

GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Gilbert GASCARD
Director
Research Executive Agency
COV2 18/132
B-1049 Brussels

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GB/TS/sn/D(2014)0444 C 2013-0271
Please use edps@edps.europa.eu
for all correspondence

Subject: Prior checking notification concerning public procurement

Dear Mr Gascard,

I refer to the notification for prior checking concerning public procurement submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the Research Executive Agency (REA) on 11 March 2013.

We note that the procurement procedure at the REA is in most aspects in compliance with Regulation (EC) No 45/2001¹ (the Regulation) as outlined in the EDPS Public Procurement Guidelines² and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

1. Data conservation. According to the information provided in the notification, data processed in this context are kept for a certain period of time after signature of the respective contract on a basis of the respective provisions of the Common Retention List of the European Commission³, namely ten years in case of successful tenderers and five years in case of unsuccessful ones.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

² EDPS Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts of 25 June 2013 (EDPS 2012-501).

³ Common Commission-Level Retention List for European Commission Files - SEC (2007)970 adopted on 4 July 2007 and revised on 17 December 2012 as SEC(2012)713, and in particular, points 7.1.4 and 12.6.1 of the Annex I.

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.

The EDPS observes that the conservation of data of unsuccessful tenderers for up to five years after the signature of the respective contract can be considered as necessary in order to allow for all possible legal remedies.

At the same time, we would like to question the necessity of the existing time limit for storage of the data of successful tenderers. In particular, we would like to recall that the further storage for control and audit purposes should correspond to time limits set out in Article 48(1)(d) and (2) of the Rules of Application to the Financial Regulation⁴. Therefore, we invite the REA to shorten the existing conservation period to seven years.

Furthermore, we are of the opinion that the extracts from judicial records should not be kept for longer than two years after the signature of the related contract⁵. Consequently, we invite the REA to establish such a conservation period for extracts kept in electronic form.

2. Transfers of data. Personal data processed in this context are transferred to the responsible staff in the REA, as well as to the members of the opening and evaluation committees. External experts can be involved as members of the evaluation committee. All data recipients are reminded of their obligation not to use the data received for any further purpose than the one for which they were transmitted.

The data transfers to the responsible staff at the Executive Agency can be considered as necessary for the accomplishment of the respective task in the procurement procedure and thus in compliance with Article 7 of the Regulation.

The transfers to the external members of the evaluation committee have to be assessed in light of Articles 8 and 9 of the Regulation, depending on as to whether they are subject to national law adopted pursuant to Directive 94/56/EC⁶, i.e. whether they are established in the EU.

The transfers to the external recipients established in the EU can be deemed necessary for the performance of the evaluation task in the area of public procurement in terms of Article 8(a) of the Regulation 45/2001; whereas the transfers to experts established outside of the EU may be considered as necessary for the implementation of pre-contractual measures taken in response to the data subject's request within the meaning of Article 9(6)(b) of the Regulation.

In any case, the tenderers should be informed about the possible processing of their data by external experts established outside the EU at an early stage of the procedure. The EDPS thus invites the REA to include this information in the existing template for invitations to tender.

⁴ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

⁵ See to this respect the letter on conservation of extracts from the judicial records sent by EDPS to the management of all EU institutions and bodies on 12 March 2013 (EDPS 2011-482).

⁶ Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of any provision of the Regulation provided that the considerations contained in this Opinion are fully taken into account. In particular, the REA should:

- shorten the existing conservation period for data of successful tenderers to seven years after the signature of the contract;
- establish a two years conservation period for the extract from judicial records kept in electronic form;
- include the information about the possible processing of data by external experts in the existing template for invitations to tender.

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

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor
(signed)

Cc: Evangelos Tsavalopoulos, DPO