

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Education Audiovisual and Culture Executive Agency on the Monitoring of external experts' work**

Brussels, 22 March 2012 (case 2012-0008)

### **1. Proceedings**

On 3rd January 2012, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Education Audiovisual and Culture Executive Agency (EACEA) a notification for prior checking on the monitoring of external experts' work. The notification was accompanied by the following documents:

1. Privacy statement;
2. application instructions;
3. data protection clause included in the contract with the experts;
4. declaration of absence of conflict of interests and of confidentiality;
5. "*manuel pour la sélection et la contractualisation des experts*";
6. print-out of EACEA's online recruitment tool for experts;
7. call for expressions of interest EACEA/07;
8. contract with the expert database service provider.

The draft Opinion was sent to the DPO for comments on 28 February 2012. These were received on 20 March 2012.

### **2. The facts**

The purpose of the data processing is monitoring of the experts to ensure the quality requirements established in the contract with selected experts.

In the framework of the management of the European programmes in the fields of education, audiovisual culture, youth and citizenship, the EACEA selects experts to assist in the performance of evaluating proposals received in response to calls for proposal, evaluating and monitoring projects and for specific studies and analyses relating to fields of activity. The selection and management procedure of experts, including the monitoring of the experts work, is detailed in the "*Manuel pour le sélection et la contractualisation des experts*"<sup>1</sup>.

The operational Units of EACEA are in charge to monitor the quality of the work carried out by external experts during or after these have carried out their work. This monitoring means

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<sup>1</sup> EACEA's management and administration of the selection procedure for external experts on a basis of a call for expression of interest and the data processing relating to the conclusion of contracts with the selected external experts was prior checked by the EDPS; see the Opinion of the EDPS of .....2012, case no. 2012-007.

that EACEA staff verifies the quality of the experts comments, the coherence, the form and the linguistic quality of the experts evaluation.

The evaluation is not undertaken in a systematic paper based monitoring procedure in which each expert's evaluation would be checked against pre-defined criteria. It will only take place in exceptional cases, if it appears during the work of an expert or after the termination of a contract with an expert that his work is of significant lower quality than the average performance. This underperformance may lead, in conformity with the contract between EACEA and the expert concerned, to a reduced payment, no payment at all or to the termination of the contract with the expert. In this case, the expert shall be informed in writing by the responsible Head of Unit. This letter explains in detail the reasons why the EACEA considers the expert as underperforming and what the intentions of the EACEA are. The letter stresses that the expert concerned has the right to lodge comments on the assessment made and the intention of the EACEA within a delay of 30 calendar days. If the expert has submitted comments, the Head of Unit takes these comments into account for his decision and informs accordingly the expert about his decision, giving a specific reasoning in reply to the comments lodged.

Only significant cases of underperformance fall under the scope of this procedure. In particular, the following criteria may be taken into account to assess whether the work is of a significant lower quality than the average performance:

- manifest errors in the analysis of the projects and expert's comment;
- important or repeated delays in the analysis of the projects, including fewer numbers of projects/report excerpts;
- insufficient professional conduct (e.g. lack of cooperation, simple 'copy and paste' of reports/report excerpt);
- expertise and competencies significantly below the knowledge declared during application.

In order to keep trace of the underperformance, the letters of EACEA to the expert, as well as his reply with potential comments, are stored in the expert's profile in the databases.

The data relating to the evaluation of personal aspects of the data subject (such as his or her ability, efficiency and conduct) and to the experts' work are processed automatically within the database provided by an external contractor. Moreover, a paper file of the expert selection is kept, in which the correspondence with the experts is stored.

Files relating to the selection procedure of experts, including personal data, are retained in the Unit in charge of the procedure until it is finalised, and in the archives for a period of 10 years following the signature of the contract. In addition, limited personal data relating to the expert may be retained in the unit in charge of the procedure until it is finalised, and in the archives for a period of 10 years after the closure of the project. This retention period applied at EACEA is foreseen by the Common Conservation List (CCL)<sup>2</sup>.

Data relating to the evaluation of personal aspects of the data subjects may be disclosed to the following **recipients**:

- Administrator of the database;
- Service provider for technical assistance;
- Designated staff members of the Unit;
- Head of Unit;

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<sup>2</sup> Common Conservation List (CCL), SEC (2007) 970 adopted by the Commission on 04/07/2007, Annex 1, p.11, point 7.1.2, 7.1.3 and p. 23, point 12.6.1.

- Head of Department,
- Director.

**Information to data subjects** is provided in the privacy statement. Moreover, a data protection clause is included in the contract with the expert.

The data subjects are granted **rights of access and rectification**. In case experts wish to verify which personal data is stored, have it modified or corrected, they may do this online.

In respect of the **right to obtain the blocking of personal data**, the notification under review mentions that 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. **Erasure** is carried out within 15 days upon request.

**Processing of personal data on behalf of the controller:** the processing operation is mainly performed in a computer environment provided by an external contractor.

[...]

### **3. Legal aspects**

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

The processing of personal data relating to the monitoring of experts falls within the scope of Regulation (EC) 45/2001 (hereinafter the Regulation) and is subject to prior checking by the EDPS pursuant to its Article 27(2) (b). Data is collected and processed with the purpose to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.

In principle, prior checks by the EDPS should be carried out before the processing operation is implemented. Since the relevant data processing operations have already been established, the check has to be carried out *ex post*. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

The notification of the DPO was received on 3 January 2012. 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 21 days to allow for comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than 26 March. 2012.

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

Processing of personal data relating to the monitoring of experts contracted by the EACEA following a call for expression of interest can be considered as necessary for the performance of the tasks of the EACEA carried out in the public interest on the basis of the following legal acts:

- Commission Decision C (2009) 3355 final of 6 May 2009 (delegating powers to EACEA): in particular Article 4;
- Call for expressions of interest EACEA/07<sup>3</sup>.

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<sup>3</sup> Call for expressions of interest EACEA/07<sup>3</sup> for the establishment of a list of experts to assist the Education, Audiovisual and Culture Executive Agency in the framework of the management of the Community programmes in the fields of education, audiovisual, culture, youth and citizenship.

The processing of personal data of the experts is necessary for the management and functioning of the EACEA. The processing ensures that the experts properly fulfil their contractual cooperation and the obligation to assist the EACEA in the performance of its tasks. Thus, processing of personal data in the case at hand is lawful within the meaning of Article 5(a) of Regulation (EC) 45/2001, read together with its recital 27.

### **3.3. Data Quality**

According to Article 4(1)(c) of the Regulation "*personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed*". The EDPS is of the opinion that the data listed in the notification and collected from the data subject for the purposes of the evaluation procedure comply with the criteria set out in Article 4(1)(c).

Monitoring of the experts means that the EACEA staff verifies the quality of the experts comments, the coherence, the form and the linguistic quality of the experts evaluation based on the criteria mentioned above. From the information presented to the EDPS it can be concluded that the categories of data processed for the assessment are adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed.

Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". Data subjects are informed in writing about the reasons why the EACEA considers the expert as underperforming. They are also made aware of their right to lodge comments on the assessment. The EDPS notes that this contributes to keep the data accurate and up to date throughout the process.

Article 4(1)(a) also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 3.2). As to fairness, this must receive a great deal of attention in this context. It relates to the information which has to be transmitted to the data subject (see point 3.8).

### **3.4. Data retention**

Article 4(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 EDPS notes that keeping files of engaged experts for seven years (instead of ten years) after the finalisation of the procedure would correspond to the maximum time period for which personal data is necessary for control and audit purposes in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation<sup>4</sup>. Thus, the EACEA is requested to reconsider the retention period and establish a shorter retention period for all files concerning engaged experts.

### **3.5. Compatible use**

Article 4(1)(b) of Regulation 45/2001 provides that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

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<sup>4</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.

The EACEA also makes use of the personal data collected in the selection procedure<sup>5</sup> for the purpose of monitoring the performance of the contracted experts, in particular as regard the ability and efficiency of the data subjects. The check of the efficiency of the work outcome can be considered lawful (see point 3.2) and compatible with the selection procedure. This is the only way to ensure that the experts fulfil their duties.

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

Article 7(1) of Regulation 45/2001 provides that "*Personal data shall only be transferred within or to other Community Institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The intra-institutional transfers of personal data within the procession operation seem to be necessary for the legitimate performance of tasks covered by the competence of the recipient. Article 7(1) of the Regulation is respected.

Furthermore, in accordance with Article 7(3) of the Regulation, the EDPS reminds that the recipient of the data shall process them only for the purposes for which they were transmitted.

### **3.7. Right of access, rectification, blocking and erasure**

The EDPS considers that the measures provided by the EACEA to guarantee the rights of access, rectification, blocking and erasure seem to be in accordance with Articles 13-16 of the Regulation, whereas the assessment result (by nature subjective) can only be rectified within the respective appeal procedures.

### **3.8. Information to the data subject**

The EDPS notes that all necessary information is provided to the data subjects and that Articles 11 and 12 of the Regulation seem to be respected. As regard the monitoring procedure, the contracted expert is informed in detail of the reasons why the EACEA considers the expert as underperforming and of his right to lodge comments. Thus, fairness towards the data subject is respected. Moreover, the privacy statement contains further necessary information to be supplied to data subjects as prescribed by Article 11 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 all recipients of the data shall process them only for the purposes for which they were transmitted.

Done at Brussels, on 22 March 2012

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor

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<sup>5</sup> submitted for prior check, see footnote 1.