

Opinion on a notification for Prior Checking received from the Data Protection Officers of European Union Agency for Fundamental Rights (FRA) and European Parliament on the selection procedure of members of the Agency's Scientific Committee

Brussels, 29 April 2008 (Joint Cases 2008-179 and 2008-202)

1. Proceedings

On 19 March 2008, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the Fundamental Rights Agency (FRA), a notification for prior checking relating to the processing of personal data in the selection procedure of members of the Agency's Scientific Committee. The documentation provided includes: the description of the procedure relating to call for expressions of interest for the position of members of the Scientific Committee of the FRA, the published FRA call for expression of interest, Eligibility and Selection criteria, procedures and arrangements for the selection and appointment of the members of the Scientific Committee of the FRA, Requirements for the selection of the members of the Scientific Committee of the European Union Agency for Fundamental Rights (FRA). Scale of merit points, facts and evidence to be considered to assess the compliance with these requirements, Instructions for applying for the position of a member of the Scientific Committee of the FRA and the FRA Scientific Committee application form. Also provided were the Provisional Rules of procedure of the FRA and a copy of Council Regulation (EC) No 168/2007 of 15 February 2007¹ establishing the FRA.

On 3 April 2008, the EDPS received a notification from the DPO of European Parliament (EP) concerning the processing of personal data by the LIBE Committee (Civil liberties, Justice and Home Affairs Committee) in the selection procedure of members of the Agency's Scientific Committee. The documentation attached included a covering note placing the processing operation in context, the Article 25 notification from the LIBE Committee to the DPO, a letter of 17 December 2007 from the FRA and a document headed "Annex" and describing the procedure of selection within the LIBE Committee. A subsequent definitive version of this procedure was sent to the EDPS by the DPO on 8 April 2008.

Since both notifications concern the same procedure, the EDPS has decided to treat them jointly in one same opinion.

The EDPS requested further information from the DPO of the FRA on 20 March 2008. This was replied to on 25 March 2008. The EDPS requested further information from the controller at the LIBE Committee on 9 April 2008; this was replied to by telephone on the very same day.

¹ OJ L 53, 22.2.2007

The draft opinion was sent to the FRA and to the EP for their comments on 16 April 2008 and these were received on 17 and 23 April 2008.

2. Examination of the matter

2.1 The facts

In accordance with Article 14, paragraph 1 of Regulation (EC) 168/2007 establishing a the FRA, the Management Board of the Agency shall appoint a Scientific Committee which shall be comprised of eleven independent persons, highly qualified in the field of fundamental rights.

Pre-selection

The selection of candidates for membership of the Scientific Committee of FRA was advertised through a call for expressions of interest published on 18 December 2007. The call for expressions of interest has also been published in the EU Official Journal (OJ), in relevant leading academic publications as well as the Agency's website. The call for expressions of interest invites experts, possessing the necessary up-to-date experience in one or more scientific disciplines in the field of fundamental rights, to express their interest in becoming members of the Scientific Committee of the Agency.

Candidates were invited to submit an application form and send it to the FRA functional mailbox. This application form included personal details (name, address, e-mail, nationality, date of birth); professional experience details (notably discipline, academic grade(s), academic specialisation, current professional position, category of expertise, publications...); language skills and any other information of relevance for the application.

The application form was to be accompanied by a motivation letter and abstracts from the candidate's 10 most relevant articles from scientific publications in books or peer-reviewed journals.

The Director of the Agency prepared and organised the work for the pre-selection of the members of the Scientific Committee. He or she chaired a pre-selection panel, composed of the Heads of Unit of the Agency and a person appointed for the purpose by the Council of Europe. Two members of the FRA Management Board could attend the pre-selection panel as observers.

The pre-selection panel verified the eligibility of the candidates, in accordance with the eligibility requirements.

According to the set eligibility criteria, the members of the Scientific Committee must be highly qualified experts in the field of fundamental rights. Therefore, interested persons were considered for the pre-selection phase on the basis of the following formal criteria to be fulfilled at the time of the deadline for expressions of interest. Interested persons must:

- Hold a postgraduate university degree;
- Have proven expertise of at least seven years of dealing with fundamental rights in the context of any relevant scientific disciplines such as human and social sciences, political sciences, law, statistics or communication and media, after obtaining the above mentioned degree;
- Possess a thorough knowledge of at least one of the official languages of the European Union and a satisfactory knowledge of another of these languages;

- Be nationals of one of the EU member states.

Failure to comply with one of these requirements resulted in the exclusion of the concerned candidate from the next steps of the selection process.

The pre-selection panel then assessed each eligible candidate according to the requirements for selection. According to these selection criteria, preference was given to candidates who possess:

- Experience in delivering scientific opinions at national or international level;
- Professional experience in peer reviewing scientific work related to the fields of interest of FRA in a multidisciplinary and international environment;
- Proven scientific excellence related to the fields of the mandate of FRA;
- Organisational and managerial experience in research;
- A thorough knowledge of English will be an added advantage;
- Possession of a doctoral degree will be an added advantage.

The pre-selection panel drew up an ‘Individual Assessment Form’ for each candidate which included a short comment, highlighting the specific values/shortcomings of the person.

The Director presented the results of the pre-selection process to the FRA Executive Board, including information on the candidates deemed ineligible.

Selection

The Executive Board assessed all the candidates on the basis of the established selection requirements.

In this assessment the Executive Board took into account:

- The work of the pre-selection panel;
- The need that the specialist fields of the members of the Scientific Committee shall cover the most relevant scientific fields linked to fundamental rights, in accordance with the mission and objectives of FRA;
- The need to ensure even geographical and gender balance.

The Executive Board submitted to the Management Board a list of most eligible candidates. This list included more than eleven and fewer than twenty-two names. This list also included merit points and a conclusion concerning the suitability as a member of the Scientific Committee for each candidate.

The Chair of the Executive Board presented the results of the selection process to the Management Board, including a record of the candidates not included in the lists mentioned above as well as on candidates deemed ineligible.

Appointment

On the basis of the list submitted by the Executive Board, the Agency’s Management Board shall appoint the members of the Scientific Committee, after having consulted the competent committee of the European Parliament (LIBE Committee).

The LIBE Committee requests that the Management Board provides the following information to the members of the Committee:

- a copy of the open call for tender to become a member of the Scientific Committee and information on how the call was disseminated,
- a description of the selection criteria used during the procedure (as detailed as available to members of the Management Board), with justification of the selection methodology chosen,
- the number of applications received, broken down according to a Member State and gender, with information on how many of the applicants were not eligible to apply,
- a short list of candidates with their applications and CVs.

The LIBE Committee will discuss applications in a LIBE Committee session open to the public. It will then give its opinion about the candidates after receiving the above information by expressing its order of preference in a secret ballot. This opinion will be communicated to the FRA Management Board allowing it to nominate members of the Scientific Committee.

The LIBE Committee intends to make the names of the short listed candidates, their CVs and the results of the vote public based on the consent of the candidates. Non-consent on the part of any of the candidates will lead to the non publication on their data.

The candidates not appointed shall be put on a reserve list. In accordance with Article 14, paragraph 1 of the Regulation, the Management Board of the Agency shall ensure even geographical representation in the membership of the Scientific Committee it shall appoint. Furthermore, the Management Board must aim to achieve a balanced participation between women and men in the Scientific Committee. It will also pay due attention to the scientific disciplines with the aim of covering the entire field of competence of the Scientific Committee.

Members will be appointed for a five-year term, which shall not be renewable.

The reserve list shall be valid for the duration of the term of the appointed Scientific Committee. In case of a vacancy, the Management Board shall appoint a new member from the reserve list. The filling in of a vacancy shall be for the rest of the duration of the term of the Scientific Committee. However, in accordance with Article 14, paragraph 1 of the Regulation, the Management Board shall follow a process of appointment identical to the one followed for the appointment of the original member including consultation of the competent committee of the European Parliament.

Information

Candidates were informed in the Call for expression of interest for the position of member of the Scientific Committee of the FRA published on 18 December 2007 of the processing of their personal data for the purposes of the selection procedure in accordance with Regulation (EC) 45/2001. The candidates were also informed of the identity of a contact person at the FRA for the procedure. The annex provides the procedure for the Call for expression of interest for the position of member of the Scientific Committee of the FRA and includes information on the legal basis; the recipients of the data (pre-selection panel, Executive Board, Management Board and LIBE Committee); the fact that the data will only be processed for the purposes of the selection procedure and that it will not be transmitted to

third parties; that the data will be processed in the strictest confidence and with high standards of security; and that the data will be kept for as long as mandatory to fulfil the requirements of auditing/control procedures applicable to the Agency.

The EP intends to provide Article 12 information to the candidates in the invitation to attend the hearing before the LIBE Committee.

Right of data subjects

The FRA provides that the candidates had the right to rectify their data until the closing date of the call. They do not have the right to access their data. They have the right to block the data at any time. At any point, the data may be erased upon request of the candidate provided there is no conflict of interest with the defined procedure.

In the LIBE Committee, the notification to the EDPS provides that the rights of the data subjects can be exercised in accordance with the EP Bureau decision of 22 June 2005 (Articles 8-13) which provides the procedures for a right of access, rectification, blocking and erasure.

Conservation of the data

The data are kept by the FRA for as long as it is mandatory to fulfil the requirements of existing auditing/control procedures applicable to the agency. Statistical data are kept in order to provide information such as how many applications were received, which nationalities, gender etc. These data are anonymous.

The EP keeps the data for six months from the date of the meeting of the LIBE Committee when the candidacies were considered.

Recipients of data

The CVs are communicated to the European Parliament LIBE Committee as part of the selection procedure (consultative role).

The LIBE Committee envisages making public the names of the short listed candidates, their CVs as well as the result of the Committee's vote. The candidates will be asked to consent to this publication. Indeed during the Committee sessions hard copies of the CVs will be distributed during the LIBE Committee meetings which are open to the public. Furthermore, as a result of the public nature of the Committee sessions, the data will be available on the EP web site. The names of the candidates and order of preference (result of the vote) will also be available electronically to the public.

Security

[...]

2.2 Legal aspects

2.2.1 Prior checking

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data

(hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The recruitment procedure for the Scientific Committee relates to data concerning applicants which qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by a Community agency and a Community institution in activities which fall within the scope of Community law.

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In this case the processing is carried out both electronically and in a structured paper filing system.

Regulation 45/2001 therefore applies.

Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of selecting members of the Scientific Committee precisely aim at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, the data controller will perform various assessment activities such as weighing up whether the individual in question matches the selection criteria, judging his/her performance during the interviews, judging the performance of each candidate in his/her current positions, etc. In sum, taking the above into account, clearly the data processing operations fall within Article 27(2) (b) and must therefore be prior checked by the EDPS.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, it is regrettable that the Notification from the FRA was submitted when the processing was well underway, even after the closing of the call for tender to become a member of the Scientific Committee, and at this moment the shortlist of candidates has already been established and is about to be submitted to the LIBE Committee. This notwithstanding, all recommendations made by the EDPS, should be fully taken into account and the remedies should be put into practice.

The Notification from the FRA was received on 19 March 2008. It was suspended for 12 days.

The Notification from the EP was received on 3 April 2008.

The Opinion must therefore be adopted no later than 31 May 2008.

2.2.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the *"processing is necessary for 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"*.

Article 14 of Council Regulation (EC) No 168/2007 establishing the FRA provides for the appointment of a Scientific Committee by the Management Board of the FRA after consultation of the competent Committee in the EP in accordance with the rules of procedure which shall lay down the detailed conditions governing the appointment of this Committee. In view of the appointment of this Committee the FRA has established a selection procedure in the rules of procedure provisionally adopted². These legal instruments serve as legal basis for the selection of the Scientific Committee by the Management Board and the LIBE Committee.

The collection of personal data such as CVs and motivation letters of candidates by the Management Board and of the CVs of the short listed candidates by the LIBE Committee must be considered as "necessary for performance of a task" of selection of a Scientific Committee as referred to above and the processing must therefore be considered as lawful.

The public availability of the personal data of the short listed candidates (Cvs, names of the candidates and results of the vote) during the sessions and the subsequent publication of this data by the LIBE Committee must also be assessed in the light of the provisions of Article 5. The notification of the EP to the EDPS (point 17) provides that this publication will be based on the consent of the candidates. The lawfulness of the publication would therefore be based on Article 5(d) of Regulation (EC) 45/2001 which states that the processing of personal data will be considered as lawful if the data subject has unambiguously given his or her consent. Article 2(d) of the Regulation defines the consent of the data subject as "any freely given specific informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed". In the context of a recruitment procedure, the free nature of the consent must be questioned. Furthermore, as will be examined below (2.2.9. Information to the data subject), the data subjects have not been informed of the fact that their data will be made publicly available. On the contrary, the Call for expression of interest provides that the data will not be transmitted to third parties. According to the EDPS, therefore, in the light of the definition of consent of the data subject provided in Article 2(d) of Regulation (EC) 45/2001, the publication of the personal data of the short listed candidates cannot be based on Article 5(d).

This being said, the EDPS considers that the publication of the personal data of the short listed candidates can be considered as necessary for 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 in accordance with Article 5(a) of the Regulation. Indeed, Article 14(1) of Regulation (EC) No 168/2007 refers to a "transparent call for applications and selection procedure". Furthermore Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents foresees that the "institutions shall as far as possible make the documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned". Since the exceptions to the principle of transparency do not apply a priori in the present case, the making the personal data of the short listed candidates available to the public

² Since according to Article 12§6 g), the Scientific Committee must give his opinion on these rules.

can therefore be considered as lawful. Candidates will however need to be informed of the fact that their personal data will be made publicly available (see below, 2.2.9. Information to the data subject). Candidates must also be given the opportunity to object to this publication on the basis of Article 18 of the Regulation (see below 2.2.8).

2.2.3. Processing of special categories of data

Article 10(1) of Regulation 45/2001 establishes that "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, are prohibited". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject (Article 10(2)(a)).

The notification provides that photographs may be included in the submitted CVs. These photographs may reveal the candidate's racial or ethnic origin. This is not a problem however as the processing of such data by the Management Board and the LIBE Committee are based on the consent of the data subject in accordance with Article 10(2)(a). Indeed the presence of a photograph is not mandatory and is therefore purely based on the will of the candidate.

Furthermore, the application form leaves a box open in which candidates can provide other information of relevance for their application. This information may also include sensitive data. However, this is again not a problem as it is purely up to the data subject to provide this data if he or she so wishes.

Article 10(5) of Regulation (EC) No 45/2001 establishes 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 or, if necessary, by the European Data Protection Supervisor." According to the notification no such data are collected in the context of the selection of the Scientific Committee.

2.2.4. Data Quality

According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed*".

The type of information requested to apply for the Scientific Committee is twofold: candidates are asked to fill in an on-line application form which contains standard questions, concerning personal details, relating to the candidate's professional experience language skills and other relevant information for the application. Candidates are also asked to provide a letter of motivation and a list of scientific publications in books and peer-reviewed journals, including abstracts of the 10 most relevant articles.

The EDPS considers that the questions which candidates have to answer are adequate and relevant in relation to the purposes for which they are intended to be used. Indeed, in order to determine whether a candidate complies with the minimum conditions of eligibility for the Scientific Committee, the Agency must necessarily know his/her years of experience and the years of experience in the related fields of interests of the FRA. Furthermore, motivation letters can be considered as relevant and adequate information for the purposes of selecting candidates for a given position. Only if the FRA has information on the education and

professional experience as well as on the candidate's suitability for a given job, will it be able to select the best suited candidate.

Personal data collected by the LIBE Committee include a short list of candidates with their applications and CVs. These data are also considered as relevant and adequate according to the Regulation.

In sum, the EDPS considers that the information collected from candidates in the context of the selection of candidates for the Scientific Committee of the FRA complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

Article 4(1)(d) of the Regulation provides that the data must be accurate and kept up to date. The fact that the personal data are collected from the data subjects themselves and the right of access of the candidates to their data (see below 2.2.7. Right of access and rectification) serve to guarantee the accuracy of the data.

Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.9.

2.2.5. Conservation of data

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

According to the notification, application documents are kept by the FRA for as long as it is mandatory to fulfil the requirements of existing auditing/control procedures applicable to the Agency.

The EDPS recommends that the FRA clarifies the storage periods. The EDPS considers that a maximum period of 5 years would be sufficient for the purposes of facing possible challenges for non-selected candidates, as this is the approximate period during which documents are required to be kept under the Financial Regulation. Of course, data of candidates that are successful may be retained longer by other data controllers who will have to process such data in the context of their data processing operations. For example, parts of such data will be kept in the personal file of the recruited person. This Opinion does not address the adequacy of such retention periods, which need to be reviewed in the context of each particular data processing operation.

According to the notification, the data may be kept for historical, statistical or scientific reasons by the FRA. These data are kept in an anonymous form in compliance with 4(1)(e) of the Regulation.

The data are kept by the LIBE Committee for a maximum period of 6 months. This period is considered as adequate.

2.2.6. Transfer of data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on

whether the transfer is made (i) to or within Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

According to the notification the transfers are made to the pre-selection panel, to the Executive Board and Management Board and to the European Parliament LIBE Committee. These are transfers within or between Community institutions and bodies, thus, Article 7 of the Regulation applies. Article 7 of Regulation (EC) No 45/2001 requires personal data to be transferred only "for the legitimate performance of tasks covered by the competence of the recipient". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the data are necessary for the performance of this competence.

The EDPS considers that the transfers of information to the recipients described above for the purposes stated comply with Article 7(1). Indeed, all the recipients have the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the candidates. The level and concrete tasks vis-à-vis the assessment varies depending on the recipient, but all the recipients, at some point of the procedure, have the obligation to assess the candidates. The transfer of the personal data is therefore considered as falling within the tasks covered by the competence of the recipient.

As to the necessity of the data transferred, the data communicated to the LIBE Committee consist in the short list of candidates and their applications and CVs. The communication of such data is deemed necessary for the LIBE Committee to be able to perform its duties of selection.

The LIBE Committee communicates its final decision to the FRA. This transfer is also compliant with Article 7(1).

2.2.7. Right of access and rectification

According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

According to the notification received from the FRA, data subjects do not have the right to access their data. They had a right to rectify their data until the closing date of the call.

The EDPS recalls that candidates should be able to have access to their entire file, comprising the merit points and assessment notes concerning them drafted by the various parties at the FRA competent for their assessment (pre-selection panel, Executive Board, Management Board).

Article 20 (1) provides for an exception to the principle of access by stating that "The Community institutions and bodies may restrict the application of Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others". This may imply that information comparing the data subject with other applicants should not be provided and no information should be given

regarding the particular remarks or evaluations of members of the selection boards or committees.

The EDPS considers that in the context of this data processing, the applicant's right of access to information concerning them directly and individually must be strictly complied with. It enables applicants to see which elements were taken into account for the overall assessment and to see that the selection board has acted fairly and objectively. Any restrictions to this right on the basis of Article 20(1) must be applied restrictively.

Article 14 of Regulation (EC) No 45/2001 provides data subjects with the right to rectify inaccurate or incomplete data. This right can obviously apply only to factual data. Merits points allocated or individual assessments, for example, could not under any circumstances be open to a right or rectification by the data subject, except in the context of an appeal lodged according to an established appeals procedure. Furthermore, the EDPS notes that the FRA has introduced limitations to the right of rectification of candidates' data after the deadline for the sending of documents. The EDPS considers this limitation can be deemed necessary to ensure objective, certain and stable conditions for the competition, and essential to the fairness of processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

In the light of the above, the EDPS recommends that the FRA sets up procedures to ensure that candidates have access to their personal data in accordance with Regulation (EC) 45/2001. Information about the procedures to exercise the right of access should be given to individuals (see below, 2.2.9. Information to the data subject).

As for access to the data processed by the LIBE Committee, the notification to the EDPS provides that the rights of the data subjects can be exercised in accordance with the EP Bureau decision of 22 June 2005 (Articles 8-13). The EDPS is satisfied that the rights of the data subjects are respected by the EP, but underlines that the same limitations to the right of rectification could apply to the data processed by the EP.

2.2.8. Right to object

Article 18(a) of the Regulation provides that the "data subject shall have the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of personal data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data". According to the EDPS, since the publication of personal data by the EP of the short listed candidates is based on Article 5(a), these candidates have the right, on compelling and legitimate grounds, to request that their data are not made publicly available. In these cases the EP will need to take the necessary measures.

2.2.9. Information to the data subject

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the selection of the members of the Scientific Committee, personal data are obtained directly from the data subject on the application form and from bodies involved in the Selection Procedure. Thus Articles 11 and 12 will both apply.

As mentioned in the facts, candidates were informed in the Call for expression of interest for the position of member of the Scientific Committee of the FRA published on 18 December 2007 of the processing of their personal data for the purposes of the selection procedure in accordance with Regulation (EC) 45/2001. The candidates were also informed of the identity of a contact person for the procedure. The annex provides the procedure for the Call for expression of interest for the position of member of the Scientific Committee of the FRA and includes information on the legal basis; the recipients of the data (pre-selection panel, Executive Board, Management Board and LIBE Committee); the fact that the data will only be processed for the purposes of the selection procedure and that it will not be transmitted to third parties; that the data will be processed in the strictest confidence and with high standards of security; and that the data will be kept for as long as mandatory to fulfil the requirements of auditing/control procedures applicable to the Agency.

The EDPS considers that, in accordance with Regulation (EC) 45/2001, candidates should also have been informed of the procedures to exercise their right of access and of the right to have recourse to the EDPS. Furthermore, candidates were not informed that their personal data will also be made available to the public as a consequence of the public procedure of the LIBE Committee sessions. According to Article 12, this information should be provided at the time of collection of the data or at the latest at the time when the data are first disclosed to a third party. Since this information was not provided in the Call for expression of interest, it must be given at the latest when the data are disclosed to the EP. The EDPS therefore recommends that the FRA informs, prior to the communication of their data to the LIBE Committee, all short listed candidates that the data which have been submitted by them will be publicly available as a result of the public nature of the EP sessions and that they have a right to object to the publication of their data and informs them of the procedures to exercise their right of access and of the right to have recourse to the EDPS.

This information should also be inserted in the FRA website so that it is accessible for the non short listed candidates. The EDPS considers that information on the processing of personal data should remain available on the FRA website at least until the end of the selection procedure.

In the application form it should also have been marked whether replies to questions are obligatory or voluntary as well as the possible consequences for failure to reply. Since the data have already been collected from data subjects this latter information can no longer be given.

As to the information to be provided by the EP, Article 12 applies since the data are not directly collected from the data subject. This article lists a series of items of which the data subject must be informed. However, the EP will not need to provide information if the data subject already has it. This therefore implies that the EP provides information to the short listed candidates on the processing of personal data by the EP such as the identity of the controller, the conservation periods of the data, and the existence and the procedures to exercise their right of access and rectification and of the right to have recourse to the EDPS. The EP intends to provide this information in the invitation to attend the hearing before the LIBE Committee.

2.2.10. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

After review of the security measures, the EDPS considers that Article 22 and 23 are respected.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account:

- the FRA clarifies the periods for conservation of personal data;
- the FRA sets up procedures to ensure the right of access to candidates' personal data;
- the FRA provides information as described in point 2.2.9;
- that the information on the processing of personal data remains available on the FRA website throughout the procedure in case applicants want to refer back to it;
- that the EP provides information as described in point 2.2.9.

Done at Brussels, 29 April 2008

(signed)

Joaquín BAYO DELGADO
Assistant Supervisor