

**Opinion on a notification for prior checking received from the Data Protection Officer of the European Communities Personnel Selection Office (EPSO) on the "*Selection of contract staff with a view to recruitment by the European institutions or by Community bodies, offices and agencies*"**

Brussels, 14 November 2006 (Case 2005-366)

## **1. Procedure**

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "*selection of contract staff with a view to recruitment to the institutions by the European Communities Personnel Selection Office (EPSO)*" was given by the Data Protection Officer of the European Commission, by e-mail on 23 November 2005.

This notification is one of the priorities set by the EDPS, inasmuch as it contains data on the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)).

The note of 13 April 2005 addressed to the European Data Protection Assistant Supervisor states that EPSO has decided to use the services of the Commission's DPO in order to ensure consistent interpretation of the Regulation and also owing to a lack of resources. That is why the Commission's DPO has given notification on EPSO's behalf.

Questions were put to the acting Data Protection Officer of the European Commission in e-mails dated 13 January 2006. On 13 September 2006 the EPSO Director forwarded additional information to the EDPS. This included substantial new material on the introduction of the CARL database. That is why the EDPS decided to extend the time-limit by a month. A draft opinion was forwarded on 17 October 2006 for comments from the DPO and the controller and the time-limit was thus suspended for 15 days. The EDPS received important new information<sup>1</sup> from EPSO, leading it to suspend the time limit for a further 15 days in order to incorporate the information into its opinion.

## **2. Facts**

The European Communities Personnel Selection Office (EPSO) was established by Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the

---

<sup>1</sup> This information included the Agreement between the Secretaries-General of the institutions on the common principles for a shared selection and recruitment policy and the principles for managing reserve lists, adopted on 25 July 2002.

European Ombudsman of 25 July 2002<sup>2</sup>. The way in which EPSO is organised and operates was laid down in a decision adopted by the Secretaries-General of the same institutions (Decision 2002/621/EC) on 25 July 2002. In accordance with Article 82(5) of the Conditions of Employment of Other Servants of the European Communities, EPSO provides assistance to the Community institutions, bodies, offices and agencies with a view to the selection of contract staff, which is the case here.

Contract staff are a new category of non-permanent staff introduced under the recent administrative reform of the European institutions<sup>3</sup>. The selection procedure generally comprises the following stages: publication by EPSO of a call for expressions of interest, on-line registration of the applicant via EPSO Porta, validation of a database set up by EPSO and, where applicable, pre-selection tests. The interview for possible recruitment is conducted by the institution concerned which has access to the database on which applicants' data are stored. The conduct and configuration of the various stages may vary depending on the call for expressions of interest. Nevertheless, the example described in the notification relates to the call for expression of interest published on 20 June 2005 for the selection of contract staff from the 25 Member States. That was a full-scale call for expression of interest, and it included pre-selection tests.

At the request of one or more of the institutions, a call for expressions of interest is published on the EPSO website. It contains useful information for the applicant, notably conditions and eligibility requirements (general terms, profiles sought, eligibility criteria and general conditions), how to apply, successive stages of the selection procedure and general information.

With the exception of those with a disability that prevents them from doing so, applicants fill in the application on line once they have created their EPSO Porta. All subsequent communication takes place via EPSO Porta, which applicants are required to consult on a regular basis.

EPSO prepares a validated database of applicants who fit the competence profiles and qualifications as set out in the call for expression of interest. The personal data required for this database are as follows:

- (i) personal data identifying the applicant: surname, forename, name by which the applicant is commonly known, date of birth, gender, private address, city, postcode, country, e-mail address;
- (ii) information provided by the applicant under the selection procedure allowing assessment of whether he/she fits the competence profiles and qualifications set out in the call for expression of interest, such as nationality, professional experience, education and training, language knowledge;

EPSO submits the data to a Selection Committee which draws up the list of applicants invited to sit the tests.

The pre-selection tests are designed to assess their verbal and non-verbal reasoning capacity and language knowledge. There is also a test to assess their knowledge of the EU and a test to ascertain their specific abilities. For some particular profiles, the specialist test is conducted orally (for instance, in most profiles relating to research activities). As a general rule, applicants sit these tests in their second language, which must be different from their main language. It is important to note that some selection procedures do not include pre-selection tests. Where pre-selection tests are not organised, EPSO immediately gives the institutions which so request access to the database once it has been checked (to eliminate repeat applications and frivolous applications).

---

<sup>2</sup> The EDPS was established at the end of 2003 and is not one of the signatory institutions; the EDPS sits as an observer on the Management Board and will be a full member after the basic Decision has been revised.

<sup>3</sup> Under Article 3a of the Conditions of Employment of Other Servants, "contract staff" means staff not assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned and engaged for the performance of full-time or part-time duties.

In carrying out the selection procedure for contract staff, EPSO is assisted by a contractor responsible for organising the computer-assisted pre-selection tests and also by the Commission Data Centre in Luxembourg. These third parties act as processors and sign an undertaking to EPSO that the legal provisions on data protection will be fully observed. Moreover, where the pre-selection tests are computer-assisted, EPSO provides the contractor with the applicants' identifying data (surname, forename, date of birth, e-mail address) so that the identity of applicants attending the examination centre can be checked.

In the selection process itself, only authorised persons have access to the data relating to applicants, that is to say the database controllers, those responsible for organising the tests and the members of the Selection Committees.

Once the selection process is complete, access to the database is handed over to the European institutions' central recruitment services and, where appropriate, to other Community bodies. They may then decide, on their responsibility, to extend access to decentralised human resource management departments. It is important to note that, following several requests to that effect, a decision was also taken to grant access to the database to regulatory bodies, such as the European Food Safety Authority (EFSA), under conditions similar to those applying to the institutions, with, however, the following order of priority of access: (1) the institutions, (2) the executive agencies (3) the regulatory bodies. Access will be regulated by a Service Level Agreement (SLA) between EPSO and the bodies concerned which has yet to be finalised<sup>4</sup>. The reference to data recipients in the current privacy statement will be amended accordingly to take account of data transfer to the regulatory bodies.

Under the procedure, the recipients mentioned above invite the successful applicants most suitable for their requirements to interview. Applicants called to interview by the institution or by other Community bodies concerned are required to produce all relevant supporting documents (diplomas, certificates and other documents attesting to professional experience and relating to the information provided by the applicant in the application). The institutions or other Community bodies concerned are the only bodies having authority to recruit an applicant as a contract staff member.

Once they have registered on line, applicants are systematically provided with the privacy statement informing them of the processing of their personal data. By clicking on the OK button, they acknowledge that they have been so informed. The privacy statement is on every page of the on-line application form and is a permanent feature on the website and on each applicant's EPSO Porta and can thus be consulted at any time. This notice provides applicants with the following information: the identity of the controller, the purposes for which the data are processed, the intended recipients, whether a response is mandatory or optional, the right of access to and the right to rectify the data, the data concerned, the legal basis, the date as of which data are to be processed, the length of time they are stored and the right to have recourse at any time to the EDPS. In the case under consideration, unlike a competition, no list of successful applicants is published. Applicants are informed individually, via their EPSO Porta, as to whether or not they have been successful at the various stages of the selection process.

With regard to data storage, the database for pre-selected applicants remains valid for two years, whereas the database for applicants who are successful at all stages of the selection process is three years. However, according to the latest information received by e-mail on 13 September 2006, the Commission could extend the validity of the database for certain profiles. In that event, all applicants concerned would be informed in advance that their

---

<sup>4</sup> Regulatory bodies will have access to the database by 1 May 2007 at the latest.

personal data were to be stored for an extended period. Institutions' departments interested in the various profiles on the database will have access to all successful applicants' electronic CVs via the new "Contract Agents Reserve List" (CARL)<sup>5</sup>. The agreement adopted by the Secretaries-General of the institutions on 25 July 2002 sets out the common principles for a shared selection and recruitment policy and the principles for managing reserve lists. In accordance with principle 3(5) of that agreement, relating to the use of reserve lists, the lists may comprise three or four merit classes. Within each class or where there are no classes, as in the case of the CAST 25 exercise, "*applicants will appear in alphabetical order and the Institutions are free to choose any applicant*".

In general, where the period of validity of the profiles is not extended, personal data are no longer accessible via CARL once the period has expired. For instance, where applicants have not been successful in the pre-selection tests, their data are not accessible via CARL. Where applicants have not been successful in the tests and the interview organised by the institution, their personal data are deleted from the database as soon as the time limits for any appeals have expired<sup>6</sup>.

An Inter-institutional Code of Conduct has been drawn up for the use of CARL. Each new user of CARL receives a copy of the Inter-institutional Code of Conduct beforehand. Final access to CARL is granted only after the new user has sent an e-mail confirming that he/she has read the Code of Conduct and undertakes to follow the rules for the use of the database. Those rules are additional and in no way supplant the rules on the protection of personal data resulting from Regulation (EC) No 45/2001 with which all users are also required to comply.

There are four levels of access to CARL. The four different types of users, who are both officials and temporary staff, are as follows:

- (i) Administrators from all the institutions and from EPSO: they can create all types of users, they have complete control over the database and they can issue/delete any comment or flag
- (ii) Administrators at the institutional level at which CARL is being used: they can create full-access users and read-only users and can issue/delete comments for their institution
- (iii) Administrators at department/DG level who have full access: they can create read-only users and issue comments and add flags
- (iv) Administrators at department/DG level who have read-only access: they cannot create users and they have access to all information only at read-only level.

Users at each level (except read-only) have the right to control lower-level users. That means that full-access users and institution-level users can grant or refuse access to lower-level users. In accordance with the access rules for CARL (paragraph 1.3)<sup>7</sup>, any user who does not follow the Code of Conduct, who uses the database improperly, or who passes on his/her access code to another person will have all access withdrawn and may be subject to disciplinary proceedings.

Institution-level users will check full-access users' use of the database. Should a full-access user move to another post or should a full-access user name remain unused for a period of six

---

<sup>5</sup> CARL is not a new database separate from the one on which all applicants are registered (data are not re-entered on a database separate from CAST 25); it is simply a multi-criteria search engine providing access only to the CVs of applicants who have been successful in all the selection tests. Its purpose is to make it easier to identify applicants having the profile required by data recipients for a specific post.

<sup>6</sup> EPSO considers that the storage period applicable for officials and temporary staff (10 years) will be applied by analogy.

<sup>7</sup> These rules are additional to the CARL Manual, which is on the database.

months, that user name will be withdrawn. Full-access users will also check read-only users' use of the database and will withdraw an access name if the user moves to another post or if the name remains unused for a period of six months. Full-access users and read-only users who move to another post or who no longer wish to have access to CARL must inform their Administrator and their access will then be withdrawn.

Each user is responsible for his/her search criteria and they must be based on the actual needs of the departments wishing to recruit. Users should be able to justify their selection criteria if so requested by a selection board or on the occasion of an audit. Where more applicants meet the selection criteria than are required for interview, a selection is made on the basis of the CV without discrimination on the grounds of age, sex or nationality.

Regarding comments inserted in CARL, any user entering a comment which is inappropriate or subjective will have access withdrawn and will be held responsible for such comments. If an applicant requests that a comment be withdrawn or amended, the user responsible for the comments will decide whether or not to meet the request. In the event of disagreement, EPSO will act as mediator and will take the final decision.

CARL uses four types of flags: green, yellow, red and blue.

Assigning a green flag to an applicant means that the applicant is available for recruitment.

A yellow flag means that the applicant has been contacted by an institution and invited to come for interview. The full-access user must insert a comment stating the date and time of the interview and the venue. Yellow flags should be withdrawn after two months at the latest.

A red flag means that the applicant has been selected for recruitment. Once an applicant is informed that he/she has been selected for a particular post, the full-access user must replace the yellow flag with a red flag. If a red-flagged applicant is not recruited, the red flag must be replaced by a green flag. A comment may be added giving any reasons why the person was not recruited. Red flags must be withdrawn after three months at the latest.

A blue flag means that the applicant already works for one of the institutions and any user may enter an indication of the place of work (DG/department and institution) and the date of end of contract. Each institution is responsible for updating such information.

An applicant may request that the blue flag be replaced by a green flag if he/she wishes to be considered for another post. The full-access user in the department/DG in which the person works may change the blue flag to a green flag up to three months before the contract is due to expire. A comment may be added to explain the situation.

Each applicant is identified by a number which is an integral part of the application. The number is used mainly for the purposes of practical organisation of tests and is also known to the applicant.

According to the original notification, even after the deadline for registration applicants could continue to modify their personal identifying data, for instance change of surname on marriage. A justified request had to be sent to EPSO. However, according to the additional information sent to the EDPS on 13 September 2006, that justified request requirement no longer exists. Since the minimum period of validity of the database showing applicants who have been successful in all the tests is three years, in order to keep the database needs up to date, thus facilitating recruitment of applicants throughout that period, all applicants are now allowed to update their CV data (i.e. new skills acquired) at any time via their access to EPSO Porta without making a prior request to EPSO.

However, the initial mandatory data to be entered at the time of registration in order to meet the eligibility criteria for the selection procedure (e.g. qualifications obtained and professional experience) cannot be deleted or altered.

The rectification, blocking and erasure rights recognised by Regulation (EC) No 45/2001 remain unchanged should the validity of the database be extended.

Access to answers given and to the sheet of correct answers to the selection tests is restricted because the database used shows all the questions; tests are generated on a random basis for a given level of difficulty and applicants sit the tests on different dates. Hence, in order to protect the integrity of the database, access to the answers given is strictly limited as follows: only applicants who fail the tests receive on request the numbers of the questions they answered together with the number of their actual answer and the number of the right answer. EPSO puts a variety of arguments to justify this procedure (see point 3.8 below).

Applications are stored on a central server called CAST (Contract Agent Selection Tool) managed by the Commission Data Centre in Luxembourg.

### **3. Legal aspects**

#### **3.1 Prior checking**

The notification received on 23 November 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

Processing of the registration procedure in response to the call for expression of interest and of the management of pre-selection tests is entirely automated except in the case of applicants with disabilities for whom it is partly automated. Article 3(2) is therefore applicable in this case.

The processing therefore 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 subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations likely to present such risks. Among those, Article 27(2)(b) refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*".

The procedure for selecting contract staff of the European institutions is an operation for the processing of personal data covered by Article 27(2)(b), and as such is subject to prior checking by the European Data Protection Supervisor.

In principle, the check by the European Data Protection Supervisor is made prior to the data processing operation. In this case, as the European Data Protection Supervisor was appointed after the system was set up, the check necessarily has to be performed ex-post. 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 by e-mail on 23 November 2005. An e-mail requesting information was sent on 13 January 2006. Pursuant to Article 27(4) of the Regulation, the

two-month period within which the European Data Protection Supervisor must deliver an opinion was suspended. The replies and new information regarding the database were received by e-mail on 13 September 2006, resulting in a suspension of 243 days (or eight months). Since the new information received may make the European Data Protection Supervisor's opinion more complex, the EDPS decided to extend the period by a month. A draft opinion was forwarded on 17 October 2006 for comments from the DPO and the controller and the time-limit was thus suspended for 15 days. The EDPS received important new information<sup>8</sup> from EPSO, leading it to suspend the time-limit for a further 15 days in order to incorporate the information into its opinion. The EDPS will therefore deliver an opinion by 14 November 2006 at the latest (24 January plus 258 days of suspension and a 45-day extension).

### **3.2 Lawfulness of processing**

Examination of the legal basis provided by Regulation No 45/2001 includes considering the lawfulness of processing in the light of Article 5(a) of that Regulation, which stipulates that "*personal data may be processed only if: (a) processing is necessary for 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 or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed, (...)*".

In the case in point, the procedure for selecting contract staff with a view to their recruitment by the European institutions is part of the legitimate exercise of official authority vested in the institutions and, by extension, in EPSO. The processing operation is therefore lawful.

The legal basis for the data processing in question is the Conditions of employment of other servants of the European Communities (hereinafter "CEOS") and Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing a European Communities Personnel Selection Office.

In particular, Article 82(5) of the CEOS stipulates that: "*The European Communities Personnel Selection Office (hereinafter "the Office") shall, at their request, provide assistance to the different institutions with a view to the selection of contract staff, in particular by defining the contents of the tests and organising the selection procedures. The Office shall ensure the transparency of selection procedures for contract staff.*" The legal basis is therefore valid.

### **3.3 The controller and the processor**

Pursuant to Article 2(d) of Regulation No 45/2001, the controller is "*the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data*". The controller is responsible for ensuring that the obligations laid down in the Regulation are met (information to be given to the data subject, ensuring the rights of the data subject, choice of processor, notification of the data protection officer, etc.). The processor is the "*natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller*" (Article 2(e)).

---

<sup>8</sup> See footnote on page 1 of this opinion.

In accordance with the Regulation, in this instance EPSO must be considered as the controller in the context of the selection of contract staff, the exception being the final selection after the use of CARL. The contractor responsible for organising the computer-assisted pre-selection tests and the Commission Data Centre responsible for storing EPSO data in Luxembourg must be considered as processors processing personal data on EPSO's behalf.

Consequently, as a controller, EPSO's role is to assist the Community institution that asked it to organise the selection of contract staff whose profile best corresponds to the call for expressions of interest by the institution concerned. The role of the various processors is to help EPSO organise the procedure for the selection of the applicants found to be the most suitable for the European institutions.

### **3.4 Data quality**

Pursuant to Article 4(1)(c) of Regulation No 45/2001, personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". In the case in point, the data required are administrative in nature and are necessary for the proper functioning of the procedure for selecting temporary staff. The EDPS therefore considers that Article 4(1)(c) of the Regulation is complied with.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing operation has already been discussed in section 3.2 of this opinion. The question of fairness relates to the information which must be transmitted to the data subject (see section 3.9 below).

Under Article 4(1)(d) of the Regulation, data must be "*accurate and, where necessary, kept up to date; 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 ensures that data are accurate and kept up to date. Moreover, the data subject has the right to access and rectify data, which helps ensure that they are kept up to date and that the file is as complete as possible. These rights are the second means of ensuring data quality. See point 3.8 below on the rights of access and rectification.

### **3.5 Data retention**

Under Article 4(1)(e) of Regulation No 45/2001, personal 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*".

In this instance, the database for pre-selected applicants remains valid for two years whereas the database for applicants who are successful at all stages of the selection process is three years. On the other hand, where applicants have not been successful in the pre-selection tests or the written or oral tests, their data are deleted and are no longer accessible via CARL once the period of validity expires. However, according to the latest information received by e-mail on 13 September 2006, the Commission wishes to extend the validity of the database for certain profiles.

The EDPS considers that the two-year data retention period for pre-selected applicants does not seem excessive, nor does the three-year period for those who are successful at all stages of the selection process. That period is reasonable and justified provided that the data are immediately erased once the period has expired. It is recommended that the period for extending the validity



of the database be reasonable and justified. It is therefore essential that the EDPS be informed and that justification for the period proposed be provided in advance.

According to the notification, the possibility of storing data for historical, statistical or scientific reasons appears to be excluded.

The EDPS considers that the data-processing notified does comply with Article 4(1)(e) of the Regulation. However, the extension of database validity for certain profiles envisaged by the Commission must not be excessive but must be justifiable under Article 4(1)(e) of the Regulation, and it is important that the EDPS be informed beforehand.

### **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*".

In this instance, once the deadline for on-line registration via EPSO Porta is reached, applicants data are submitted to a Selection Committee which draws up the list of applicants invited to sit the tests. To enable the pre-selection tests to be conducted, EPSO provides the contractors, as database controllers, with the applicants' identifying data so that they can check the identity of applicants attending the examination centre. This data transfer to all of these recipients is necessary and is in line with the legitimate performance of the tasks of the various parties.

The Community institutions and bodies are allowed to access the data of applicants who are successful at all stages of the selection process. According to the new information received on 13 September 2006, access to data will be granted to executive agencies and regulatory bodies, after the institutions have had priority. In this case too, Article 7(1) is therefore duly complied with. Moreover, Article 7(3) of the Regulation provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". There must be an explicit guarantee that no-one receiving and processing data in the context of the selection procedures for contract staff of the institutions can use them for other purposes. The EDPS notes that the description of persons having access to the database is specific and entails limited access. Nevertheless, the EDPS recommends that it be explicitly stated in CARL that persons having access to the database must be part of the recruitment procedure. The EDPS also welcomes the fact that EPSO intends to finalise the Service Level Agreement (SLA) between it and the regulatory bodies before the date on which they are to have access to the data concerned, 1 May 2007.

Moreover, although that is not mentioned, the Civil Service Tribunal<sup>9</sup> may receive copies of items from such files at its request in the event of proceedings before it. In matters of recruitment, such proceedings are a frequent occurrence. These transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

Finally, data are transferred to the processor, i.e. the company managing the organisation and drafting of the tests (EPSO will forward the following items of the applicant's identifying data to the contractor involved: surname, forename, date of birth and e-mail address so that it can

---

<sup>9</sup> The European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), is competent instead of the Court of First Instance. The Court of First Instance is the appeal body.

check the identity of applicants attending the examination centre). This processing must be examined in the light of Article 8 ("*transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC*"). In the case in point, these transfers are covered by Article 8(b) insofar as the two recipients establish "*the necessity of having the data transferred and [...] there is no reason to assume that the data subject's legitimate interests might be prejudiced*". At present the processor is subject to the obligations laid down by Directive 95/46/EC. Should the processor change, Article 9 of the Regulation will be applicable.

There must be an explicit guarantee that no-one receiving and processing data in the context of the selection procedures for contract staff can use them for other purposes. The EDPS recommends that in this specific case EPSO must explicitly state in CARL that persons having access to the database must be part of the recruitment procedure and that the Service Level Agreement (SLA) between EPSO and the regulatory bodies scheduled for 1 May 2007 must comply with all the provisions of Regulation (EC) No 45/2001.

### **3.7 Processing including the identifying number**

For the record, each applicant is identified by a number which is an integral part of his/her application. That identifying number is used mainly for the purposes of practical organisation of tests and is also known to the applicant<sup>10</sup>.

Under Article 10(6) of Regulation (EC) No 45/2001, the European Data Protection Supervisor "*shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body*".

This decision does not aim to establish the general conditions for using the personal number or any other identifier, but only its use in the context of the "*Selection of contract staff*" processing operation. In the case in point, the use of a number which is an integral part of the applicant's application and is known to the applicant is reasonable as the number is used for the purposes of practical organisation and facilitates processing.

### **3.8 Right of access and rectification**

Article 13 of Regulation No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, data subjects have access to their EPSO website application files so that they can complete all the sections required for the procedure to take its course.

Article 14 of the Regulation allows the data subject a right to rectification. In the same way that the data subject has a right of access, he or she may also directly change personal data or have it changed, if necessary.

For the record, according to the original notification, even after the deadline for registration applicants could continue to modify their personal identifying data, for instance change of surname on marriage. A justified request would have to be sent to EPSO. However, according to the additional information sent to the EDPS on 13 September 2006, all applicants are now allowed to update their CV data at any time via their access to EPSO Porta without making a prior request to EPSO.

---

<sup>10</sup> This is not a secret identifying number such as the one that may be generated when copies of examination papers are being prepared for assessors as in the case of competitions for officials.

However, the initial mandatory data to be entered at the time of registration in order to meet the eligibility criteria for the selection procedure (e.g. qualifications obtained and professional experience) cannot be deleted or altered. In addition, the rectification, blocking and erasure rights recognised by the Regulation remain unchanged should the validity of the database be extended.

With regard to the one exceptional bar on rectification, Article 20(1)(c) of the Regulation applies in order to ensure that the principle of equality between all applicants is not infringed, as stated in Opinion 2004-236<sup>11</sup>. The EDPS therefore considers that the applicants' rights of access and rectification pursuant to Regulation (EC) No 45/2001 are complied with.

However, access to answers given and to the sheet of correct answers to the selection tests is restricted: only applicants who fail the tests receive on request the numbers of the questions they answered together with the number of their actual answer and the number of the right answer.

EPSO provides practical and legal justification for not granting all applicants access to the correct answers.

#### From a practical point of view:

Firstly, EPSO argues that general access to the numbers of the multiple-choice questions and answers would be detrimental to the rule on uniform use of the list of applicants having been successful in the test in the context of CAST 25 and would therefore affect their equality as regards recruitment. According to EPSO, if an applicant knew his/her marks, he/she would be able to put them to the relevant departments as a way of prioritising and speeding up his/her recruitment by comparison with that of other applicants.

Secondly, EPSO takes the view that broader access would rapidly enable applicants to reconstitute the entire content of the database, thus removing the tool's substance and its operational validity in selection procedures, creating enormous practical difficulties for EPSO and leading to discrimination between applicants at future selection tests.

#### From a legal point of view:

EPSO argues that Article 13(b) of the Regulation provides that, with regard to processing, the data subject has the right to confirmation and to information as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed, but that it does not provide for a right of access to the processing which took place, even if automated. Moreover, EPSO makes a distinction between "*personal data*" (Article 2(a)) and "*processing of personal data*" (Article 2(b)) and argues that, as a result, access would be limited by Article 13 since the activity concerned is a processing operation.

The EDPS considers it correct that only the answers to the questions which an applicant answered should be given to him/her. These are the data relating solely to the applicant concerned (Article 2(a) of the Regulation).

The EDPS would emphasise that each applicant's incorrect answers for each pre-selection test are obviously that applicant's personal data. To prove that the answers are incorrect, it is necessary to supply the correct answers. Therefore, the correct answers are also part of the applicant's personal data. That is particularly true in this instance since the processing operation

---

<sup>11</sup> See opinion 2004-236, "*Recruitment, by competition, of permanent staff*".

is automated data-processing (see 3.10) in the course of which the computer both sets the questions and provides the corrected tests<sup>12</sup>.

The EDPS does not share EPSO's legal argument regarding Article 13(b) and Article 2(a) of the Regulation. Article 13 refers to a data subject right which applies without constraint to all processing operations and can be exercised without providing any justification or proving any special interest. The points listed are cumulative (although Article 13(d) applies only when processing is automated, as in this case). The definitions in Article 2(a) and (b) of the Regulation are also cumulative. There is therefore no basis for the argument that there is a different system for *personal data* and for *processing of personal data*. Collection, recording, organisation, storage, use and disclosure by transmission of personal data are all constant features of processing of personal data. In the case in point, the specific questions put to the applicant, the applicant's incorrect answers and the correct answers to those questions are all part of the applicant's personal data.

As for the practical reasons raised by EPSO, the application of Article 13 is limited only in the five cases provided for in Article 20(1) and the two cases provided for in Article 20(2) of the Regulation. Only the exception based on Article 20(1) of the Regulation which relates to the protection of the rights and freedoms of others is applicable in this case.

The two principles put by EPSO in its arguments from a practical point of view, the principle of equality for recruitment purposes (agreement between the Secretaries-General of the institutions) and the principle of avoiding discrimination against future applicants, can both be justified by Article 20(1)(c). As set out in Article 20(1)(c), it is necessary for EPSO to limit the right of access in order to safeguard "*the protection of the (...) rights and freedoms of others*". For that reason, the EDPS accepts that EPSO should proceed as stated when communicating the right answers to the pre-selection tests under the conditions specified above. However, given that that limitation is imposed by EPSO, the EDPS considers it essential that the data subjects be informed of the principal reasons for it and of their right to have recourse to the EDPS, in compliance with Article 20(3) of the Regulation.

That limitation of the right of access needs to be seen in the light of an analysis of the balance of interests involved. Like all limitations, it must be interpreted narrowly and must be applied only when the rights and freedoms of others are of more fundamental importance than those of the data subject requesting access to the data relating to him/her. In this instance, the interest of applicants who failed the tests in having access to the right answers is more important than the interests described by EPSO. They have the right to know where they failed since the system may have made material errors. Obviously, this also means that the applicant can have his/her data rectified in the event of a proven error in the system, in compliance with Article 14 of the Regulation.

Yet that does not mean that the interest of applicants who succeeded, whether with a mark just above the threshold or a very high mark, is negligible. Point 3.5 of the Agreement between the Secretaries-General provides that "*as a general rule*" reserve lists may consist of three or four merit classes and, within each class, applicants will appear in alphabetical order. In the CAST 25 exercise merit classes were not used. With regard to the applicants' interest in exercising their right of access, let us take an example: an applicant in merit class 3 may have an interest in asking for the right answers in order to understand why he/she is not in merit class 1 since the merit classes have an impact on the institutions' choice of applicants. That is

---

<sup>12</sup> For that reason, to keep the terminology in the opinion as simple as possible, all information relating to incorrect and correct answers is referred to here as "*right answers*".

why the EDPS accepts that limitation on right of access imposed by EPSO on condition that in all future selection procedures reserve lists do not consist of merit classes but are in alphabetical order. The EDPS therefore recommends that point 3.5 of the Agreement between the Secretaries-General be amended if EPSO maintains its limitation on right of access since inter-institutional agreements should in no case derogate from Regulation (EC) No 45/2001. On the other hand, if the reserve lists are to continue to be set out in merit classes, the right of access to the right answers cannot be limited only to applicants who failed.

With regard to the oral tests organised by EPSO for certain particular profiles, the EDPS would refer EPSO to its opinion 2004--236, "*Recruitment, by competition, of permanent staff*", and to the follow-up to that opinion. The EDPS stressed that up to now EPSO has always indicated "*the various areas in which applicants will be assessed at the oral test*" and in certain cases "*the breakdown by percentage allocated to each area*". It would be extremely regrettable, and would certainly cause concern to the EDPS if EPSO were to alter its practice, thereby taking a backward step. Offering applicants the opportunity to find out what their results are is a way of making it clear that the Selection Board is objective. And we do not doubt that EPSO will be able to continue to meet that objective.

The EDPS also expressed satisfaction at the EPSO decision to allow access to part of the marks at the oral (...) in a case where it would have been regarded as advisable to define the legal framework to be respected by the selection board more strictly. That right of access is one of the keystones of data protection and is directly linked to the right to sound administration.

### **3.9 Information to be given to the data subject**

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

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 in this case. Inasmuch as the applicant for the competition personally fills in the data required of him or her, the data subject provides the data himself or herself.

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, since the information is collected from the different participants in the process, in particular from the Selection Board and the contractor in charge of running the pre-selection tests.

As already stated, once they have registered on line, applicants are systematically provided with the privacy statement informing them of the processing of their personal data. By clicking on the OK button, they acknowledge that they have been so informed. The privacy statement is on every page of the on-line application form and is a permanent feature on the website and on each applicant's EPSO Porta and can thus be consulted at any time. Where the regulatory bodies are to have access to the data concerned, the current privacy statement will have the reference to data recipients amended to take account of the transfer to the regulatory bodies.

That being so, the provisions of Article 11(1)(a) to (f) and Article 12(1)(a) to (f) of the Regulation are complied with.

However, where regulatory bodies are to have access to the database, it is important that the current privacy statement as amended with regard to the recipients also be made available to the data subjects before 1 May 2007. Moreover, where the period of validity of the data is extended, that information should appear on the privacy statement and the data subjects should be informed.

Applicants will also have to be informed of the limits set by EPSO on their right of access to the right answers (see point 3.8 above).

### **3.10 Automated individual decisions**

Since the selection procedure for contract staff provides for computer-assisted pre-selection tests, we are dealing with automated individual decisions. The results are provided by the computer following automated reading of the tests. Article 19 of the Regulation is therefore applicable: *"The data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken."*

The European Data Protection Supervisor obviously authorises this type of processing given the size of the task when there is a very large number of applicants, subject to the following three points:

Firstly, the conditions for right of access set out in point 3.8 above must be taken into consideration.

Secondly, Article 13(d) of the Regulation must be complied with. Applicants must be aware of the logic of the pre-selection test process, that is to say *"the logic involved in (the) automated decision process"*, and that forms part of the information received by the applicant (see point 3.9).

Thirdly, they must be guaranteed a right to rectify but that can apply only to reporting material errors (reading of the tests by the computer) and not to the substance, i.e. to the pre-established answers fed into the computer to determine whether the applicants' answers are correct or not.

### **3.11 Processing by a processor**

Where a processing operation is carried out on its behalf, Article 23 of Regulation No 45/2001 stipulates that the controller must choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by the Regulation. The carrying out of a processing operation by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that the processor must act only on instructions from the controller and that the obligations with regard to confidentiality and security of personal data are also incumbent on the processor.

For the record, the service contract signed by EPSO and the contractor managing the tests includes a specific data protection clause.

The internal network and EPSO's computer system storage and hosting environment are covered by a service contract between the controller and the processor which transposes Article 23, together with Articles 21 and 22, of Regulation (EC) No 45/2001.

In this instance, the service contracts concluded between EPSO and both the processors in charge of managing the tests and the processors responsible for storing EPSO data comply in full with Article 23 of Regulation (EC) No 45/2001.

### **3.12 Security**

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements "*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*".

The European Data Protection Supervisor considers that the full set of security measures and the other organisational and technical measures taken to ensure maximum processing security are such that they can be regarded as adequate within the meaning of Article 22 of the Regulation.

### **Conclusion**

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. Specifically, that means that EPSO must:

- ensure that the extension of database validity for certain profiles envisaged by the Commission is not excessive and is justifiable under Article 4(1)(e) of Regulation No 45/2001 and that the EDPS is informed beforehand;
- explicitly state in CARL that persons having access to the database must be part of the recruitment procedure and that the Service Level Agreement (SLA) between EPSO and the regulatory bodies scheduled for 1 May 2007 complies with all the provisions of the Regulation;
- either abolish the use of merit classes in future reserve lists for contract staff, on account of the limitation on applicants' right of access imposed by EPSO, and have the Agreement of 25 July 2002 between the Secretaries-General amended accordingly, or else extend the right of access to the right answers to all applicants if the merit classes are to continue to be used for reserve lists;
- in connection with the oral test, inform applicants of the various areas in which they will be assessed and the percentages of the overall mark involved and give them access to the partial marks relating to those areas, if so stated in the call for expression of interest;
- inform data subjects of the main reasons for limiting their right of access and of their right to have recourse to the EDPS;
- ensure that all the measures relating to automated processing are duly complied with;
- ensure that, where regulatory bodies are to have access to the database, the current privacy statement is amended with regard to the recipients and is made available to the data subjects

before 1 May 2007;

- where the period of validity of the data is to be extended, include that information in the privacy statement and ensure that data subjects are informed.

Done at Brussels, 14 November 2006

Peter HUSTINX

Supervisor

### **Executive summary**

The European Communities Personnel Selection Office (EPSO) is responsible for the recruitment of contract staff through preselection tests. All the data are entered in a database called "CAST 25". The institutions concerned have access to the CVs of all successful applicants via a search engine called "CARL". Processing is subject to prior checking because it is designed to evaluate personal aspects relating to the data subjects such as their ability.

The EDPS has made a number of recommendations. In particular, the transfer of data must be limited to persons who are part of the recruitment procedure and data subjects must be informed if their data are to be stored for a period longer than originally scheduled. It also emphasised that EPSO should abolish the use of merit groups in future reserve lists for contract staff if the right of access to the questions and answers (right answers) is limited to applicants who failed. If merit groups are to be retained for the reserve lists, the right of access to the right answers must be extended to all applicants.