



## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Research Council Executive Agency regarding the project "IDEAS-Exclusion of Experts by Applicants"**

Brussels, 21 September 2011 (Case 2010-661)

### **1. Proceedings**

On 7 July 2011, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the project "IDEAS-Exclusion of Experts by Applicants" from the Data Protection Officer (**DPO**) of the European Research Council Executive Agency (**ERCEA**). This notification was preceded by a consultation under Article 46(d) of Regulation (EC) No 45/2001 ("Regulation") of 17 June 2011, to which the EDPS replied by letter of 4 July 2011 (case 2011-590).

The draft Opinion was sent to the DPO for comments on 25 August 2011. The EDPS received a reply on 9 September 2011.

### **2. The facts**

#### **Purpose**

In the context of peer evaluation, project proposals submitted to the ERCEA are subject to a review by independent experts (peer reviewers)<sup>1</sup>, which is carried out by means of panels of independent scientists and scholars<sup>2</sup>. Under the notified procedure, applicants submitting a project proposal can include a request accompanied by specific reasons that up to three specific persons would not act as peer reviewer in the evaluation of the proposal. The purpose of the processing is to guarantee a fair, equal and objective assessment of project proposals, and neutralize applicants' concerns on the correctness of the evaluation outcome and the objectivity of experts.

#### **Data subjects**

Data subjects concerned are independent experts (Panel Reviewers or Remote Referees<sup>3</sup>) supporting ERCEA in the peer review evaluation of frontier research proposals<sup>4</sup> and the review of funded projects.

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<sup>1</sup> See Commission Decision 2010/767/EU of 9 December 2010 amending Decision C(2007) 2286 on the adoption of ERC Rules for the submission of proposals and the related evaluation, selection and award procedures for indirect actions under the Ideas Specific Programme of the Seventh Framework Programme (2007 to 2013), OJ L 327, 11.12.2010, p. 51-70 (henceforth: "Commission Decision 2010/767/EU"), section 3, p. 56.

<sup>2</sup> Commission Decision Commission 2010/767/EU, point 3.1.6.1, p. 59.

<sup>3</sup> According to ERC Grant Schemes Guide for Peer Reviewers, p. 5, the latter are scientists and scholars who bring in the necessary *specialised* expertise, work remotely and deliver their reviews by electronic means.

## Legal basis

**Commission Decision 2010/767/EU**<sup>5</sup> foresees the possibility for applicants submitting project proposals to request that a specific person would not act as peer reviewer in the evaluation of their proposal. This request has to be accompanied by specific reasons based on clear grounds; the Decision at footnote 6 lists "direct scientific rivalry", "professional hostility" and "similar situation which would impair or put in doubt the objectivity of the potential evaluator".

## Procedure

To launch his/her request that up to three specific persons would not act as peer reviewer in the evaluation of the proposal, the applicant has the **possibility to introduce experts' data in Part A of the grant application form** in the EPSS (Electronic Proposal Submission Service). This request has to be accompanied by specific reasons based on the grounds of:

- direct scientific rivalry;
- professional hostility;
- similar situation which would impair or put in doubt the objectivity of the potential evaluator.

Applicants are informed<sup>6</sup> that *"If the person(s) identified is an independent expert participating in the Starting Grant 2012 evaluation, he/she may be excluded from the evaluation of your proposal as long as ERCEA remains in the position to have your proposal evaluated. The names of the excluded experts may be provided to the Panel Chair. If the excluded expert is a member of the panel he/she will be informed about the request."*

Applicants need to provide the following data about the expert(s) they intent to exclude from the evaluation<sup>7</sup>:

- name of the expert(s);
- institution/Employer, city and country;
- webpage
- ground and specific reasons for exclusion (to be indicated in a "free text" field, max. 100 characters).

Applicants are reminded<sup>8</sup> that *"...in the free text only professional reasons can be provided. Applicants must refrain from providing any offensive statement or remark of a personal kind. Any request where allegations could be considered by ERCEA as offensive or discreditable will be disregarded as a whole"*. This is reiterated and complemented further<sup>9</sup> by stating that *"...in the free text only professional reasons can be provided by the applicant (e.g. identification of the scientific article(s), study(ies), publication(s) which unambiguously prove the situation impairing the objectivity of the potential experts)"*.

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<sup>4</sup> According to ERC Grant Schemes Guide for Applicants for the Starting Grant 2012 Call (henceforth: "Applicants' Guide"), p. 12, "ERC grants aim to support 'Frontier Research', in other words the pursuit of questions at or beyond the frontiers of knowledge, without regard for established disciplinary boundaries..." .

<sup>5</sup> Commission Decision 2010/767/EU of 9 December 2010 amending Decision C(2007) 2286 on the adoption of ERC Rules for the submission of proposals and the related evaluation, selection and award procedures for indirect actions under the Ideas Specific Programme of the Seventh Framework Programme (2007 to 2013), OJ L 327, 11.12.2010, p. 51-70.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0051:0070:EN:PDF>.

<sup>6</sup> See Applicants' Guide, p. 25.

<sup>7</sup> See Applicants' Guide, p. 25 and also ERC Grant Schemes Guide for Peer Reviewers, p. 6.

<sup>8</sup> See Applicants' Guide, pp. 25/26.

<sup>9</sup> See Applicants' Guide, pp. 41/42; see also ERC Grant Schemes Guide for Peer Reviewers, p. 6.

Applicants are further made aware<sup>10</sup> that such a request "*will be treated confidentially by the authorised staff of ERCEA and the concerned Panel Chair. If the excluded expert is a member of a panel he/she will be informed about the request concerning him/her. Please note that the request for exclusion is accepted by ERCEA as long as the proposal could still be evaluated by other reviewers having the necessary expertise. Additionally, in application of the existing regulation (Regulation (EC) No 45/2001 articles 13 and 14, OJ L8 of 12.1.2011, p. 10) an excluded expert may be granted access to all data linked to the ground and specific reasons for his/her exclusion in order to provide information which could rectify inaccurate statement done by the applicant*". With regard to the latter point, applicants are directed to a specific privacy statement provided on the ERCEA website.

The experts' data are initially submitted with the project proposal and thus available to authorised staff of ERCEA Departments B and C (mainly scientific officers), authorised staff of the Commission (members of the Unit of DG RTD in charge of overseeing inter alia ERCEA's activities and its respective hierarchy as well as Commission staff managing Commission databases relevant for the procedure at hand), and the competent Panel Chair<sup>11</sup>.

Public access to the experts' data is not allowed as the privacy and integrity of the individual would be undermined (e.g. professional reputation and reliability). Two scenarios are foreseen:

- in the "No Matching Scenario", i.e. none of the experts identified by the applicant is going to evaluate his/her project, no further processing of the experts' data takes place;
- in the "Matching Scenario", i.e. the expert(s) identified by the applicant is/are going to evaluate his/her project, the ERCEA intends to accept the request for exclusion expressed by the applicant by default, provided the ERCEA is still able to carry out the evaluation (i.e. unless the expert is unique in the field, and his/her expertise is required for the evaluation). The ERCEA does not plan to carry out an in depth assessment of the request for exclusion and the relevant reasons specified by the applicant. The ERCEA will re-allocate projects where necessary in order to avoid any potential negative financial impact on the remuneration of excluded experts. The evaluation report will use the general indication "Conflict of Interest and/or Exclusion", in order to document that an expert did not participate to the evaluation of a project while safeguarding his/her professional reputation and privacy.

### **Recipients**

Recipients include authorised staff of ERCEA Departments B and C (mainly scientific officers), authorised staff of the Commission (members of the Unit of DG RTD in charge of overseeing inter alia ERCEA's activities and its respective hierarchy as well as Commission staff managing Commission databases relevant for the procedure at hand), and the competent panel chair.

In addition, some personal data may be disclosed, in compliance with the relevant current legislation and established case law, and on a temporary basis to: (a) the General Court or the Court of Justice at their request; (b) the Ombudsman, at his request; (c) the European Data Protection Supervisor, at his request; (d) the audit and control bodies such as OLAF, Court of Auditors, ERCEA Internal Audit Office and the Internal Audit Service.

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<sup>10</sup> See Applicants' Guide, p. 42.

<sup>11</sup> A European Research Council (ERC) panel consists of a chairperson plus 10-15 members (ERC Grant Schemes Guide for Peer Reviewers, p. 4) and operates under the chairmanship of a senior independent expert (Commission Decision 2010/767/EU, point 3.1.6.1., p. 60).

### **Right of access and rectification**

Whilst no automatic individual information to experts is foreseen, the expert's right to know about their own exclusion (or request for exclusion) from an evaluation will be guaranteed as follows: (i) the concerned member of a panel is informed by the relevant panel chair bilaterally in the presence of an ERCEA agent; (ii) any expert may ask to the ERCEA to have access regarding him/her, upon closure of the evaluation exercise. However, the expert may experience a limitation to his/her **right of access**, in order to protect the applicant (e.g. serious scientific rivalry or strong professional hostility). This will be handled on a case-by-case basis. The expert's **right to rectify** information kept by ERCEA can be exercised after closure of the whole proposal evaluation exercise. Upon the expert's acknowledgement of the information regarding him/her kept by ERCEA, he/she can send to ERCEA a statement balancing the subjective appreciation by applicant(s). This right to access, verify, rectify or delete any personal data can be exercised by contacting the ERCEA in writing via a dedicated functional mailbox ([ERC-EXPERTS@ec.europa.eu](mailto:ERC-EXPERTS@ec.europa.eu)).

### **Right of information**

An applicant guide, a peer reviewers' guide and a dedicated website page explain the overall exclusion system and, together with a specific privacy statement that will be available on the website contain the following:

- identification of the data controller;
- indication of the purpose of the data processing;
- the categories of data processed;
- information on the data recipients;
- the right of access;
- the legal basis;
- the retention periods;
- a reference to Regulation 45/2001, and
- a reference to the right of data subjects to have recourse at any time to the EDPS.

### **Retention policy**

Based on Commission document SEC(2007)970, the retention policy is linked to the evaluation process, i.e. experts' data mentioned in rejected project applications are retained for a maximum of three years, whereas experts' data mentioned in successful projects are retained for a maximum of ten years.

The ERCEA is not going to create black lists of excluded experts or make cross-checks between different calls. Any further statistical analysis of the reasons for request of exclusion will be anonymous.

[...]

## **3. Legal analysis**

### **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*" in the sense of Article 2(a) of the Regulation). The data processing is performed by several actors on behalf of EU institutions and bodies (ERCEA Departments B and C (mainly scientific officers), authorised staff of the Commission, and the

competent panel chair), in the exercise of activities which fall within the scope of Union law. The processing of the data is done mostly by automatic means (with the creation and transmission of electronic application, evaluation files and excel tables) and when the processing is manual (when ERCEA scientific officers carry out a manual/visual preliminary check of applications), it forms part of a filing system. Therefore, the Regulation is applicable.

**Grounds for prior checking:** Article 27 (1) of the Regulation subjects to prior checking all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*" by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks.

- This list includes "*processing operations intended to evaluate personal aspects relating to the data subjects*" (**Article 27 (2) (b) of the Regulation**). The "ground and specific reasons referred to by the applicant's request for exclusion", which according to the information by the DPO regard issues such as "direct scientific rivalry", "professional hostility" and "similar situation which would impair or put in doubt the objectivity of the potential evaluator" are "*personal aspects relating to the data subjects*", i.e. the expert(s) the particular applicant would like to see excluded. However, the ERCEA does not plan to carry out an in depth assessment of the request for exclusion and the relevant reasons specified by the applicant. Unless the expert is unique in the field, and his/her expertise is thus required for the evaluation, the ERCEA intends to accept the request for exclusion expressed by the applicant by default. In the light of these circumstances, the data processing operations are in principle not performed with the intention to "*evaluate personal aspects relating to the data subjects*", unless the expert is unique in the field. Consequently, they will by default, i.e. for their most part, not fall within the scope of Article 27(2) (b) of the Regulation, except where the expert is unique in the field, and his/her expertise is thus required for the evaluation.
- The list further includes "*processing operations for the purpose of excluding individuals from a right, benefit or contract*" (**Article 27 (2) (d) of the Regulation**). The processing of experts' data under the project on the exclusion of independent experts by applicants pursues the purpose of excluding individuals (i.e. the expert(s) concerned by the applicant's request) from a contract, namely the appointment as a peer reviewer by signature of an appointment letter by the expert and the ERCEA. In the light of the foregoing, the data processing operations are performed with "*the purpose of excluding individuals from a right, benefit or contract*" and thus fall within the scope of Article 27(2) (d) of the Regulation.
- Furthermore, the exclusion of an expert could "*present specific risks to the rights and freedoms of data subjects*" in the sense of **Article 27(1) of the Regulation**: adverse reputational and/or professional effects can result from the processing both for the excluded expert and the concerned applicant, in particular in cases of a strong professional rivalry or hostility and where the expert cooperating with ERCEA for the evaluation is unique in his scientific field (and can thus not be excluded, as the proposal could not be evaluated by other reviewers having the necessary expertise).

The EDPS therefore concludes that the project on the exclusion of independent experts by applicants must be notified for prior checking under Article 27 of the Regulation.

The notification of the DPO was received on 7 July 2011. 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 16 days for comments. Consequently, the present Opinion must be delivered no later than 22 September 2011.

### **3.2. Lawfulness of the processing**

**Commission Decision 2010/767/EU** of 9 December 2010<sup>12</sup> explicitly foresees the possibility for applicants submitting project proposals to request that a specific person would not act as peer reviewer in the evaluation of their proposal. This request has to be accompanied by specific reasons based on clear grounds. The Decision at footnote 6 lists "direct scientific rivalry", "professional hostility" and "similar situation which would impair or put in doubt the objectivity of the potential evaluator". This legal instrument thus serves as the legal basis for the exclusion of experts, where applicants submitting project proposals request that a specific person would not act as peer reviewer in the evaluation of their proposal.

The processing further needs to meet the condition of **necessity** under Article 5(a) of the Regulation. In cases of "direct scientific rivalry" or "professional hostility" between the applicant and an expert as well as in a "similar situation which would impair or put in doubt the objectivity of the potential evaluator", there seems to be no less privacy-invasive alternative to the collection of personal data regarding the expert on the occasion of the submission of the project proposal to guarantee a fair, equal and objective assessment of project proposals, and neutralize applicants' concerns on the correctness of the evaluation outcome and the objectivity of experts.

However, as has been pointed out in the EDPS reply to the consultation under Article 46(d) of the Regulation, a "free text" field would allow applicants to include allegations on the conduct, professional abilities, and others personal aspects of expert(s) the applicant would like to see excluded. These are potentially subjective and potentially sensitive data, opinions, and declarations on individuals who are not even in a contractual relation with ERCEA which are likely to go well beyond "direct scientific rivalry", "professional hostility" and "similar situation which would impair or put in doubt the objectivity of the potential evaluator". It would consequently seem questionable whether the use of the "free text" field can be considered necessary under Article 5(a) of the Regulation (aspects of data quality are considered below point 3.3.).

The EDPS therefore reiterates its recommendation that ERCEA investigate the possibility of defining pre-fixed categories to limit the use of "free text", or to demonstrate that a "free text" field is necessary in the sense of Article 5(a) of the Regulation.

### **3.3. Data Quality**

As has been pointed out above (point 3.2.), a "free text" field would allow applicants to include allegations which could go well beyond the grounds specified by Commission Decision 2010/767/EU of 9 December 2010. Such allegations, however, cannot be relevant or adequate for the purpose of guaranteeing a fair, equal and objective assessment of project proposals, and neutralize applicants' concerns on the correctness of the evaluation outcome and the objectivity of experts. It should further be noted that the ERCEA, as a rule, does not

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<sup>12</sup> Commission Decision 2010/767/EU, p. 51-70.

plan to carry out an in depth assessment of the request for exclusion and the relevant reasons specified by the applicant.

- The EDPS welcomes that ERCEA provides clear instructions on how to fill in the free text by clearly excluding the use of offensive language or remarks of a personal, rather than professional kind. However, as the notification explicitly mentions: "The reasons can be *subjective statements and appreciations* by applicants requesting the exclusion. But *mainly* they should be focussed on the identification the scientific article(s), study(ies), publication(s) which unambiguously prove the situation impairing the objectivity of the potential experts" (emphasis added). The clear instructions on how to fill in the free text can thus not on their own exclude that applicants introduce such inappropriate remarks on personal aspects of expert(s) in the "free text" field.
- The EDPS also welcomes that any request containing allegations that are considered by ERCEA as offensive or discreditable will be disregarded as a whole, but would like to reiterate that under Article 2 (b) of the Regulation the processing of data already includes the collection of personal data. Such a sanction (disregarding the request to exclude an expert) *following* the submission of the application does thus not exclude that ERCEA collects data via the "free text" field that fails to meet the standards of data quality.

With a view to minimizing the risk of failing the requirements of adequacy, relevance and proportionality under Article 4 (1) (c) of the Regulation, the EDPS therefore reiterates its recommendation (see also above point 3.2.) that ERCEA investigate the possibility of defining pre-fixed categories (thus limiting the use of "free text"), or to demonstrate the need for a "free text" field in the light of the principle of data quality.

### **3.4. Conservation of data/ Data retention**

There is no reason to believe that the standard retention period applicable in the framework of call for proposals under the ERCEA Retention Policy (data mentioned in *rejected* project applications retained for a maximum of 3 years; data mentioned in *successful* projects retained for a maximum 10 years) would as such give rise to concern.

However, the data of experts concerned by a request of applicants for exclusion as peer reviewer is not collected for the same purpose as the other data contained in the project applications, but rather with the comparatively limited purpose of taking a decision on the exclusion of expert(s) from a particular peer review exercise.

In cases of a "matching scenario" (the expert(s) identified by the applicant is/are in principle foreseen as evaluators for his/her project), once a decision on exclusion or not has been taken, it would seem adequate to allow for retention of the experts' data in line with the rest of the documentation regarding the project application. It cannot be excluded that subsequent challenges regarding the (non-)execution of a project might be linked to the project's evaluation by expert(s) identified by the applicant foreseen as evaluators. This would seem to be the case in particular where the expert is unique in the field, and his/her expertise was thus required for the evaluation.

The EDPS would re-invite the ECREA to better demonstrate that it has checked that in a "no matching scenario" (none of the experts/the expert identified by the applicant is going to evaluate his/her project anyway), the experts' data are not retained beyond the discovery of



that scenario or that the purpose of processing the experts' data does not cease to exist at that stage.

### **3.5. Transfer of data**

Recipients include authorised staff of ERCEA Departments B and C (mainly scientific officers), authorised staff of the Commission (members of the Unit of DG RTD in charge of overseeing inter alia ERCEA's activities and its respective hierarchy as well as Commission staff managing Commission databases relevant for the procedure at hand) and the competent panel chair.

The EDPS considers that the **transfer of data to the competent panel chair** is covered by Article 7(1) of the Regulation as a transfer internal to the ERC structure, as the panel he chairs is as an operational entity forming an integral part of the ERC evaluation system managed by the ERCEA:

- unlike for external contractors working on the basis of negotiated contracts, it is the ERCEA that determines the set-up of each panel by means of a pre-defined appointment letter setting the framework of the relationship between panel members and the ERCEA<sup>13</sup> and by formally appointing the panel chair<sup>14</sup>;
- it is the ERC Scientific Council that establishes the peer review evaluation methodology and oversees the peer review evaluation process<sup>15</sup>. Whilst the panel consists of individually *independent* scientists and scholars<sup>16</sup>, their independence once appointed as members of a panel is thus exercised within such a pre-defined frame and the tasks entrusted.

The EDPS further notes that the relationship between the ERCEA and the panel chairs is governed by appointment letters explicitly referring to the Regulation and committing them inter alia to confidentiality<sup>17</sup>.

The EDPS considers that the transfers of data to the other recipients listed in point 2. above are transfers to other Community institutions or bodies complying with Article 7(1) of the Regulation. 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.

### **3.6. Right of access**

Article 13 of the Regulation provides for a **right of access** and sets out the modalities of its application following the request of the data subject concerned. According to the notification, no automatic individual information to experts about their own exclusion (or request for exclusion) from an evaluation is foreseen (except for concerned active panel member(s) actually working with ERCEA). However, any expert may ask to the ERCEA to have access to

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<sup>13</sup> Commission Decision 2010/767/EU, point 3.1.3, p. 57.

<sup>14</sup> Commission Decision 2010/767/EU, point 3.1.1, pp. 56/57.

<sup>15</sup> Commission Decision 2010/767/EU, point 3.1.6, p. 59; the Council Decision 2006/972/EC, JO L400 of 30.12.2006, pp. 243-270, provides for the Commission's adoption of the work programme and positions proposed/established by the Scientific Council.

<sup>16</sup> Commission Decision 2010/767/EU, point 3.1.6.1, p. 59.

<sup>17</sup> As an inter-service consultation was still ongoing at the time of the notification, the ERCEA could provide only the "Appointment Letter Models" contained in the old "Draft Commission Decision concerning the amendment of the ERC Rules for the submission of proposals and the related evaluation, selection and award procedures for indirect actions under the Ideas Specific Programme of the Seventh Framework Programme (2007-2013)", pp. 29-52, dated 09.07.2010.



personal data regarding him/her, upon closure of the evaluation exercise, but the expert may experience a limitation to his/her right of access, in order to protect the applicant (e.g. serious scientific rivalry or strong professional hostility), which according to the notification will be "handled on a case-by-case basis".

The EDPS welcomes the commitment by ERCEA that the exclusion of experts "will not be detrimental for the experts, both from the financial and reputational side" contained in the notification. Nevertheless, in the light of the above, the EDPS recommends that procedures are set up to ensure that an expert's right of access is limited on the basis of Article 20(1)(c) of the Regulation only in cases where this is necessary on the basis of the protection of the rights and freedoms of others, namely in cases of serious scientific rivalry or strong professional hostility. In such cases, data subjects should be informed of right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation.

### **3.7. Right of rectification**

Data must be "*accurate and, where necessary, kept up to date; 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*" (Article 4(1)(d) of the Regulation). Under Article 14 of the Regulation, the "*data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

The right of rectification is not a priori entirely excluded by the fact that the experts' data are partially -as regards the ground and specific reasons referred to by the applicant's request for exclusion, notably "direct scientific rivalry", "professional hostility" and "similar situation which would impair or put in doubt the objectivity of the potential evaluator"- not objective data, but rather subjective appreciations. Whilst only objective data can be straightforwardly "*accurate*" in the sense of Articles 4(1)(d) of the Regulation, the EDPS considers that the fact that some of these subjective data cannot be always directly rectified, or that they can only be sometimes rectified via the inclusion of statements or notes made by data subjects, does not prevent them from being personal data, with a view to ensure the transparency of processing and the exercise of right of access<sup>18</sup>. Therefore, the right of rectification under Article 14 of the Regulation should in principle also be applicable to subjective data, as these could be nonetheless potentially "*inaccurate*" and the data subject should be in a position to add his/her own statement "neutralising" or "balancing" and thus rectifying these inaccuracies.

Against this background, the EDPS welcomes that after closure of the whole proposal evaluation exercise and upon the expert's acknowledgement of the information regarding him/her kept by ERCEA, he/she can send to ERCEA a statement balancing the subjective appreciation by applicant(s).

However (as outlined above point 3.6.), the expert may on a case-by-case basis experience a limitation to his/her right of access, in order to protect the applicant (e.g. in cases of serious scientific rivalry or strong professional hostility). In this particular context, the EDPS would like to reiterate its recommendation that the expert should have access to all data linked to the ground and specific reasons referred to by the applicant's request for exclusion, subject to the restrictions of Article 20 of the Regulation (see below), so that he/she is in a position to verify

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<sup>18</sup> See Article 29 WP Recommendation 1/2001 on Evaluation Employee Data, adopted on 22/03/2001, in <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2001/wp42en.pdf>.

whether he/she wants to add his/her own statement "neutralising" or "balancing" the subjective appreciation by the applicant.

- Article 20 (1) (c) of the Regulation allows for a restriction of the application of, inter alia, Article 14 of the Regulation "*where such restriction constitutes a necessary measure to safeguard ... the protection of the data subject or of the rights and freedoms of others*". In the context of the project at hand, such "*others*" might be applicants, e.g. in the case of serious scientific rivalry or strong professional hostility. However, unless it is obvious for the expert from the mere fact of the exclusion as such who the applicant requesting his exclusion might be (e.g. very limited area of scientific rivalry), it would not seem justified, in principle, to exclude the right to rectification to protect applicants.
- Under Article 20 (2) of the Regulation, "*Articles 13 to 16 shall not apply when data are processed solely for purposes of scientific research...*" Whilst the project at hand regards the exclusion of experts linked to the field of scientific research, Article 20 (2) of the Regulation explicitly excludes the use of the data "*for taking measures or decisions regarding particular individuals*". Therefore, project is not covered by the exception of Article 20(2) of the Regulation.

The EDPS would therefore like to reiterate its recommendation that the ERCEA develop a methodology to procedurally ensure within the explained limits that experts concerned can exercise their right to rectify without delay of inaccurate or incomplete personal data under Article 14 of the Regulation.

### **3.8. Information to 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 as in the case at hand (where the applicant supplies the personal data regarding the expert he wishes to be excluded). The EDPS notes that experts are appropriately informed of the elements provided in Article 12 of the Regulation by means of publically available applicants' and peer reviewers' guides, a dedicated website explaining the overall exclusion system and a specific privacy statement that will be available on the website (see above point 2).

[...]

## **4. Conclusion**

The EDPS welcomes steps undertaken by ERCEA in response to the consultation under Article 46(d) of Regulation, in particular as regards proportionality considerations in limiting the sharing data to the panel chair and the expanded right of concerned experts to rectifying inaccuracies by adding his/her own "neutralising" or "balancing" statement.

In the light of the above examination following the notification, there is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations contained in this Opinion are taken into account. In particular, the ERCEA should:

- investigate the possibility of defining pre-fixed categories (thus limiting the use of "free text"), or to demonstrate the need for a "free text" field in the light of the principle of data quality;

- demonstrate how, in case of a "no matching scenario" (none of the experts/the expert identified by the applicant is going to evaluate his/her project anyway), the experts' data are not retained beyond the discovery of that scenario or that the purpose of processing the experts' data does not cease to exist at that stage;
- remind each of the recipients of data that they should process the personal data they receive only for the purpose for which they were transmitted;
- set up procedures to ensure that an expert's rights of access and rectification are limited on the basis of Article 20(1)(c) of the Regulation only in cases where this is necessary, namely in cases of serious scientific rivalry or strong professional hostility. In such cases, experts concerned should be informed of their right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation;
- set up procedures to ensure that the expert has access to all data linked to the ground and specific reasons referred to by the applicant's request for exclusion, subject to the restrictions of Article 20 of the Regulation, so that he/she is in a position to verify whether he/she wants to rectify objective data and/or add his/her own statement "neutralising" or "balancing" the subjective appreciation by the applicant and thus exercise his/her right under Article 14 of the Regulation to rectify inaccurate or incomplete personal data without delay.

Done in Brussels, 21 September 2011.

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor