

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Food Safety Authority ("EFSA") regarding the "EFSA in-house scientific expertise database"

Brussels, 05 December 2012 (Case 2011-0882)

1. Proceedings

On 28 September 2011, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data in the context of the "In-house Scientific Expertise Database of EFSA and the selection of in-house experts based on the database" from the Data Protection Officer (**DPO**) of the European Food Safety Authority (**EFSA**).

Questions were raised on 30 September 2011, to which the EFSA DPO replied on 3 October 2011. On 10 October 2011, the EDPS suggested suspending the case until notification by EFSA of the additional processing operation regarding the *selection* of in-house experts based on their database profiles; EFSA accepted this suggestion on 26 October 2011. EFSA submitted an updated, comprehensive notification on 21 November 2012.

The draft Opinion was sent to the DPO for comments on 26 November 2012. The EDPS received a reply on 5 December 2012.

2. The facts

The **purpose** of the data processing is twofold: (i) to allow the identification of in-house scientific expertise via a database and (ii) to select in-house experts to fulfill specific needs or to assume unexpected and/or urgent tasks in the area of scientific risk assessment and/or data collection in food and feed safety based on their database profiles.

According to the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts", additionally, *"the in-house scientific expert database may support professional and career development. Without substituting procedures already in place at EFSA, the database may provide a complementary source of information in relation to:*

- *Internal Mobility processes;*
- *The identification of individual learning needs as a consequence of competence gaps analysis;*
- *The identification of in-house trainers on specific matters.*

Finally the database may support statistical purposes..."

Data subjects concerned are scientific staff employed by EFSA.

The **legal basis** was established by decision of the Executive Director of EFSA of 19 May 2011 (note ref. 377046); henceforth: "Mandate")¹ establishing an internal mandate "*for registering in-house expertise into an in-house scientific expertise database*". This decision by the Executive Director is based on her powers under Articles 24(b), 26 of Regulation (EC) No 178/2002². The procedure for the selection of experts based on their database profiles is outlined in an "*In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts*" provided with the notification.

The **controller** has entrusted the Human Capital and Knowledge Management Unit (HUCAP) with the processing operation. According to the "*In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts*", the HUCAP will be assisted by EFSA's Advisory Forum and Scientific Cooperation Unit (AFSCO). The "*In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts*" notes in this respect that "*...the ownership...for the selection of in-house experts was assigned to the Human Capital and Knowledge Unit (HUCAP)...*".

The **procedure** is similar to the process of pooling external scientific expertise into the data base of *external* scientific experts (see Opinion by the EDPS of 11 November 2008 in case 2008/455³):

1) **Application phase**: EFSA staff having a scientific background in any area that falls within EFSA's remit shall be invited by email to apply for registration in the in-house scientific expertise database. In order to be eligible, applicants must fulfil the following eligibility criteria⁴:

- be employed by EFSA;
- detain a university degree, or equivalent, in one or more areas of expertise within the remit of EFSA, as listed in the database application form;
- demonstrate relevant professional experience (in risk assessment, data collection on biological or chemical hazards, as appropriate); and
- show evidence of scientific articles published in peer-reviewed journals or of any other scientific or technical documents relevant to the experience declared.

Registration is voluntary⁵ and takes place by filling in and submitting an online application. Information marked on the online application form with an asterisk (*) is mandatory; technically, applications missing such mandatory information cannot be submitted. The application form is partially prefilled with the following information:

¹ Decision of the Executive Director of EFSA of 19 May 2011 (note ref. 377046).

² Regulation (EC) No 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L31 p.1 of 1 February 2002 <http://www.food.gov.uk/multimedia/pdfs/1782002ecregulation.pdf>.

³ http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Supervision/Priorchecks/Opinions/2008/08-11-11_EFSA_expert_database_EN.pdf. The notification mentions in this respect that "*Even though the EFSA in-house scientific expertise database and the Experts Database (EDB) are supported by the same IT tool, the type of personal data processed (in-house scientific staff profiles vs. external experts), the purpose of the data processing and the way this is done (i.e. regarding transfers) are clearly distinct in both. For this reason, the EFSA in-house scientific expertise database and the Experts Database (EDB) are considered to be distinct personal data processing operations*".

⁴ These eligibility criteria correspond to the ones set out in Article 15 of the Decision of the Executive Director concerning the selection of members of the Scientific Committee, Scientific Panels and external experts to assist EFSA with its scientific work (<http://www.efsa.europa.eu/en/keydocs/docs/expertselection.pdf>).

⁵ The "Notice to EFSA staff on the processing of personal data when applying to the EFSA in-house Scientific Expertise Database" reads: "*Data subjects can apply on their own volition for inclusion in the database by means of an online application form (link available here - <https://ess.efsa.europa.eu/ess/edb>)*".

- name*, surname*, title;
- profile information (registration date, date of last application and last modification);
- address for correspondence*, telephone, fax, email*;
- professional situation* (e.g. "employed");
- gender*;
- nationality*;
- institutional information* (address, contact details, status and function).

Applicants complement this by filling in additional information regarding:

- fields of competence* (at least one to be chosen from a list provided);
- other competencies (free text; 4000 characters maximum);
- knowledge of languages*;
- education* (free text; 4000 characters maximum);
- professional experience: number of years of relevant professional experience* and past and present professional positions held* (free text; 4000 characters maximum);
- specific curricular information* (free text; 24000 characters maximum);
- listing of relevant publications* (free text; 23000 characters maximum).

The Expert Database Supervisory Committee then assesses the validity of the data submitted in the applications and takes a decision on their inclusion in the database on the basis of the above eligibility criteria. According to the notification, all in-house applicants will be informed of the outcome of the assessment, and in case of exclusion, of the validity and/or eligibility criteria that were not met.

2) **Selection phase:** Via a web-portal, internal end-users can access the search environment of the database to identify expertise already available in-house in cases of a specific need or when unexpected and/or urgent work of EFSA is required in the area of scientific risk assessments and /or data collection in food and feed safety. Section 2.1 of the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts" sets out the different steps and criteria applicable in that process. Criteria include *"...Experience in (1) carrying out scientific risk assessment, (2) carrying out data collection in chemical or biological hazards, and (3) provision of scientific advice in fields relevant to the task at hand;...experience in peer-reviewing scientific work and publications, preferably in fields elated to the area of interest..."*.

Recipients include authorised staff of EFSA (administrator of data base (AFSCO Unit), IT supporting unit; Expert Database Supervisory Committee, EFSA staff granted access as users to the search environment of the in-house scientific expertise database in cases of a specific need or when unexpected and/or urgent work of EFSA is required in the area of scientific risk assessments and/or data collection in food and feed safety, and (2) bodies competent for carrying out audits or legal review, including the EFSA Internal Auditor, the Internal Audit Service, the European Court of Auditors, the European Ombudsman, the Civil Service Tribunal and the European Data Protection Supervisor.

Rights of access and rectification:

- **Application phase:** As mentioned in the data protection notice, to which a link is displayed throughout the application form, as well as in the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts", data subjects can access, modify and/or delete their data/profiles in the database at any point in time entering the system with their user name and password.
- **Selection phase:** As noted in Section 3 ("Privacy notice") of the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house

Experts", *"upon specific request to the HUCAP Unit, each candidate in the selection process has a right of access to his/her evaluation results, with the exception of comparative results of other candidates"*.

Right of information: A data protection notice, to which a link is displayed throughout the application form, provides the following information:

- The purpose of the data processing operation;
- The identity of the "controller" (according to the notice, *"...the Head of the EFSA Advisory Forum and Scientific Cooperation Unit is identified as controller of the data processing operation"*);
- Information on the data subjects;
- The categories of personal data processed, namely the need for submission of a valid application and for compliance with the eligibility criteria;
- The recipients of personal data, i.e. the users of the in-house database search tool;
- The right to access and rectification of experts as concerns their own profile;
- Information on the conservation of personal data and the process of renewal;
- A reference to Regulation (EC) No 45/2001;
- The right to have recourse at any time to the EDPS.

Section 3 ("Privacy notice") of the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts" complements this for access rights in the context of the selection phase (see above, "right of access and rectification").

Retention policy: The notification does not refer to any maximum retention period after which data would be deleted. The retention policy is limited to a "process for data renewal" and expiry is based on two procedures: (1) experts will be requested once per year to confirm their interest to remain listed in the database, and, if yes, to update their profiles; and (2) in-house scientific experts included in the database will be informed that they are able, at any time, to update/modify inaccurate or incomplete personal data on their individual profiles, or to request the exclusion of their profiles from the database. At the end of EFSA employment, the profiles of former in-house experts will become invisible in the search mode.

Security measures: (...)

3. Legal analysis

3.1. Prior checking

Applicability of Regulation (EC) No 45/2001 ("the Regulation"): The processing of data under analysis constitutes a processing of personal data (*"any information relating to an identified or identifiable natural person"* in the sense of Article 2(a) of the Regulation). The data processing is performed by several actors on behalf of EU institutions and bodies (EFSA as well as, potentially, bodies competent for carrying out audits or legal review) in the exercise of activities which fall within the scope of Union law. The data controller is EFSA rather than the Head of the EFSA Advisory Forum and Scientific Cooperation Unit (EFSA as controller is represented by its Head of the EFSA Advisory Forum and Scientific Cooperation Unit). The processing of the data is done by means of an online application form and access to the database by experts and by EFSA end users via a designated webpage, i.e. by automatic means. 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*

subjects by virtue of their nature, their scope or their purposes" by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. The processing operation at issue falls under Article 27(2)(b) of the Regulation stipulating that *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"*. One of the steps of the processing is the assessment of the submitted applications and the decision on their inclusion in the database on the basis of predefined eligibility criteria by the Expert Database Supervisory Committee. In order to assess the fulfilment of these criteria,

- the Expert Database Supervisory Committee has to conclude on whether professional experience has been sufficiently demonstrated and is relevant to EFSA's activities;
- The Expert Database Supervisory Committee also evaluates whether scientific articles published in peer-reviewed journals are relevant to the experience declared or if other scientific or technical documents show sufficient evidence relevant to the experience declared.

This implies an evaluation of the data subject's ability⁶. The EDPS considers that the additional effects mentioned in the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts" (see above Section 2, "purpose") are potential side-effects of the use of the database and that any evaluation of data subjects concerned is covered by "other procedures already in place at EFSA" already notified to the EDPS.

Prior Checking: Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this present case, the notification relates to a processing which has not yet taken place at the EFSA and therefore qualifies for prior-checking.

The notification of the DPO was received on 28 September 2011. According to Article 27(4) of the Regulation, the present Opinion must be delivered within a period of two months. The procedure was suspended for a total of 402 days for further information from the controller and 9 days for comments. Consequently, the present Opinion must be delivered no later than 10 January 2013.

3.2. Lawfulness of the processing

The processing is based on a **formal decision by the Executive Director of EFSA**, which establishes an internal mandate and was adopted on 19 May 2011. *"In the light of ongoing discussions concerning the EFSA science strategy, namely on optimizing the use of internal scientific resources"*, it foresees *"pooling the profiles of EFSA staff with a scientific background into a database"*, thus allowing EFSA to gain an overview of the expertise already available in-house. The processing thus is considered by EFSA as serving 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"* in the sense of Article 5(a) of the Regulation, which, under Recital 27 of the Regulation *"includes the processing necessary for the management and functioning of those institutions and bodies"*.

The processing further needs to meet the condition of **necessity** under Article 5(a) of the Regulation. In order to allow EFSA to gain an overview of the expertise already available in-

⁶ See also reply to consultation under Article 27(3) of the Regulation in case 2007-0659 regarding the EFSA Database of External Scientific Experts.

house with a view to optimizing the use of internal scientific resources, there seems to be no less privacy-invasive alternative than inviting staff members with a scientific background to provide their relevant personal data by submitting a voluntary application to be included in the database. Given that in the employment context, the value of consent of the data subject must be assessed with adequate cautiousness⁷, the EDPS invites the EFSA to ensure that in-house scientific staff members not applying to be included in the database will not be put to any disadvantaged position and inform about this accordingly in the invitation.

3.3. Data Quality

Adequacy, relevance and proportionality: 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 collected and/or further processed*". The stated purpose of the processing is to gain an overview of the expertise already available in-house with a view to optimizing the use of internal scientific resources.

- In this context, it is not clear how the (mandatory) information under the title "*General Expert Information*" on *gender* and *nationality* can usefully contribute to optimizing the use of *scientific expertise*. The EDPS invites the EFSA to justify the relevance of these aspects to the processing or to these mandatory elements from the items to be included in the database.
- Under the title of "Fields of Competence", a free text field allows for the voluntary introduction of 4000 characters maximum on undefined "*other competencies*". This might lead applicants to give details on skills, interests and activities which are not necessarily in relation with EFSA expertise already available in-house. As noted in the Guidelines on Staff Recruitment⁸, the EDPS understands that such open questions may bring useful information regarding the competences of staff members and he does not object to including such questions as optional in the application form. The EDPS invites EFSA to ensure, however, that applicants not answering optional questions will not be put to any disadvantaged position due to their failure to give answer and has to inform applicants accordingly (on the latter, see below point 3.7).

Accuracy: Article 4 (1)(d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*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*".

In the case at hand, accuracy of data refers to two elements: (1) to the fact that the data in the database are limited to those transmitted by the applicant and (2) to whether skills and competences included in the profile information by the applicant reflect reality.

The EDPS notes in this respect that the attention of the internal end-users is called in the data protection notice to the limited nature of the validity check carried out, clarifying that the veracity and authenticity of the profile information is the responsibility of the in-house experts. The rights of access and rectification contribute to ensure that the data processed are accurate and up to date (see below point 3.4 and 3.6.).

3.4. Conservation of data/ Data retention

⁷ Opinion 15/2011 of the Article 29 Data Protection Working Party on the definition of consent pp. 13+ 14, 35, see http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf.

⁸ Guidelines concerning the processing operations in the field of staff recruitment of 10 October 2008, see http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf, in Section B 3 iv).

Under Article 4(1)(e) of the Regulation, personal data may 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 in this context that any statistical information on the database will be collected in an aggregated way, not containing personal data.

The notification does not refer to any maximum retention period after which data would be automatically deleted. The retention policy is limited to a "process for data renewal" and expiry is based on procedures which depend on some form of active input by the in-house scientific experts included in the database (confirmation of interest, updating of profile, modifying inaccurate or incomplete personal data on the profile or requesting exclusion from the database). Whilst the EDPS notes that, at the end of EFSA employment, the profiles of former in-house experts will become invisible in the search mode, the EDPS invites the EFSA to define a *deletion* policy, including a maximum retention period for cases in which in-house scientific experts do not contribute in one way or another to the "process for data renewal", so as to ensure that profiles are automatically deleted (see also above point 3.3).

3.5. Transfer of data

According to the notification, only transfers within EFSA and to other EU institutions or bodies under Article 7 of the Regulation take place. The EDPS considers that the transfers of data to the recipients listed above for the purposes described in the facts above comply with Article 7(1) of the Regulation. In the light of Article 7 (3) of the Regulation, according to which each of the recipients should be explicitly reminded that they should process the personal data they receive only for the purpose for which they were transmitted, the EDPS welcomes the Data Protection Notice inviting internal end users to tick a box, thus confirming inter alia that they "*...will not process personal data contained in EFSA's in-house scientific expertise database for any purpose incompatible with the respective aim...*".

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*".

According to the notification, applicants can access, modify and/or delete their data/profiles in the database at any point in time.

Considering that the data/profiles in the database are based on an assessment of the submitted application and the decision by the Expert Database Supervisory Committee to include it in the database, the EDPS notes that applicants are informed of the outcome of the validation and eligibility steps, and in case of exclusion, of the validity and/or eligibility criteria that were not met. In addition, the EDPS recommends that procedures are set up to ensure that applicants have access, upon request, to their entire own personal evaluation data contained in the evaluation grids, minutes, and other internal documents documenting the assessment and decision by the Expert Database Supervisory Committee - not just to the evaluation results. This right of access may be limited on the basis of Article 20(1)(c) of the Regulation only in cases where this is absolutely necessary, namely no disclosure of comparative results when this is necessary to protect others and no disclosure of individual opinions of the actors involved in the selection procedure in order to protect the independence of these actors. In such cases, data

subjects should be informed of the principal reason for restricting the right of access and the right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation.

3.7. Information to the data subject

A data protection notice, to which a link is displayed throughout the application form, provides all information required under Articles 11 and 12 of the Regulation, with the exception of a reference to the legal basis of the processing operation and the time-limits for storing the data (see above point 3.4) as required under Article 11(1)(f)(i) and (ii) as well as Article 12 (1)(f)(i) and (ii) of the Regulation. The EDPS recommends including references to both, the legal basis of the processing operation and the time-limits. The EDPS further invites the EFSA to clarify vis-à-vis applicants that not answering optional questions will not put them in any disadvantaged position (see above point 3.3).

The EDPS welcomes that, in line with earlier recommendations regarding the EFSA Database of External Scientific Experts previously prior checked by the EDPS in case 2008-455, the data subjects have access to the data protection notice not only when initially filling in the application form, but each time an in-house scientific expert subsequently enters the database.

As regards "*...the Head of the EFSA Advisory Forum and Scientific Cooperation Unit*" who is identified as controller of the data processing operation", the EDPS notes that this does not correspond to the information given in the "In-house Scientific Expertise Database Procedure for the Identification and selection of In-house Experts" and highlights that it is EFSA who should be regarded as controller of the processing operation at hand. The EDPS consequently invites the EFSA to clarify in the data protection notice that the controller has entrusted the Human Capital and Knowledge Management Unit (HUCAP) with the processing operation.

3.8. Security measures

(...)

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations contained in this Opinion are taken into account. In particular, the EFSA should:

- ensure that in-house scientific staff members not applying to be included in the database and applicants not answering optional questions will not be put to any disadvantaged position due to their failure to give answer and inform about this accordingly;
- justify the relevance of "gender" and "nationality" to the processing or to these mandatory elements from the items to be included in the database;
- define a deletion policy, including a maximum retention period for cases in which in-house scientific experts do not contribute in one way or another to the "process for data renewal", so as to ensure that profiles are automatically deleted;
- ensure long-term data quality by including in the annual request to in-house scientific experts to update/confirm their profile a warning that failure to respond following a

specific period of time will entail the automatic deletion of the non-updated or the repeatedly confirmed profile;

- set up procedures to ensure that applicants have access, upon request, to their entire own personal evaluation data contained in the evaluation grids, minutes, and other internal documents documenting the assessment and decision by the Expert Database Supervisory Committee, not just to their "evaluation results";
- include references to the legal basis of the processing operation and the time-limits in the data protection notice and clarify in the data protection notice that the controller has entrusted the Human Capital and Knowledge Management Unit (HUCAP) with the processing operation.

Done at Brussels, 05 December 2012

(signed)

Giovanni BUTTARELLI

Assistant European Data Protection Supervisor