

Opinion on the notification for prior checking from the European Commission's Data Protection Officer on documents provided during recruitment

Brussels, 5 June 2009 (Case 2008-755)

1. Procedure

In an e-mail received on 10 December 2008, the European Commission's Data Protection Officer (DPO) sent the European Data Protection Supervisor (EDPS) notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning documents provided during recruitment.

The notification form was accompanied by a specific declaration of confidentiality.

Some questions were addressed to the DPO on 19 December 2008. The replies were provided on 6 March 2009. The draft opinion was sent to the DPO for comments on 20 April 2009. The comments were received on 27 May 2009.

2. The facts

Purpose and legal basis of the processing

The purposes of the data processing are:

- to check that the applicant meets the requirements in terms of the Staff Regulations and of the selection/competition notice;
- to determine the applicant's ranking;
- to determine the data subject's pay entitlement;
- to create an access badge.

This notification concerns only the obtaining and subsequent processing of the documents provided by applicants and does not concern the other aspects of the recruitment procedure, such as the organisation and carrying out of internal or external competitions, assessment and selection of applicants, or the medical examination before recruitment. Nor does it concern the storage of personal files.

Description of the processing operation

Unit A 4 of the Administration Directorate-General (ADMIN) is responsible for obtaining and examining documents submitted by applicants during the recruitment process.

The documents are obtained directly from the data subject or, for data subjects belonging to delegations, through DG Relex. They are then examined and filed in the application file of the person concerned. If any doubt arises concerning diplomas, either the staff member responsible for diplomas or EPSO is consulted.

As to criminal records, if the record is not clean a note is sent to IDOC, along with a copy of the relevant extract, for its opinion.

Once the contract or the letter of appointment has been signed, all the documents are sent to the Personal Files section via the PMO.

Data subjects

The subjects of the data processing are applicants for posts at the Commission (officials, temporary staff, contract staff, etc.).

Personal data processed

For each applicant, the department responsible gathers the following data:

- name, forename,
- contact information,
- sex,
- nationality,
- data on offences, criminal convictions or security measures,
- birth information (date, place, parents),
- qualifications and certificates,
- data on professional experience (employer's name, length of employment, level of responsibility),
- data on linguistic and IT skills,
- photograph,
- data on marital status, dependents and any family members working for the European institutions,
- data on military service status.

More specifically, all applicants must bring the following documents to their interview with an ADMIN A.4 administrator:

- application form (original),
- birth certificate (certified true copy),
- identity document (original or certified true copy),
- recent extract from criminal record/ certificate of good conduct or equivalent (original),
- qualifications and certificates (certified true copies),
- attestations from employers confirming length of employment and level of responsibility, letter of appointment and payslip from current employer (certified true copy),
- photographs,

and, where applicable:

- certificate of marriage/divorce/separation (certified true copy),
- birth certificates of children (originals),
- attestation of military service status (certified true copy).

Applicants may provide any other documents or make any remarks they consider necessary for their applications to be examined.

Note that ADMIN A.4 can certify copies on presentation of originals.

Information to the data subject

The managing department provides information to the data subject in the form of a specific declaration of confidentiality.

It contains:

- a list of the data being processed,
- the purposes of the processing operation,
- the legal basis of the processing operation,
- identity of the controller;
- data recipients;
- the data retention period;
- the existence of the rights of access and rectification, and information on how to exercise them;
- the possibility of appealing to the controller, the Commission's DPO and the EDPS.

Recipients or categories of recipient to whom the data might be disclosed

The data may be transferred to the following departments within the Commission:

- Department of security (always in order to create the badge):
 - o photo,
 - o name,
 - o forename,
 - o contact information,
 - o birth date,
 - o nationality,
 - o identity card number,
 - o status,
 - o staff number,
 - o DG of employment,
 - o dates of beginning and end of employment,
- IDOC:
 - o an extract from the criminal record or equivalent (in the event of uncertainty),
- Head of/expert on qualifications (consulted in the event of doubt regarding a qualification),
 - o diploma,
- EPSO (consulted in the event of doubt regarding a qualification),
 - o diploma,
- Personal files unit, via PMO (in each case, in order to digitise documents and add them to the personal file)
 - o all documents.

Data storage medium

Documents are kept on paper.

Some data forwarded to the Security Directorate (photo, name, forename, contact details, birth date, nationality, identity card number, status, staff number, DG of employment, dates of beginning and ending work) are digitised and forwarded electronically.

Personal data storage policy

Documents are kept by ADMIN A.4 for as long as is strictly necessary to process the applicant's file, i.e. until the signing of the contract (for contract staff and temporary staff) or the letter of appointment (for officials). They are then forwarded to Personal Files.

As regards applicants not recruited, data are kept until the reserve list is closed or, if there is no reserve list, for ten years.

Storage for historical, statistical or scientific purposes is not envisaged.

Measures taken to ensure security of processing

Security measures have been adopted in accordance with security rules in force at the Commission.

3. Legal issues

3.1. Prior checking

The notification describes processing of personal data. Applicants' personal data are collected and processed within the meaning of Articles 2(a) and 2(b) of Regulation (EC) No 45/2001. The data processing in question is carried out by the Commission in the exercise of activities which fall within the scope of Community law (Article 3(1)). The processing is primarily manual, the data are intended for inclusion in a filing system as defined in Article 2(c) of the Regulation: "*any structured set of personal data which are accessible according to specific criteria*". The processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of 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) contains a list of processing operations likely to present such risks, such as "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*" (Article 27(2)(a)) and "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). Here personal data relating to criminal convictions are involved, so the processing may present risks within the meaning of Article 27(2)(a).

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, the check is necessarily *a posteriori*. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The DPO's notification was received on 10 December 2008. Under Article 27(4) this opinion must be delivered within two months. The period allowed for delivery of the EDPS's opinion was suspended for 114 days, so the EDPS will deliver his opinion no later than 5 June 2009.

3.2. Lawfulness of the processing

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

Paragraph 27 of the preamble stipulates that "(...) *the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies.*"

The data processing associated with the recruitment of officials and other staff is necessary for the Commission to be well managed and run smoothly. The procedures in question are based on the Staff Regulations and the Conditions of Employment of Other Servants of the European Communities (CEOS), which in turn are based on the Treaties establishing the European Communities. The processing operation is therefore clearly lawful.

The legal basis of the processing is set out in Title III, Chapter 1 (Articles 27 to 34) and Article 4 of the Staff Regulations and in Title II, Chapter 3 (Articles 12 to 15) of the CEOS and in Title V, Chapter 3 (Articles 82 to 84) of the CEOS. The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

Article 10(1) of the Regulation provides that "*the processing of 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*" unless grounds can be found in Articles 10(2) or 10(3).

In principle the Commission does not collect such data but the applicant may choose to reveal particular personal data, e.g. if the applicant spontaneously provides information on his or her political opinions or religious or philosophical convictions or union membership.

The justification for the processing of data concerning offences, criminal convictions or security measures is taken from Article 28(c) of the Staff Regulations, and therefore complies with Article 10(5) of the Regulation, which stipulates that the "*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, subject to appropriate specific safeguards.*"

3.4. Data quality

Personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)I). In principle, the data required are necessary for the procedure for recruiting officials to be properly run. In this respect the EDPS considers that the conditions imposed by Article 4(1)I of Regulation (EC) No 45/2001 appear to be fulfilled, subject to the observations developed below.

As regards the birth certificate, it has not been shown that the data contained in it are adequate and not excessive in relation to the purpose of the processing. The data it contains are in

principle redundant given those appearing on the passport or identity card. If the birth certificate contained other data (e.g. the fact that the data subject was adopted, a change of surname, parents' occupations, etc.), the collecting of such data would be excessive in relation to the purpose of the processing. The EDPS therefore requests the Commission not to request birth certificates of persons recruited except where it is impossible to obtain a copy of the passport or identity card or if it is necessary to determine the remuneration entitlements of persons recruited (in particular in connection with dependent relatives in the ascending line). Collection of such data should be exceptional and duly justified in each individual case.

Particular attention should also be drawn to the obtaining of extracts from criminal records or equivalent documents (certificates of good conduct, certificates from the police, etc.). The EDPS notes that such documents have different names and very different content from one Member State to another. In some Member States, those documents contain information on the behaviour of the data subject that goes beyond the legitimate purpose of the processing here considered. While the EDPS considers the collection of such documents lawful in principle, the controller should analyse in each case whether or not the content of the documents requested is appropriate for the purpose specified in Article 28 of the Staff Regulations.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in point 3.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (point 3.8).

Personal data must also be "*accurate and where necessary kept up to date*". The Regulation further provides that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*" (Article 4(1)(d)). The system itself helps to ensure that the data are accurate since it is up to the applicant to provide the necessary documents. Moreover, the data subject must have the right to access and rectify data in order to ensure that they are kept up to date and that the file is as complete as possible. This is a second way of ensuring the quality of the data. See point 3.7 below on the rights of access and rectification.

3.5. Data storage

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

For the record, the procedure for storing data makes a distinction between persons recruited and persons not recruited.

As regards files on applicants who are recruited, documents are kept by ADMIN A.4 for as long as is strictly necessary to process the applicant's file, i.e. until the signing of the contract (for contract staff and temporary staff) or the letter of appointment (for officials). They are then forwarded to the personal files department. The EDPS considers this practice to be in compliance with the Regulation.

The EDPS recommends setting a specific period for storing extracts from the criminal record or equivalent documents kept in personal files. Any offences committed by the data subject will be gradually deleted from the records of the Member State concerned, according to

criteria set by that State. The Commission cannot keep these data longer than the Member State in question. Keeping the data in the long term would not respect the right to oblivion or the right to erasure of criminal records, rights which the Member States share. Furthermore, a clean criminal record is clean at the specific time when it is issued and its acquisition meets a requirement of the official's being appointed. This condition is laid down in Article 28 of the Staff Regulations, in the "Recruitment" chapter. The criminal record is therefore strictly necessary for the recruitment of the official, and once this has taken place, there is no need to keep the criminal record. The EDPS therefore requests the Commission not to keep the extract from the criminal record after recruitment. An attestation similar to that following the medical examination would be adequate as a supporting document to cover any audits on the recruitment procedure. This implies that the criminal record or equivalent need neither be kept by the department responsible nor be forwarded to the personal file of the data subject.

As to the files of applicants not recruited, the EDPS considers that in that particular processing operation, the storage period of ten years is excessive in relation to the purpose of the processing. A shorter storage period, not longer than five years, would suffice to deal with any complaints to the Ombudsman or the EDPS, for appeals to the Court of Justice and for the requirements of audit services that might need access to the data under Article 49 of the implementing rules for the Financial Regulation. If the applicant appears on a reserve list which is still valid at the end of the data storage period, those data may be kept until the validity of the reserve list concerned expires.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within other Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

Data are forwarded to the other departments of the Commission (Security Directorate, IDOC, staff member responsible for diplomas, EPSO). Given the purpose of their transfer and the categories of data transferred (see point 2), the EDPS considers these transfers to be in accordance with the Regulation. They are necessary for the purpose of checking documents received and creating the access badge.

Access may also be granted to the bodies authorised to carry out external checks, such as the Court of Auditors and OLAF. In addition, the courts with jurisdiction, the European Ombudsman and the EDPS may, on request, receive copies of items from those files in the context of an appeal or a complaint. The EDPS considers that data transfers carried out under the above conditions are necessary for the legitimate performance of tasks assigned to the recipients. The requirements set out in Article 7 of the Regulation are therefore fulfilled.

Moreover, Article 7(3) of Regulation (EC) No 45/2001 provides that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*. It must be remembered that no-one receiving and processing data in the context of recruitment procedures may use them for other purposes.

3.7. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. Under Article 13 of the Regulation, the

data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to their source. Article 14 of the Regulation allows the data subject a right of rectification. In addition to being given access to their personal data, data subjects may also have the data rectified if necessary.

The EDPS notes that the Commission has set up a formal procedure to make it possible for those rights to be exercised and that the procedure complies with the Regulation.

The EDPS notes that applicants must have access to their whole file, including the assessment notes on the documents they have submitted, e.g. assessments of their diplomas by EPSO or by the staff member responsible for diplomas.

As to the right of rectification, it applies only to factual data. Notes and assessments which are made at the discretion of Commission bodies may not be "rectified" by the data subject other than through appeal or complaint procedures.

3.8. Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on informing the data subject applies in this case since the data subject provides some of the data collected.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since some information may be collected from the various other participants in the process, including the staff member responsible for diplomas, EPSO and IDOC.

The specific declaration of confidentiality includes all the information listed in Articles 11 and 12 of the Regulation.

The EDPS notes that this declaration must be provided to each applicant, e.g. by sending it with the request for documents to be submitted.

3.9. Security

Article 22 of Regulation (EC) No 45/2001, provides that "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*". Those security measures must in particular prevent any unauthorised disclosure or access.

Given the available information, the EDPS has no reason to think that the Commission has not implemented the security measures required by Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This implies, in particular, that the Commission should:

- limit collecting of extracts from criminal records;
- refrain from requiring provision of birth certificates for persons recruited, other than exceptionally;
- not keep extracts from judicial records after the recruitment procedure;
- review the period for which data on persons not recruited are kept in the light of point 3.5 of this opinion;
- bear in mind that no-one receiving and processing data in the context of recruitment procedures may use them for other purposes.

Done at Brussels, 5 June 2009

(Signed)

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