

Opinion on the notification for prior checking received from the Data Protection Officer (“DPO”) of the European Union Agency for Fundamental Rights (“FRA”) on 2 October 2008 regarding FRA’s selection and recruitment of its temporary and contractual agents

Brussels, 24 September 2009 (Case 2008-589)

1. Proceedings

On 2 October 2008, FRA's DPO submitted to the European Data Protection Supervisor (“EDPS”) a prior checking notification regarding FRA’s selection and recruitment of its temporary and contractual agents (“**Notification**”).

The EDPS sent the draft of the Facts Section of the Opinion to FRA with his remaining questions on 25 November 2008. FRA responded on 13 July. The EDPS sent his draft Opinion for comments on 15 July 2009. FRA provided its comments on 23 and 24 September.

While this prior checking procedure was pending, on 10 October 2008, the EDPS published his Guidelines concerning the processing operations in the field of staff recruitment (“**Recruitment Guidelines**”) with the aim of facilitating a joint prior checking procedure for Community agencies whose recruitment procedures have not yet been prior checked by then. In the framework of this joint exercise, on 7 May 2009 the EDPS issued his Opinion on notifications for prior checking received from the Data Protection Officers of certain Community agencies concerning the “Staff recruitment procedures”.

Considering that FRA submitted its prior checking notification prior to the issuance of the Recruitment Guidelines and the commencement of the joint prior checking procedure for the agencies concerned, the EDPS carried out a separate prior checking procedure for FRA.

2. The facts

2.1. Scope of the Notification and purpose of the processing. The Notification covers the selection and recruitment of FRA's temporary and contractual staff.

During the process, applicants apply for specific calls advertised by FRA. A selection committee established by FRA then selects a number of applicants, in a competitive process, to be included on a reserve list. Candidates are subsequently recruited from the reserve list for specific vacancies within FRA.

2.2. Legal basis of the selection and recruitment procedures. Articles 12 and 82 of the Conditions of Employment of other servants of the European Communities (“**Conditions of Employment**”) provide the primary legal basis for the selection and recruitment of temporary and contractual staff for FRA.

The detailed conditions for the selection and recruitment procedure are then set forth in Decision nr 2006/02/A of the Director of EUMC¹ (“**Director’s Decision**”). This decision is available on FRA's intranet, which is accessible to FRA's staff but not published on its external website.

2.3. The procedures as described in the Director’s Decision. Chapter C of the Director’s Decision describes the selection and recruitment procedures as follows:

Article 4

Details of the vacancy notice are drawn up by the Head of Unit, where the vacancy is situated, and endorsed by the Head of Human Resources and Planning.²

The publication must specify:

- the category or the grade of the vacancy
- the type of duties and tasks involved
- all compulsory requirements for eligibility of candidates
- where appropriate, the core expertise and skills required
- where appropriate, the aspects which will be considered as assets
- the closing date for applications (with a minimum of 20 working days from the date of publication of the vacancy notice and in duly justified cases 10 working days).

The vacancy notice should also mention that the Centre has the right, on the basis of the overall information given in the CVs, to draw up a short list of candidates to be invited for interview.

Article 5

Candidates shall provide the Centre with a curriculum vitae and a letter of motivation. Candidates will be invited to send their applications by email.

Candidates may be required subsequently to provide Human Resources and Planning with additional documents or information.

Article 6

The Director shall appoint for each selection procedure a selection board. The appointment shall take place the day of the publication of the vacancy note.

The role of the selection board is to:

- determine which candidates fulfil the requirements detailed in the notice
- create a shortlist of candidates to be invited to an interview according to the provisions of article 4

¹ The European Monitoring Centre on Racism and Xenophobia (EUMC) is the legal predecessor of FRA.

² When commenting on the draft Opinion, FRA explained to the EDPS that at the time of issuance of this Opinion, the Director's Decision is in the process of being modified. The EDPS Opinion therefore has been slightly revised to already reflect the expected changes. These are specifically noted in footnotes. One among these changes is the replacement of the word "Administration" by the words "Human Resources and Planning" or "Human Resources and Planning Department".

- decide on suitability of candidates for the post based on their qualifications and experience as well as on their performance at interview and/or in written/practical tests
- make recommendations on the candidate(s) to be chosen

The selection board will consist of a Chairman (usually the Head of Unit concerned or someone delegated by it), a member from the Unit concerned, a member from another Unit, a member of Human Resources and Planning. The Staff Committee will be invited to nominate a member of staff as their representative in the selection board. The representative of Human Resources and Planning will also support the committee as facilitator and secretary. The Director has the right to nominate an external expert to act as a member of the selection board.

Article 7

In no case may agents of the Centre take part in any way in the recruitment procedure of a relative or of any external person who they happen to know to whatever degree or for whatever reason without declaring it beforehand. Members of the selection board will be asked explicitly if they know or are related to external candidates whose application are considered by the board.

Article 8

At the first place the Human Resources and Planning Department checks the fulfilment of all formal requirements. Failure to comply with one of the formal requirements will result in a disqualification of the applicant concerned. Then the selection board decided from among the eligible applicants those who are to be invited to attend an interview.

Preferably, no later than 15 working days after the deadline to submit applications, applicants invited for an interview shall be informed of this decision in writing. The invitation will be sent out by Human Resources and Planning.

Candidates selected for an interview must accept the invitation to the interview within a reasonable timescale (10 working days).

Article 9

All the interviews shall be carried out by the selection board, preferably no later than 20 working days after the decision of the board on the list of candidates to be interviewed.

Candidates invited for interview will be asked questions predefined by the selection board and designed to assess their suitability for the post. They will be asked to undergo written or practical tests.³

³ In the new version of the Director's Decision referred to in footnote 2 the phrase "where appropriate" will be deleted from the beginning of this sentence, thus signalling that candidates will always have to undergo written or practical tests.

Article 10

The representative of Human Resources and Planning shall prepare a Proces Verbal (PV) and a justification of choice on the outcome of the interviews listing the candidates in alphabetical order and draw up a reserve list of suitable candidates.

The PV shall be approved and signed by all members of the selection board. It will be kept by Human Resources and Planning.

If no candidate is considerable suitable after interview, the selection board will decide whether to continue the procedure with the candidates in reserve or to re-launch the procedure.

Article 11

The proceedings of the selection board are strictly confidential. No information on the proceedings shall be communicated outside the board by the members of the selection board. No information on the outcome shall be communicated until a reserve list is drawn up and until the chosen candidate has accepted the job offer.

2.4. Data collected during the selection and recruitment procedure

2.4.1. Application phase. According to the new procedures in effect as of April 2008 applicants need to apply on-line through FRA's "recruitment tool".

The on-line application form requires the following information:

- "Contact details" including name, address, email address and telephone number
- "Demographic details" including date of birth, nationality (also second nationality as an optional entry), gender, first language (also second and further languages as optional entries)
- Attachments including professional resume in the European CV format, motivation letter and eligibility form⁴
- "Working experience" indicating the total length of working experience (in months) and of these, separately, the total length of experience relevant to the job

FRA confirmed that no other information is collected at this stage. For example, the applicants are not required to attach their photographs (although they may do so on their CVs if they so wish), references, diplomas, or any other documents. Nor does FRA use any database for background check or carry out any background research on its own on the candidates.

2.4.2. Selection phase. The selection phase consists of an interview and, in all cases, also a practical or written test. At this stage, applicants are required to provide copies of their diplomas and copies attesting previous work experience (copies of contracts, payslips, or any

⁴ This refers to the eligibility and selection criteria grids, introduced in April 2008, which are published along with the call for applications. With respect to each item on the eligibility grid, applicants must indicate whether they fulfill that requirement (e.g. "I am entitled to my full rights as citizen" / "yes" or "no"). As regards the selection criteria grid, either yes or no answers are expected (e.g. "I have experience in a multicultural/multilingual environment" / "yes" or "no") or the applicants have to rank themselves on a scale of 1 to 4 (e.g. "My ability to draft high quality analyses and policy papers is" / "slight", "good", "very good", "excellent").

other documents proving previous employment). If the applicant requests reimbursement of his/her travelling expenses, his/her banking details also need to be provided in the standard EU format (legal entity form and financial identification form).

2.4.3. Recruitment phase. After the applicant has been selected for a particular job, and offered a contract, he/she needs to provide the following additional documents:

- military certificate
- criminal record certificate (in most cases this means a certificate confirming that the candidate has no criminal record)
- medical certificate (to prove that the applicant is physically fit to perform his/her duties)
- copy of ID or passport
- certified true copies of diplomas
- certified true copies regarding previous work experience (copies of contracts, payslips, or any other documents proving previous employment).

2.5. Access rights. Applicants have the right to modify their applications until the closing date of the vacancy. The application, except for contact data, cannot be changed after this deadline in order to guarantee equal treatment to all applicants.

Applicants do not have right to physically access their data prior to the lapse of the deadline for the given vacancy. This is because at this time, there are no paper files. Once the deadline is passed, they can also request physical access to their documents. This allows, for example, that a candidate could review the paper files in preparation for a legal appeal against the selection or recruitment decision. In any event, should they require further information or wish to exercise their rights of access, they may send an email to the following functional mail-box: recruitment@fra.europa.eu. Any request is analysed by the HR staff who will respond to the data subjects via email. FRA explained to the EDPS that candidates have the right to information regarding decisions that directly affect them. Upon request, FRA provides as much information as possible while at the same time respecting the confidentiality of the Selection Board's work and deliberations.

Data subjects have the right to block data at any time as well as to object in case their data are transferred to third parties. The personal data can be blocked immediately upon request of the data subject at any time during the procedure.

At any point the data can also be erased upon data subjects request provided there is no conflict with the defined procedure. The data will be erased within 15 working days. When asked for clarifications, FRA explained that a conflict with the defined procedure might arise, in some cases, for example, when the data subject requests deletion of data on the reserve list while the reserve list is still valid and these data are necessary for auditing purposes. However, a candidate, in principle, at any time, when he/she wishes to withdraw an application, can request his/her data to be deleted.

2.6. Information provided to data subjects. Information regarding the selection and recruitment procedures is provided to the applicants both in the text of the vacancy notice and on the website of FRA.

As regards data protection, the template for vacancy notices for temporary agents presented to the EDPS includes a section on data protection. The template confirms that

- applicant data will be processed in compliance with Regulation 45/2001, in particular, as regards the confidentiality and security of the data,
- data will be processed solely for the purposes of pre-selection and recruitment, and that
- candidates may contact the FRA at a dedicated functional email-box if they have any questions regarding the processing of their data.

The template regarding contractual agents has no mention of data protection.

A separate privacy statement, specific to the selection and recruitment procedure, is available on the website of the FRA, and can be reached from the main recruitment page. This statement reads as follows:

Privacy Statement

The personal information we request from you will be processed in line with **Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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.**

Who has access to your information and to whom is it disclosed?

The members of the Human Resources Department in charge of recruitment and establishment of individual rights, the Management of the organizational unit concerned, the staff members participating to the selection, the Finance Department (in case of recruitment).

You are free to give your data on a voluntary basis. Failure to reply automatically excludes the subject from recruitment.

You have the right to access, rectify or block your data. Please note that for practical reasons there is no possibility to update and correct data after the deadline of the competition. Should you require further information or wishes to exercise your rights you should address to: recruitment@fra.europa.eu.

You have also the right to have recourse at any time to the European Data Protection Supervisor. <http://www.edps.europa.eu>.

The legal basis of the processing operation for which the data is intended is that the processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

How long do we keep your data?

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 5-year period.

Contact information:

If you have any further questions concerning your data, please contact the controller.

European Union Agency for Fundamental Rights
Head of Human Resources and Planning Department
Schwarzenbergplatz 11
A-1040 Vienna
Austria⁵

Finally, there is also a general privacy statement available at the FRA website⁶. This statement:

- provides an introduction to data protection, including definition and examples of personal data, as well as explanation of the concept of manual and automated processing activities,
- refers to Regulation EC (No) 45/2001 and other relevant legal instruments,
- refers to the principle of fairness and lawfulness,
- provides a general overview of the purposes for which data may be processed,
- lists the rights of data subjects,
- list a number of other important data protection principles,
- describes the role of the main players (EDPS, DPO, controller), and
- provides a link to three specific privacy statements including the one on recruitment.

2.7. Conservation period. The data of (both successful and un-successful) candidates received as of April 2008 are kept for five years after which time they are destroyed. The retention period commences on the deadline date of the submission of applications.

FRA keeps a reserve list with the candidates whose applications are successful.

Spontaneous applications are not kept.

Statistical data are kept in order to provide information such as how many applications were received, which nationalities, which gender, etc. These data are conserved in an anonymous format.

2.8. Recipients and data transfers. A limited number of persons in FRA's HRP Department have on-line access to the recruitment tool and the applications in it. They also have direct access to any other documents submitted in connection with the selection or recruitment procedure.

FRA's HR unit transfers the data of the applicants to the selection board members. The selection board returns the documents to the HR unit after it has made its decision.

External members may perform the tasks either inside the premises of FRA or outside. In the latter case the transfer of data is supported with the following text: "Please note that in order to respect the Regulation 45/2001 on personal data, please make sure that all the measures shall be taken to ensure a level of security appropriate in order to prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and prevent any unlawful forms of processing of the data received from the applicants". Selection

⁵ FRA noted the new address here and undertook to make the change on its privacy statement.

⁶See http://www.fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=48a95308c17b5.

board members are made aware of the confidentiality of these personal data and sign a Declaration of Absence of Conflict of Interest and Confidentiality.

In addition, the data of applicants are transferred to the management of the organisational unit concerned (i.e. the unit hiring) and to the staff members of the unit involved in the financial workflow for reimbursement of expenses and expenses related to taking up duties. IT staff may also have access for purposes such as troubleshooting IT problems with the database.

2.9. Security. On-line access to the recruitment database is password-protected and given to the HR staff members only on a need-to-know basis. FRA uses the IT infrastructure provided by the European Commission and the standard security measures apply.

Physical files are kept in secure cabinets accessible by HR staff members on a need-to-know basis. Transmission of documents to the external members of the Selection Board takes place physically via courier in a registered and strictly confidential way or in person by an HR staff member.

3. Legal aspects

3.1. Prior checking

Scope of Notification. As discussed under Section 2.1 above, the scope of the Notification and of this Opinion covers the selection and recruitment of FRA's temporary and contract staff.

Applicability of the Regulation. Regulation 45/2001 (the “**Regulation**”) applies to the “processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system” and to the processing “by all 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).

All elements that trigger the application of the Regulation are present here:

First, the notified selection and recruitment process entails the collection and further processing of personal data as defined under Article 2(a) of the Regulation.

Second, the personal data collected undergo “automatic processing” operations as well as manual data processing operations, which form part of a filing system (Article 3(2) of the Regulation).

Third, the processing is carried out by FRA, a Community body, in the framework of Community law (Article 3(1) of the Regulation).

Based on the foregoing, the Regulation is applicable.

Grounds for prior checking. Article 27(1) of the Regulation 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) contains a list of processing operations that are likely to present such risks. This list specifically includes, under paragraph (b), “processing operations intended to evaluate

personal aspects relating to the data subject, including his or her ability, efficiency and conduct.” The notified processing operation involves evaluation of the applicants’ ability to perform the job functions for which the selection and recruitment procedures have been organized. Therefore, the notified processing operation requires prior checking by the EDPS.

Additionally, the processing operation also involves some processing of data related to criminal offences and health (namely the candidates need to submit their criminal records and a medical certificate in the final phase of recruitment). Therefore, Article 27(2)(a) serves as a supplementary ground for prior checking.

Notification and due date for the EDPS Opinion. The Notification was received on 2 October 2008. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The procedure was suspended for a total of 301 days (230 days + 71 days for comments). Thus, the Opinion must be rendered no later than 2 October 2009.

Ex-post prior checking. The processing operations started before the EDPS had been notified. Since prior checking is designed to address situations that are likely to present risks, the opinion of the EDPS should normally be requested and given prior to the start of the processing operation.

However, this processing operation was notified after it had already been in place for some time and therefore the prior checking needs to be carried out ex-post. This does not represent a major problem in the present case provided that all recommendations of the EDPS are taken into account.

3.2. Lawfulness of the processing

General comments. Article 5(a) of the Regulation provides that personal data may be processed if “processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties ... or other legal instrument adopted on the basis thereof”.

The first issue under Article 5(a) is to determine whether there is a specific legal basis for the processing: a Treaty provision or another legal instrument adopted on the basis of the Treaties. The second issue is to determine whether the processing operation is necessary for the performance of a task carried out in the public interest. To address this second issue in the present case, Recital 27 of the Regulation needs to be taken into account, which specifies 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”. Thus, the second issue in the present case is whether the processing is necessary and proportionate for the management and functioning of FRA.

With regard to the first issue, the selection and recruitment procedure for temporary agents is based on the provisions cited in Section 2.2 above. Thus, specific legal instruments adopted on the basis of the Treaties allow for the notified processing operations. With regard to the second issue, the EDPS is also satisfied and does not question that the notified processing operation is necessary and proportionate for the management and functioning of FRA.

To conclude, the EDPS considers that the notified processing operations are lawful, so long as the recommendations made in this Opinion are followed.

3.3. Processing of special categories of data

Applicable provisions of the Regulation. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited unless an exception can be found in Articles 10(2) -(4) of the Regulation.

The prohibition is lifted among others where the data subject has given his/her express consent to the processing (Article 10(2)(a)) and where the processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof, or as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards (Article 10(2)(b) of the Regulation).

Further, Article 10(5) provides that processing of personal data relating to offences, criminal convictions or security measures may be carried out only if authorized 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 safeguards.

Special categories of data collected during the selection and recruitment procedures. During the selection and recruitment procedures certain “special categories of data” are systematically collected, namely, information regarding criminal records.

In addition, the applicant's application form, in particular certain sections of the EU CV covering additional information, may reveal additional sensitive data. These may include, among others, trade union membership or membership or activities in religious or political groups that may reveal political opinions, religious or philosophical beliefs.

Medical certificates are also collected. However, the organization of the medical check-ups falls outside of the scope of this Notification and Opinion, therefore, processing of medical data will not be discussed further in this document.

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.

Additional sensitive data. When an applicant reveals additional sensitive information, without this being specifically requested or the volunteering of information being encouraged by FRA, it should be considered that the candidate gave his/her consent to the processing of that data, thus the condition of Article 10(2)(a) is met.

3.4. Data Quality

Adequacy, relevance, and proportionality. According to Article 4(1)(c) of the Regulation personal data must be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.”

The EDPS does not question the adequacy, relevance and proportionality of the data collected in the database.

Fairness and lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects (see Section 3.8 below).

Accuracy. According to Article (4)(1)(d) of the Regulation, personal data must be “accurate and, where necessary, kept up to date”, and “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.”

Based on the information provided to him, the EDPS does not question the accuracy of the data collected during the selection and recruitment procedures.

3.5. Conservation of data. The general principle in the Regulation is that personal data may 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 (Article (4)(1)(e) of the Regulation).

The EDPS recommends that FRA evaluates the necessity of keeping all data for a period of five years as of the date of the deadline for the application. During this assessment it must bear in mind that conservation periods should closely match the periods during which access to the personal data may be necessary for clearly specified purposes. FRA should, in particular, assess how long it needs to keep the data in case of an eventual challenge to a selection or recruitment decision, or for the possibility of an eventual audit.

In addition, even if certain documents may need to be kept to facilitate future audits, others, which are not indispensable for purposes of the audit, should be deleted earlier. In this respect, the EDPS specifically calls the attention of FRA to a recently added last paragraph to Article 49 of the Implementing Rules of the Financial Regulation⁷, which provides the following: “Personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes.”⁸

Accordingly, a case-by case analysis is recommended with respect to each type of data collected in connection with selection and recruitment, to determine whether the data are necessary for budgetary discharge, control and audit purposes.

The EDPS is especially concerned about keeping highly sensitive data, such as information regarding criminal records for longer than absolutely necessary for purposes of selection and recruitment.

It is inappropriate to keep information about crimes that have expunged and which would be no longer reflected in a criminal record, police record or certificate of good conduct. These

⁷ Commission Regulation (EC, Euratom) No 2342/2002 of 23/12/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

⁸ This recent amendment was adopted following the recommendations provided in paragraphs 33-47 of the "Opinion of the EDPS of 12 December 2006 on proposals for amending the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules (COM(2006) 213 final and SEC(2006) 866 final), OJ C 94, 28.04.2007, p. 12".

documents represent snapshots which may not even reflect the reality just one day after their emission. The principle of accuracy of data is therefore not respected if they are conserved for any significant period of time. Moreover, 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.).

These data should be deleted at the latest following the lapse of deadlines open to challenge the selection or recruitment procedure (or following the date when any follow-up procedure on that challenge has been completed, if criminal records are an issue in the procedure). Indeed, 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 recruitment⁹. If a person is recruited, it should also be returned.

When commenting on the draft Opinion, FRA indicated its commitment to follow this recommendation. This was welcomed by the EDPS.

As a good practice, the EDPS also encourages a flexible approach to accommodate candidates (in all stages of the recruitment procedure) who wish to withdraw their applications and wish to request that their data be deleted earlier than the general timelines provided by FRA. For example, if a candidate on a reserve list withdraws his/her application and specifically requests FRA to delete his/her name, CV, and supporting documents from its database (both in paper and in electronic form), FRA should accommodate such a request, unless exceptional circumstances (e.g. an ongoing litigation) warrant otherwise. If a record of what happened to the data so deleted is required for auditing purposes (to audit the recruitment procedures), FRA may consider, for example, keeping a written record of the fact that a request was made and that the data (e.g. CV) were deleted. This can then serve as an evidence that the deletion has indeed occurred and its reason was the data subject's request.

In addition to these specific recommendations, FRA should also carefully consider the general recommendations set forth in Section B/4 (data retention) of the Recruitment Guidelines.

Finally, Section 3.8 provides further recommendations on how to communicate the conservation period to data subjects.

3.6. Recipients and data transfers. As regards recipients, the EDPS welcomes the fact that on-line access to the recruitment database is limited to those members of the human resources department who deal with recruitment and that off-line access (print-outs) are only given to members of the selection board and management (the recruiting head of unit) and others when needed in the selection/recruitment procedure, as described in Section 2.8 above.

As regards transfers under Article 7 of the Regulation, the EDPS additionally calls FRA's attention to the requirement that if unforeseen data transfers are requested by any third party, FRA should allow transfers subject to (i) either the unambiguous (with respect to sensitive data, explicit) and informed consent of the data subject, or (ii) as otherwise specifically allowed by the Regulation. The EDPS also emphasizes that pursuant to Article 7(3), the recipients may only process the personal data transferred for the purposes for which they were transmitted.

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

In case of doubt, the EDPS recommends that the head of FRA HRP consults FRA's DPO before he/she makes the requested data transfer.

3.7. Right of access and rectification. Article 13 of the Regulation grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

The EDPS welcomes that, as described in Section 2.6 above,

- the Notification confirms that FRA, in general, provides access to their personal data to candidates or staff members,
- rights can be exercised by sending an email to a functional email box,
- and that FRA did not establish any specific restrictions on access to the data subjects to their data, except the rules aimed at respecting the application deadlines and equal treatment.

The EDPS makes the following recommendations to further improve FRA's procedures:

First, as a good practice, the EDPS recommends that upon specific request internal documents such as the proces verbal (PV) referred to in Article 10 of the Director's Decision would also be made available to the data subjects.

Any exception to restrict access to internal documents should only be applied in justified cases. As a general principle, restrictions on access pursuant to Article 20(1)(c) of the Regulation to protect "the data subject or the rights and freedoms of others", as the EDPS pointed out in previous prior checking procedures regarding EPSO's practices¹⁰, should not be interpreted to arbitrarily limit access of data subjects to the documents on the basis of which decisions were made about them. The acceptable restrictions, in principle, are of two kinds:

- restrictions on giving access to candidates of individual personal data of competing candidates (this does not prevent the provision of access to aggregate information or anonymized information); and
- restrictions on giving access to candidates of certain confidential internal documents of the selection bodies, where such access would jeopardize the confidentiality of the deliberations and decision-making of the selection board.

In line with the previous opinions of the EDPS on EPSO selection procedures and the follow-up of these opinions with EPSO, the EDPS recommends that FRA 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 body or safeguarding the rights of other candidates.

FRA must bear in mind that (i) the objective of any confidentiality requirement is to ensure that the selection body is able to maintain its impartiality and independence and is not under undue influence from the candidates or others, and (ii) any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective.

¹⁰ 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).

Therefore, as a good practice, the EDPS recommends that FRA should provide access, upon request, to the proces verbal and other internal documents documenting the decisions of the selection bodies.¹¹

Protection of the impartiality and independence of the selection body, which is the reason behind the requirement of confidentiality, would be unlikely to be prejudiced if the selection body disclosed to candidates, in a transparent manner, the criteria based on which it evaluated candidates and the actual detailed marks or comments a particular candidate received with respect to each criterion. Indeed, providing a specific comment in the proces verbal, upon specific request of the candidate, referring to the evaluation of the specific candidate (e.g. that the candidate's communication skills or professional experience was judged to be insufficient compared to other candidates), should not, in the judgment of the EDPS, negatively effect the impartiality or independence of the selection board. This does not mean that the individual marks of other candidates should also be generally provided: indeed, their rights to their personal data must also be strictly protected.

In any event, and notwithstanding the recommendations above, the EDPS welcomes FRA's plans that in the future they would systematically inform candidates about their scores at the oral interviews, as well as about the lowest scores of those candidates who were selected, so that failed candidates could make their own comparisons and could have a better understanding of how far they were from the passing rate.

Second, FRA should provide procedural safeguards to ensure that access rights are granted in a timely manner and in accordance with the requirements discussed immediately above. These may include a maximum time-limit established for response to the request by FRA, and the obligation for the controller to request the advice of the DPO in case of doubt whether a request can be granted.

3.8. Information to the data subject. Articles 11 and 12 of the Regulation require that certain information be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 is applicable to data obtained from the data subject, which is the case, for example, with regard to data contained in the candidate's on-line application form. Article 12 applies when the data have not been obtained from the data subject. This is the case, among others, of the marking and evaluation data contained in documents prepared by the selection board or FRA HRP.

The EDPS welcomes the combination of the general privacy statement and the specific recruitment and selection privacy statement on the FRA website, which are both easily accessible from the FRA's recruitment page. The EDPS would welcome, as good practice, if the Director's Decision was also made available to candidates, for example, on-line via the recruitment page.

The EDPS additionally recommends that the specific privacy statement specify the purposes of the processing and clearly state that the data cannot be used for purposes other than to carry out the selection and recruitment.

The EDPS further notes that with regard to the conservation period there appears to be an inconsistency between the information provided during the prior checking procedure

¹¹ If necessary to safeguard the confidentiality of the deliberations and decision-making of the selection body, certain information may be deleted from the documents provided. For example, if opinions varied about a candidate, it is not always necessary to indicate which selection body member favoured and which did not favour the applicant. Any deletions, however, should be assessed on a case by case basis.

(conservation period starts on the day which was set as a deadline for the submission of the applications) and the one noted on the privacy statement (conservation period starts once the "operational purposes" are closed). This should be clarified. When commenting on the draft Opinion, FRA made a commitment in this regard, which was welcomed by the EDPS.

3.9. Security measures. According to Article 22 of the Regulation, the controller must implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The EDPS has not encountered any facts which would suggest doubts about the adequacy of the security measures for data processed in the framework of FRA's selection and recruitment procedures. In any event, the EDPS calls attention to the fact that FRA should ensure that applicant data in the database are not accessible by and not disclosed to anyone other than those specified in this Opinion.

3.10 Recruitment Guidelines. The EDPS additionally recommends that FRA carefully reviews the Recruitment Guidelines and the Joint Recruitment Opinion referred to in Section 1, to make sure its selection and recruitment practices are also fully in compliance with the EDPS recommendations made to other agencies as part of a joint prior checking procedure between the autumn of 2008 and the spring of 2009, while this prior checking case was suspended pending response from FRA.

Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations noted in Sections 3.2 through 3.10 are fully taken into account. The recommendations of the EDPS include, most importantly, the following:

- Conservation of the data:
 - FRA should reconsider the conservation periods to ensure that data are kept no longer than necessary for the purposes initially contemplated. In particular, when data are conserved for budgetary discharge, control and audit purposes, personal data contained in supporting documents shall be deleted where possible when those data are not necessary for these purposes. Special attention should be paid to highly sensitive data such as criminal records. In this regard the EDPS welcome the commitment of FRA to comply with the recommendations.
- Rights of access:
 - FRA should ensure that any restrictions in order to preserve the confidentiality of the deliberations of the selection panel must be reconciled with the candidates' right of access; the EDPS recommends that further efforts should be made to ensure wider access to internal documents. Certain other additional procedural safeguards are also recommended (see Section 3.7).

- Information to data subjects:
 - Certain modifications are necessary with respect to some items under Articles 11 and 12 of the Regulation (see Section 3.8). The Director's Decision should be made available to candidates.

Done at Brussels, on 24 September 2009

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor