data subject.

Candidates have the right to access their data and the right to rectify, erase and block those data in conformity with the provisions of Section 5 of Council Decision 2004/644/EC of 13 September 2004 (OJ L 296, 21.9.2004, p. 20)⁸. Those provisions fulfil the conditions of Articles 13 and 14 of the Regulation⁹.

Nonetheless, the EDPS recommends the Council to mention in the 'Privacy statement' the limits to the scope for exercising those rights resulting from Council Decision 2004/644/EC of 13 September 2004.

3.9. Information to be given to the data subjects

The provisions of Article 11 of the Regulation covering the information to be supplied when data have been obtained from the data subject are the ones which apply in this case, since – according to the notification – all the categories of data processed in the procedure are obtained from the candidates themselves (internal and interinstitutional candidates or candidates who were successful in an EPSO competition), if appropriate via a database which they have completed (e.g. online CV).

The information for the data subjects is provided by a 'Privacy statement'. The home page of the 'Internal mobility' website at the GSC, interinstitutional vacancy notices published by the GSC via the interinstitutional portal and vacancy notices submitted to successful candidates placed on reserve lists in open competitions via their EPSO account give access to this statement by a link which refers to it.

- The EDPS notes that, according to the information communicated in the 'Privacy statement', the time-limit for storing the data is 'three years after the end of the selection in question'; yet according to the notification, the lists of selected candidates and, where appropriate, the opinions of the joint Mobility Committee, are stored for a period of five years. The EDPS asks the Council to clarify that information in the 'Privacy statement'.
- Although the 'Privacy statement' informs the data subjects of the existence of their rights of access and rectification, the EDPS recommends explicitly mentioning Council Decision 2004/644/EC of 13 September 2004 (see point 3.8 above).

3.10. Security

[...]

⁸ http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_296/l_29620040921en00160022.pdf.

⁹ See EDPS Opinion in case **2009-197**, point 3.6, page 8.

Conclusion

The proposed processing operation does not appear to involve any violations of Regulation (EC) 45/2001 provided the above observations are taken into account. That implies, in particular, that the Council should:

- make it clear that the question concerning ‘...personal skills acquired in the course of your life...’ (page 3 of the ‘Application for a transfer’ form) is purely optional and that it ensures that candidates who do not answer optional questions will not be penalised on that account;
- explicitly remind recipients at the time of the transfer that the data should be processed only for the purposes for which they were transmitted, in accordance with Article 7(3) of the Regulation;
- add an explicit reference to Council Decision 2004/644/EC of 13 September 2004 in the ‘Privacy statement’ informing the data subjects of the limits to the scope for exercising the rights of access and rectification resulting from that decision;
- make it clear, in the information communicated in the ‘Privacy statement’ on the ‘time-limits for storing the data’ (‘three years after the end of the selection in question’), that the lists of selected candidates and, where appropriate, the opinions of the joint Mobility Committee are kept for a period of five years;
- examine the possibility of destroying documents concerning other non-selected candidates as early as possible. The EDPS asks the Council to examine the possibility of destroying documents concerning non-recruited candidates (whose names were not placed on the ‘ranking list of suitable candidates’) as early as possible.

Done in Brussels, 27 July 2011

(signed)

G. Buttarelli (Assistant Supervisor)