

## **Opinion on a notification for prior checking received from the Data Protection Officer of the European Research Council Executive Agency (ERCEA) regarding ERCEA's internal mobility procedure for Temporary and Contractual Agents**

Brussels, 03 December 2012 (Case 2012-0870)

### **1. Proceedings**

On 10 October 2012, the European Data Protection Supervisor (**EDPS**) received a prior checking notification for a processing operation regarding internal mobility from the Data Protection Officer (**DPO**) of the European Research Council Executive Agency (**ERCEA**).

Questions were raised on 23 October 2012 to which the ERCEA replied on 29 October 2012. The draft Opinion was sent to the DPO for comments on 16 November 2012. The EDPS received a reply on 26 November 2012.

### **2. The facts**

This Opinion concerns the processing of personal data in the context of the ERCEA's internal mobility procedure, which involves the assessment of the CV, professional experience and other personal information against a prospective position at the ERCEA. Internal mobility means any significant change of the job occupied by a jobholder *within the same category of employment*<sup>1</sup>, as the procedure at hand concerns Temporary and Contractual Agents<sup>2</sup>.

The procedure has the **purpose** of facilitating the selection of staff members for new or newly vacant posts in the ERCEA and of improving the career development and possibilities of ERCEA staff whilst optimising the use of ERCEA's resources.

The present Opinion only covers cases of *voluntary mobility*, which involves the publication of a vacancy notice on the ERCEA intranet, a selection phase under the auspices of the HR unit (establishing a list of eligible candidates), an interview with the Head of Unit concerned (resulting in an evaluation grid) and, if no suitable candidate has been identified, the launch of an external selection procedure.

The procedure in principle also applies in cases *mobility in the interest of the service* (without prior publication of a vacancy notice on the ERCEA intranet), but according to Annex III of the ERCEA Mobility Guidelines, for these situations, the processing operations follows procedures which have been covered by Opinions of the EDPS in other cases<sup>3</sup> and are consequently not within the scope of the present Opinion.

---

<sup>1</sup> Point 2 of ERCEA Mobility Policy Guidelines as approved on 18 October 2011 (ARES (2011)1107841).

<sup>2</sup> Mobility across function groups or from one category of staff to another is not covered by this procedure.

<sup>3</sup> Mobility in the interest of the service occurs firstly in the context of *reorganisation and redeployment* as well as *at the request of the staff member*. In both cases, data will be processed in line with the management of the

The processing is automated.

**Data subjects** are Temporary and Contractual Agents (ERCEA statutory staff members).

The ERCEA's internal mobility procedure involves the **processing of the following data**: identification data (name, personnel number, date of birth), contact details (e-mail, office telephone number and address, home address), data allowing assessment against the vacancy notice's selection criteria (motivation letter, CV, latest Career Development Report when requested by the Head of Unit recruiting). It was confirmed by the ERCEA that no health data is processed, unless it is provided on a spontaneous basis by the data subject (e.g. in the case of an individual request by a staff member based on sickness reasons).

The **legal basis** of the processing is:

- Articles 11(6) and 18 of Council Regulation (EC) N° 58/2003<sup>4</sup>;
- Articles 3 and 8(5) as well as Recital 2, of Commission Decision C(2008) 5694 final<sup>5</sup>;
- Articles 4, 7(1) and 29(1) of the Staff Regulations<sup>6</sup>, and
- ERCEA Mobility Policy Guidelines<sup>7</sup>.

The **recipients** of the data processed in the ERCEA's internal mobility procedure are:

- Applications: management personnel (Director, Head of Unit/Department), other staff members if involved in conducting the interview;
- European Commission as regards migration data after selection (job title, job description, objectives and units involved in mobility) for the purpose of updating Sysper2;
- Other EU institutions and bodies upon relevant legal provisions of EU law (supervisors, auditors, Pay Master's Office, Medical Service, Gestionnaire de Conges).

The data recipients are reminded in all email correspondence that they are to use it only for the purpose of internal mobility.

The **data subjects are informed** via a "Specific Privacy Statement on Internal Mobility"<sup>8</sup> which refers data subjects to other Specific Privacy Statements (including those on the "Selection phase" and "Recruitment phase and constitution of personal files", which are available both on the intranet and on the external website). Whenever health data are involved, in combination with the "Specific Privacy Statement on Health Data"<sup>9</sup>.

---

personal file (see Annex III of the ERCEA Mobility Guidelines, ARES(2011)1107841 of 18/10/2011), which has been examined in the context of the Opinion of the EDPS in case 2010-0244 of 3 November 2010 and is consequently not covered by the present Opinion. Secondly, mobility in the interest of the service occurs *at the request of management*, when data will be processed according to the "Evaluation of Staff" procedures (see Annex III of the ERCEA Mobility Guidelines), which have been covered by the Opinion of the EDPS in case 2011-0955 of 15/12/2011 and are consequently not within the scope of the present Opinion.

<sup>4</sup> Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11/1 of 16 January 2003, stipulating the ERCEA's Director's responsibility for personnel management.

<sup>5</sup> Commission Decision of 8 October 2008 delegating powers to the European Research Council Executive Agency with a view to performance of tasks linked to implementation of the specific programme Ideas in the field of research comprising in particular implementation of appropriations entered in the Community budget.

<sup>6</sup> Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities (CE, CECA, Euratom) No. 23/2005.

<sup>7</sup> ARES(2011)1107841 of 18 October 2011.

<sup>8</sup> Annex III of the ERCEA Mobility Guidelines.

<sup>9</sup> This "Specific Privacy Statement on Health Data" is the privacy statement covered by the Opinion of the EDPS in case 2009-0763 of 11 February 2011 and will therefore not be further examined in the context of this Opinion.

The following **retention periods** apply:

- Contract and "other documents related to the transfer" are kept in the personal file, which is stored for 8 years after the extinction of all rights of the person concerned and of any dependants, and for at least 120 years after the date of birth of the person concerned (section 12.3.7 of the Commission Retention List<sup>10</sup>);
- Documents of all applicants are kept for five 5 years after the conclusion of the selection procedure (section 12.3.4.D of the Commission Retention List);
- Internal selection folders are kept for 5 years (as of the date of the publication of the open position);
- Personal data of candidates in the list of published posts and names of eligible applicants for each post are removed from the file after 2 years; the remaining list is kept for historical / statistical purposes.

Paper copies (print-outs of CVs and motivation letters generated by Heads of Units / Departments for interview purposes) are destroyed regardless of the result of the interview at the end of the selection phase.

**Rights of the data subject:** As stipulated in the specific privacy statements to which the "Specific Privacy Statement on Internal Mobility" refers, data subjects can exercise their rights under Articles 13 to 18 of the Regulation by sending an e-mail to a dedicated mailbox of the HR unit, which treats it at the latest within three months from the receipt of the request<sup>11</sup>.

Additionally, according to the "Specific Privacy Statement on Internal Mobility", the data subjects' right of rectification is guaranteed by means of dialogue with the management and written contributions.

According to the notification, after the closing date of the respective call, the right to rectify personal data is restricted to material errors to ensure equal treatment of all applications. Access to personal data may be limited on the grounds of Article 20(1) of the Regulation.

(...)

### **3. Legal analysis**

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

**Applicability of Regulation (EC) No. 45/2001 ("the Regulation"):** The processing of data relating to the ERCEA's internal mobility procedure constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" under Article 2(a) of the Regulation) and is performed by ERCEA in the exercise of its activities which fall within the scope of EU law<sup>12</sup> (Article 3(1) of the Regulation in the light of the Lisbon Treaty). The personal data processed is partially automated or forms part of a structured filing system. Therefore, the Regulation is applicable.

**Grounds for prior checking:** Article 27(1) of the Regulation subjects to prior checking all "*processing operations likely to present specific risks to the rights and freedoms of data*

---

<sup>10</sup> Common Commission-Level Retention List for European Commission Files [SEC(2007) 970] applied in ERCEA by analogy.

<sup>11</sup> Article 13(1)(c) of the Decision of the Steering Committee of ERCEA adopting implementing rules concerning the Data Protection Officer pursuant to Article 24(8) of Regulation 45/2001 of 21 June 2010.

<sup>12</sup> See above Section 2 "legal basis".

*subjects by virtue of their nature, their scope or their purposes*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. Article 27(2)(b) of the Regulation refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". Given that the processing at hand is intended to evaluate the ability and efficiency of candidates in order to select the best suitable staff members for new or newly vacant posts in the ERCEA, the processing operation at hand thus requires prior checking under Article 27(2)(b) of the Regulation.

**Ex-post prior checking:** In this case, the processing operation had already been established and implemented at ERCEA before the EDPS was notified. The Opinion of the EDPS should, as a rule, be requested and given prior to the start of any processing of personal data. Any recommendations made by the EDPS in this Opinion must be fully implemented accordingly.

The notification of the DPO was received on 10 October 2012. According to Article 27(4) the present Opinion must be delivered within a period of two months. The procedure was suspended for a total of 6 days for further information from the controller and 10 days for comments. Consequently, the present Opinion must be delivered no later than 26 December 2012.

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

Personal data may only be processed if legal grounds can be found in Article 5 of the Regulation. Under Article 5(a) of the Regulation, personal data may be processed inter alia if the "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties or other legal instruments adopted on the basis thereof (...)*".

The selection of candidates is based on Article 29(1) of the Staff Regulations and on the ERCEA Mobility Policy Guidelines. The respective processing of personal data is considered as necessary for the performance of a public interest task, namely the selection of the best suitable candidate for new or newly vacant posts in the ERCEA and of improving the career possibilities of ERCEA staff whilst optimising the use of ERCEA's resources, through the internal mobility procedure.

Thus, the processing appears to be lawful in accordance with Article 5(a) of the Regulation.

### **3.3. Processing of special categories of data**

Article 10 of the Regulation prohibits inter alia the processing of data concerning health, which in the processing operation at hand may be communicated in the motivation letter or the CV of a candidate without being requested by ERCEA. Under Article 10(2)(a) of the Regulation, this prohibition can be lifted if the data subject has given his or her express consent. As it is clear for the data subject that communicating these data is not compulsory under the rules governing the internal mobility procedure, the spontaneous communication of such sensitive data can be considered as covered by Article 10(2)(a) of the Regulation<sup>13</sup>.

### **3.4. Data Quality**

---

<sup>13</sup> Guidelines on the processing operations in the field of staff recruitment, 10 October 2008, Section B/2).

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

As to the proportionality of the data processed, the EDPS notes that the personal data processed are necessary for the organisation of the internal mobility procedure with a view of selecting the best suitable candidates to fill new or newly vacant posts in the ERCEA. Article 4(1)(c) of the Regulation is thus complied with.

The internal mobility procedure itself ensures that the data are accurate and kept up to date considering that data processed during the selection phase are provided by the data subjects. In addition, the possibility to make use of the rights of access and rectification helps to ensure that the data are accurate and up to date (see Section 3.7 below).

Lawfulness of the data processing has been already discussed (see Section 3.2), whereas fairness has to be assessed in the context of the information provided to the data subject (see Section 3.8 below).

### **3.5. Conservation of data/ Data retention**

According to the information provided in the notification, contract and other documents related to the transfer are kept in the personal file, which is stored for 8 years after the extinction of all rights of the person concerned and of any dependants, and for at least 120 years after the date of birth of the person concerned (section 12.3.7 of the Commission Retention List).

Article 4(1)(e) of the Regulation states that personal data can be kept in a form permitting identification of data subjects for no longer than necessary for the purpose for which they were collected or further processed.

Whilst the EDPS notes that a ten years retention period for promotion files and (insofar comparable) contracts can be considered necessary for related appeals<sup>14</sup>, there seems to be no sufficient evidence that the existing retention periods for the information provided in the notification and "other documents related to the transfer" extending to the whole career at the ERCEA are necessary for the respective purpose.

Therefore, the ERCEA is invited to reconsider the existing time limits in this respect and to provide for their precise justifications that will be taken into account in the upcoming discussions with the relevant stakeholders.

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

The internal<sup>15</sup> and inter-institutional data transfers mentioned above are subject to Article 7 of the Regulation, which stipulates that these must be necessary for the legitimate performance of the task covered by the competence of the particular recipient, who must process the data only for the purposes for which they were transmitted.

There is nothing to suggest that any transfers (here to the Head of Unit/Department and the Director concerned as well as potentially to supervisory instances of ERCEA and the judicial

---

<sup>14</sup> Opinion of the EDPS in case 2008-0095 on the promotion of officials and regrading of temporary agents.

<sup>15</sup> Although the notification identifies "authorised staff of the HR unit" as recipients, the EDPS notes staff members of the unit in charge of the processing operation on behalf of the controller are not actually recipients in the sense of Article 2(g) of the Regulation and no respective transfer takes place.

authorities mentioned in Section 2) are not in line with the requirements of Article 7 of the Regulation, in particular as recipients are reminded that they must not to use the data for purposes other than the tasks carried out in the exercise of their respective competences (Article 7(3) of the Regulation).

### **3.7. Rights of access and rectification**

Articles 13 and 14 of the Regulation provide for data subjects' rights of access and rectification with respect to their personal data processed. These rights may be restricted in terms of Article 20(1) of the Regulation, in particular where necessary to for the protection of rights and freedoms of others, including the evaluators in terms of Article 6 of the Annex III to the Staff Regulations and the other candidates competing for the post.

The procedure outlined above (Section 2) is in principle providing for these data subjects' rights. However, the EDPS emphasises that data subjects should have access not only to the data they submitted but also to any existing evaluation results regarding different stages of the procedure, unless the exception of Article 20(1)(c) of the Regulation applies. Phrasing this exception as "*Access to personal data may be limited on the grounds of Article 20(1) of the Regulation*" may imply that access will not be granted to the comparative data concerning other applicants if such access would undermine the rights of others applicants or the freedom of others (e.g. staff members involved in conducting interviews). Nevertheless, data subjects should be provided with aggregated results and any restriction to the right of access to such information on the basis of Article 20(1)(c) of the Regulation should be applied restrictively, on a case-by-case basis. The EDPS would further invite the ERCEA to ensure that where the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations applies, data subjects are informed about such limitation (see Section 3.8 below).

Additionally, the general time limit of three months from the receipt of the request for the HR unit to treat requests for blocking under Articles 15 of the Regulation seems excessive. Under Article 15 of the Regulation, two situations must be distinguished:

(a) When the data subject contests the accuracy of his/her data, the data should be blocked "*for a period enabling the controller to verify the accuracy, including the completeness of the data*". Thus, when receiving a request for blocking on this ground, the ERCEA should *immediately* block the data for the period necessary for verifying the accuracy and completeness of the data.

(b) When the data subject requires the blocking of his/her data because the processing is unlawful, or when data must be blocked for purpose of proof, the ERCEA will need some time to make this assessment before deciding to block the data. In such cases, even though the request for blocking may not take place immediately, it should nonetheless been dealt with *promptly*<sup>16</sup> in order to preserve the data subject's rights. Having considered this, the period of three months mentioned by the ERCEA for treating such a request seems excessive and the EDPS recommends that the time limit for ruling on a request for blocking under these grounds is shortened to a reasonable period (usually two weeks).

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

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. In the processing operations on internal mobility, Article 11 (*Information to be supplied where the*

---

<sup>16</sup> See also Opinion of the EDPS in case 2011-1021 of 16 December 2011.

*data have been obtained from the data subject*) applies since data have been provided directly by the data subjects themselves by submitting their CVs and motivation letters. Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) applies as well, since data are obtained from different participants during the interviews in the selection phase.

The ERCEA Mobility Guidelines, including their Annex III ("Specific Privacy Statement on Internal Mobility") and the specific privacy statements to which it refers, contain almost all pieces of information foreseen by Articles 11 and 12 of the Regulation. The EDPS would, however, recommend that the ERCEA provide information about the limitations that apply to the right of rectification.

### **3.9. Security measures**

(...)

#### **Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No. 45/2001, provided the following recommendations are fully taken into account. The ERCEA must:

- Reconsider the existing retention periods and provide for their precise justifications that will be taken into account in the upcoming discussions with the relevant stakeholders;
- Ensure that data subjects exercising their right of access are provided with aggregated results and that any restriction to the right of access on the basis of Article 20(1)(c) of the Regulation is applied restrictively, on a case-by-case basis;
- Inform data subjects of limitations to their rights based on Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations by complementing the "Specific Privacy Statement on Internal Mobility" accordingly;
- Reduce the three month time limit for dealing with blocking requests from data subjects under Article 15 of the Regulation as outlined in Section 3.7.

Done at Brussels, 03 December 2012

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor