

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Medicines Agency Trainee applications and recruitment

Brussels, 18 May 2009 (Case 2008/0730)

1. Proceedings

On 20 June 2007 the European Data Protection Supervisor (EDPS) received a notification from the Data Protection Officer (DPO) of the European Medicines Agency (EMA) for an ex-post prior check relating to the management of spontaneous CVs sent to EMA. This notification was subsequently withdrawn and a new notification was submitted to the EDPS on 9 December 2008 covering processing operations related to spontaneous CVs and also including trainee applications.

Questions were submitted to the DPO of EMA on 7 January 2009. These were answered on 24 February 2009. A request for an additional document was made on 12 March 2009. This document was sent on 19 March 2009. The deadline was further suspended on 20 March 2009 pending clarifications. These clarifications were made on 27 April 2009 by which, on the one hand, the notification was extended to include the recruitment of trainees and, on the other hand, the part on spontaneous CVs was removed from the notification as it fell outside the scope of Article 27 of Regulation (EC) 45/2001.

On 6 May 2009 the EDPS sent the draft Opinion to EMA for review and comments. EMA provided its reply on 13 May 2009.

2. The facts

Trainee applications. On 4 June 2008, the Executive Director of EMA adopted rules governing in-service training at the EMA.

Trainee applications are received by the EMA following calls of interest which are published twice a year on the EMA website. The EMA makes its selection of trainees on the basis of the applications received. The **purpose** of the processing operation is therefore to organise the selection procedure within the traineeship scheme at the EMA.

Categories of personal data. Candidates are requested to fill in an electronic application form. This form is compulsory in order to submit an application and all items should be filled in. The form collects administrative data (name, nationality, date of birth, address and telephone number), education data and educational/professional background; language skills; traineeship period envisaged; and the units or sectors of the EMA the candidate would be most interested in working in. The candidate must also mention why he/she is applying for traineeship and the reasons for giving priority to this or that sector.

The application is to be sent electronically by email. There is no requirement to send any CV or an additional covering letter nor any photograph.

The application form received by the EMEA is in a pdf format and the information is abstracted into the Agency Traineeship part of the Traineeship database. A standard reply letter is sent by the Personnel and Budget Sector within two weeks to confirm that the candidate's application will be retained on the EMEA database of traineeship applications and reviewed before the next in-take (March or October of each year).

Selection procedure: Managers are given access to the Traineeship database where they can conduct a "key word search" to find suitable candidates who they will contact and interview via telephone. The Executive Director makes the final selection of the applicants on the basis of proposals submitted by the units concerned. Successful candidates are informed by letter, in duplicate, of the dates of the training period. A copy of the rules governing in-service training at the EMEA is enclosed with the letter. If a candidate is not recruited at the first attempt, he/she may reapply, but will need to resubmit a full application afresh.

Recruited trainees receive a contract which they sign for acceptance.

Recruited trainees are responsible for making sure that they obtain the correct visa, where applicable, to enter into the United Kingdom. EMEA is able to provide only a limited support.

Transmission of data. The data of recruited trainees may be communicated to: (i) the Executive Director, (ii) Heads of Unit and Heads of Sector, (iii) Deputy Heads of Sector, (iv) team leaders and (v) Personnel staff.

Conservation of data. The period of conservation of the personal documents for traineeship is of six months for unsuccessful candidates and of two years for persons who have made a successful application and who have actually undertaken a traineeship at EMEA. Further processing for statistical purposes is envisaged, for example, to measure workload in Personnel department statistics could include the number of CVs received or traineeship applications per category (scientific, administrative...).

Data subjects are granted the usual **rights of access** as provided for in Section 5 of Regulation (EC) No 45/2001 (hereinafter "the Regulation"), the detailed procedures had been put in place by the EMEA implementing rules. Further practical measures, such as online requests for access to data and an easy complaint procedure to facilitate the data subject's access, are also implemented. In this respect a specific "personal data access request form" has also been developed by the EMEA.

[...]

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The selection of candidates on the basis of the traineeship selection involves the processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a Community body, in this case, by the EMEA, in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation). The processing of the data is both electronic and manual: the latter forming

part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of Regulation (EC) 45/2001 "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct*". The selection trainees clearly involves evaluation of the ability of data subjects and therefore represents such a processing operation and is therefore subject to prior checking by the EDPS. Furthermore, data relating to the health of the data subjects may be processed should the trainee claim a disability allowance. In this case the prior checking can be based on Article 27(2)(a).

Ex-post prior checking: Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should have been given prior to the start of the processing operation. In this case however the processing operation has already been established. Recommendations made by the EDPS should be adopted accordingly.

Deadlines: The notification of the DPO was received on 9 December 2008. According to Article 27 (4) of Regulation (EC) 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 55 days (93 days + 7 days for comments) to require additional information and to allow for comments from the data controller. Consequently, the present opinion must be delivered no later than on 17 May 2009. This day being a Sunday, the opinion must be delivered by the next working day.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. 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 or in the legitimate exercise of official authority vested in the Community institutions or body*". The 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*" (recital 27).

The legal basis of the processing operation is interlinked with its lawfulness: The rules governing in-service training at the EMEA adopted by the Executive Director on 4 June 2008 (EMEA/1335665/08/4450) lay down detailed rules as concern the official traineeship programme of the EMEA.

The EDPS notes that the processing of applicants' personal data to select them for traineeship is necessary for the performance of the agency's task carried out in the public interest on the basis of the decision mentioned above. Thus, the processing operation is lawful under Article 5(a) of the Regulation. Furthermore, since the application for traineeship is done on voluntary basis, the processing of the data can be based on the consent of the data subject (Article 5(d)).

3.3. Processing of special categories of data

The EMEA has not signalled the processing of special categories of data as those mentioned in Article 10 of the Regulation. However the EDPS notes that the EMEA Rules on traineeship (Article 10.3) provide for a *disability allowance*: "Upon presentation of the proper justification, disabled trainees may receive a supplement to their grant to a maximum of 50% of the amount of the grant. Personnel may consult the EMEA medical service if necessary". This therefore implies that, in certain cases, data revealing the state of health of the trainee candidate may be requested. This should not pose any problem in terms of the prohibition of Article 10 of the Regulation, as the processing of such data can be based on the express consent of the data subject as permitted by Article 10.2.a. Furthermore the processing of such data can also be considered as necessary for the EMEA to respect its obligations in the field of employment law (Article 10.2.b). The EDPS nevertheless reminds EMEA that a justification of the disability of a trainee may only be requested from successful candidates for traineeship who are actually recruited as trainees by the EMEA. Furthermore, the justification requested from trainees should not be excessive for the purposes of determining the need and amount of disability allowances (data quality requirement).

3.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of Regulation (EC) 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The information presented to the EDPS on the data processed during the selection exercise appears to meet those requirements. The requested data are relevant for the purposes of selecting candidates and trainees.

Accuracy: Article 4 (1) (d) of Regulation (EC) 45/2001 provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". Basically all the information processed within the initial selection exercise is provided by the data subject. This serves to guarantee the accuracy of the data. Moreover, it is important that the data subjects can make use of their rights of access and rectification to ensure the accuracy of their personal data processed (see section 3.6).

Fairness and lawfulness: Article 4 (1) (a) of Regulation (EC) 45/2001 also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (section 3.2) and fairness will be dealt with in relation to information provided to data subjects (section 3.8) and the rights of access and rectification (see section 3.7).

3.5. Data retention

Article 4 (1)(e) of Regulation (EC) 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*".

Regarding the ***conservation periods***, the EDPS finds the conservation period of two years for successful candidates and persons who have actually performed a traineeship to be in accordance with Regulation (EC) 45/2001. He underlines the importance of ensuring the destruction of electronic versions of data when destroying paper copies.

3.6. Transfer of data

In line with Article 7 of Regulation (EC) 45/2001, personal data can be transferred within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1). The recipient can process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

As mentioned above, the data may be transferred to: (i) the Executive Director, (ii) Heads of Unit and Heads of Sector, (iii) Deputy Heads of Sector, (iv) Team leaders and (v) Personnel staff.

The EDPS considers that in principle these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. In fact, the data transmitted is necessary for the selection procedure and subsequent recruitment of the person. It should be underlined that only the data necessary for the performance of his/her functions should be communicated to those persons mentioned.

As mentioned above, Article 10.3 of the EMEA Rules on traineeship state that the human resources sector may consult the medical service of EMEA if necessary before making any decision on granting the disability supplement. Even if on a more abstract level, the transfer of disability data can be seen necessary for the tasks of the Personnel and Budget sector (meeting the requirement of Article 7(1) of the Regulation), a special criteria (or form) should be developed determining what data may be exactly requested by the human resources from the medical service, in order to meet the necessity requirement in each and every case.

In order to ensure full compliance with Article 7 (3) of Regulation (EC) 45/2001, the EDPS recommends that all recipients be reminded of their obligation not to use the data received for any further purposes than the one for which they were transmitted. It could, for example, be considered as good practice to remind Heads of sector or of Unit that are granted access to the CVs of trainees for a few days in order to select appropriate trainees for their unit or sector, that they are reminded that they can only use the data for the purpose of trainee selection. This is why the EDPS would encourage such a reminder whenever data contained in applications are transferred internally.

3.7. Right of access and rectification

The following provisions are applicable in the present case: (i) Article 13 of Regulation 45/2001 that provides a right of access to personal data being processed; (ii) Article 14 of Regulation 45/2001 that provides a right to rectification without delay of inaccurate or incomplete data.

The EDPS considers the current practice as compliant with Articles 13 and 14 of the Regulation 45/2001. In particular, he welcomes the fact that practical measures have been put into place to ensure the effective performance of these rights (for e.g. personal data access request forms).

3.8. Information to the person concerned

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing,

the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

According to the information received, the EMEA does not provide specific information on the processing of personal data by the Agency in the field of trainee selection and recruitment. Indeed, specific information is neither provided for in the application form nor in the standard reply letter. The EDPS therefore recommends that the EMEA provide information corresponding to those items listed in Articles 11 and 12 to trainee applicants at the time of collection of the data in the application form and that a link to where this information can be found is mentioned in further correspondence.

3.9. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented 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 to prevent all other unlawful forms of processing"*. EMEA acknowledges that it has adopted the security measures required under Article 22 of the Regulation. On the basis of the information available and in view of the nature of the data collected, the EDPS does not have any indication suggesting that EMEA would not have applied the security measures required in Article 22 of the Regulation.

Having said this, according to the EMEA rules on traineeship, when the Personnel and Budget Sector consult the medical service, the medical service will provide health related information with a view to decide about the amount of disability grant. It is planned that trainees send their justification to the human resources directly, which will remain confidential. Due to the sensitivity of this information, people in charge of handling that data in the Personnel sector should be made aware that they are processing sensitive information and they should respect the confidentiality requirement.

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation (EC) 45/2001 provided that the considerations in this Opinion are fully taken into account. In particular:

- the justification requested from trainees should not be excessive for the purposes of determining the need and amount of disability allowances;
- the Personnel and Budget Sector should limit its request to the medical service to disability related data which is strictly necessary for making a decision about the needs of the trainee and the amount of the additional grant to be supplied to disabled trainees; a criteria or a form should be developed to that aim;
- the EMEA must ensure that all recipients of data concerning trainees be reminded of their obligation not to use the data received for any further purposes than the one for which they were transmitted;

- the EMEA must provide the information listed in Articles 11 and 12 of Regulation (EC) 45/2001 to all candidate trainees;
- people in charge of handling that data in the Personnel sector should be made aware that they are processing sensitive information and they should respect the confidentiality requirement.

Bruxelles, 18 May 2009

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor