

Opinion on a notification for prior checking received from the Data Protection Officer of the European Ombudsman regarding the "Recruitment of staff (officials/temporary staff/contract staff)" dossier

Brussels, 9 January 2008 (Case 2007-405)

1. Procedure

On 14 June 2007 the EDPS received a notification for prior checking regarding a data processing operation in relation to the "Recruitment of staff (officials/temporary staff/contract staff)" dossier. The notification was accompanied by a document entitled "Monitoring applications under a recruitment procedure". The DPO subsequently supplied a copy of the application form and a call for expressions of interest.

On 8 August 2007 the DPO of the European Ombudsman was asked for further information. The DPO replied on 5 December 2007.

On 20 December 2007 the draft opinion was sent to the DPO for comments, which were provided on 9 January 2008.

2. Facts

This dossier concerns the procedure for the selection of statutory personnel by the Administration Sector of the Administration and Finance Department of the European Ombudsman pursuant to Articles 4 and 29 of the Staff Regulations of Officials of the European Communities (Staff Regulations) and Articles 12 to 15 and 82 to 84 of the Conditions of employment of other servants of the European Communities (CE0S).

The selection procedure involves the processing of personal data contained in applications submitted following the publication of a call for expressions of interest or of a vacancy notice. Such data is obtained directly from applicants (in the case of recruitment of contract and temporary staff and the transfer of established officials) or forwarded by EPSO (in the case of recruitment of probationary officials on the reserve list of successful candidates in competitions)¹.

Selection procedure at the European Ombudsman's Secretariat

The selection procedure consists of the following stages:

- publication of a call for expressions of interest or a vacancy notice with a closing date for submitting applications,

¹ EPSO is in charge of the recruitment of probationary officials pursuant to Article 2(2) of the Staff Regulations as implemented by Decision 2002/621/EC of 25 July 2002 - see EDPS opinion 2004-236 of 24 February 2006 "Recruitment of permanent staff" (Commission/EPSCO).

- receipt and registration of applications, including data concerning applicants on a reserve list forwarded by EPSO, in a database (Excel table) in which they are archived and classified by a number (an individual data sheet is annexed to each application).
- first evaluation in the light of eligibility criteria,
- second evaluation in the light of experience and qualifications (verification of eligibility criteria),
- interview with successful candidates,
- selection of the best candidate.

Data subjects

The data subjects are persons who submit an application following the publication of a call for expressions of interest or the publication of a vacancy notice and, potentially, all the candidates on an EPSO reserve list.

Categories of data

The data that undergo processing are data supplied by candidates in the context of their application and in particular standard information included on a CV, in principle a European CV.

In principle, sensitive data within the meaning of Article 10 of Regulation No 45/2001 are not processed. However, the possibility of applicants voluntarily or involuntarily including some sensitive information in their application cannot be ruled out. Racial origin may, for example, be revealed by a copy of the applicant's identity card where it is submitted to prove that the applicant is a European Union national.

Applications are accompanied by supporting documents that are supposed to corroborate the information supplied in the CV and which form the basis for selection (professional experience, diplomas and identity card). Information such as the judicial record is required in the last stage of recruitment and only candidates who have been selected and actually recruited are asked to supply it. No medical information is requested in the context of recruitment. There is, however, an exception to the processing of medical data in the context of recruitment. The European Ombudsman wishes to encourage participation by the disabled in the selection procedures that he organises. In this context, it is conceivable that the persons concerned mention in their applications special requirements for example for participating in a test or interview. In this case, medical information is not actually included in data processing operations relating to recruitment but may have an impact on the practical arrangements for the procedure.

In principle, the processing operation in question concerns the following data:

- information concerning the identity of the applicants (surname, forename(s), date of birth, nationality, sex),
- the applicants' postal and e-mail contact details (address, telephone number, fax number and email address),
- data concerning skills and competences, training and professional experience, language knowledge and any publications by applicants (certificates and copies of diplomas are requested),
- if the applicant is a Community official, copies of the last three staff reports,
- data concerning the completeness or otherwise of their file and compliance with the closing date,
- data concerning eligibility and the appointing authority's classification of their application,
- data concerning correspondence with applicants (acknowledgements of receipt, negative/positive letters, communication of the outcome of evaluations or reasons for exclusion, etc.).

With regard to the recruitment of probationers, data are communicated by EPSO by means of an electronic reserve list to which the Ombudsman has access in the various stages of the selection procedure (first evaluation of eligibility criteria, second evaluation based on experience and interview).

The following data included on the electronic reserve list are made available to the Ombudsman by EPSO:

- data allowing identification of the candidate (surname, forename(s), date of birth, nationality, postal and telephone contact details),
- the applicant's full curriculum vitae,
- the reserve list on which he has been placed and his merit group,
- the applicants' situation with regard to their possible recruitment (interviews with institutions and their outcome, any "reservations" by an institution, etc.).

Transfer of data

Personal data may be communicated by the Ombudsman to certain members of his staff other than those of the Administration Sector or to external experts appointed by the Ombudsman. The Ombudsman could in fact call upon eminent persons who have a high level of expertise in their field and are of high moral standing, and has already done so in one case (recruitment of the Secretary-General²) where they helped to evaluate applications on a voluntary basis. No contractual relationship exists with these persons and they do not receive any remuneration.

Certain personal data of candidates who have been finally selected may be passed on to other institutions for medical reasons or for insurance, right of access to buildings or financial audit purposes.

Right of rectification

Applicants may correct the data contained in their applications. In principle it is not possible to add documents after the closing date for applications. If a request for rectification of the data included in the application is made after the closing date for applications, reasons must be given, and such requests must be considered on a case-by-case basis; they may not have the aim of improving an application which was not properly completed on the closing date for applications.

Information for data subjects

Calls for expressions of interest and vacancy notices published by the Ombudsman contain information for prospective applicants. Such information concerns the identity of the controller, the purpose of the processing operation, the existence of the right of access and of rectification, the time-limits for storing data concerning unrecruited applicants and the possible transfer of data concerning recruited applicants.

If officials or other servants are recruited on the basis of EPSO lists, there are no plans to supply information to candidates who are presumed to have been informed directly by EPSO. Information could be supplied where applicants on EPSO lists are finally selected and are therefore the subject of data processing by the Ombudsman. Such information will be sent to applicants when they are invited to attend an interview.

Retention policy

² For example, the selection board for recruiting the Ombudsman's Secretary-General was composed of the European Ombudsman, the Danish Ombudsman, a judge at the European Court of Human Rights and a Jurisconsult at the European Parliament.

Personal data other than those of applicants who are actually recruited are destroyed two years after the post has been filled or the reserve list has expired. This period is justified by the need to respond effectively to complaints and to keep within a retention period corresponding to what it should be in other institutions whose recruitment procedures could be the subject of complaints to the Ombudsman. The period of abatement of action is two years (see Article 2(4) of the Statute of the European Ombudsman³).

The selected applicant's personal data will form the basis for his personal file. At the time of recruitment, the selected applicant must supply the same documents as those forming part of the application, apart from the fact that he must supply the originals or certified copies. The documents forming part of the application will therefore be treated in the same way as the other applications and will be destroyed after two years.

Data relating to nationality, sex, country of origin, education and languages spoken are stored anonymously for statistical purposes (in order to take stock regularly of the total number of candidates and their distribution by country and by language).

Security measures

[...]

3. Legal aspects

3.1. Prior checking

The notification received by e-mail on 14 June 2007 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 a Community institution in the exercise of activities which fall within the scope of Community law (Article 3(1)). The processing of the certification procedure is manual processing within a structured whole. Article 3(2) therefore applies. The processing therefore falls within the scope of Regulation (EC) No 45/2001.

The EDPS is not performing a prior check of the stage during which EPSO is involved. That stage is the subject of an opinion given by the EDPS⁴.

Article 27 of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations likely to present such risks including, in Article 27(2)(b), "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The procedure for recruitment of officials and other staff of the European Ombudsman is an operation for the processing of personal data for the purpose of assessment and is therefore covered by Article 27(2)(b), and as such is subject to prior checking by the EDPS.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this specific case, the processing was set up before consultation of the EDPS, so the check necessarily has to be performed ex-post. The Ombudsman recruited staff before the EDPS was established, which made checking prior to processing impossible. The EDPS stresses that, under Article 27 of Regulation (EC) No 45/2001, the Union's institutions and bodies must

³ Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113, 4.5.1994, p. 15).

⁴ EDPS opinion 2004-236 of 24 February 2006 ("Recruitment of permanent staff" - Commission/EPDS) and EDPS opinion 2005-365 of 2 May 2006 ("Selection of temporary staff" - Commission/EPDS).

notify the EDPS of processing operations such as that under review here at the earliest opportunity, preferably before processing begins.

The notification was received on 14 June 2007. Under Article 27(4), this opinion had to be delivered within the following two months. The period was suspended for a total of 116 days (96 days for information + 20 days for comments) as well as for the month of August. The EDPS will therefore deliver his opinion by 9 January 2008

3.2. Lawfulness of processing

The lawfulness of the processing must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing must be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution*".

In accordance with Article 5(d) of the Regulation, the data subject has unambiguously given his or her consent.

The recruitment procedure, which involves the collecting and processing of personal data on officials comes within the legitimate exercise of official authority vested in the institution.

The legal basis for the data processing in question is provided by Articles 4 and 29 of the Staff Regulations and Articles 12 to 15 and 82 to 84 of the CEOS. The legal basis, which is sufficiently clear, raises no particular issues.

The legal basis complies with the Regulation and supports the lawfulness of the processing.

3.3. Processing of special categories of data

Pursuant to Article 10 of the Regulation, "*The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, is prohibited*" except where grounds are identified in particular in Article 10(2).

During selection, data are collected such as information supplied by the applicant for purposes of the physical organisation of the pre-selection and other tests and in particular the possibility of a disability. The latter data must be regarded as data concerning health for the purposes of Article 10. However, the processing of such data would comply with Article 10(2) because it would be carried out with the consent of the person concerned and is necessary within the framework of employment law.

It is important to note that the Ombudsman's staff who collect information concerning disabilities and any medical certificates are not health practitioners. Consequently, the EDPS recommends that these persons be reminded that they are subject to professional secrecy in order to ensure compliance with Article 10(3) of the Regulation.

Moreover, 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 under criminal law (i.e. whether the data subject has a criminal record or not).

Article 10(5) of the Regulation 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*. As stated above, processing of this data is justified by Article 28(a) of the Staff Regulations and

Articles 12(2)(a) and 82(3)(a) of the CEOS, which state that a member of staff may be appointed and/or recruited only on condition that he enjoys his full rights as a citizen. The conditions laid down in Article 10(5) of the Regulation are therefore met.

At the time of the recruitment procedure, the possibility of the applications submitted also containing special categories of data, without such data having been requested, cannot be ruled out. In the case of voluntarily submitting sensitive information in applications, it can be considered that the data subject has given his/her consent to the collecting and processing of those data. The conditions laid down in Article 10(2)(a) of the Regulation are therefore met.

3.4. Data quality

Under Article 4(1)(c) of Regulation (EC) No 45/2001, data must be "*adequate, relevant and not excessive*". The processed data described in point 2 of this opinion should be regarded as satisfying these conditions. The data required are needed for the evaluation of the applicants' skills and competences. The EDPS acknowledges that the relevance and proportionality of the data that help to assess the data subject are more difficult to establish. In this context, the EDPS encourages the establishment of precise selection criteria and weightings in the presentation of the call for applications. Article 4(1)(c) of Regulation (EC) No 45/2001 thus seems to be duly complied with in this respect.

Under Article 4(1)(a) of Regulation (EC) No 45/2001, the data must also be "*processed fairly and lawfully*". The lawfulness of the processing has already been discussed (see point 3.2 above). The issue of fairness is linked to the information which must be transmitted to the data subjects (see point 3.9 below).

The 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*" (Article 4(1)(d) of the Regulation). The procedure itself must guarantee the accuracy of the data. In the case under examination, the system requires candidates to submit most of the data necessary for the selection procedure. The data subject who voluntarily provides information therefore considers that such data are adequate, relevant and not excessive. Nevertheless, the EDPS would like to warn the Ombudsman about using the CV to obtain data. The lack of a template and instructions concerning how to draw up the CV may lead candidates to question the relevance of the data collected and lead to the collection of excessive data. The EDPS notes that the data usually included in a CV have already been supplied on the application form that applicants must fill in. In order to prevent superfluous and/or excessive data from being obtained, the EDPS recommends that the Ombudsman should not ask candidates to supply a CV in addition to an application form. If necessary, the form could be further elaborated. The application form must also inform the applicant of the compulsory or optional nature of the replies to be given.

The rights of access and rectification represent the second means of guaranteeing the quality of the data (see point 3.8 below on the rights of access and rectification).

3.5. Conservation of data

Article 4(1)(e) of Regulation (EC) No 45/2001 posits 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*".

According to the notification, documents are scheduled to be kept for two years after the post has been filled or the reserve list has expired. In the Ombudsman's view, this time-limit is justified by the need to be able to respond effectively to any appeals. It is also the time-limit within which officials in other institutions may make a complaint to the Ombudsman regarding the certification

procedure. The EDPS considers that this period is proportional to the fulfilment of the purposes of the processing operation. No purpose is served by keeping the files on unsuccessful applicants for more than a few years. Except for the routine data (surname, first name, etc.), the data relevant for evaluation will have changed.

For applicants who have been selected, the personal data processed at the time of selection form the basis for their personal files. At the time of recruitment, the selected applicant must supply the same documents as those forming part of the application, apart from the fact that originals or certified copies must be supplied.

Personal files are stored for a long period but this is not specified in the notification. The EDPS has already pointed out that a period during which data may be stored needs to be set. In similar cases⁵, the EDPS considered that it was reasonable to set the data storage period at 10 years, starting from the time when the staff member leaves or the last pension is paid.

This long-term storage of data in the personal file will also have to be accompanied by appropriate safeguards. The data conserved are personal. The fact that they are archived for long-term conservation does not divest them of their personal nature. For that reason, data stored over a long period must be covered by adequate measures for transmission and storage, like any other personal data.

Statistics may be established and stored for more than 2 years to allow better preparation of future selection procedures. The EDPS recognises the need to keep this type of data. The EDPS considers that storage of data in an anonymous form for statistical purposes complies with Article 4(1)(e) of the Regulation.

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) concerns 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 case, the data are for circulation among various departments within the Ombudsman's Office. Personal data may not be transferred within an institution unless they are necessary for the legitimate performance of tasks falling within the competence of the recipient. Transfer to the Administration Sector, the members of the specific selection board and the internal auditor is in accordance with the legitimate performance of the tasks of those involved.

Certain personal data of candidates who have been finally selected may be passed on to other institutions for medical reasons or for the purposes of insurance, right of access to buildings or financial audit. Finally, the European Union Civil Service Tribunal may receive these files in the context of a legal action. Such transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks falling within the competence of the recipient.

In this instance, Article 7(1) of Regulation (EC) No 45/2001 is duly complied with.

Lastly, Article 7(3) of Regulation No 45/2001 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 recruitment procedure can use them for other purposes. The European Data Protection Supervisor would like the

⁵ For instance EDPS opinion 2006-109, *Certification procedure*, Court of Auditors, EDPS opinion 2006-45, *Certification procedure*, Council of the European Union, EDPS opinion 2007-168, *Certification procedure*, European Parliament and EDPS opinion 2007-434, *Certification procedure*, Court of Justice.

Ombudsman to pay particular attention to the fact that the personal data should be processed only in the context of recruitment.

As for exceptional transfer to appointed experts taking part in the selection procedure, the EDPS considers that such transfers are covered by Article 8 of the Regulation.

3.7. Processing of personal number or unique identifier

Article 10.6(6) of the Regulation states that "*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.*". To facilitate the recruitment procedure, each applicant receives a reference number, which is linked to them. The EDPS considers that the use of an identification number in the selection procedure as it appears on the application form must be considered reasonable insofar as it facilitates the identification of the applicant during the procedure.

3.8. Right of access and of rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. The right of rectification of data subjects is provided for in Article 14 of Regulation (EC) No 45/2001.

In fact, in the case of applications submitted directly by applicants, the latter may correct all the data contained in their applications until the closing date for applications laid down in the vacancy notice or the call for expressions of interest. In the case in point, the data subject has access to his personal file so that he can point out any factual errors or omissions which can then be rectified before the appointing authority's draft list is drawn up. In principle it is not possible to add documents after the closing date for applications. If a request for rectification of the data included in the application is made after the closing date for applications, reasons must be given, and such requests must be considered on a case-by-case basis; they may not have the aim of improving an application which was not properly completed on the closing date for applications. This condition is justified since fair competition between the applicants must be ensured, according to Article 20(1)(c). ("*necessary measure to safeguard ... the protection [...] of the rights and freedoms of others*")⁶.

With regard to applications transferred by EPSO, applicants may alter all the data contained in their applications until the closing date for applications. Thereafter, only identification data may be changed⁷.

Furthermore, the EDPS stresses that the right of rectification of the data subject can apply only to objective and factual data and not to assessments made by members of the selection board because they are the result of a subjective assessment of the data subject.

It must therefore be concluded that Articles 13 and 14 of the Regulation are complied with in this case.

3.9. Information for data subjects

⁶ See EDPS opinion 2005-132 of 1 February 2006 ("Recruitment" - European Monitoring Centre on Racism and Xenophobia), EDPS opinion 2004-236 of 24 February 2006 ("Recruitment of permanent staff" - Commission/EPSCO), EDPS opinion 2005-366 of 14 November 2006 ("Selection of contract staff" - Commission/EPSCO), EDPS opinion 2006-351 of 2 February 2007 ("Recruitment" - CPVO) and EDPS opinion 2007-3 of 4 June 2007 ("Recruitment" - ECB).

⁷ See EDPS opinion 2004-236 of 24 February 2006 ("Selection of permanent staff" - Commission/EPSCO).

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. These articles list a series of compulsory and optional items. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) concerning information to be given to the data subject apply in this case insofar as the official himself fills in the application form.

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 EPSO and, exceptionally, the external experts taking part in the selection.

As already indicated, the provision of information to the data subjects is ensured by calls for expressions of interest and vacancy notices published by the Ombudsman. A footnote contains information on the identity of the controller, the purpose of the processing operation, the existence of rights of access and rectification, the time-limits for storing data concerning unrecruited applicants and the possible transfer of data concerning recruited applicants. Furthermore, data subjects are informed that submission of an application will be deemed to constitute consent to processing pursuant to Article 5(d) of the Regulation.

If officials or other servants are recruited on the basis of EPSO lists, there is no provision for information to be communicated to candidates who are presumed to have been informed directly by EPSO. Information is communicated by the Ombudsman to applicants on EPSO lists who are finally selected and are therefore the subject of data processing by the Ombudsman. Such information will be sent to applicants when they are invited to attend an interview.

The EDPS welcomes the provision of information concerning the processing of data relating to calls for expressions of interest and vacancy notices. He would, however, like to see information concerning the legal basis for the processing operation and the compulsory or optional nature of replies to the questions and the possible consequences of failure to complete any section of the application form. In addition, in order to guarantee transparency of treatment, information must be given concerning the possibility of appealing to the EDPS.

3.10. Security measures

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*".

The organisational and technical measures are taken to ensure a maximum level of security for the processing operation. [...]

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

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. This implies in particular that the Ombudsman should:

- establish and notify to staff the period of 10 years from the date on which the member of staff or his legal successors are entitled to claim pension rights or the date of the last pension payment as the period of time for which the data relating to the candidates selected may be stored in the individual file;
- establish, in the context of long-term storage, adequate measures for transmission and storage of personal data and information relating to the data subjects;
- inform data subjects of the legal basis for the processing operation, the compulsory or optional of replies to questions, as well as the possible consequences of failure to reply, and the right to have recourse at any time to the EDPS. This information must be provided when the data are collected or, where appropriate, when data which have not been collected directly from the data subject are recorded.
- reconsider the need to ask applicants for a curriculum vitae in so far as the information contained therein has already been provided on the application form.

Done at Brussels, 9 January 2008

(signed)

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