

Opinion on the notification for prior checking from the Data Protection Officer of the European Railway Agency concerning the "Call for applications for inclusion on a list of Human Factors experts to assist the National Investigation Body in some Member States in the investigation of railway accidents"

Brussels, 10 October 2012 (Case 2012-0635)

1. Proceedings

On 24 July 2012, the European Data Protection Supervisor (EDPS) received a notification for prior checking from the Data Protection Officer (DPO) of the European Railway Agency (ERA) concerning the Call for applications for inclusion on a list of Human Factors experts to assist the National Investigation Body in some Member States in the investigation of railway accidents (hereinafter the Call for applications).

The notification was accompanied by the respective Call for applications¹, application form and privacy statement.

The draft Opinion was sent to the DPO for comments on 20 September 2012. These were received on 5 October 2012.

2. Facts

This prior checking Opinion deals with the **selection procedure** for external experts on the basis of a Call for applications. Any interested applicant may submit an application within the deadline specified in the Call for application. The processing and evaluation of submitted application forms and CVs is carried out by the Agency² on the basis of selection criteria such as fields of expertise, qualifications and experience set out in the Call for applications.

The list of experts is made available to the Network of National Investigations Bodies (NIBs) set up in the Member States in accordance with Directive 2004/49/EC on safety on the Community's railways³ for the selection and further recruitment of experts from the list on the basis of the specific technical assistance required to assist the NIBs in the investigation of railway accidents. The final list will be valid for 5 years.

The **controller** is the ERA, represented by the Head of the Safety Unit.

The **purpose** of the processing operation is to draw up a list of experts in the field of railway safety and the role of human factors in railway accidents by evaluating their personal aspects (field of expertise, qualifications and experience).

¹ Calls for application ERA/2012/SAF/ CALLHF/01.

² Relevant staff members of the Agency's Safety Unit and Agency's staff members who are members of the selection committee

³ OJ L 220 of 21 June 2004, p. 16.

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

The **Recipients of data** are the Agency's staff members who are members of the selection committee and the relevant persons from the Network of the National Investigation Bodies established in Member States with the tasks to carry out investigations after serious accidents on the railway system, the objective of which is possible improvement of railway safety and the prevention of accidents (see point 3.2.). The supervisory instances of the Agency (i.e. European Court of Auditors, Internal Audit Service, European Ombudsman, etc.) may have also access to this data. 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.

Data are provided by the data subjects in their application forms 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 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;

The following **retention policy** applies:

- data of unsuccessful applicants will be kept for two years after the notification of the candidate of the decision of the selection committee not to include him/her in the list;
- data of successful applicants included in the list will be kept for two years after the expiry date of the list that is valid for 5 years.

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

- identity of the controller;
- 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 of data subjects to access and rectify their data;
- existence of the right to access their individual evaluation results;
- existence of the right of data subjects to contact the Agency's DPO and to have recourse to the EDPS.

The **rights of access to and rectification** may be granted upon an email request to the Safety Unit. The inaccurate identification data may be rectified at any time during the validity of the list, whereas the rectification of other data submitted in the CV and the application form is possible only up to the closing date for submission of applications.

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 and expertise of each applicant in a specific field of railway safety related to the role of human factors in railway accidents.

The notification was received by email on 24 July 2012. According to Article 27(4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. The deadline was suspended for 15 days to allow for comments on the draft Opinion, therefore the present Opinion must be delivered no later than 10 October 2012.

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 Call for applications is based on Regulation No (EC) 881/2004⁴ establishing a European Railway Agency as amended by Regulation (EC) 1335/2008⁵ and Directive 2004/49/EC on safety on the Community's railways⁶.

According to its founding regulation, the Agency's mission is:

- developing a common approach to safety, safety regulation and accident investigation, in particular by harmonization of safety assessment methods, safety targets and safety certification conditions;
- improving the interoperability of the European rail system by developing the conditions for the free and uninterrupted movement of trains through technical and operational harmonization, including conditions for mutual acceptance of railway vehicles;
- facilitating the exchange of information within the railway sector by networking with national bodies, providing registers and databases and giving guidance on the implementation of the regulatory framework.

Further, Directive 2004/49/EC on safety on the Community's railways provides in particular that "*Each Member State shall ensure that investigations of accidents and incidents referred to in Article 19 are conducted by a permanent body, which shall (...) be independent in its organisation, legal structure and decision-making from any infrastructure manager, railway undertaking, charging body, allocation body and notified body, and from any party whose interests could conflict with the tasks entrusted to the investigating body. It shall furthermore be functionally independent from the safety authority and from any regulator of railways*".

"*Member States shall ensure that an investigation is carried out by the investigating body referred to in Article 21 after serious accidents on the railway system, the objective of which is possible improvement of railway safety and the prevention of accidents*" (article 19.1). It provides also that "*The investigating bodies shall conduct an active exchange of views and experience for the purpose of developing common investigation methods, drawing up common principles for follow-up of safety recommendations and adaptation to the development of technical and scientific progress. The Agency shall support the investigating bodies in this task.*" (article 21.7).

⁴ OJ L 220 of 21 June 2004, p. 3.

⁵ OJ L 354 of 31 December 2008, p. 51.

⁶ See above.

Based on the above, 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 legal acts. 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 rights 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 and CVs information that may not be necessary for the respective selection procedure. In this respect, the EDPS would like to remind the obligation of the controller not to process further data supplied by the data subjects which is irrelevant or excessive for the purpose of the processing operations.⁷

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, data of unsuccessful applicants will be kept two years after the notification of the candidate of the decision of the selection committee and data of successful applicants included in the list will be kept two years after the expiry date of the list that is valid for 5 years.

The EDPS notes that the processing operation is limited to the evaluation of experts and their inclusion in a list of experts and therefore does not have financial implications. In this respect, the proposed retention period seems to be appropriate in order to allow data subjects to make use of all available legal remedies and to protect their rights.

3.5. Transfer of data.

The intra 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 agencies staff members involved in the selection procedure are in principle considered as necessary for its accomplishment. Furthermore, the potential 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.

⁷ As previously stated in a similar EDPS Opinion in Joint Cases 2011-0667 and 2011-0668 of 22 November 2011.

The EDPS notes that inter-institutional 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.

Furthermore, data are transferred to the National Investigative Bodies which are subject to national law adopted pursuant to Directive 95/46/EC. Such a transfer will be covered by Article 8 (a) of the Regulation which provides that data may be transferred "*if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". The EDPS notes that the NIBs process data in connection with tasks described above which are carried out in the public interest based on Directive 2004/49/EC on safety on the Community's railways and has no reason to believe that the processing operation raises any specific concern as regard Article 8 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*".

As already mentioned, the data subjects are granted rights of access their data, including their individual evaluation results, upon a request to the controller. As regard the right to rectification, considering the competitive nature of the selection process the data subjects can request rectification of their data only up to the closing date for submission of applications. The EDPS considers that this limitation of the rectification right aims to ensure transparency and equality of treatment; hence it is admissible in light of Article 20(1) (b) and (c) of the Regulation.

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 Call 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

Based on the above considerations, the proposed processing operation does not appear to involve any breach of the provisions of Regulation (EC) 45/2001.

Done at Brussels, 10 October 2012

(signed)

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