

Opinion on the notifications for prior checking from the Data Protection Officer of the European Railway Agency concerning the Calls for applications to establish lists of prospective independent experts to assist the work of the Working Parties/Groups/Task Forces of the European Railway Agency in the fields of Railway Safety and Railway Interoperability

Brussels, 22 November 2011 (Joint Cases 2011-0667 and 2011-0668)

1. Proceedings

On 11 July 2011, the European Data Protection Supervisor (EDPS) received two notifications for prior checking from the Data Protection Officer (DPO) of the European Railway Agency (ERA) concerning the Calls for applications to establish lists of prospective independent experts to assist the work of the Working Parties/Groups/Task Forces of the European Railway Agency in the fields of Railway Safety and Railway Interoperability (hereinafter the Calls for applications).

The notifications were accompanied by the respective Calls for applications and a Privacy statement.¹

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

2. Facts

This prior checking Opinion deals with the **selection procedure** for external experts on the basis of Calls for applications. Any interested applicant may submit an application at any time during the period of validity of the list, with the exception of the last three months. The evaluation of submitted applications forms, eligibility grids and detailed CVs² is carried out by an evaluation committee at least three times a year. The applicants are selected on the basis of selection criteria such as fields of expertise, qualifications and experience set out in the Calls for applications.

When the working parties of the Agency require an expert assistance in their activities in the fields of railway safety or railway interoperability, the Agency selects experts from the lists on the basis of the specific technical assistance required.

The **controller** is to be considered the ERA as a whole.

The **persons responsible for the processing operations** are the Head of the Interoperability Unit and the Head of the Safety Unit of the Agency.

¹ Calls for applications ERA/2010/SAF/ CALLIND EXP/01 and ERA/2010/INT/CALLIND EXP/01, posted on ERA website at www.era.europa.eu.

² These documents may be downloaded from the Agency's web site.

The **purpose** of the processing operation is to draw up lists of experts in the fields of railway safety and railway interoperability by evaluating their personal aspects (field of expertise, qualifications and experience).

Data subjects are natural persons who apply to the selection of independent experts pursuant to the Calls for applications.

Recipients of data are the Heads of Unit, the members of the selection committees, the secretariats of the Safety Unit and the Interoperability Unit, the project officers leading working parties and the Appointing Authority. When appropriate, data may be disclosed to the European Court of Auditors, the Internal Audit Service, the Civil Service Tribunal, the Ombudsman, the European Data Protection Supervisor and other EU institutions and bodies in the context of their activities. The Privacy statement reminds to all recipients of the data their obligation not to use the data received for any further purpose other than the one for which they were transmitted.

Data are provided by the data subjects in their application forms, eligibility grids and CVs. The following **categories of data** are processed:

- data relevant to identify and contact the candidate (family name, given name, date of birth, gender, nationality, private postal address, e-mail address, fax and telephone numbers);
- data relevant to demonstrate that the candidate fulfils the profile advertised in the Call for applications in terms of expertise, qualifications and experience (CV in European format, eligibility grid and application form). The applicants may indicate any individual situation regarding eligibility criteria and any other information they would like to provide to support their application;
- additional Data (in case of appointment, any document supporting the candidate's technical and professional competence -diplomas, certificates of previous work experience; upon request, ID/passport number and bank account details for reimbursement of expenses and payment of allowances.

The following **retention policy** applies:

- data of unsuccessful applicants will be kept three years after the notification of the candidate of the decision of the selection committee not including him/her in the list;
- data of successful applicants included in the list but not appointed will be kept until the date of expiry of the list (for experts on railway safety) and up to three months after the date of expiry of the list (for experts on railway interoperability);
- data of successful applicants who have been offered an appointment will be kept for three years following the date of the appointment.

The following **information to data subjects** is provided in the Calls for applications and the Privacy statement:

- information on the controller and the persons responsible for the processing operations;
- legal basis and purpose of the processing;
- eligibility and selection criteria;
- recipients of the data processed;
- categories of data processed;
- time-limits for storing the data;
- existence of the right to be informed on the results of the evaluation and to request a review of the application;
- existence of the right of data subjects to verify, modify, block or delete their data;
- existence of the right of data subjects to contact the Agency's DPO and to have recourse to the EDPS.

The data subjects are granted **rights of access to and rectification of data processed** that they can exercise by sending an email to the respective Agency's Units. The right to rectify the factual data processed can be exercised up to the closing date for submission of applications. However, inaccurate identification data may be rectified at any time during the selection procedure. The applicants have the right to access the criteria used and their individual evaluation results at all stages of the selection procedure upon written request sent to the dedicated email address.

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

3. Legal aspects

3.1. Prior checking

The processing of personal data relating to the management and administration of Calls for applications falls within the scope of Regulation (EC) No 45/2001 (hereinafter the Regulation). It is subject to prior checking by the EDPS pursuant to its Article 27(2) (b) since it is clearly intended to evaluate the capacity of each applicant to assist the specific work of the Agency in the fields of railway safety and interoperability.

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, the EDPS regrets that the processing operations have already been established prior his prior-checking Opinion. However, the EDPS underlines that all his recommendations made in the present Opinion should be duly implemented and the processing operations adjusted accordingly.

The notifications were received by email on 11 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 44 days to allow for clarifications requested by the EDPS and comments on the draft Opinion, the present Opinion must be delivered no later than 22 November 2011.

3.2. Lawfulness of the processing

Under Article 5(a) of the Regulation, 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*".

The Calls for applications are based on Article 3 (1) and (4) of Regulation No (EC) 881/2004 establishing a European Railway Agency as amended by Regulation No (EC) 1335/2008. These provisions set out the possibility for the European Railway Agency to establish a limited number of working parties for drawing up recommendations concerning some of its activities and "*if necessary, add to the working parties independent experts recognised as competent in the field concerned*".

The purpose of processing operations is to select experts able to assist the work of the Working Parties/Groups/Task Forces of the ERA in the fields of railway safety and interoperability based on their recognised expertise, qualifications and experience in the respective field. In this respect, the processing operations under review can be regarded as being necessary for the performance of tasks carried out in the public interest on the basis of

the above mentioned regulation. Therefore, the data processing is lawful within the meaning of Article 5(a) of the Regulation.

3.3. Data quality

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

The accuracy of the data processed is facilitated by the fact that data are provided by the respective data subjects who can also make use of their right of access and rectification (see point 3.6).

Lawfulness of the data processing has been already discussed (see point 3.2), whereas fairness has to be assessed in the context of information provided to data subjects (see point 3.7).

The applicants may provide in their application forms, eligibility grids and CVs information that may not be necessary for the respective selection procedure. In this respect, the EDPS would like to invite the ERA to procedurally ensure that unnecessary and excessive data submitted by applicants are not processed (e.g. by providing respective guidance or instructions to staff participating in the processing operation).

3.4. Data retention

According to Article 4(1)(e) of the Regulation, personal data may be kept in a form enabling 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.

Data of successful applicants who have been offered an appointment will be kept for three years following the date of the appointment.

The EDPS notes that data of unsuccessful applicants will be kept three years after the notification of the candidate of the decision of the selection committee not including him/her in the list. The EDPS does not see any reason to keep data longer than it is necessary to exhaust available remedies which in this case would be the deadline of two years for submitting a complaint to the European Ombudsman. For the same reason the EDPS considers that it is of the best interest of successful applicants included in the list but not appointed to keep their data for two years after the expiry of the list. In this respect, the EDPS invites the ERA to reconsider the data retention periods for unsuccessful applicants and successful but not appointed applicants in line with his considerations.

As regard the three years period for keeping data of successful candidates offered an appointment, the EDPS would like to point out that according to Article 49(1)(d) of the Implementing Rules to the Financial Regulation, supporting documents relating to the budget implementation measures should be kept for "*at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate*". Further, according to Article 49(2) of the Implementing Rules, "*documents relating to operations not definitively closed shall be kept for longer than provided for in point (d) of the first subparagraph, that is to say, until the end of the year following that in which the operations are closed*". In any case, "*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*" as provided by Article 49(3) of the Implementing Rules. Against this background, the EDPS notes that the ERA intends to keep personal data of successful and appointed applicants for only three years

but he would like also to invite the ERA to reconsider the data retention period for data with financial/budget implications (supporting documents relating to the budget implementation measures) in line with the requirements of Article 49 of the Implementing Rules to the Financial Regulation.

3.5. Transfer of data

The internal and inter-institutional data transfers mentioned above are subject to Article 7 of the Regulation. They should be necessary for the legitimate performance of tasks covered by the competence of the particular recipient who can process the data only for the purposes for which they were transmitted.

In the present case, the transfers of personal data to the Heads of Unit, the members of the selection committees, the secretariats of the Safety and Interoperability Units, the project officers leading working parties and the Appointing Authority are in principle considered as necessary for the accomplishment of the respective selection procedures. Furthermore, the data transfers to the European Court of Auditors, the Internal Audit Service, the Civil Service Tribunal, the Ombudsman, the European Data Protection Supervisor and other EU institutions and bodies in the context of their activities may be regarded as being necessary for the performance of respective supervisory tasks.

The EDPS notes that *all recipients* of the data are reminded of their obligation not to use the data received for any further purpose other than the one for which they were transmitted and has no reason to believe that the processing operation raises any specific concern as regard Article 7 of the Regulation.

3.6. Rights of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the data subject concerned. Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

In the case at hand, access and rectification of data processed can be granted upon an email request sent to the respective Agency's Unit, whereby after the expiry of the application deadline, the right of rectification is limited to the identification details. This restriction can be deemed necessary to ensure the fairness of the selection procedure, i.e. safeguard the protection of rights of other applicants in terms of Article 20(1)(c) of the Regulation.

The EDPS would like to also underline that data subjects should be given access also to their evaluation results regarding the respective selection procedure unless a restriction provided for by Article 20 (1) of the Regulation applies. This restriction may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the selection committee if such access would undermine the rights of others applicants or the freedom of members of the selection committee. In any case the data subjects should be provided with aggregated results and informed of the principal reasons on which the application of the restriction of their right of access is based and of their right to have recourse to the EDPS as required by Article 20 (3) of the Regulation³.

In this case, the EDPS notes with satisfaction that the applicants have the right to access the criteria used and their individual evaluation results at all stages of the selection procedure.

³ cf. EDPS Guidelines concerning the processing operations in the field of staff recruitment, adopted on 10 October 2008

3.7. Information to the persons concerned

Articles 11 and 12 of the Regulation provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

The EDPS notes that the Calls for applications and the Privacy statement provide for all information as required in terms of Articles 11 and 12 of the Regulation.

3.8. Security measures

On the basis of the available information, the EDPS has no reason to believe that the security measures implemented by the ERA are not adequate in light of Article 22 of the Regulation.

4. Conclusion

The proposed processing operation does not appear to involve any breach of the provisions of Regulation (EC) 45/2001, provided that the recommendations made above are taken into account. This means, in particular, that:

- the controller should procedurally ensure that data supplied by the data subjects but irrelevant or excessive to what is requested for the purposes of the processing operations are not processed, in line with section 3.3. of the present Opinion;
- the data retention periods should be reconsidered in line with section 3.4 of the present Opinion.

Done at Brussels, 22 November 2011

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