



## **Opinion on the notification for prior checking from the Data Protection Officer of the European Research Council Executive Agency (ERCEA) concerning proposals evaluation and grants management**

Brussels, 21 November 2011 (case 2011-0845)

### **1. Proceedings**

On 29 July 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Research Council Executive Agency (ERCEA) a notification for prior checking concerning the processing operation "Specific Programme IDEAS—proposals evaluation and grants management" organized by the ERCEA in the frame of the 7th Research Framework Programme.

The draft Opinion was sent to the DPO for comments on 27 October 2011. These were received on 18 November 2011.

### **2. Facts**

The ERC Executive Agency (ERCEA) manages the operations of the European Research Council (ERC)<sup>1</sup> and implements the Specific programme IDEAS in the frame of the EU 7th Research Framework Programme. In this context, the ERCEA is responsible for the calls for proposals according to the ERC grant schemes and for awarding grants aiming to support research projects carried out by individual national or transnational research teams headed by a principal investigator. The notification covers the processing operations performed by the ERCEA, in particular, with regard to the granting schemes that are awarded and managed by the ERCEA at the time of this notification: ERC Starting Independent Researcher Grant (ERC Starting Grant), ERC Advanced Investigator Grant (ERC Advanced Grant)

The data are collected and processed with the **purpose** of evaluating and selecting proposals submitted under the IDEAS programme funding schemes; afterwards to prepare and manage respective grant agreements. Excellence is a primary criterion of evaluation. It is applied to the evaluation of both the principal investigator and the research project. An essential part of the operation is the assessment of the curriculum vitae of the principal investigator who will run the project, including his/her expertise, background and commitment.

The notification for prior checking refers to the following **legal basis** defining the mandate and operational modalities of the ERCEA in the frame of the Ideas Specific Programme and the EU 7th Research Framework Programme:

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<sup>1</sup> The ERC is established by the European Commission with the aim to support the highest quality research in Europe through competitive funding provided in the frame of the EU 7th Research Framework Programme.

- Decision n. 1982/2006 of the EP and the Council concerning the FP7;
- Regulation (EC) n. 1906/2006, Rules of participation of undertakings, research centres and universities;
- Council Decision 2006/972/EC concerning the specific programme Ideas;
- Commission Decision 2007/134/EC establishing the ERC;
- Commission Decision (2011/12/EU) of 12 January 2011 amending Decision 2007/134/EC establishing the European Research Council;
- Commission Decision C(2007)2286 ERC rules for the submission of proposals and the related evaluation, selection and award procedures relevant to the Ideas Specific Programme;
- 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);
- Commission Decision 2008/37/EC setting up the ERCEA;
- Commission Decision C(2008)5694 delegating powers to the ERCEA.

The **controller** is to be considered the ERCEA as a whole, represented here by its Director<sup>2</sup>.

**Data subjects** are natural persons participating in different phases (evaluation, preparation, management phase) of the grant award procedures in their capacity of applicants, principal investigators, co-investigators, scientific team members, contact persons and legal representatives of the beneficiaries.

The following **data categories** may be processed:

- Information on *the principal investigator*: name, title, gender, nationality, country of residence, date of birth, country and place of birth, contact address, phone, fax, email, academic and research record, copy of PhD document (for Starting Grant), any significant career breaks (for career stage extension), data on children, military service and/or statutory service (to justify career breaks), medical certificates (for career stage extension), type of ID document, ID number;
- Information on *the co-investigator*: name, title, gender, nationality, country of residence, date of birth, country and place of birth, contact address, phone, fax, email, academic and research record;
- Information on *the authorised legal representative* of the host institution: name, title, gender, position;
- Information on *the contact person* at the host institution: name, contact address, phone, fax, email.

The template forms used to collect data on the principal investigators, co-investigators, legal representatives and contact persons are included in the Guide for applicants (Section A1). The principal investigators and co-investigators are required also to include a CV in the part B1 of their application for which there is no template.

The template forms state that data on gender is required for statistical and mailing purposes. As regard data on children and health data (regarding the principal investigator) the template form refers to the eligibility criteria applicable to the principal investigator, defined yearly in the IDEAS Work Programme, e.g. paragraph 3.4.2 of IDEAS Work Programme 2012<sup>3</sup> (see below for further details section 3.3).

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<sup>2</sup> The Controller is supported by the responsible Head of Departments as specified the Service Specific Privacy Statement.

<sup>3</sup> See IDEAS Research Work Programme 2012, available at: [http://ec.europa.eu/research/fp7/pdf/wp2012/wp2012\\_ideas\\_en.pdf](http://ec.europa.eu/research/fp7/pdf/wp2012/wp2012_ideas_en.pdf).

The following data may be collected and further processed concerning the scientific staff members *only upon unambiguous and informed consent* for the purpose of anonymous statistical studies, impact evaluation of the programme, or improvement of the funding schemes for researchers: last name, first name, gender, nationality, staff category, year of birth, information on the latest higher education (degree, subject area, institution, year of award, country), information on the latest post doctorate of professional situation (activity, start and end dates, institution/organisation, country), employment period within the funded project (start and end dates), completion of the doctorate within the project (month, year, subject area). In this case the *prior and unambiguous consent* of each data subject is documented according to the model declaration annexed to the Service Specific Privacy Statement.

If the project coordinator/leader or principal investigator or other participant in a funded project gives his/her *prior and unambiguous consent* the following data may be published on paper and Internet for communication purposes (and further processed for statistics/study/programme evaluation purposes by contractors or beneficiaries of a Cooperation and Support Action): short curriculum vitae (professional contact details, education and work experience), picture, nationality (for statistical and communication purposes - e.g. the analysis of the mobility of researchers), age (for statistical and communication purposes - e.g. the analysis of the participation of young/elder researchers). In this case the *prior and unambiguous consent* of each data subject is asked directly (by means of e-mails and/or ticking "yes/no" boxes in the relevant application).

In addition, certain categories of data are processed for the purpose of excluding experts from participation in the grants evaluation process. These aspects of the processing operation have been analyzed and prior checked by the EDPS in a separate Opinion<sup>4</sup> and are consequently not assessed in this Opinion.

Data processed within the processing operations may be disclosed to the following **recipients**:  
*1) Recipients of data in line with the specific modalities of the 7th Framework Research Programme (relating to the applicants and principal investigators):*

- Internal authorised Commission staff, independent experts and contractors working on behalf of the Commission for the purposes of proposals evaluation, projects selection and management of operational and financial aspects of research projects within the Research Framework Programmes or other Programmes and Initiatives;
- Other structures associated with the Research Framework Programmes, other Programmes and Initiatives, such as e.g. Programme Committees, Advisory Groups, other European Institutions or Community Programmes/Bodies/Initiatives;
- General public: for projects under a grant agreement, limited data (e.g. contact details of the participants, total budget of the project) may be published on the CORDIS website/Europa/other dedicated Internet webpage/paper in order to provide the necessary information to facilitate contacts between interested parties and the research consortium;
- Contractors and Beneficiaries of a Cooperation and Support Action cooperating with the ERCEA may access and process personal data of applicants and principal investigators upon their *prior and unambiguous consent* for purposes related to monitoring, study and evaluation foreseen by the IDEAS Work programmes (see above).

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<sup>4</sup> See EDPS case 2011-0661.

2) *Recipients of data in line with the specific modalities of the IDEAS Specific programme and ERCEA:*

- Staff of the scientific department of the ERCEA, experts of the corresponding panel and other experts involved in the evaluation (shadow panel members, secondary panel members, and remote referees). In addition, in particular cases, certain information may be disclosed to the Scientific Council, for approval of the final ranked list of projects and the ERCEA Grants Management Department, for the proposals selected for funding.

Further, some personal data may be disclosed, in compliance with the relevant legislation and established case law, to the General Court or the Court of Justice, the Ombudsman, the European Data Protection Supervisor, the audit and control bodies such as OLAF, Court of Auditors, ERCEA Internal Audit Office, the Internal Audit Service.

Independent experts participating in the evaluation and management procedures sign a Declaration of confidentiality which states the following: *"I undertake not to reveal information on any proposal without the express written approval of the ERCEA. I understand that I will be held personally responsible for maintaining the confidentiality of any documents or electronic files sent and for returning, erasing or destroying all confidential material upon completing the peer review process, unless otherwise instructed"*.

The following **retention policy** applies:

For applicants selected for grant agreements, personal data (on papers and registered in data bases) are kept as required by the Commission's Common Retention List (SEC(2007)970) applied by analogy in the ERCEA Retention Plan, i.e. 10 years after the end of the project. For applicants which are not granted, personal data are kept for 3 years and eliminated after this period.

The following **information to data subjects** is provided in the privacy statement and the grant documentation:

- the identity of the controller;
- legal basis of the processing;
- purpose of the processing;
- categories of data processed;
- recipients of data processed;
- processing of health data;
- retention policy;
- existence of the rights of data subjects of access and rectification;
- existence of the right of data subjects to address queries concerning the processing of personal data to the data controller and co-controllers or the DPO of the ERCEA;
- existence of the right of data subjects to have recourse at any time to the EDPS.

Data subjects are granted the **rights of access and rectification** in accordance with Decision StC210610/6 of the ERCEA's Steering Committee, available on the ERCEA website. Modalities for the exercise of these rights are provided by the privacy statement, included in the grant documentation. Data subjects may request the access, verification, modification or deletion of their data by submitting a request to the controller in writing via a dedicated functional mailbox for applicants for each call.

As regards **security measures**, (.....)

### **3. Legal aspects**

#### **3.1. Prior checking**

The processing of personal data related to proposals evaluation and grants management falls within the scope of Regulation (EC) No 45/2001 ("the Regulation") and it is subject to prior checking by the EDPS pursuant to its Article 27(2)(a) and (b). It relates to the evaluation and ranking of information on personal aspects of the data subjects, incl. their expertise, professional and academic background, abilities and commitment. It also involves processing of health data contained in medical certificates submitted in support of health related career breaks (e.g. illness, maternity) that are relevant to the assessment of the career path of the principal investigator.

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 operation was already carried out by the European Commission and then delegated to the ERCEA. The latter could not stop the "business" upon delegation of tasks and setting-up of its services. This is why the ERCEA submitted an ex-post prior check. The EDPS regrets that the processing operation has already been established prior to his prior-checking Opinion. However, the EDPS underlines that all his recommendations given in the present Opinion should be duly implemented and the processing operations adjusted accordingly.

The notification of the DPO was received on 29 July 2011. According to Article 27(4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. Taking into account that the deadline for *ex post* prior checking notifications was suspended in the month of August and the procedure at hand was additionally suspended for 22 days to allow for comments on the draft Opinion, the present Opinion must be delivered no later than 21 November 2011.

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

The proposals evaluation and grants management procedures organized by the ERCEA with the aim to support research projects through competitive funding in the frame of the EU 7th Research Framework Programme relates to the ERCEA's mandate and EU objectives and policies. Therefore, processing of respective personal data can be regarded as being necessary for the performance of tasks carried out in the public interest on the basis of the legal instruments mentioned above and is lawful within the meaning of Article 5(a) of the Regulation (read together with its recital 27).

#### **3.3. Processing of special categories of data**

The Regulation provides for specific rules for categories of data considered by their nature of infringing fundamental rights and freedoms. According to Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and 10(3).<sup>5</sup> In the present case, the respective processing of health data could be justified on the basis of Article 10 (2)(a) of the Regulation.

The proposals evaluation stage involves the processing of health data contained in medical certificates where these are submitted by the data subjects (principal investigators) in support of health related breaks in their career. Health data is collected on the basis of the IDEAS Work Programme<sup>6</sup> which defines the eligibility criteria applicable to the principal investigators. According to paragraph 3.4.2 of the IDEAS Work Programme, the principal

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<sup>5</sup> See EDPS Guidelines concerning the processing of health data in the workplace by Community institutions and bodies, adopted in September 2009.

<sup>6</sup> See IDEAS Research Work Programme 2012, transmitted for adoption to the European Commission on 21 of March 2011, available at [http://ec.europa.eu/research/fp7/pdf/wp2012/wp2012\\_ideas\\_en.pdf](http://ec.europa.eu/research/fp7/pdf/wp2012/wp2012_ideas_en.pdf).

investigator must have been awarded his/her first PhD degree at least 2 and up to 12 years prior to the publication of the call for proposals. The principal investigator who was awarded his/her PhD more than 12 years prior to the publication may be eligible in some *properly documented* circumstances such as maternity leave (the effective elapsed time will be reduced by 18 month for each child), paternal leave (the effective elapsed time will be reduced by the actual amount of leave) and long-term illness (over ninety days). Health related documentation is thus provided by the applicants on a voluntarily basis when they wish to have their health related career breaks taken into consideration for the calculation of the respective period (PhD obtained no more than 12 years prior to the publication of the call). The selection criteria stipulate clearly that this 12 years period is relevant for the grant award; consequently data subjects are aware that by not providing such data they may be in a situation of non admissibility.

Due to the sensitive nature of health data, the EDPS would like to remind the obligation to process health data to the extent they are "*adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed*" as required by Article 4(1)(c) of the Regulation and invites the ERCEA to procedurally ensure compliance with this provision (e.g. by providing respective guidance or instructions).

### **3.4. Data quality**

The collection of the above mentioned data seems to be justified and necessary for the evaluation both of the research projects and the researchers. Data are provided by the respective data subjects; hence the procedure itself helps to guarantee accuracy of data being processed. The rights of access and rectification contribute further to ensure that the data processed are accurate and up to date subject to considerations and recommendations set out in section 3.7 of the present Opinion.

The EDPS takes note that the grant documentation provides extensive information on the categories of data requested for the purpose of proposals evaluation and grants management procedures. However, it cannot be excluded that despite this guidance provided, applicants may submit via their applications and supporting documents information which might not be necessary or excessive for the purpose pursued by the procedure. Provided that the controller does not process data that are irrelevant and excessive to what is requested and necessary for the processing operations at hand, compliance with the principles relating to data quality as stipulated by Article 4 (1)(c) of the Regulation can be ensured. The EDPS invites the ERCEA to procedurally ensure that unnecessary and excessive information submitted by applicants is not processed (e.g. by providing respective guidance or instructions).

### **3.5. Data retention**

Personal data of applicants selected (on paper and registered in data bases) are kept as required by the Commission's Common Retention List (SEC(2007)970) applied by analogy in the ERCEA Retention Plan, i.e. 10 years after the end of the project. For applicants who do not receive a grant, personal data are kept for 3 years and eliminated after this period.

The EDPS does not see any reason for concern under Article 4(1)(e) of Regulation 45/2001 regarding the three years time limit for keeping data of *unsuccessful* applicants. However, he does not see any reason to keep data of *successful* applicants for ten years after the end of the project. The EDPS would like to point out that according to Article 49(3) of the Implementing Rules as modified by the Commission Regulation 478/2007 of 23 April 2007 "*personal data contained in supporting documents [relating to the budget implementation measures] shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*". Against this background, he considers that a seven years period after the

end of the project would correspond to the maximum time limit for which personal data necessary for control and audit purposes can be kept in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation<sup>7</sup>. The EDPS consequently invites the ERCEA to reconsider the data retention period applicable for data of successful applicants.

### **3.6. Transfer of data**

As indicated above, intra- and inter- institutional transfers of personal data take place within the proposals evaluation and grants management procedures. Pursuant to Article 7 of the Regulation, the transfers within the ERCEA and to other institutions or bodies have to be "*necessary for the legitimate performance of the tasks covered by the competence of the recipient*" (paragraph 1) and the recipients can process the data "*only for the purposes for which they were transmitted*" (paragraph 3). Pursuant to Article 21 of the Regulation, a person employed with an EU institution having access to personal data shall not process them except on instructions from the controller.

In the present case, the transfers of personal data to the ERCEA's staff members participating in the proposals evaluation and grants management procedures and to other EU institutions and organisational structures associated with the Research Framework Programmes<sup>8</sup> are considered necessary for the administration and management of these procedures. Similarly, transfers to the General Court or the Court of Justice, the Ombudsman, the European Data Protection Supervisor, to audit and control bodies such as OLAF, Court of Auditors, ERCEA Internal Audit Office and the Internal Audit Service and other may be necessary for the legitimate performance of tasks covered by the competence of the recipient. This is to be assessed on a case by case basis.

To ensure compliance with Article 7 (3) of the Regulation, the EDPS recommends that all of the above mentioned recipients of data are always reminded of the purpose limitation of the respective transfer.

Further, processing of data on behalf of the controller where independent experts participate in the proposals evaluation and grants management procedures implies an assessment of the compliance of such processing with the requirement of confidentiality set out by the Regulation. In the present case the EDPS notes that these experts are requested to sign a Declaration of confidentiality that seems to ensure compliance with Articles 21 of the Regulation.

### **3.7. Rights of access and rectification**

Data subjects are granted rights of access and rectification to their personal data upon a request to the controller. The EDPS notes that the deadlines for the exercise of these rights are specified in the Applicants Guide but they are not mentioned in the privacy statement. In the context of the competitive character of the selection procedure and the deadlines for submitting applications, the EDPS would like to invite the ERCEA to stipulate in the privacy statement time limits for the exercise of the right to rectify certain categories of data (e.g. professional and academic background). The EDPS considers that such clarification would contribute to the predictability and legal certainty of the respective processing operation.

Nevertheless, the EDPS recalls that any restriction of the right to access and rectification should be justified on the basis of Article 20(1) of the Regulation and data subjects should be

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

<sup>8</sup> Other Programmes and Initiatives, such as e.g. Programme Committees, Advisory Groups, other European Institutions or Community Programmes/Bodies/Initiatives.

informed of the right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation<sup>9</sup>.

### **3.8. Information to the persons concerned**

The EDPS notes that the privacy statement and the grant documentation provide to data subjects all necessary information as prescribed by Articles 11 and 12 of the Regulation with the exception of information on the time limits for the exercise of the right to rectify certain categories of data as stated above in section 3.7.

### **3.9. Security measures**

After review of the security measures described in the notification, there is no reason to believe that the measures implemented in the context of the notified procedure do not comply with Article 22 of the Regulation. (.....)

## **4. Conclusion**

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

- the ten years time limit (from the end of the grant contract) for storage of personal data relating to successful applicants should be reduced in line with section 3.4. of the present Opinion;
- the time limits for the exercise of the right to rectify certain categories of data (e.g. professional and academic background) should be clearly stated in the privacy statement;
- data recipients should be always reminded of the purpose limitation of the transfer in question and the obligation of confidentiality;
- the data controller should ensure that health related data are "*adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed*";
- the controller should ensure that data supplied by the data subjects but that are irrelevant or excessive to what is requested for the purpose of the processing operation, are not processed.

Done at Brussels, on 21 November 2011

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor

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<sup>9</sup> cf. EDPS Guidelines concerning the processing operations in the field of staff recruitment, adopted on 10 October 2008.