



Opinion on the notification for prior checking from the Data Protection Officer of the Educational Audiovisual and Culture Executive Agency (EACEA) concerning "internal mobility of EACEA's staff members"

Brussels, 17 October 2011 (case 2011-0672)

1. Proceedings

On 8 July 2011, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the Educational Audiovisual and Culture Executive Agency (**EACEA**) a notification for prior checking concerning the "internal mobility of EACEA's staff members".

The comments on the draft Opinion sent to the DPO on 5 October 2011 were submitted on 12 October 2011.

2. Facts

This prior checking Opinion deals with the selection of internal candidates to fill in a vacancy, in accordance with Article 29 (1) of the Staff Regulations which states that "*before filling a vacant post in an institution, the Appointing Authority shall first consider (a) whether a post can be filled by: (i) transfer, or (...)*". The processing operations at stake are put in place to manage applications administratively and the different stages of this procedure. In practice, the internal mobility at the EACEA means moving from one unit to another, within the same category of employment. The EACEA adopted an "internal mobility policy", approved by the EACEA Direction meeting of the 17/11/2008.

The controller is the EACEA represented by the Head of Unit R1-Resources, administration and communication.

All vacant posts for internal mobility in the Agency are published on the EACEA Intranet. In addition to the job description, the publication contains any specific additional requirements for the post.

There is no standard form for applying. Interested candidates can apply by sending their CV and a motivation letter to a functional mail box. The Human Resources sector receives the application and sends an acknowledgement receipt to all candidates. This e-mail includes a paragraph on protection of personal data:

"In accordance with article 12 of Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, the Human Resources sector informs that your personal data are processed in

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accordance with the relevant legal dispositions of the Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities. For further information regarding the processing of your personal data please refer to the Privacy statement of the Internal mobility procedure". The privacy statement contains all mentions required by Article 11.

The Human Resources sector runs an eligibility check on the received applications. Once the check is completed, the Human Resources sector informs by e-mail candidates who are not eligible and draws up the list of eligible candidates for each vacant post. This list (electronic file) is kept by the HR in a restricted folder.

The Human Resources sector sends an e-mail containing the CV and motivation letter of candidates applying for each specific post to the concerned Head of Unit. This e-mail includes a confidentiality reminder:

"Please be aware that the information includes personal data and is therefore considered highly confidential. It is meant to be used for the exclusive purpose of this internal mobility procedure. Please refrain from commenting, forwarding or copying the data to any other person. In case you delegate the selection procedure or get assisted by another staff member, the recipient of the data shall be reminded of the obligation of confidentiality and that the data may only be processed for the purpose of the selection procedure. When the work involving the use of these data is finalised, please make sure to delete them and destroy any eventual hard copy".

The concerned Head of Unit organises directly the interviews with the candidates he/she selects on the basis of the information provided. The constitution of a selection committee is not required. Generally, the Head of Unit meets the candidate alone. In principle, the selection is exclusively based on the oral interview with the concerned Head of Unit. No evaluation sheet corresponding to the interview is held, nor are any rankings or general conclusions established. No report is established.

Once the Head of Unit has agreed with the Director the recruitment of a candidate for a specific post, he/she informs by e-mail the Human Resources sector, in charge of the administrative follow up.

The following **categories of data** are processed: identification data, contact details, data allowing assessment against the selection criteria, motivation of the candidate and the last Career Development Report may be requested by the Head of unit concerned.

The data collected are submitted by candidates themselves with their curriculum vitae or if the applicant does not provide his curriculum it can be extracted from the personal file of the candidate.

Conservation: When the selection is concluded, Head of Units destroy hard copies of documents (CV and motivation letter of applicants). The Human Resources keep the electronic file of each mobility exercise for 2 years after the mobility (as of the date of the transfer to the new Unit). An excel file, including all vacant posts without any personal data is kept for statistical purposes by the HR. Only the final decision on mobility is kept in the personal file of the concerned person.

Recipients are the following: the Human Resources sector, the Head of Unit to whom the vacant post is assigned, the Head of Sectors or designated member of the concerned teams (if

delegated by the Head of Unit), the Authority empowered to conclude employment contracts (the Director). In case of control or dispute, the supervisory instances of EACEA (i.e. European Commission, European Court of Auditors, OLAF etc.) and the judicial authorities (i.e. EU Courts, Ombudsman etc.) may be recipients of the data.

Rights of the data subjects: Each candidate can access his/her personal data and have them rectified upon a written request addressed to the data controller, sending an e-mail to EACEA-INTERNAL-MOBILITY@ec.europa.eu. After the closing date of the respective call, the right to rectify personal data is restricted to material errors. Access to personal data may be limited on the grounds of Article 20, paragraph 1, of Regulation (EC) N° 45/2001.

Blocking: According to Article 13, paragraph 3, of EACEA's Implementing rules, the controller has to assess as soon as possible whether to block the data or not within 15 working days after reception of the request. If the request is accepted, the controller has another 30 working days to implement the technical blocking of the personal data.

Erasure: it may take place in maximum 15 working days.

Information: A privacy statement is published on the intranet section dedicated to internal mobility. The acknowledgement of receipt sent by the Human Resources sector contains a paragraph on protection of personal data and refers to the Privacy statement published on the Intranet.

3. Legal aspects

3.1. Prior checking: The processing of personal data for the purpose of selection and of best qualified internal candidates in the frame of the mobility by the EACEA falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(b) since in this case it clearly intends to evaluate the ability of persons applying for a post internally.

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 operations. In this case however the processing operations have already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 8 July 2011. According to Article 27(4) of Regulation 45/2001, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for a total of xxxx days () to allow for provision of comments on the draft opinion. Due to the fact that the month of August does not count in the calculation of the deadline, the present opinion must be delivered no later than on 9 October 2011.

3.2. Lawfulness of the processing:

Under Article 5(a) of Regulation (EC) No 45/2001, personal data may be processed "*if processing 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*". Recital 27 of the Regulation states that "*processing of personal data for the performance of tasks carried out in the public interest (...) includes the*

processing of personal data necessary for the management and functioning of those institutions and bodies".

The selection of candidates is based on Article 29 (1) of the Staff Regulations and on the policy on internal mobility adopted the EACEA on 17 November 2008.

The respective processing of personal data is necessary for the performance of a public interest task, namely the selection of the best suitable candidate for an EACEA post, through the internal mobility procedure. Thus, the processing is lawful in accordance with Article 5(a) of Regulation 45/2001 read together with recital 27 of the Regulation.

3.3. Processing of special categories of data:

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 according to Article 10. This prohibition can be lifted if the data subject has given his or her express consent (Article 10 (2) (a)).

Special categories of data may be communicated in a motivation letter or a CV of a candidate without being requested by EACEA. The spontaneous communication of the sensitive data should be considered as authorised in terms of Article 10(2)(a) of the Regulation if it is clear for the data subject that communicating these data is not compulsory. In the case in point, it seems that it is not EACEA intention to collect sensitive data. The privacy statement mentions that "*candidates are free to give their data on a voluntary basis*".

3.4. Data quality: Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate and kept up to date.

As to the proportionality of the data processed, the EDPS notes that the data referred to above are necessary for the organisation of the internal mobility procedure with a view of selecting the best suitable candidates to fill in a vacancy. Article 4(1) (c) of the Regulation is therefore complied with.

The accuracy of the data processed is partly ensured by the fact that some data are provided by the respective data subjects. In addition, the invitation to make use of the rights of access and rectification (cf. point 3.7 below) helps to ensure that the processed data are accurate and up to date.

Lawfulness of the data processing has been already discussed (cf. point 3.2), whereas fairness has to be assessed in the context of information provided to data subject (cf. point 3.8 below).

3.5. Data retention: According to Article 4(1)(e) of Regulation 45/2001, personal data may be kept in a form enabling the identification of data subjects for no longer than necessary for the purposes for which they were collected or further processed.

The different retention periods described in the fact seem to be justified in order to conduct the selection of the best candidate internally.

3.6. Transfer of data: The internal and inter-institutional data transfers mentioned above are subject to Article 7 of Regulation 45/2001. They should be necessary for legitimate

performance of the task covered by the competence of the particular recipient who can process the data only for the purposes for which they were transmitted.

The EDPS notes that the transfers to the Human resources sector, the Head of unit concerned or the delegated Head of sector and the Director are considered as necessary for the execution of the selection procedures. The EDPS welcomes the fact that they are reminded that they are required not to use the data for any other purposes other than the tasks carried out in the exercise of their respective competences to comply with Article 7(3) of the Regulation.

Supervisory instances of EACEA (i.e. European Commission, European Court of Auditors, OLAF etc.) and the judicial authorities (i.e. EU Courts, Ombudsman etc.) may be recipients of the data to carry out the tasks covered by their competence.

3.7. Right of access and rectification: Articles 13 and 14 of Regulation 45/2001 provide for data subject's rights of access and rectification with respect to their personal data processed. These rights may be restricted in terms of Article 20(1) of the Regulation, in particular when it would be necessary to for the protection of rights and freedoms of others, including the evaluators in terms of Article 6 of the Annex III to the Staff Regulations.

According to the notification and the privacy statement, data subjects have a right to obtain from the data controller access to the documents relating to them, as well as updates and rectifications of material errors. Data can also be modified by the data subjects until the closing of the application call. Furthermore, they can ask corrections by contacting directly the data controller. The access might be restricted to protect the secrecy of the proceeding of the Head of unit on the basis of Article 20 (1) c) of Regulation (EC) No 45/2001. The EDPS notes that no selection report is drafted and therefore the probability that EACEA uses the limitation provided for in Article 20 (1) c) is low.

The EDPS welcomes the fact that the data subjects are provided access to all data categories processed within this particular procedure and that the right of rectification can apply only to the factual data processed, as it is reflected in the data protection notice to data subjects.

Blocking and erasure: As already stated in the Opinion on EACEA's recruitment (2010-595), in accordance with Article 15 of the Regulation, several situations must be distinguished:

(1) When the data subject contests the accuracy of his/her data, the data should be blocked "for a period enabling the controller to verify the accuracy, including the completeness of the data". Thus, when receiving a request for blocking on this ground, the EACEA should immediately block the data for the period necessary for verifying the accuracy and completeness of the data.

(2) When the data subject requires the blocking of his/her data because the processing is unlawful, or when data must be blocked for purpose of proof, the EACEA will need some time to make this assessment before deciding to block the data. In such cases, even though the request for blocking may not take place immediately, it should however been dealt with promptly in order to preserve the data subject's rights. Having considered this, the EDPS notes that the decision as to whether to block the data is taken by the EACEA as soon as possible and at the latest within the delay of 15 working days.

3.8. Information to the person concerned: As indicated above, the "personal data protection notice" provides for certain information as required in terms of Articles 11 and 12 of Regulation 45/2001.

The EDPS takes note of the information provided to the data subjects through the personal data protection notice. Nevertheless, the text provided in the acknowledgement of receipt should be modified to reflect the fact that personal data are processed in accordance with Regulation 45/2001 to implement the internal policy procedure based on Article 29 (1) of the Staff Regulations and the EACEA policy on internal mobility adopted on 17 November 2008.

3.9. Security measures: According to Article 22 of Regulation 45/2001, technical and organisational measures need to be implemented in order to prevent, in particular, any unauthorised disclosure or access, accidental or unlawful destruction, accidental loss or alteration, as well as any other forms of unlawful processing.

On a basis of the available information, the EDPS considers that the EACEA seems to have implemented security measures appropriate to the processing operation under analysis.

4. Conclusion

In order to ensure that there is no breach of the provisions of Regulation 45/2001, the above considerations have to be taken fully into account. In particular:

- the time for blocking the data should be modified in accordance with the point 3.7;
- the acknowledgement of receipt should be modified in accordance with the point 3.8.

Done at Brussels, 17 October 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor