

## **Opinion on the notification for prior checking from the Data Protection Officer of the Education Audiovisual and Culture Executive Agency concerning call for expression of interest for selection of experts**

Brussels, 22 March 2012 (case 2012-0007)

### **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 concerning call for expression of interest for selection of experts (selection and management of experts). EACEA already notified this procedure in February 2011 (case 2011-0147). After having received the EDPS draft opinion on 31 March 2011 EACEA decided to withdraw the notification to carry out further verifications on new elements. The new notification also addresses several issues which have been raised in the EDPS draft Opinion on case 2011-0147. 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. Facts**

The **purpose** of the processing in question is the management and administration of the selection procedure for external experts on a basis of a call for expression of interest in line with Article 179a of the Financial Regulation<sup>1</sup>, read together with Article 265a of its Implementing Rules<sup>2</sup>, for tasks involving assistance in evaluating proposals and grant applications or tenders for procurement procedures, and for providing technical assistance in

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<sup>1</sup> Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1), as subsequently amended ("Financial Regulation"), in particular Article 179a.

<sup>2</sup> Commission Regulation (EC, EURATOM) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as subsequently amended ("Implementing Rules"), in particular Article 265a.

the follow-up, as well as the final evaluation of projects financed by the budget. An application is always related to one of the programmes/actions. If experts want to work for several programmes/actions, they have to fill in a separate application for each programme/action they wish to apply for. The expert tool distinguishes between the different programmes/actions. Secondly, the scope and purpose of data processing relates to conclusion of contracts with the selected external experts.

Designated staff in EACEA's operational units carry out an eligibility check, on the basis of the published eligibility criteria. On the basis of the eligibility check the operational units establish two lists for each programme/action: a list with experts accepted and a rejected list. The lists are validated by the Agency Director or the Head of LLP Department. Each time the operational Unit wishes to make use of experts for one of the purposes defined in the call for expression of interest, it will select among the accepted experts on the basis of the experts profiles in the database. The final selection of experts among the experts who indicated their availability is carried out by an expert's selection committee. The selection committee can also include staff members of mirror units within the European Commission. Selection notes are signed by all members of the selection committee and validated by the responsible Head of Unit.

The selection and management procedure is detailed in EACEA's "*Manuel pour la sélection et la contractualisation des experts*". The "Manuel" includes a series of specific reminders and instructions to EACEA staff concerning the processing of personal data.

The **controller** is the EACEA, here represented by its Director.

**Data subjects** are applicants for an assignment as external experts, potential experts contained in EACEA's experts' database and selected experts.

All applications must be submitted online. The following **categories of data** may be processed:  
*Personal and contact information* (name, date of birth, gender, nationality, address, further contract details);

*Professional experience/Employment History* (current organisation, job title, organisation name and type, description of responsibilities);

*Personal skills and competences* (languages -mother tongue and other-, accounting skills, financial analysis skills, project management skills -based on a self assessment-);

*Education, training and academic background;*

*Field (s) of expertise and particular experience related to the respective call.*

The applicants provide additional information that may contain a motivation letter and a list of publications.

Selected applicants are requested to provide additional information such as: ID card, bank account reference (*IBAN and BIC codes*), VAT n<sup>o</sup> (*where applicable*) and Legal Entity File that will be stored in the financial database of the Commission (ABAC).

The following **retention policy** applies:

*Rejected applications:* 2 years following the closing of the Call for expression of interest;

*Accepted applications for experts never engaged by EACEA:* 2 years following the closing of the Call for expression of interest;

*Accepted applications for experts engaged by EACEA:* Files relating to the selection procedure 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. This retention period applied at EACEA is foreseen by the Common Conservation List (CCL)<sup>3</sup>. In addition, limited personal data relating to the expert may be included in the files relating to grants in which the expert has been involved. These grant files are to 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. However, documents relating to unsuccessful grant applications have to be kept only for 3 years following adoption of the award decision.

*Withdrawn applications:* withdrawn application(s) which are not re-activated by the applicant will be deleted after the closure of the Call for expression of interests if the expert does not want to be deleted from the database before that time-limit.

*Incomplete applications:* Reminders will be sent to the applicant to inform him that his incomplete application should be completed and submitted. If the application remains still incomplete, it will be deleted permanently.

Bank Account Validation file and supporting documents are not retained at EACEA after the Bank Account Validation has been done by DG BUDG.

Legal Entity File and supporting documents are not retained at EACEA after the Legal Entity has been created by DG BUDG.

Limited information, in particular name, first name and the Community programme(s) for which the contractor has worked are published yearly for the two following years of the engagement in any form and medium, including via EACEA's website for the following two years of the engagement.

The **data processing is automated**. The whole processing operation is mainly performed in a computer environment provided by an external contractor. The submitting of applications and their storage is performed online. The expert database is managed with the help of an informatics database tool.

Data processed within the processing operation may be disclosed to the following **recipients**:

*Data relating to the evaluation of personal aspects of the data subject*

*Pre-selection:*

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

*For pre-selected experts contained in database, in addition to the above mentioned:*

- Selection Committee members (EACEA + Commission staff, if applicable). Staff members involved in the selection committee do not have access to the experts database. Every member of the evaluation committee signs a declaration on conflict of interests.
- European Commission or third parties related to the European Commission (EU bodies) in the case that the expert has accepted during registration the additional opportunity to work with the Commission (opt-in-option). In addition to their application to EACEA,

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<sup>3</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.

experts have the choice to express their interest in working either for the European Commission and/or for third parties related to the European Commission (EU bodies) by ticking the relevant box.

*Bank account Validation file and supporting documents*

- Agency staff, Commission staff (DG BUDG)

*Legal Entity File and supporting documents*

- Agency staff, Commission staff (DG BUDG)

*Name, first name and the Community programme (s) for which the contractor has worked*

- The information is published on the Agency's website.

In case of control or dispute, personal data might be disclosed to the supervisory instances of EACEA (i.e. European Commission, OLAF, European Court of Auditors) and to the judicial authorities (i.e. EU Courts, Ombudsman, etc.).

The data subjects are granted **rights of access and rectification** that they can exercise directly online. The password set up during the registration of the application allows the applicants to log in to the system and update their personal information or to withdraw their application. If an applicant decides to withdraw his/her application, it is set to invisible and may be re-activated at a later stage by contacting the EACEA External Helpdesk.

Data subjects are given access to their evaluation results. Rejected experts who did not meet the eligibility criteria are informed about their rejection and that they may update their profile at any time.

If the applicant wants all his/her data permanently removed, he/she has to contact EACEA.

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.

**Information to data subjects** is provided in the privacy statement and the application instructions published on the EACEA's website. Before filling in their data in the database, the applicants have to click on a button which brings them to the screen with the privacy statement. They have to confirm that they accept the privacy statement.

The *privacy statement* provides information about the following details:

- identity of the controller;
- categories of data processed;
- purpose of the processing;
- technical information related to the way data is collected and stored;
- recipients of the data processed;
- rights of access and rectification;
- retention policy;
- EACEA's contact information;
- right to have recourse to the controller, EACEA's DPO and EDPS;
- legal basis of the processing.

The *application instructions* provide detailed practical information on the modalities to exercise online the rights to access and rectification, incl. to withdraw the application.

Before the selection takes place, a letter for availability check is sent to candidate experts, which mentions explicitly EACEA's obligation of publication of the surnames and names of the experts. In the same letter, experts are furthermore informed that should they object to this publication, it will not be possible for EACEA to enter a contract (or purchase order) with them, unless their obligation is based on compelling legitimate grounds of confidentiality or security relating to their particular situation. The letter confirming the participation as an external expert in the assessment contains a similar clause.

A data protection clause is included in the contract with the expert.

**Processing of personal data on behalf of the controller:** The processing operation is mainly performed in a computer environment provided by an external contractor. The EDPS received a copy of the service contract on the development of a training tool for the recruitment application and a copy of the service contract on the acquisition of a commercial hosted recruitment application. A data protection clause and a confidentiality clause are included in both contracts. The data protection clause states that personal data shall be processed solely for the purposes of the performance, management and follow-up of the contract by the Agency without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in conformity with European Union law.

[...]

### **3. Legal aspects**

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

The processing of personal data within the management and administration of the selection procedure and for the conclusion of contracts with selected expert including the database system falls within the scope 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 to assist the EACEA in evaluating proposals and grant applications or tenders for procurement procedures and to provide technical assistance to the EACEA in the follow-up and final evaluation of projects financed by the Union budget. The selection of experts is performed on the basis of an evaluation of their professional and technical ability to carry out the tasks described in the call for applications.

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*. The EDPS finds this regrettable and reminds the EACEA that 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 Regulation (EC) 45/2001, 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

The legal basis of the processing of personal data within the management and administration of the selection procedure for external experts on a basis of calls for expression of interest can be found in the following legal acts:

- Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002<sup>4</sup>
- Commission Regulation (EC, EURATOM) No 478/2007 of 23 April 2007<sup>5</sup> ;
- Commission Regulation (EC) No 1653/2004 of 21 September 2004<sup>6</sup> ;
- 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>7</sup>.

Processing of personal data within the management and administration of the selection procedure and the processing of personal data for the conclusion of contracts with selected experts at the EACEA can clearly be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned regulations and to ensure compliance with obligations arising from them. 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.

Article 20 of Commission Regulation (EC) No 1653/2004 specifies that the budget of the agency shall be drawn up and implemented and the accounts presented in compliance with the principle of transparency. The publication of the lists of experts (containing personal information) on the website and in any other form or medium enhances transparency regarding the use of EACEA's funds and can therefore also be considered as legal basis in accordance with Article 5 (a) of Regulation (EC) 45/2001.

### 3.3. Data quality

The collection of personal data listed above seems to be necessary for the identification and evaluation of eligibility of the data subjects pursuant to the respective provisions of the Financial Regulation, as well as its Implementing Rules.

As regard the publication of data on EACEA's website, there is no evidence that the information that is published goes beyond what is necessary for transparency.

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 (cf. point 3.6. below).

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<sup>4</sup> see footnote 1.

<sup>5</sup> Commission Regulation (EC, EURATOM) No 478/2007 of 23 April 2007<sup>5</sup> amending Regulation (EC, EURATOM) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as subsequently amended by Regulation (EC, Euratom) No 478/2007 ("Implementing Rules"), in particular Article 265a.

<sup>6</sup> Commission Regulation (EC) No 1653/2004 of 21 September 2004<sup>6</sup> on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) No 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, (OJ L 297, 22.09.2004, p. 6), as subsequently amended, in particular Article 20.

<sup>7</sup> Call for expressions of interest EACEA/07<sup>7</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.

As already mentioned in section 2, the applicants provide additional information that may contain different categories of data in their cover letters, motivation letters and lists of publications which might not be necessary for the respective selection procedure. Provided that the controller does not process further data that are irrelevant and excessive to what is requested for the purpose of the selection of experts, compliance with the principles relating to data quality as stipulated by Article 4 (1)(c) of Regulation (EC) 45/2001 will be ensured. The EDPS welcomes that the 'Manuel pour la sélection et la contractualisation des experts' includes specific instructions and reminders to EACEA staff concerning the processing of personal data, especially with regard to the purpose limitation and the necessity principle.

### **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.

As indicated above, personal data relating to rejected applicants and applicants put on a list but never engaged by EACEA are to be retained in the archives for 2 years following the closing of the Call for expression of interest. The EDPS is of the opinion that keeping personal data of the applicants within this period would correspond to the time period for which personal data is necessary for control and audit purpose<sup>8</sup>.

The storage period of personal data concerning withdrawn and incomplete applications can be considered appropriate.

Files relating to the selection procedure of engaged experts are to be 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 as foreseen by the Common Conservation List (CCL). Documents relating to unsuccessful grant applications are to be kept only for 3 years following adoption of the award decision.

The data retention period for unsuccessful grant application is based on the CCL<sup>9</sup> and can be considered lawful. The EDPS is of the opinion 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>10</sup>. Therefore a longer retention of these data would be in violation of Article 4.1 (e) of the Regulation. Thus, the EACEA is requested to reconsider the retention period and establish a shorter retention period for all files concerning engaged experts. Given the fact that the archives of EACEA are physically managed by the archives services of the Commission, EACEA should subsequently request the Commission to apply the shortened retention period to the relevant data. However, if EACEA is formally bound by a legal obligation to apply the European Commission's policy for electronic archiving and document management (e-domec rules) including compliance with the common Commission-level CCL and therefore EACEA has legally no competence to modify or otherwise influence the retention period settled by the Commission, the EDPS will pursue this matter further with the Commission services at a general level.

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<sup>8</sup> This time limit covers the period in which data subjects may make a complaint with the European Ombudsman (see Article 2, paragraph 4, of Decision 94/262/ECSC, EC, Euratom of the European Parliament on the Regulations and General Conditions governing the performance of the Ombudsman's duties, OJ L 113 of 4.5.1994, p.159.

<sup>9</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, all read together with reference "T1", foresees for rejected applications a retention period of 3 years following adoption of the award decision.

<sup>10</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

### **3.5. Transfer of data**

Intra -and inter- institutional transfers of personal data take place within the procession operation under review. Pursuant to Article 7 of Regulation (EC) 45/2001, the transfers within the EACEA and to other institutions 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).

The EDPS takes note that a reminder on the purpose limitation is sent to the recipients in such cases. The EDPS is therefore satisfied that the requirements of Articles 7 (3) and 23 (2) read together with Article 21 of the Regulation are taken into consideration and all data recipients (intra- and inter-institutional) are reminded of the purpose limitation of the transfer in question.

### **3.6. Rights of access, rectification, blocking and erasure**

The data subjects are granted rights of access and rectification that they can exercise directly online. They may also contact the EACEA External Helpdesk and request to update or permanently delete their data or to withdraw their application, or request from the controller the blocking of their personal data. The EDPS welcomes that applicants and shortlisted experts are given access also to their evaluation results regarding the respective selection procedure.

The EDPS considers that these measures guarantee the rights of access, rectification, blocking and erasure in accordance with Articles 13-16 of Regulation 45/2001 (EC).

### **3.7. Right to object**

Article 18(a) of the Regulation provides that the "*data subject shall have the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of personal data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data*".

According to the EDPS, since the publication of personal data in any form and medium, including EACEA's website is based on Article 5(a) of the Regulation, the data subject might use their right, on compelling and legitimate grounds, to request that their data are not made publicly available on the EACEA's website. The EDPS considers that the information on the obligation of publication and of the data subject's right to object in the letter for availability check and in the letter confirming the participation seems to be in accordance with Article 18 (a) of the Regulation.

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

The EDPS notes that the privacy statement contains necessary information to be supplied to data subjects as prescribed by Regulation (EC) 45/2001. In addition, information related to different aspects of the data processing operations is provided in the Call for expression of interest and the application instructions.

[...]

### **3.9 Processing of personal data on behalf of controller**

Following Article 23.2.b, Article 21 and 22 obligations are also incumbent on the processor unless it is already subject to the same obligation by virtue of the nation law of a Member State. In the case in point, the company in charge of online data base is subject to the French national law. Therefore confidentiality and security obligations established by virtue of the French law are applicable respectively.



#### **4. Conclusion**

The notified processing operations do not appear to involve any breach of the provision of Regulation (EC) No 45/2001, provided that the recommendations made above are taken into account. This means that,

- the retention period for all files concerning engaged experts should be reconsidered as mentioned above.

The EDPS would like to invite the EACEA to inform him about the implementation of this recommendation within three months after receipt of this letter.

Done at Brussels, on 22 March 2012

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor