

## **Opinion on the notification for prior checking from the Data Protection Officer of the Committee of the Regions regarding the "Procedures for calls for expressions of interest and invitations to tender" dossier**

Brussels, 3 May 2006 (Case 2006-52)

### **1. Procedure**

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (hereinafter referred to as "the Regulation") concerning the "Procedures for calls for expressions of interest (CEIs) and invitations to tender" dossier was given by the Data Protection Officer of the Committee of the Regions by letter received on 27 January 2006.

The European Data Protection Supervisor (EDPS) had previously received from Data Protection Officers an inventory of data processing operations that might be subject to prior checking as provided for by Article 27 of the Regulation. On the basis of the inventories received, the EDPS had identified a number of priority topics; staff evaluation was among them. The case in point, relating to the evaluation of external experts by the Committee of the Regions, is closely related to that "staff evaluation" priority topic identified by the EDPS.

The EDPS asked for additional information by e-mail on 10 March 2006; the Data Protection Officer of the Committee of the Regions replied on 4 April 2006. Further queries were put on 10 April 2006; the Data Protection Officer answered them on 21 April 2006.

### **2. Facts**

This processing operation is carried out by the Committee of the Regions, specifically by the Unit for Policy Analysis, Studies and Inter-institutional Legislative Planning (hereinafter referred to as "DTC3") of the Directorate for Consultative Work. The processing operation relates to procedures for calls for expressions of interest (hereinafter referred to as "CEIs") and invitations to tender; data subjects are both natural persons and legal entities<sup>1</sup>. The purpose of the operation is to establish a CEI list for service contracts relating to studies in research fields covered by the Committee of the Regions with a view to awarding study contracts and allocating lots on the basis of the framework contract for external experts<sup>2</sup>.

The data subject responds to a call for expressions of interest (phase 1). If that data subject is included in the CEI list, he or she may be invited to take part in a tender procedure (phase 2). The

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1 However, the notification and this opinion relate to natural persons only.

2 The CEIs involve research fields covered by the CoR, in particular areas relating to cohesion policies; economic and social policy; sustainable development; culture, education, vocational training and the information society; constitutional matters and European governance; and external relations. The invitation to tender procedure is used to award the study contracts.

third phase is the award of the contract; however, that phase does not fall within the scope of this prior checking exercise.

Tenderers are requested to submit a set of documents for the purposes of appraising their response to the CEI and invitations to tender. In particular, during the first phase (CEI), candidates are asked for "sensitive" documents, such as extracts from judicial records, and during the second phase (invitations to tender), the competence of tenderers is assessed on the basis of the candidates' CVs. Personal data are processed in order to assess the abilities and reliability of the data subjects and to determine whether the conditions for inclusion on the CEI list and the specifications of the invitations to tender are met.

Three documents are included in the file: document C concerning the launch of the CEI, which has been used since 2004 (phase 1); document B, which is sent to all tenderers to invite them to take part in the tender procedure (phase 2); and document A containing a copy of the clauses inserted into the contract once the tender procedure is complete and the contract has been awarded to one of the tenderers (phase 3). Only documents C and B are relevant to the processing operation in the case in point, since they concern the first two phases (CEI and invitations to tender, respectively).

The data subjects can be any interested natural person from the European Union, the European Economic Area or third countries with which the European Communities have concluded specific agreements in the field of public contracts.

The data collected are as follows: name, address, telephone and fax numbers of the data subject, photocopies of the passport or certificate of nationality, proof of self-employed status, proof of tax status, bank details, an extract from the judicial record, a certificate relating to payment of social security contributions and taxes, a CV with a photograph, a list of the main works published and study contracts carried out in the previous three years, a statement setting out the data subject's turnover, and bank references or proof of professional-risk insurance cover.

As regards storage of data, tenders from the data subjects are accepted on paper only. The processing operation is both manual and computerised, for the data are stored on a computer drive. All correspondence, minutes and notes relating to the processing operation are stored in paper and electronic form.

The recipients of the data are the staff of the Committee of the Regions, the Director of the Directorate for Consultative Work and the members of an opening board or an assessment committee established in accordance with Article 98(3) and (4) of the Financial Regulation and Articles 145(2) and 146(1) of the detailed rules for the implementation of Regulation No 1605/2002 of 25 June 2002 on the Financial Regulation. Departmental instructions governing the membership of the opening boards and evaluation committees established for study contracts were adopted on 8 March 2006.

In principle, the opening boards and evaluation committees established for study contracts must comprise the following members:

- one or more official(s) from the commissions(s) involved;
- one or more official(s) from the Policy Analysis Unit;
- one official from the CoR's Legal Service;
- possibly one official from another of the CoR's directorates;
- possibly one official from the Studies Department;
- possibly an external expert (usually a relevant official from another Community institution or body).

As a general rule, the composition of the opening board and evaluation committee remains the same for any given contract. Members of these bodies must be selected for their competence in the field to be covered by the study.

The authorising officer and internal auditor are invited to take part as observers.

All officials of the Directorate for Consultative Work must take part in drafting the tender specifications and sit on the opening boards and evaluation committees on a rota basis. As a general rule, it is not desirable for an official to draft more than one set of specifications and take part in more than one study procurement procedure per year.

The statement on information for data subjects, entitled "Data Protection" and attached to the notification, specifies that the data shall be processed by the controller "without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in conformity with Community law". The bodies referred to are the Court of Auditors, the European Parliament (within the framework of the discharge procedure) and OLAF.

As regards the retention of personal data, the data relating to this processing operation are kept for three years. That period could be shortened, depending on the European Parliament's discharge procedure. The discharge procedure usually lasts at least 28 months. For the purposes of financial control and to cover the possibility of any dispute, the personal data of unsuccessful tenderers are also kept. Furthermore, data are anonymised and only the nationality of the data subjects and contractors is kept for statistical purposes.

The information for data subjects is set out in the CEIs and the invitations to tender (the documents used are document C relating to the CEI established in 2004 and valid until 11 February 2007 and document B relating to the invitation to tender). The fact that a new CEI will be issued at the end of 2006 is also mentioned. See the information set out in section 3.8 below.

The data subjects may exercise their access, rectification, blocking, erasure and objection rights by submitting a request to the controller. Data are blocked and erased within two weeks.

The data are kept in a locked cupboard in the offices of the DTC3 Unit of the Committee of the Regions. Access to the drive on which data are stored is restricted to members of the DTC3 Unit.

### **3. Legal aspects**

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

The notification received on 27 January 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data are processed by an institution, the Committee of the Regions, and is carried out in the exercise of activities which fall within the scope of Community law (Article 3(1)).

Processing of the evaluation procedure is both manual and computerised. Processing of the procedure for evaluating responses to the CEI and invitations to tender is manual but the content is intended to form part of a filing system. Article 3(2) therefore applies in this case.

Accordingly, this processing operation falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes "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" subject to prior checking by the European Data Protection Supervisor.

Article 27(2) contains a list of processing operations likely to present such risks, such as "processing of data relating to health and to suspected offences, offences, criminal convictions or security measures" (Article 27(2)(a)) and "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). In the case in point, the data are processed in order to evaluate personal aspects relating to the data subjects (in particular their ability – Article 27(2)(b)). Furthermore, personal data relating to suspected offences (Article 27(2)(a)) may also be processed. This dossier therefore falls within the scope of the prior checking procedure.

In principle, checks by the European Data Protection Supervisor should be performed before the data processing operation is implemented. In this case, as the European Data Protection Supervisor was notified after the system was set up, the check necessarily has to be performed *ex post*. However, this does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The formal notification was received through the post on 27 January 2006. An e-mail requesting additional information was sent on 10 March 2006. In accordance with Article 27(4) of the Regulation, the two-month period within which the European Data Protection Supervisor must deliver an opinion was suspended. Replies were given by e-mail on 4 April 2006. Additional queries were put on 10 April 2006 and were answered on 21 April 2006. The European Data Protection Supervisor therefore had to submit his opinion by 3 May 2006 (28 March plus a 36-day suspension period).

### **3.2. Legal basis and lawfulness of the processing operation**

The legal basis for this processing operation is Articles 93 and 94 (relating to exclusion criteria) of Regulation (EC) No 1605/2002 of 25 June 2002 on the Financial Regulation, Article 97 of that same Regulation and Articles 135 (selection criteria), 136 (economic and financial capacity) and 137 (technical and professional capacity) of the detailed rules for the implementation of that Regulation.

In particular, under Article 93(1) of the Financial Regulation, candidates or tenderers are excluded from participation in a procurement procedure if:

*"(a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;*

*(b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of res judicata;*

*(c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;*

*(d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are*

*established or with those of the country of the contracting authority or those of the country where the contract is to be performed;*

*(e) they have been the subject of a judgment which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;*

*(f) following another procurement procedure or grant award procedure financed by the Community budget, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations."*

Candidates or tenderers must certify that they are not in one of the situations listed in paragraph 1. Also, under Article 94, contracts may not be awarded to candidates or tenderers who, during the procurement procedure, are subject to a conflict of interest or are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.

Furthermore, selection criteria are set out in Article 97(1) of the Financial Regulation and in Articles 135 to 137 of the detailed rules, which provide in particular for an evaluation of the tenderers' technical and professional capacity: "*the selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders shall be defined in advance and set out in the call for tender*".

Alongside the legal basis, the lawfulness of the processing operation must also be considered. The lawfulness of the processing is based on Article 5(a) of Regulation (EC) No 45/2001, since the processing operation is necessary for the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of official authority vested in the Community institution. Furthermore, recital 27 of Regulation (EC) No 45/2004 points out that processing "*includes the processing of personal data necessary for the management and functioning of those institutions and bodies*". The legal basis set out in the provisions of the Financial Regulation applicable to the general budget of the European Communities further strengthens the lawfulness of the processing operation.

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

Article 10(5) of Regulation (EC) No 45/2001 provides that processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof.

The case in point involves processing of personal data relating to offences and criminal convictions, since the extract from the judicial record required may reveal the situation of the data subject as regards criminal law (i.e. whether the data subject has a criminal record or not).

As was pointed out above in connection with the legal basis, the data processing operation is based on Article 93(1)(b) of Regulation (EC) No 1605/2002 of 25 June 2002 on the Financial Regulation and therefore complies with Article 10(5) of Regulation (EC) No 45/2001 whereby processing of data relating to offences may be carried out if it is "authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof".

### **3.4. Data quality**

Data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation with the processing operation. The data required are of an administrative nature and are necessary for the purposes of evaluating responses to the CEI and invitations to tender. The EDPS is satisfied that Article 4(1)(c) of Regulation (EC) No 45/2001 is duly complied with in this respect.

Furthermore, the data must be processed "*fairly and lawfully*" (Article 4(1)(a) of Regulation (EC) No 45/2001). The matter of the lawfulness of the processing operation has already been reviewed (see section 2 above). The issue of fairness is linked to the information which must be transmitted to the data subject. That point is discussed in section 3.9 below.

Article 4(1)(d) of the Regulation stipulates that "*data must be (...) accurate and, where necessary, kept up to date*". Furthermore, under that Article, "*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*". The system itself guarantees reasonable accuracy of the data collected and updating of the data is provided for in particular in the publication of the CEI. The data subject is made aware of his or her right of access to and right to rectify data, in order to ensure that the file remains as comprehensive as possible. These rights are the second means of ensuring that data are accurate and kept up-to-date. They are discussed in section 3.7 below.

### **3.5. Data retention**

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that data must 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*".

As has been stated above, the data relating to the data subjects in both phase 1 (CEI) and phase 2 (invitation to tender) are kept for three years. The EDPS considers that the above period is consistent with the purposes of the processing operation and does not need to be reduced for any other reason. Furthermore, the EDPS notes that the CoR keeps the personal data of unsuccessful tenderers for the purposes of financial control and to cover the possibility of any dispute. A reasonable and justified period should be set for the retention of such data and the data should be destroyed at the end of that period.

Lastly, under Article 4(1)(e), if personal data has to be stored for historical, statistical or scientific use, the Community institution or body must ensure that it is kept either in anonymous or encrypted form. The EDPS welcomes the fact that data kept for statistical purposes, which contain only the nationality of tenderers and contractors, are anonymised. Such a personal data storage system duly complies with Article 4(1)(e) of the Regulation.

The EDPS recommends that steps be taken to ensure that data relating to unsuccessful tenderers are kept for a reasonable and justified period and are destroyed at the end of that period.

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

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to

other Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The case in point concerns transfers within the same institution, and in particular among CoR staff belonging to an opening board or an evaluation committee in accordance with Article 98 of the Financial Regulation. While members of the opening board and evaluation committee are almost all CoR officials, the data can also possibly be transferred to officials from another Community institution or body since one of the members of the opening board is an official or expert from another institution (however, this is highly unlikely and has never occurred to date).

The case in point also concerns transfers between institutions, since the data can be transferred to the Court of Auditors, the European Parliament and OLAF for the purposes of possible investigations and budgetary control.

It follows that the conditions of Article 7(1) are fulfilled since the data collected are necessary for carrying out the processing and, furthermore, are *"necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

Furthermore, Article 7(3) of Regulation (EC) No 45/2001 provides that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*. This implies that personal data may be transferred within an institution only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient, which is obviously the case here. Lastly, it must be explicitly guaranteed that any member of an opening board or evaluation committee receiving and processing data for the purpose of evaluating respondents to the CEI and invitations to tender may not use them for any other purpose.

Accordingly, the EDPS recommends that, in the case in point, the Committee of the Regions should specify that the persons responsible for evaluating tenderers may not use those data for any other purpose.

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

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for right of access at the request of the data subject. In the case in point, the data subject has access to his or her tender file in order to fill in all the sections required for the procedure. Article 14 of Regulation (EC) No 45/2001 allows the data subject a right of rectification. In addition to being given access to their personal data, data subjects may also amend factual personal data directly or have them amended if necessary.

As has been mentioned above, data subjects may exercise their access, rectification, blocking, erasure and objection rights by submitting a request to the controller. Data are blocked and erased within two weeks.

The EDPS considers that the conditions laid down in Articles 13 and 14 of Regulation (EC) No 45/2001 are duly complied with.

### **3.8. Information for data subjects**

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. Article 11 provides that when the data are obtained from the data subject, information must be given at the time of collection. When the data are not obtained from the data subject, the information must be given

when the data are first recorded or disclosed, unless the data subject already has the information (Article 12).

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply to tenderers who send their tender through the post to the CoR unit responsible for processing it, within the framework of both phase 1 (CEI) and phase 2 (invitations to tender).

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also apply in this case because information is obtained from the various persons involved in the process, in particular the members of an opening board or an evaluation committee in both phase 1 and phase 2. The concept of personal data also covers information relating to the identity, characteristics or behaviour of a person and information which is used to determine or influence how a person is treated or appraised (and this is obviously the case in the context of evaluations carried out by the members of an opening board or evaluation committee).

As regards phase 1 (CEI), as has been mentioned above, the information for data subjects is set out in document C relating to the launch of the CEI; this document is adequate for the purposes of the processing operation in the case in point. The document provides tenderers with information on the identity of the controller, the purposes of the processing operation, the possible recipients of the data, the existence of the right of access to and the right to rectify data concerning them and the time-limits for storing the data. Information about whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply, is not provided (Article 11(1)(d)). Nor is the information relating to the legal basis of the processing operation (Article 11(1)(f)(i)) and the right to have recourse to the EDPS (Article 11(1)(f)(iii)).

Accordingly, the EDPS considers that the information supplied pursuant to Article 11 of the Regulation should be more comprehensive when the next CEI is issued at the end of 2006.

As regards Article 12, data subjects are provided with the information set out in subparagraphs (a) (identity of the controller), (b) (purposes of the processing operation), (c) (categories of data concerned), (d) (recipients or categories of recipients) and (e) (existence of the right of access to, and the right to rectify, the data concerning them). The time-limits for storing the data are also given (Article 12(1)(f)(ii)). However, the information referred to in Article 12(1)(f)(i) (*legal basis of the processing operation*) and in Article 12(1)(f)(iii) (*right to have recourse at any time to the European Data Protection Supervisor*) is not supplied.

Accordingly, the EDPS recommends that the information referred to in Article 12 be supplied in full when the next CEI is issued.

As regards phase 2 (invitations to tender), as has been mentioned above, the information for data subjects is set out in document B relating to the invitation to tender. That document supplies the following information: the identity of the controller, the purposes of the processing operation, the possible recipients of the data and the data subjects' right of access to and right to rectify data concerning them. Information about whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply, is not provided (Article 11(1)(d)). The time-limits for storing the data are not supplied either (Article 11(1)(f)(ii)). Nor is the information relating to the legal basis of the processing operation (Article 11(1)(f)(i)).

Accordingly, the EDPS considers that the information supplied pursuant to Article 11 of the Regulation should be more comprehensive when the next invitations to tender are issued.



As regards Article 12, data subjects are provided with the information set out in subparagraphs (a) (identity of the controller), (b) (purposes of the processing operation), (d) (recipients or categories of recipients) and (e) (existence of the right of access to, and the right to rectify, the data concerning them). As regards Article 12(1)(c) (the categories of data concerned), the EDPS considers that these categories of data are necessarily set out in the invitation to tender itself – a document which is not attached and should accompany document B. The right to have recourse at any time to the European Data Protection Supervisor is also mentioned (Article 12(1)(f)(iii)). However, the information referred to in Article 12(1)(f)(i) (*legal basis of the processing operation*) and in Article 12(1)(f)(ii) (*time-limits for storing the data*) is not supplied.

Accordingly, the EDPS recommends that the information referred to in Article 12 be supplied in full when the next invitations to tender are issued.

### **3.9. Security**

In accordance with Article 22 of Regulation (EC) No 45/2001 on security of processing, "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*".

Organisational and technical measures have been taken to ensure an optimum level of security for the processing operation.

Having examined all of these measures, the EDPS considers that they are appropriate for the purposes of Article 22 of Regulation (EC) No 45/2001.

### **Conclusion**

The proposed processing operation does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This implies, in particular, that the CoR should:

- take measures to ensure that data relating to unsuccessful tenderers are kept for a reasonable and justified period and are destroyed at the end of that period;
- specify that the persons responsible for the tenderer evaluation procedure may not use the related data for any other purpose;
- supply the full information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001 when both the next CEI (phase 1) and the next invitations to tender (phase 2) are issued.

Done at Brussels, 3 May 2006

Peter HUSTINX  
European Data Protection Supervisor