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Ms [...]
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Subject: Prior checking - Selection of confidential counsellors at EU- OSHA

Dear Ms [...],

We refer to the notification for prior checking submitted to us by the Data Protection Officer of EU-OSHA ("**OSHA**") in the framework of EU-OSHA policy on building and maintaining a working culture based on dignity and respect (notification received on 29 June 2015)¹.

OSHA also provided the following draft documents:

- Decision of the Governing Board on OSHA Policy on building and maintaining a working culture based on dignity and respect (the "**Dignity Policy**");
- Manual of procedures for confidential counselors (the "**Manual of procedures**")²;
- Privacy statement in relation to the selection and appointment of confidential counselors³.

The EDPS issued Guidelines concerning the processing of personal data during the selection of confidential counsellors in EU institutions and bodies (the "**Guidelines**")⁴. We will

¹ The draft Opinion was sent to the DPO for comments on 27 July 2015. The EDPS received reply on 4 September 2015.

² Contrary to what its title might suggest, the Manual of procedures does not relate only to the informal procedure managed by confidential counsellors in case of harassment but also to the selection of confidential counsellors. Moreover, the Manual of procedures is not only intended for confidential counsellors only but also for OSHA's HR section. Therefore, OSHA could change the title of the Manual of procedures in order to better reflect that it deals with the informal procedure and the selection of confidential counsellors.

³ The processing of personal data in the context of informal procedures for harassment was notified for prior checking separately (Case 2015-0467).

therefore only address the aspects of the processing which do not seem to be fully compliant with Regulation 45/2001⁵ ("**the Regulation**") as further outlined in the Guidelines.

1. Lawfulness of the processing

The grounds for lawfulness mentioned in the notification are Article 5(a) (task necessary in the public interest), (d) (consent of the person concerned) and (e) (vital interests of the data subject) of the Regulation. The privacy statement refers to Article 5(a) and (d).

Consent should not be used as a ground for lawfulness of the processing operations carried out for the selection of confidential counsellors, as they occur in the employment context⁶. Article 5(a) of the Regulation is a sufficient ground in this respect.

Article 5(e) is not relevant in the context of the selection of confidential counsellors.

Recommendation:

1) Remove from the notification the references to Article 5(d) and (e) of the Regulation as grounds for lawfulness of the processing; remove Article 5(d) from the privacy statement.

2. Information to data subjects

In order to fully comply with Articles 11 and 12 of the Regulation 45/2001, OSHA should slightly complete/amend the privacy statement (see recommendations below). In particular, Article 20(1)(c) of the Regulation states that the right of access may be restricted to "*safeguard the protection the rights and freedoms of others*", being other applicants (when comparative data are involved) and selection panel's members (no access to individual appreciations)⁷. The privacy statement, which states that "*the rights of access and rectification do not apply as regards the appreciations done by the members of the selection committee*" should be amended in order to make clear that the restrictions to the right of access only applies to the *individual* appreciations of the selection committee and may also apply to the other candidates' data.

As to the availability of the privacy statement, the templates of call for expressions of interest and of application form duly include a hyperlink to the privacy statement⁸. As general information, the privacy statement should also be posted on the agency's intranet.

Moreover, information on the availability of the privacy statement should also be included in the notification (Section 7 - Information to data subjects) and explanations on the restrictions to the data subject's rights (currently inserted in Section 7) should be moved to Section 8 of the notification (procedures to grant rights to data subjects).

⁴ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-02-18_Harassment_Guidelines_EN.pdf

⁵ 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.

⁶ Consent can, however, be taken into consideration to lift the prohibition of the processing of sensitive data of article 10 of the Regulation: if and when a candidate provides sensitive data on a voluntary basis, one can consider that the candidate has given his/her express consent to the processing of these sensitive data (under Article 10(2)(a) of the Regulation 45/2001).

⁷ See p. 11 of the Guidelines.

⁸ Annex VI and VIII of the Manual of procedures.

Recommendations:

As to the contents of the privacy statement:

- 2) Add the organisational part entrusted with the processing (HR section, as mentioned in the notification);
- 3) Add to the type of data processed: evaluation data by the selection committee;
- 4) Remove Article 5(d) of the Regulation from the legal basis (*cf. Recommendation No. 1*);
- 5) Clarify in the section on data subject's rights that access may notably be restricted under Article 20(1)(c) if such access would undermine the rights and freedoms of others, in particular other candidates (comparative results) and members of the selection committee (individual opinions).

As to the availability of the privacy statement:

- 6) Ensure that the privacy statement is posted on OSHA's intranet page concerning the selection of confidential counsellors.

As to the notification:

- 7) Move the current text of Section 7 (Information to be given to data subjects) to Section 8 (Procedures to grant rights to data subjects);
- 9) In Section 7, include a reference to the privacy statement and how it is made available to the potential candidates (publication on the intranet, hyperlink in the call of expressions for interest and in the application form).

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In conclusion, there is no reason to believe that there is a breach of the provisions of the Regulation provided that the above-mentioned recommendations are fully taken into account.

The EDPS expects that OSHA implements the recommendations accordingly and will therefore **close** the case.

Yours sincerely,

(signed)

Wojciech RAFAŁ WIEWIÓROWSKI

Cc: Ms [...], Data Protection Officer