

**Opinion on a notification for Prior Checking received from the Data Protection Officer of the Community Plant Variety Office on 28 May 2008 regarding the engagement and use of temporary agents in the Community Plant Variety Office.**

Brussels, 20 February 2009 (Case 2008- 315)

## **1. Proceedings**

On 28 May 2008, the European Data Protection Supervisor (“EDPS”) received by regular mail from the Data Protection Officer (“DPO”) of the Community Plant Variety Office (“CPVO”) a notification for *a true* prior checking relating to the engagement and use of Temporary Agents (TAs). The notification was accompanied by the following annexes:

- CPVO Application Form
- Draft Decision of the President of CPVO on temporary agents in the CPVO (Decision on TAs)
- Privacy Statement according to Article 11 of the Regulation (EC) No 45/2001
- Instructions of 26 June 2006 to personnel department on the period of time during which the Office will keep documents containing personal data submitted to the Office in relation to recruitment procedures or spontaneous applications

On 02 July 2008 the EDPS requested additional information from the CPVO. The replies were received on 20 January 2009. Further, the EDPS was also informed that the Decision of the President of CPVO on temporary agents had been approved by the European Commission on 8 December 2008.

The draft Opinion was sent to the DPO of the CPVO for comments on 12 February 2009 and those were received on 19 February 2009.

## **2. The facts**

The CPVO engages long term and short-term temporary agents for certain tasks. **Personal data of applicants are used and processed during the recruitment procedure** of temporary agents in order to evaluate and select the candidates for vacant TAs posts.

**Description of the selection process:** According to the Decision on TAs, the selection procedure for recruiting TAs for vacant posts in the CPVO can be carried out in two ways:

### **1) Selection procedure by the European Communities Personnel Selection Office:**

a) Upon request of the CPVO, the European Personnel Selection Office (EPSO) organises a selection procedure following the same standards as for competitions for officials (Article 3.1 of Decision on TAs).

Following the competition, EPSO provides the CPVO with a short list of successful candidates, who can be invited by the CPVO for interviews (see procedure below).

The CPVO sets up a Selection Committee based on the criteria laid down in the Decision on TAs. The Selection Committee invites for interview the candidates who are considered to be most suitable among the ones on the short list established by EPSO. Minutes of Committee meetings should be drawn up setting out the reasons for any decision taken.

The Selection Committee proposes the short list of successful candidates to the Authority, who may establish a reserve list of successful candidates. This list will be valid up to 12 months from the date of its establishment with a possibility to extend that period.

According to the Decision on TAs, candidates should be informed of the outcome of the interview and the enrolment to the reserve list.

**2. Selection procedure carried out by CPVO:** The CPVO itself can also organise the selection procedure. In this case, the vacancy notice is published via official means (CPVO web site, EPSO, Inter-agency job market, etc).

Candidates wishing to apply should send their application, which should contain:

- a detailed CV (the form of the CV depends on the choice of the candidates, which can also include Europass CV format),
- the filled in application form, which the applicants can download from the CPVO's website and which they should send via email,
- a motivation letter to the Human Resource service (HR).

The HR officer acknowledges receipt of the application using a standard form indicating the reference number.

The HR officer records the following personal data for each candidate in an Excel sheet: candidate number/name/title/first name/languages spoken and written/last employment.

A Selection Committee is set up on the basis of the Decision on TAs composed of 3 to 5 members designated by the President and the Staff Committee respectively. Once the deadline for application has elapsed, each member of the Selection Committee receives the applications.

The Selection Committee makes an assessment on the applications received and selects those applicants who meet the eligibility criteria and who match best the selection criteria required by the vacancy notice. The Selection Committee invites the selected candidates to written tests and interviews.

The content of the written tests depends on the level and profile of the advertised position. It consists of the following elements, which can be combined or tailored according to the profile of the post:

- general aptitudes and language abilities to the extent necessary for the performance of their
- duties,
- knowledge on European integration, the institutions and the CPVO;

- specific competencies with reference to their profiles, assessing the quality of writing style and presentation.<sup>1</sup>

In accordance with Article 12 (4) of the CEOS<sup>2</sup>, at the request of the CPVO, EPSO should provide assistance to the CPVO's selection procedure, in particular and/or organising written tests.<sup>3</sup>

The Selection Committee draws up minutes of its meetings setting out the reasons for any decisions taken.

The Selection Committee proposes a short list of successful candidates, after the tests and the interviews, to the Authority empowered to conclude employment contracts. The Authority may establish a reserve list of successful candidates.

Candidates are informed of the outcome of the written tests and interviews, as well as their placement on the reserve list.

**Data subjects:** Any candidate applying for a vacant post at the CPVO can become a data subject.

**The processed personal data:** A variety of personal data are concerned in the selection process:

- **All applicants have to submit:** a CV, a motivation letter and the application form.
- The following data fields are required in **the application form**:
  - photo of the candidate
  - surname, forenames,
  - address, email, fax and telephone
  - place and date of birth
  - nationality
  - military situation (and grade)
  - knowledge of language (mother tongue or main language, level of other language skills)
  - education (primary, secondary, advanced secondary and technical education and higher education)
  - general, specialist and further training courses:
  - works published
  - office skills: familiarity with software applications and computer literacy
  - career to date: present and previous post
  - long period spent abroad (countries visited, dates and reasons for stay)
  - interests and skills not related to work, social and sport activities (not compulsory field)
  - name, address and telephone number of contact person.

- **Successful candidates in addition have to submit:**

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<sup>1</sup> Article 2 section 2(d) of Decision on TAs

<sup>2</sup> Article 12(4) of CEOS reads as follow: "At the request of an institution the Office shall, in selection procedures organised for the engagement of temporary staff, ensure the application of the same standards as for the selection of officials."

<sup>3</sup> Last sentence of Article 2 section 2(d) of Decision on TA

- proof of identity and nationality
- military certificate
- clean police record (short listed candidates who are invited for an interview should provide a criminal record or a similar document issued in accordance with their respective national law)
- birth certificate for himself (or herself) and for his/her children
- marriage/divorce certificate
- copies of diplomas
- copies of work certificates
- financial identification form
- legal entity form
- confidential form for the sickness insurance scheme
- 4 identity photos

● **Health related data:** During the pre-employment medical check ups at the CPVO health related data are also processed.

**The recipients of personal data:** The documents are collected by HR service. The data of the applicants then are transferred to the Selection Committee members. The members of the committee are asked to return all documents to the HR service upon completion of the selection procedure.

The Privacy statement provides more details on the list of recipients under the section": Who has access to your information and to whom is it disclosed?": *"Anybody involved in the processing of the applications or verifying the procedure in particular, the members of the Human Resources Department in charge of recruitment and establishing of individual rights, the management of CPVO, the members participating to the selection, the Financial Department (in case of recruitment), internal controllers and internal and external auditors."*

It is stated in the notification for prior checking that personal data are not transferred to anyone outside of the CPVO.

#### **Manual and/or automatic processing:**

The processing of personal data is mainly manual, but there are some instances of automatic processing:

- application forms should be sent via email
- the HR keeps an Excel sheet , where the HR officer records the following data: candidate number, name, title, first name, languages spoken and written and last employment.
- members of the Selection Committee may receive personal data in electronic format (email).

**Conservation period:** A distinction is made between the storage period of personal data relating to recruited and unsuccessful candidates.

**As to unsuccessful candidates:** According to the instructions to the personnel department from the Head of the personnel department dated 26 June 2006, all personal data submitted following recruitment procedures will be destroyed after a period of 24 months form the date of decision of the Office appointing the successful candidate. A disclaimer notice will be added to the acknowledgment of receipt sent out to candidates in that regard.

Personal data relating to spontaneous applications will be destroyed after a period of 24 months from the date of reception. A disclaimer sentence in that regard will be added in the standard reply.

The CPVO stated as motivation for the data conservation period that: "This retention policy have been developed by the Office in order to respect the rules on protection of personal data and not to keep this kind of data for a longer period of time than necessary. The need to keep the data for verifications of the Court of Auditors has also been taken into account when establishing this time limit.(...)"

**As regards to recruited candidates:** the data collected during the selection process and at the time of establishing staff member's right when taking up the duties are kept in the personal file. Following the decision of the President of the CPVO on 1 September 2008, all personal data contained in the personal file of a staff member will be destroyed after a period of 10 years from the date of the end of the contract of the staff member. The end of contract can be due to a contract with a limited duration, dismissal, resignation, retirement or death of the staff member.

These provisions do not apply to administrative data stored in the 'pension' part of the personal file containing a summary of the employment history of the staff member at the CPVO as well as all correspondence related to the staff member with the Pension Unit of the Commission. For these data, the conservation period is extended to 10 years after the date of retirement of the (former) staff member."

**Personal data dealt with by members of the selection committee:** If the members of the selection committee have received *data in electronic format* (by email for example), they are asked to destroy the data received from their computers upon completion of the selection procedure. If the members of the selection committee *receive data in paper format*, they are asked to destroy the applications upon completion of the procedure via an email from the HR Department.

**Information to data subjects:** The notification for prior checking states that a privacy statement is put on CPVO's intranet. The Privacy statement contains the following elements: the identity of the controller and contact information, the purposes of the processing operation for which the data intended; the legal basis (Articles 27-34 of the Staff Regulations and Article 5(d) of Regulation 45/2001) the categories of recipients of the data; whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply, the right of access to and rectification of the personal data (with the exception of merits and skills) and the right to have recourse to the EDPS.

The information in the privacy statement on the time limits specifies: "The processing of your data starts from the moment it is submitted and is retained as long as the operational purposes is not closed. Thereafter, the information is kept for a 2 years period. The data will then be erased."

**Right of access and rectification:** The privacy statement specifies that: "You have the right to access and update or correct your data. Please note that there is no possibility to update and correct data relating to merits and skills after the deadline of the competition."

The application form itself states that: "You have the right to rectify your data (except for merits and skills) for recruitment even after the deadline for submitting your application".

The application form in footnote 2 requires that: "The selection board should be informed of any change of address."

Although no formal procedure is adopted, and the data controller have not been confronted with the issue of exercising the right to rectify personal data, the data controller explained that the following procedure to exercise that right would apply: Data subjects would have to send a request to the Human Resources service via an e-mail to the functional mailbox foreseen for recruitment. If a request would be sent by regular mail, it will not be rejected on that ground.

Depending on the nature of the data to be changed (such as: change of address or adding diplomas) the admissibility of the request would be checked by the HR service. For example, diplomas must be issued before the deadline for sending in the applications in order to be accepted.

The data subject is informed via an e-mail if the request is accepted or not and if the change in the data have been made.

In case the request of the data subject is refused and the data subject requests an explanation or intends to appeal against this decision, he/she will have to address it to the data controller.

**Security of processing:** [...]

### **3. Legal analysis**

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

Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (hereinafter referred to as "the Regulation") applies to personal data processing activities by Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1) of the Regulation).

The Regulation applies to the data processing activities by the CPVO in the context of the procedure governing the engagement and use of temporary agents (TAs) for the reasons enumerated below.

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 CPVO processes personal data in the above sense for the selection and recruitment of temporary agents (identification, family status, financial data, education, training, skills and experiences). Those therefore qualify as personal data under Article 2(a) of the Regulation.

The processing of applicants' personal data is carried out by the CPVO, an agency in its activity which clearly falls under Community law. Article 3(1) of the Regulation therefore applies.

Application forms are sent by emails and it is possible that email messages used in the selection process contain personal data, but the processing operation is mainly manual, where

CVs and other paper documents obtained during the selection procedure are intended to form part of a filing system. The processing operation falls under Article 3(2) of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks, among those processing operations intended to evaluate personal aspects relating to the data subject, including his/her ability, efficiency and conduct (Article 27(2)(b)).

The selection procedure for recruiting TAs for vacant posts at the CPVO falls under Article 27(2)(b) as it is a recruitment procedure and is designed to assess the candidates' professional ability and skills.

The personal data processing operations during the pre-recruitment medical check ups fall outside of the scope of this prior checking opinion, as those were already prior checked by the EDPS.<sup>4</sup>

As mentioned in the facts, one type of the selection procedure by the CPVO covers the selection of temporary agents by the European Personnel Selection Office (EPSO), upon request of the CPVO, where EPSO organises the selection procedure following the general standards applicable for the competitions for officials. This recruitment procedure falls outside of the scope of this prior checking opinion, as the recruitment of temporary agents by EPSO has already been prior checked by the EDPS and he already issued his recommendations on improving the data protection standards in the selection process.<sup>5</sup>

Although submitted as a true prior checking, the Draft Decision of the President of the CPVO on Temporary Agents was adopted by the Commission decision dated 8 December 2008, while the EDPS was waiting for the responses to his information request from the CPVO. The EDPS draws the attention of the controller to the requirement under Regulation (EC) No 45/2001 that a prior check by the EDPS is necessary for the launching of any processing operations which are likely to present a specific risk. The prior checking procedure should be finalised prior to the launching of the system so that any recommendations made by the EDPS could be implemented before the start of the data processing activities. Nevertheless, in the present case the EDPS does not consider the launching of the system as an insurmountable problem, because his recommendations can still be implemented.

The notification of the DPO was received on 28 May 2008 by regular mail. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 29 July 2008. The prior checking procedure has been suspended for a period of 202 days + for 7 days for comments on the draft opinion. Thus, the Opinion should be rendered not later than 23 February 2009.

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<sup>4</sup> See EDPS Opinion of 4 June 2008 on the notification for prior checking regarding CPVO's pre-employment and annual medical check-ups (Case 2007-176). Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

<sup>5</sup> Opinion of 2 May 2006 on a notification for prior checking on the "Selection of temporary staff with a view to recruitment by the European institutions or by Community bodies, offices and agencies" (Case 2005-365). Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

### 3.2. Lawfulness of the processing

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. One of this criteria is stipulated in **Article 5(a) stating that** " *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...*". **Recital 27 further notes that:** "*processing of personal data for performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies*".

The selection and recruitment of temporary agents by CPVO can be seen as **necessary** for the **public interest** of the functioning of the agency in the above sense.

#### **The legal basis of the processing operation is interlinked with its lawfulness.**

The Decision of the President of the CPVO on Temporary Agents takes into regard Articles 2(a) and (b) and 12(5) of the Conditions of Employment of other servants of the European Communities (CEOS), which reads as follow:

Article 2(a) and (b) of CEOS: "*For the purposes of these conditions of employment, 'temporary staff' means: (a) staff engaged to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary; (b) staff engaged to fill temporarily a permanent post included in the list of posts appended to the section of the budget relating to each institution; (...)*"

Article 12(5) of CEOS: "*Each institution shall adopt general provisions on the procedures for recruitment of temporary staff in accordance with Article 110 of the Staff Regulations, as necessary.*"

The Decision on TAs makes further reference to Articles 31 and 42 of the Council Regulation (EC) No 2100/94 of 17 July 1994 establishing the CPVO and to the Commission Decision C(2005) 5304 of 16 December 2005 concerning the Guidelines on staff policy in the European Regulatory Agencies.

Article 31 (1) and (2) of Council Regulation (EC) No 2100/94 reads as follow: "*The Staff Regulations of Officials of the European Communities, the Conditions of Employment of Other Servants of the European Communities and the rules adopted jointly by the institutions of the European Communities for purposes of the application of those Staff Regulations and Conditions of Employment shall apply to the staff of the Office, without prejudice to the application of Article 47 to the members of the Board of Appeal. Without prejudice to Article 43, the powers conferred on the appointing authority by the Staff Regulations, and by the Conditions of Employment of Other Servants, shall be exercised by the Office in respect of its own staff.*"

Article 42 (2) (a) and (c) of the same above Council Regulation lays down among the powers of the President of the CPVO: He "*(...) shall take all necessary steps, including the adoption of internal administrative instructions and the publications of notices, to ensure the functioning of the Office in accordance with the provisions of this Regulation, with those referred to in Articles 113 and 114, or with the rules established, or guidelines issued, by the Administrative Council pursuant to Article 36 (1)*" and (...) "*(c) He shall exercise in respect of the staff the powers laid down in Article 31 (2).*"

The above legal basis confirms the lawfulness of the processing operation under Article 5(a) of Regulation (EC) No 45/2001.



In addition, since the participation in the selection procedure of temporary agents is not mandatory, the processing operation can also be seen lawful under **Article 5(d) of Regulation 45/2001** because "the data subject **has unambiguously given his or her consent.**" In this context, special attention has to be drawn to the information given to the data subjects, as consent can be understood to be given only to the extent that adequate information was provided before giving the consent.

The legal basis contained in the current privacy statement needs to be further specified (see below in part 3.8 below).

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

Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited according to Article 10(1) of Regulation 45/2001. Limited exceptions are permitted under Articles 10(2)- 10(5) of the Regulation.

Within the framework of the selection and recruitment procedures of temporary agents at the CPVO certain personal data belonging to the "*special categories of data*" can be collected, including

- (i) data related to health (in particular medical certificate as a result of the pre-recruitment medical check up)
- (ii) criminal records or a similar official document, which is requested from short-listed candidates who are invited to go for an interview,
- (iii) data revealing racial or ethnic origin (communication of a photograph),
- (iv) data revealing political opinions, religious or philosophical beliefs, or trade union membership (for instance, spontaneous communication of such data can take place in the field on "*social, organisational and other skills and competences*" in the European CV or on the CPVO application form in the non compulsory field "Interests and skills not related to work, including social and sports activities").

**(i) Health related data:** The EDPS addressed the issue of the lawfulness of the processing of medical data in the framework of the pre-recruitment medical check ups in section 3.2 and 3.3 of his opinion on the matter (Case 2007-176).<sup>6</sup>

**(ii) Criminal records:** Article 12(2) of the Conditions of Employment provides that a member of the temporary staff may be engaged only on condition that: "(a) he is a national of one of the Member States ... and enjoys his full rights as a citizen" and that "(c) he produces the appropriate character references as to his suitability for the performance of his duties". This legal instrument provides the basis to process data related to criminal convictions pursuant to Article 10(5) of the Regulation.

**(iii) Data revealing racial or ethnic origin (communication of a photograph):**

The CPVO application form requires the communication of a photograph by the applicant. In certain cases, this may contribute to revealing additional information related to the person concerned, in particular related to his/her ethnic origin. It may be justified on the basis that the data subject has given his/her express consent according to Article 10(2)(a) of the Regulation (on this point see below on "data quality").

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<sup>6</sup> See EDPS Opinion of 4 June 2008 on the notification for prior checking regarding CPVO's pre-employment and annual medical check-ups (Case 2007-176). Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

**(iv) Data revealing political opinions, religious or philosophical beliefs, or trade union membership:** The spontaneous communication of such data in the optional data fields on the application form may be considered to be justified in terms of Article 10(2)(a) of the Regulation (on this point see below on "*data quality*").

### 3.4. Data quality

Data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed (Article 4 (1)(c) of the Regulation).

The EDPS welcomes **the proportionality** introduced in the process of submitting personal data in the framework of a selection, notably that some type of data are required from all applicants (application form and CV) whereas other type of personal data as described in the facts part above (such as military certificate, clean police record, birth certificate for himself) are requested only from successful candidates.

Having analysed the CPVO application form, the EDPS finds that most of the data fields are adequate, relevant and not excessive for the selection of temporary agents, but the EDPS points out the following as to the photograph required, as to interests and skills not related to work and as to criminal records (see below).

The CPVO requires a **photograph** in its application form. As a photo may reveal additional information related to the person concerned, in particular related to his/her ethnic origin, the EDPS recommends that the CPVO reconsiders the adequacy and relevance of collecting the photograph in the application form as a mandatory item. In case the communication of the photograph is an option, whenever the candidate would communicate his or her photo, it could be considered to give his or her consent to the processing of that data, which would make the processing of that special data lawful under Article 10(2)(a) of Regulation 45/2001 (see above in part 3.3).

The question in the CPVO application form on "**Interests and skills not related to work, including social and sport activities**" deserves also special attention. By answering this question, candidates give details on skills, interests and activities which are not in relation with the work which they apply for. These details give the opportunity, however, to assess the personality, and not the working skills of the candidate. On the other hand, the EDPS understands that this question may bring useful information to the knowledge of the person concerned participating in the recruitment procedure. Nevertheless, the EDPS considers this question as not fully appropriate regarding the purpose of the application form. Therefore, the EDPS welcomes the fact that this question is marked as "not compulsory" in the application form.

**The collection of the criminal record or a similar official document issued in accordance with the respective national law of the candidate:** It should be noted that these documents have a very diverse content in different Member States and carry diverse denominations. In some Member States, they contain information about the character of an individual or his/her moral behaviour that go beyond a legitimate purpose for collection, which is to establish if the selected candidate "*enjoys his full rights as a citizen*" and has "*the appropriate character references as to his suitability for the performance of his duties*". Even if in principle, the EDPS considers that the collection of these documents is lawful, it is recommended that the analysis of the content of the national criminal record (or other similar document such as certificate of good conduct) is carried out on a case by case basis so that only relevant data are processed in the light of the requirement of the CEOS.

**Fairness and lawfulness:** Article 4(1)(a) provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see above, parts 3.2 and 3.3) and fairness will be dealt with in relation to information provided to data subjects (see below, part 3.8).

**Accuracy:** Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". The TAs selection procedure itself ensures that the data are accurate and kept up to date considering that a lot of the data processed during the recruitment process are provided by the data subjects. In addition, the possibility to make use of the rights of access and rectification helps to ensure that the data are accurate and up to date (see below, part 3.7)

### **3.5. Conservation of data/ Data retention**

Article 4(1)(e) of Regulation 45/2001 states that 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*".

**Differentiated retention period:** The EDPS would like to point out that there is a need to introduce differentiated data storage period regarding three different categories of data subjects, namely the recruited temporary agents, the non-recruited applicants and the non-recruited applicants whose names were put on the "*reserve lists for appointment*".

**Recruited temporary agents:** The data collected during the selection process and at the time of establishing staff member's right when taking up the duties are kept in the personal file. Following the decision of the President of the CPVO on 1 September 2008, all personal data contained in the personal file of a staff member will be destroyed after a period of 10 years from the date of the end of the contract of the staff member. The end of contract can be due to a contract with a limited duration, dismissal, resignation, retirement or death of the staff member.

These provisions do not apply to administrative data stored in the 'pension' part of the personal file containing a summary of the employment history of the staff member at the CPVO as well as all correspondence related to the staff member with the Pension Unit of the Commission. For these data, the conservation period is extended to 10 years after the date of retirement of the (former) staff member."

This retention period has been approved by the EDPS in the follow up of the EDPS prior checking opinion on CPVO an annual appraisal procedure (2007-403).

**Non-recruited applicants:** According to the instructions to the personnel department, all personal data submitted following a recruitment procedure will be destroyed after a period of 24 months from the date of decision of the Office appointing the successful candidate. A disclaimer notice will be added to the acknowledgment of receipt sent out to candidates in that regard. Personal data relating to spontaneous applications will also be destroyed after a period of 24 months from the date of reception. A disclaimer sentence in that regard will be added in the standard reply.

The CPVO explained that its retention policy have been developed in order to respect the rules on protection of personal data and not to keep this kind of data for a longer period of time than necessary. The need to keep the data for verifications of the Court of Auditors has also been taken into account when establishing this time limit.

While the EDPS find the proposed time limit adequate for the purpose of selecting temporary agents, he underlines that other considerations can also be important. The time-limit for storage of data collected for the selection purpose should also be set in relation to the possible review of the decision taken in the selection procedure (complaint to the European Ombudsman, appeal with the Civil Service Tribunal), as well as in accordance with Article 49 of the Implementing Rules to the Financial Regulation (for budgetary and audit purposes)<sup>7</sup>. In addition, the validity of the respective (reserve) lists shall be duly taken into account. It is worth-noting that in various opinions the EDPS accepted to keep personal data of unsuccessful candidates for two years *following the recruitment procedure* as that period was derived from the length of time during which a complaint may be brought to the European Ombudsman<sup>8</sup>.

The retention period for personal data relating to the **non-recruited applicants on the "reserve lists for appointment"** should be determined in terms of the validity and the actual extension of the respective reserve lists.

The processing operation involves processing of personal data **by electronic means**. It needs to be ensured that the processing of electronic data follows the same rules as those of the paper file.

The Selection Committee works with documents received from the human resources and which needs to be returned to that service and with electronic and paper documents which can be destroyed upon request of the HR after completion of the selection procedure. The EDPS calls the attention of the controller to develop a retention policy for paper and electronic files used by the members of the Selection Committee, and which do not need to be returned to the human resources. This policy would therefore cover **the working documents of the members of the selection committee**.

**Retention period of the criminal record or similar official documents:** In its earlier opinions, the EDPS established guidance as to the storage of criminal records. The legal basis provided by the institutions is strictly limited to "*a condition for recruitment*". Once the recruitment is terminated, institutions do not have a legal basis to store these documents (except limited information for auditing, etc.).

Consequently, the EDPS recommends the creation of a "*standard form*" stating that the person is suitable for the performance of his duties and enjoys his full rights of citizen. The criminal record should be returned to the person immediately after the selection and possible recruitment<sup>9</sup>. If a person is recruited, it should also be returned.

The privacy statement submitted to the EDPS together with the notification does not contain all this differentiated storage period, it should therefore be revised (see below in 3.8 below).

### 3.6. Transfer of data

**Internal transfer:** Article 7(1) of Regulation 45/2001 states that "*personal data shall only be transferred 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*".

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<sup>7</sup> Article 49 provides that "*Personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*".

<sup>8</sup> EDPS Opinion of 31 July 2007 on the recruitment of translation trainees by the Parliament (case 2007-324) and EDPS Opinion of 31 July 2007 on Trainee Recruitment by the Parliament (case 2007-208).

<sup>9</sup> EDPS Opinion of 25 January 2008 on "procédure d'embauche des fonctionnaires et autres agents du Secrétariat général du Conseil", (case 2007-194)

Many persons may become recipients of personal data collected and used in the selection and recruitment of temporary agents: the members of the Human Resources Department in charge of recruitment and establishing the individual rights, the management of CPVO, the members of the Selection Committee, the Financial Department (in case of recruitment), internal controllers and internal and external auditors."

Article 7(1) of the Regulation outlines a specific necessity requirement: internal transfers of data within the agency can be accepted as long as they are necessary for the management of the selection procedure of the staff (i.e. selection committees in the human resources sector, Head of Units) as well as for the performance of the respective supervisory task including the internal audit<sup>10</sup>. The EDPS considers that *in abstracto* this is the case regarding the recipients listed in the privacy statement.

**Article 7(3) of Regulation 45/2001** provides that: "The recipient shall process the personal data only for the purposes for which they were transmitted." In order to ensure the full compliance with Article 7 of the Regulation, the controller should remind all recipients of their obligation not to use the data received for other purposes than the one for which they were transmitted, as it is explicitly stated in Article 7(3) of the Regulation.

**External transfer:** Although the notification for prior checking explicitly states that "data are not transferred to anyone outside of the Office," the privacy statement explicitly mentions external auditors as recipients.

Article 8 applies to recipients other than Community institutions and bodies but who are subject to the national law adopted for the implementation of Directive 95/46/EC.

In the case where personal data are transferred to external auditors, Article 8(a) of the Regulation should be complied with, namely the recipient should establish that the data are necessary for the performance of a task carried out in the public interest.

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

According to Article 13 of the Regulation, the data subjects have a right to obtain access to the items listed in the provision upon their request. Article 14 of the Regulation provides the data subjects with "*the right to rectify inaccurate or incomplete data*". The rights of access and rectification may be restricted if the conditions laid down in Article 20(1) of the Regulation are met; in particular "*where such a restriction constitutes a necessary measure to (...) the protection of the rights and freedoms of others*" (point c)).

Moreover, the issue of the right of access and the secrecy of the proceedings of the Selection Committee under Article 6 of the Annex III of the Staff Regulations could also be taken into consideration.

According to the notification, data subjects can exercise their **right of access** upon request. The **right to rectify data** nevertheless applies in different ways in the two phases of the selection procedure:

- 1) until the deadline to submit applications, the right to rectify is unlimited and
- 2) after the deadline open for applications, it is restricted: no information on skills and merits can be corrected or updated.

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<sup>10</sup> See EDPS Opinion of 20 June 2008 on staff recruitment carried out by the EMCDDA (case 2008-157).

The EDPS draws the attention of the controller to the guidance laid down in other opinions<sup>11</sup> that in principle, data subjects should be granted access to all their personal data processed within a particular selection procedure, and in particular the data subjects should be given access to their evaluation results regarding all the stages of the selection procedure (pre-selection, interview and written tests), unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations are applied. This exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the Selection Committee. Nevertheless, data subjects should be provided with aggregated results.

**Right of rectification:** As concerns the right of rectification, the EDPS acknowledges that this right can only apply in the case of factual data processed within the selection procedure. In addition, he points out that any limitation to the right of rectification after the closing date of submitting applications should only apply to data related to the admissibility criteria and not to the identification data that can be rectified at any time during the selection procedure,<sup>12</sup> which is the case here as only data related to skills and merits can not be rectified by TA applicants. The EDPS considers this limitation necessary for the fairness of the selection procedure and justified in terms of Article 20(1)(c) of the Regulation. The EDPS also finds it fair towards TA candidates that this limitation on the right to rectify personal data is explicitly stated in the application form itself.

**Secrecy of the Selection Committee and limitations to the right of access and rectification:**

In line with the previous opinions of the EDPS on EPSO selection procedures<sup>13</sup> and the follow-up of these opinions with EPSO, the EDPS points out that the controller should ensure that it does not restrict access more broadly than it is justified on grounds of safeguarding the confidentiality of the deliberations and decision-making of the Selection Committee or safeguarding the rights of other candidates. It should therefore be clearly established that

- (i) the objective of any confidentiality requirement is to ensure that the Selection Committee is able to maintain its impartiality and independence and is not under undue influence from the controller, the candidates, or any other factor and
- (ii) any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective.

In a particular case<sup>14</sup>, the EDPS recommended that the agency in question should provide access, upon request, to the

- (i) evaluation sheets drawn by the selection boards,
- (ii) the “*separate assessment and decision documents signed by Chairpersons - on behalf of committees*” documenting the final decision of the selection board made available to candidates and to the
- (iii) minutes of the selection boards.

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<sup>11</sup> See notably EDPS Opinion of 20 June 2008 on staff recruitment carried out by the EMCDDA (case 2008-157).

<sup>12</sup> EDPS Opinion of 7 January 2008 on the "Recruitment of permanent, temporary and contract agents" by the European Maritime Safety Agency, case 2007-566.

<sup>13</sup> See EDPS opinions on recruitment of permanent staff, temporary staff, and contract staff for EU Institutions, agencies and bodies (cases 2004-236, 2005-365 and 2005-366).

<sup>14</sup> EDPS Opinion of 19 June 2008 on EMEA's "Access recruitment database and selection and recruitment procedures" (case 2007-422).

It has to be reminded that neither comparative data concerning other applicants (comparative results), nor the individual opinions of the members of the Selection Committee should be disclosed to the data subject.

Consequently, the protection of the impartiality and independence of the selection board, which is the reason behind the requirement of confidentiality, would be unlikely to be prejudiced if the Selection Committee disclosed to candidates, in a transparent manner, the criteria according to which it evaluated candidates as well as the actual detailed marks or comments a particular candidate received with respect to each criterion.

**As to the procedure proposed by CPVO to exercise these rights:** As a general and fundamental rule, candidates should be able to contact the human resources sector of the agency or the DPO of the agency and submit their request to access or rectify personal data processed within the framework of the selection procedure. The EDPS welcomes the proposal by the controller to deal with such request via the functional email box. The EDPS finds it fair towards the data subject that even if they do not send their request to the functional mailbox, but would send it by regular mail, such a request would also be treated appropriately.

### **3.8. Information to the data subject**

Articles 11 and 12 of Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items.

In the processing operations on staff recruitment, Article 11 (*Information to be supplied where the data have been obtained from the data subject*) applies since data have been provided directly by the data subjects themselves by submitting their application forms.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) applies as well, since data are obtained from members of the selection committee such as evaluation and marking data or whenever applicable by EPSO in charge of carrying out selection tests.

**Placement of the information:** The EDPS considers that the privacy statement should not only be put on the intranet but also on the internet making it available extensively. The privacy statement should be posted on a clearly visible page on the agency's website so that all candidates can be informed of all their rights as well as of all necessary information concerning the processing of their data before the selection procedure begins.

It is also a good practice to provide certain information on the application form, drawing the attention of the candidates to some specific items. In addition, the implementation of the suggestion in the instructions to the personnel department from the Head of the personnel department dated 26 June 2006 (see above in facts) to put a disclaimer notice in the acknowledgement of receipt seems also a good way to diffuse further information on the retention policy.

**Content of the information :** As to the content of the privacy statement, it is important that all elements listed in both Articles 11 and 12 respectively are clearly and thoroughly indicated in the statement.

The privacy statement contains all compulsory elements required by the Regulation, but the EDPS recommends a revision in the text of the note regarding the items below:

- **Legal basis:** The current privacy statement makes reference only to the Articles 27-34 of the Staff Regulations which is the legal basis for recruitment of officials. Nevertheless, the privacy statement is intended to provide information to candidates for temporary agent positions, therefore the legal basis should include Articles 12-15 of CEOS and the CPVO Decision on TAs.
- **Data retention period:** The data retention period should be updated including the decision of the President of CPVO of 1 September 2008 related to the storage of personnel files and including the instructions to the personnel department of 26 June 2006 related to non-recruited candidates. The information note should explicitly make the difference between storage of personal data of recruited candidates and non-successful ones. The storage policy related to the criminal records should also be mentioned.

The EDPS particularly welcomes the information provided to the data subjects **in the application form** regarding the rectification of their personal data and information as to the restriction of that right.

It is also a good practice to **mark clearly the questions which are optional in the application form**, as it is currently the case regarding point 14 of the application form on interests and skills not related to work.

The EDPS endorses the practice that candidates are informed of the outcome of the written tests and interviews, as well as their placement on the reserve list.

### **3.9. Processing of personal data on behalf of the controller**

In the current case, the European Personnel Selection Office can be involved in the selection of temporary agents in two ways:

- 1) where the selection procedure is organised by EPSO, upon the request of the agency and according to Articles 12(3) and (4) of the CEOS and Article 3.1 of CPVO President Decision on Temporary Agents, and
- 2) where the selection procedure is carried out by the CPVO, but in accordance with Article 12(4) of CEOS and Article 3.2 of CPVO President Decision on Temporary Agents, EPSO provide assistance to the CPVO selection procedure (providing and organising written tests), at the request of the CPVO.

In the above two scenarios, EPSO should be regarded as a "processor" which processes personal data on behalf of the controller (Article 2(e) of Regulation 45/2001). Therefore, Article 23 of Regulation 45/2001 should be taken into regard: *"The carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:*

- (a) the processor shall act only on instructions from the controller;*
  - (b) the obligations set out in Articles 21 and 22 shall also be incumbent on the processor unless, by virtue of Article 16 or Article 17(3), second indent, of Directive 95/46/EC, the processor is already subject to obligations with regard to confidentiality and security laid down in the national law of one of the Member States.*
- 3. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in Article 22 shall be in writing or in another equivalent form."*

In this case, EPSO as a processor carries out its activities on the request of the CPVO based on Articles 12(3) and (4) of the CEOS and Article 3 of CPVO President Decision on Temporary Agents. Regulation 45/2001 also applies to EPSO as it is a European body, carrying out the processing in the exercise of EPSO's activities falling within Community law



(Article 3(1) of Regulation 45/2001). Thus, the obligations in Articles 21 on the confidentiality of processing and Articles 22 of Regulation 45/2001 on the security of processing are also incumbent on EPSO.

In another prior checking opinion, the EDPS welcomed that the agreement between the Community institution and EPSO explicitly states that EPSO undertakes to introduce the appropriate technical and organisational measures to ensure the confidentiality and security of processing in accordance with Articles 21 and 22 of Regulation No 45/2001.<sup>15</sup>

### **3.10. Security measures**

Article 22 lays down the general and more specific requirements as to the security of the processing itself.

[...]

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<sup>15</sup> Opinion of 12 June 2007 on a notification for prior checking on the "Selection procedure for trainees at the General Secretariat of the Council of the European Union" (Case 2007-217). Available at: [www.edps.europa.eu](http://www.edps.europa.eu)

## **Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing that the considerations expounded above in the opinion are fully taken into account. The CPVO therefore should:

- reconsider whether collecting the photos of candidates in the application phase is adequate and relevant and should re-consider whether requesting it as an optional item on the application form is not sufficient
- consider the content of the national criminal record (or other similar document) in order to make sure that only relevant data are processed in the light of the requirement of the CEOS
- consider a retention period for personal data relating to the non-recruited applicants on the "reserve lists for appointment" in the light of the validity and the actual extension of the respective reserve lists
- ensure that the processing of electronic data follows as a general principle the same rules as those of the paper file
- develop a retention policy for working documents (paper and electronic) used by the members of the selection committee
- create a "*standard form*", instead of keeping the original criminal record, stating that the person is suitable for the performance of his duties and enjoys his full rights of citizen. The criminal record should be returned to the person immediately after the selection and possible recruitment
- -should remind all recipients of their obligation not to use the data received for other purposes than the one for which they were transmitted, as it is explicitly stated in Article 7(3) of the Regulation
- place the privacy statement on a clearly visible page of the website of the agency
- revise the privacy statement as to the legal basis and the retention period
- develop policies to ensure the security of all paper document and electronic data and file which is used in the selection and recruitment process.

Done at Brussels, 20 February 2009

(signed)

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor