



WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Mr Robert-Jan SMITS
Director General
Directorate-General for Research and
Innovation (DG RTD)
European Commission
BRU-ORBN 03/143
B-1049 Brussels - Belgium

Brussels, 14 November 2016
WW/UK/sn/D(2016)2710 C 2016-0950
Please use edps@edps.europa.eu for all
correspondence

Subject: Prior-checking Opinion regarding independent expert management in the context of Horizon 2020 at DG RTD (EDPS case 2016-0950)

Dear Mr Smits,

On 19 October 2016, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ("the Regulation") on independent expert management in the context of Horizon 2020 at DG RTD from the Data Protection Officer (DPO) of the European Commission (Commission).

As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

The EDPS has issued Guidelines concerning the processing of personal data for public procurement² ("the Guidelines"). Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for public procurement at the Commission.

¹ OJ L 8, 12.1.2001, p. 1.

² Available on the EDPS website:
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/13-06-25_Procurement_EN.pdf

1. Facts and analysis

1.1. Retention period

According to Article 4(1)(b) and (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. Further storage for historical, statistical or scientific purposes is possible only in an anonymous form (or with encrypted identity of the data subjects) on condition that the controller provides for appropriate safeguards that the personal data are not processed for any other purposes or used in support of measures or decisions regarding any individual.

Under the Guidelines (p. 4), the conservation of files of successful tenderers, grant applicants and experts for up to seven years after the signature of the respective contract, grant agreement or the end of the particular program can be considered as necessary for control and audit purposes in terms of Article 48(1)(d) and (2) of the Rules of Application, with the exception of the extracts from the judicial records that can be kept only for two years after the accomplishment of the particular procedure. In any case, according to Article 48(3) of the Rules of Application, personal data contained in supporting documents should be deleted where possible where these data are not necessary for budgetary discharge, control and audit purposes.

According to section 13 of DPO 3736.1 (provided as part of the notification), *“For experts selected by a Controller, personal data is kept for 10 years after the end of the particular programme on which they provided their services.”* (with a footnote stating *“As required by the Common Commission Retention List (CRL, SEC(2012)713).”*)

No further explanation is provided as to why a retention period of 10 years is considered as necessary for control and audit purposes in terms of Article 48 of the Rules of Application as opposed to the Guidelines stipulating a seven year retention period in the light of the same provision and considerations³.

The EDPS strongly recommends adapting the retention period (as well as the respective references to it in the Privacy Statement) regarding files of successful grant applicants to up **to seven years** as recommended in the Guidelines and expects to receive documentary evidence of implementation.

1.2. Alignment of DPO 3736.1

Section 8 of DPO 3736.1 (provided as part of the notification) stipulates that *“The data processed by DG RTD in the context of this notification fall under Article 27 of Regulation (EC) No 45/2001. However, there is no need to submit the present notification for prior check to the European Data Protection Supervisor (EDPS) as the latter has already issued his opinion on this type of processing operations. All the recommendations of the EDPS have been fully taken into account in the present notification.”*

³ As explicitly noted in case 2016-0098 (our letter to the Commission’s DPO of 12 September 2016), *“The wording of Article 54 of the Financial Regulation as such does not contain any retention period and contains no explanation as to why an additional three years (10 years instead of seven) would be required in the specific context of Horizon 2020.”*

As outlined in point 1.2 above and explicitly confirmed by the Commission's DPO in his letter notifying the processing operation, the notification is *not* fully in line with the Guidelines as regards the retention period applicable to files of successful grant applicants (a circumstance that had already led to a respective recommendation in the EDPS' Opinion in case 2009-0570).

The conclusion that a new prior-checking by the EDPS is not necessary because a previous prior-check by the EDPS in case 2009-0570 or because of full compliance with the Guidelines is thus erroneous.

The EDPS recommends omitting these erroneous statements from DPO 3736.1.

2. Conclusion

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that both recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

The EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion for the recommendations made in this Opinion on the retention period regarding files of successful grant applicants (and the respective references to it in the Privacy Statement), which needs to be adapted to up to seven years as recommended in the Guidelines.

The EDPS expects **implementation**, but does not require documentary evidence for omitting erroneous statements regarding the need for prior-checking from DPO 3736.1.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: Mr Philippe RENAUDIÈRE, DPO European Commission