

Opinion on the notification for prior checking from the Data Protection Officer of the Community Plant Variety Office on the procedure for early retirement without reduction of pension rights

Brussels, 13 December 2011 (case 2011-0304)

1. Proceedings

On 28 March 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Community Plant Variety Office (CPVO) a notification for prior checking on the procedure for early retirement without reduction of pension rights.

The notification was accompanied by the following documents:

1. Decision of the CPVO' President laying down the general implementing provisions on the early retirement of officials and temporary agents without reduction of pension rights, adopted on 15 January 2010;
2. Priority criteria for early retirement without reduction of pension rights;
3. Call for applications for early retirement without reduction of pension rights, 2011 exercise;
4. Application form for early retirement without reduction of pension rights;
5. Internal memo on data protection.

Further to the EDPS request for clarifications, the CPVO submitted a decision of the CPVO' President on the conservation of personal files adopted on 8 June 2011.

The draft Opinion was sent to the DPO for comments on 8 December 2011. These were received on 12 December 2011.

2. Facts

In accordance with Article 9(2) of Annex VIII of the Staff Regulations and Article 39 of the Conditions of Employment of Other Servants, each year a limited number of officials and temporary agents are allowed to retire before the pensionable age without reduction of pension rights. The Decision of the CPVO' President adopted on 15 January 2010 (hereafter referred to as "Decision on early retirement") establishes the provisions implementing a scheme for early retirement without reduction of pension rights at the Office.

The **purpose** of the data processing operations is to manage the early retirement applications submitted yearly by CPVO's officials and temporary agents.

The **controller** is the CPVO, here represented by its Vice-President.

The CPVO's organisational part **entrusted with the data processing** is the Human Resources service.

Data subjects are officials and temporary agents employed by the CPVO and any other person who submits an application for early retirement regardless of his/her eligibility.

The following **data** are collected based on the application form and the contracts of the applicant with the CPVO:

- identification data (staff number, surname, name, date of birth and email address);
- place of assignment (unit/service, start of employment and internal telephone number);
- administrative information data (employment status, category/grade/step, administrative position, entry into service with the CPVO as official or temporary agent);
- years of service as official or temporary agent within the CPVO;
- years of service as official or temporary agent at other European institutions;
- period of service for which a severance allowance was received, if applicable;
- reasons for applying for the early retirement without reduction of pension rights;
- data concerning transfer of pension rights, including years and months of service;
- signature of the staff member concerned.

The common **retention policy** of the CPVO applies to the processing operations under review. This policy is set forth in the Decision on the conservation of personal files, adopted by the President of CPVO on 8 June 2011. According to that decision, all personal data contained in the personal file of a staff member will be destroyed after a period of 10 years from the date of the end of contract of the staff member. This provision does not apply to administrative data stored in the “pension” part of the personal file containing a summary of the employment history of the staff member at the CPVO as well all correspondence related to the staff member with the Pension unit of the Commission. For these data, the conservation period is extended to 10 years after the date of retirement of the (former) staff member.

Personal data processed within the processing operation may be disclosed to the following **recipients**: the Appointing Authority, the Joint Committee and the unit to which the applicant is assigned. The Joint Committee is composed of one representative of the Human Resources (HR) service, the Staff Committee and a Head of Unit. Data is transferred also to the European Commission' Office for the administration and payment of individual entitlements (PMO).

An internal memo to the attention of the Appointing Authority, the Joint Committee and the concerned units adopted by the CPVO's President on 28 March 2011 reminds the purpose limitation of the transfer of personal data and requires the destruction upon conclusion of the early retirement procedure of all data provided in the frame of the procedure if in paper format and their erasure from the computer if provided in electronic format.

The data subjects are granted **rights of access and rectification**. As far the **rights of blocking and erasure** are concerned, the requests will be dealt on a case by case basis. Any request for access, rectification, erasure, blocking and any objection to processing of personal data should be sent in writing to the HR service.

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

- identity of the controller;
- legal basis and purpose of the processing;

- categories of data processed;
- retention policy;
- recipients of data processed;
- time-limits for storing the data;
- right to have recourse to the CPVO' DPO and the EDPS;
- rights of access, rectification, blocking and erasure, and the right to object;
- obligation of the Human Resources service to inform the applicant on the potential effects of exercising the right to erase, block or object on their eligibility for early retirement within the meaning of the Decision on early retirement.

As far as **security measures** (.....)

3. Legal aspects

3.1. Prior checking

The processing of personal data relating to procurement procedures falls within the scope of Regulation (EC) No 45/2001 (hereinafter "the Regulation") and is subject to prior checking by the EDPS pursuant to its Article 27(2) (a) and (b).

The procedure under examination is intended to select officials and temporary agents who may be eligible for an immediate pension without reduction of pension rights. In this respect, data are collected and processed with the purpose of evaluating certain aspects of the applicants' professional and personal situation in the context of their eligibility for early retirement. The Decision on early retirement establishes the following criteria for evaluating personal aspects of applicants: years of service at the institution and the positive contribution to the work of the service; existence of reorganisation and redeployment measures affecting the applicant, correspondence of the applicant's skills and aptitudes to the job requirements, occupation of a sensitive post, scope for training, particular personal/family situation and others.

Therefore there is an appraisal of the ability and the personal or family circumstances of the applicants which justifies submitting the procedure to prior checking by the EDPS on the basis of Article 27(2)(b) of the Regulation.

In addition, according to Article 27(2)(a) of Regulation (EC) 45/2001, the processing of data relating to health is also subject to prior checking by the EDPS. This might be the case here as some data relating to health might be collected as described in section 3.3 below.

The notification of the DPO was received on 28 March 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 200 days to allow for the submission of additional information and comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than 15 December 2011.

3.2. Lawfulness of the processing

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. In particular, Article 5(a) of the Regulation provides that personal data may be processed if the processing is "*necessary for 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 legal basis of the processing operations under review can be found in Article 9(2) of Annex VIII of the Staff Regulations and Article 39 of the Conditions of Employment of Other Servants, which allow each year a limited number of officials and temporary agents to retire before the pensionable age without reduction of pension rights. Having regarded these provisions, the decision of the CPVO's President adopted on 15 January 2010 lays down the general implementing rules and criteria for early retirement without reduction of pension rights of CPVO's officials and temporary agents.

Processing of respective personal data within the procedure for early retirement at the CPVO can clearly be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned legal provisions. To put into practice these provisions and ensure compliance with obligations arising from them, it is considered as necessary for the CPVO to collect and further process personal information that evidence that the applicants meet the respective eligibility criteria.

Thus, processing of personal data in the case at hand seems to be lawful within the meaning of Article 5(a) of Regulation (EC) 45/2001 (read together with its recital 27).

3.3. Processing of special categories of data

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited unless grounds can be found in Article 10(2) and (3) of the Regulation.

In the present case the applicants are asked to provide the reasons for their application in an empty box in their application form. One cannot exclude therefore that data relating to the health of the person concerned or of a third party such as a family member be included. The EDPS considers that processing of medical data submitted voluntarily by the applicants does not raise particular concerns as Article 10(2)(a) allows the processing of such data when "*the data subject has given his or her express consent to the processing of such data*". It could also be considered as necessary for the purpose of complying with the rights and obligations in the field of employment law (Article 10(2)(b)).

3.4. Data Quality

According to Article 4(1)(c) of the Regulation, "*personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*".

The data needed for evaluating the applications for early retirement are collected by means of a specific application form. The EDPS notes that the data collected can be considered as adequate and not excessive in light of the purpose of the processing.

Data must also be "*processed fairly and lawfully*" as stipulated by Article 4(1)(a) of the Regulation. Lawfulness has already been discussed in paragraph 3.2 above. Concerning fairness, this relates to the information which is to be communicated to the data subjects (see below, paragraph 3.8).

Finally, 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*". The accuracy of the factual data processed is ensured by the fact that they are provided by the respective data subjects so that the procedure itself helps to guarantee the accuracy. Also, the rights of access and rectification even after the submission of the

application form contribute to ensure that the data processed are accurate and up to date (cf. point 3.7. below).

3.5. Data retention

Article 4(1)(e) of the Regulation states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed (...)*".

The notification mentions that the common retention policy of the CPVO applies to the procedure under review. This policy is set forth in the Decision on the conservation of personal files, adopted by the President of CPVO on 8 June 2011. According to that decision, all personal data contained in the personal file of a staff member will be destroyed after a period of 10 year from the date of the end of contract of the staff member. This provision does not apply to administrative data stored in the "pension" part of the personal file containing a summary of the employment history of the staff member at the CPVO as well all correspondence related to the staff member with the Pension unit of the Commission. For these data, the conservation period is extended to 10 years after the date of retirement of the (former) staff member. The EDPS notes that these retention periods can be considered as reasonable in view of the specific character of pension rights and their exercise for a period of time that could not be determined in advance. Therefore, these retention timeframes seem to be in line with Article 4(1)(e) of the Regulation.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7 of the Regulation which covers the transfer of personal data within or between Community institutions or bodies. According to Article 7 (1) of the Regulation these transfers may only take place "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

In the present case, the transfers of personal data to the CPVO staff (members of the HR service, the Staff Committee, the Unit to which the applicant is assigned and the Appointing Authority) are in principle considered as necessary for the management and administration of the early retirement procedure. Similarly, the transfers of data to the European Commission's Office for the administration and payment of individual entitlements (PMO) can be considered as necessary in the context of its specific competences.

Further, Article 7 (3) of the Regulation specifies that the recipient shall only process the data "*for the purposes for which they were transmitted*". The EDPS notes with satisfaction that the CPVO's President issued an internal memo to the attention of the recipients of personal data to remind them of the purpose limitation of the transfer and to require the destruction upon conclusion of the early retirement procedure of all personal data provided in the frame of the procedure if in paper format and their erasure from the computer if provided in electronic format. These measures seem to guarantee the respect of Article 7(3) of the Regulation.

3.7. 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*".

According to the call for applications, applicants are granted full rights of access, rectification, blocking, erasure and the right to object to the processing of personal data that they can

exercise upon a writing request to the HR service. The EDPS notes that the privacy statement does not mention any deadlines for the exercise of the right of rectification. In the context of the competitive character of the procedure and the deadline for submitting applications, the EDPS would like to invite the CPVO to stipulate in the data protection notice included in the call for applications appropriate time limits for the exercise of the right to rectify certain categories of data that are essential for the evaluation of applications. The EDPS considers that such clarification would contribute to the predictability and legal certainty of the respective processing operation and is necessary to ensure its fairness, i.e. safeguard the protection of rights of other applicants in terms of Article 20(1)(c) of the Regulation.

The right of access implies also access to the evaluation results regarding the respective selection procedure unless a restriction provided for by Article 20 (1) is imposed. 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 evaluation committee. The EDPS has always reminded that 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 Regulation.

The EDPS notes with satisfaction that in the case at hand the above mentioned position is partially reflected in Article 9 of the Decision on early retirement which stipulates that "*non-selected applicants will be informed in writing with a reasoned decision*" and "*selected applicants shall be informed of their selection in writing*". The EDPS invites the CPVO to procedurally ensure that the applicants are also provided with aggregated results regarding the selection procedure and informed of the principal reasons on which the application of the restriction of their right of access is based as required by Article 20 (3) of the Regulation.

Provided that all of the above considerations in respect of the exercise of the right of access and rectification are taken into account, compliance with Articles 13 and 14 of the Regulation will be ensured.

3.8. Information to the data subject

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

The EDPS notes that the data protection notice included in the call for applications provides information on the main aspects of the processing operation. Provided that respective changes are made in the data protection notice in line with the considerations stated above in section 3.7, compliance with Articles 11 and 12 of the Regulation will be ensured.

3.9. Security measures

On the basis of the available information, the EDPS has no reason to believe that the security measures implemented by the CPVO are not adequate in light of 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 comments made above are taken into account. This means, in particular, that:

- the time limits of the right to rectification should be clarified in line with the considerations stated in section 3.7 of the present Opinion and the data protection notice should be amended accordingly;
- data subjects should be given access to the aggregated results regarding the selection procedure and informed of the principal reasons on which the application of the restriction of their right of access is based and the data protection notice should be amended accordingly.

Done at Brussels, 13 December 2011

(signed)

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