



Opinion on a notification for Prior Checking received from the Data Protection Officer of the Commission regarding spontaneous job applications in the Bureau of European Policy Advisers (BEPA)

Brussels, 29 October 2009 (Case 2009-0013)

1. Proceedings

On 6 January 2009, the European Data Protection Supervisor (hereinafter 'EDPS') received from the Data Protection Officer (DPO) of the Commission a notification for prior checking regarding the data processing operations that take place in the context of the spontaneous job applications at the Bureau of European Policy Advisers (BEPA) ('the Notification').

On 12 January 2009, the EDPS requested complementary information regarding the data processing. The Commission provided the information on 21 August 2009. Due to the fact that all suspension periods were suspended by the EDPS during the month of August, the EDPS considers that this information was received on 1 September 2009. The draft of the opinion was sent to the Commission for comments on 20 October 2009. These were provided on 28 October 2009.

2. The Facts

The mission of the Bureau of European Policy Advisers (BEPA) is to provide policy and political advice to the President and Commission services on issues relevant to the President's agenda and future of policies in the Union. According to the Commission Decision of 28 April 2004 as amended, laying down rules for implementing Article 7(2) of the Staff Regulations as regards temporary management posts, in some cases it may be necessary to have recourse to temporary posting to fill management posts. The Decision specifies that there are no formal selection procedures for the engagement of BEPA temporary agents. The purpose of the processing operation under analysis is to collect spontaneous CVs in order to constitute a reserve of potentially suitable candidates for future job openings at BEPA.

BEPA receives unsolicited job applications and CVs from persons interested in working at the Commission, including laureates from the Commission. The general rule in the Commission as concerns spontaneous applications is not to keep these CVs and to inform candidates that a specific system has been put in place to collect CVs (EU CV Online)¹. However, because of its specificities (including high turn-over of staff; possibilities of recruiting temporary staff with AT2c contracts, in accordance with Commission Decision 28/04/2004), it is appropriate for BEPA to keep CVs of potentially suitable candidates as a source of choice for specific job openings. BEPA has therefore put in place a system for dealing unsolicited job applications.

¹ The EU CV online has been the object of a prior checking opinion by the EDPS (2006-310)

A functional mailbox "BEPA-spontaneous-job-application" has been created. Its access is restricted to the Head of Unit and two staff members of the coordination Unit. BEPA staff members should therefore not receive spontaneous job applications directly. Should they receive a spontaneous job application by e-mail they must forward it to the dedicated mailbox. Staff may also send the following standard message to the candidate:

" Dear Mr/Ms, thank your for your message which I am forwarding to the department in BEPA responsible for the appropriate follow-up. Please note that in accordance with Regulation (EC) No 45/2001 on the protection of personal data, the information you have supplied will not be kept by me".

Staff members of BEPA receiving applications must not further circulate these CVs and, after having forwarded the mail to the functional mailbox they must delete it. If the application arrived by normal mail, it should not be registered in Adonis and no copy should be made by BEPA staff. The letter should be forwarded to BEPA Coordination Unit for the follow-up.

The BEPA coordination unit is responsible for ensuring the follow-up to all applications. Applications are submitted to a first screening taking into account job profiles/skills and current and future job vacancies in BEPA:

- In case of trainees, a standard reply is immediately sent to the applicant through the dedicated mailbox. This reply form informs the candidate that "the selection is already closed and they can still apply for a subsequent exercise making a fresh application via the Traineeship's Office of the Commission" or "the selection is underway and they will be kept informed on the development of the trainee selection by the Traineeship's Office of the Commission". In both cases, no data is kept by the BEPA coordination unit.

- In case of clearly unsuitable external/internal candidates (e.g. profiles obviously not fitting current need in BEPA), a standard reply is sent to the applicant through the dedicated mailbox. This reply form informs the candidate that he must address his application via EN CV Online. The candidate is informed that no data is kept by the BEPA services. If the application arrived by post, the reply is sent together with the entire incoming application (letter, CV, diplomas, references, etc). Any document thus annexed to the reply shall be neither scanned nor attached to the registration record.

- Potentially suitable applications by internal/external candidates/"lauréat de concours" can be included in a list submitted to BEPA Management Team for its consideration. The candidate will be informed that there is no immediate opportunity of employment at BEPA, but that the CV will be submitted for consideration to the BEPA Management Team who will decide whether the application will be retained for a possible position in BEPA. This same standard letter informs the candidate of the identity of the controller and possible recipients; the conservation period of the data; the possibility to access, check, update or delete the CV; and the right to have recourse to the Commission's DPO or to the EDPS. In the case of external candidates/competition laureates they are recommended to address their CV to the EU CV Online web page.

The Management team decides whether the applicant should be retained for a possible position in BEPA and, depending by current or forthcoming vacancies in BEPA, to invite him/her for an interview or to inform him/her that, pending such vacancies, his/her CVs will be kept by BEPA for future consideration. Outcomes of interviews of applicants are recorded in a note for the file based on the feedbacks of the interviewers.

Personal data concerning potentially suitable applications are kept for a maximum of 6 months by the Human resources team within BEPA mentioned above (Head of Unit and 2 staff members of coordination unit). If candidates want to submit an application after this period, they must resubmit their data. The note to the file recording the outcome to interviews is kept for administrative reasons for a period of one year. Data relating to unsuitable candidates or trainees are not kept. No historical or statistical records are kept.

If applicants wish to access, check, update or delete their CV, they should write an email giving the full details of their request to the functional mailbox mentioned in the standard message sent to the applicants.

As concerns security measures, [...].

3. Legal Analysis

3.1. Prior Checking

This Notification relates to the procedure that takes place within the BEPA (Commission) Human resources Unit. The data processing operations start with the collection of CVs sent spontaneously by applicants. They continue with the assessment of suitable candidates and possible interview in view of recruitment. Taking this into account, this Opinion will assess the extent to which the data processing operations described above carried out by the BEPA in view of collecting spontaneous CVs to constitute reserve list of potentially suitable candidates for future job openings in BEPA are in line with Regulation (EC) No 45/2001. This Opinion will not address data processing operations that go beyond this scope. For example, the data processing that takes place after the selected candidate has accepted the job, such as the data processing carried out by the Office for the Administration and Payment of Individual Entitlements ("PMO"), for example in the context of the payment of salaries, pensions, mission expenses, are not dealt under this Opinion. The Opinion is closely linked to the EDPS Opinion on the processing of personal data on the Commission EU CV online system since in the case of external candidates/competition laureates; the data is submitted through the EU CV online system².

Applicability of the Regulation. Regulation (EC) No 45/2001 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*"³. For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the selection of suitable candidates entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described above, personal data of individuals who apply for positions at the BEPA are collected and further processed.

Second, as described in the Notification, the personal data collected undergo "*automatic processing*" operations, as defined under Article 2(b) of the Regulation (EC) No 45/2001 as well as manual data processing operations which form part of a filing system. Indeed, some of the personal information is collected electronically directly from applicants for electronic submissions and in some cases applicants send their application by normal mail. In this latter case, the data of suitable candidates will be kept in a specific file forming part of a filing system in accordance with Article 3(2) of the Regulation.

² See EDPS Opinion on a notification received from the Data Protection Officer of the European Commission on EU CV Online (case 2006-310)

³ See Article 3(2) of Regulation (EC) No 45/2001.

Finally, the processing is carried out by a Community institution, in this case the dedicated BEPA human resources unit which are part of the European Commission, in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001). Therefore, all the elements that trigger the application of the Regulation are present.

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

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 be given prior to the start of the processing operation. In this case, however, the processing operations have already been established. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

Notification and Due Date for the EDPS Opinion. The Notification was received on 6 January 2009. The period within which the EDPS must deliver an opinion was suspended for 238 days to request further information from the Commission and allow for comments on the draft EDPS Opinion. In addition, the two months period deadline was also suspended during the month of August. The Opinion must therefore be adopted no later than 7 November 2009.

3.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, the grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if 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*".

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) No 45/2001, two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

Legal Basis. The Commission Decision of 28 April 2004 as amended, laying down rules for implementing Article 7(2) of the Staff Regulations as regards temporary management posts, provides that in some cases it may be necessary to have recourse to temporary posting to fill management posts. Because of the specificities of BEPA (including high turn-over of staff; possibilities of recruiting temporary staff with AT2c contracts, in accordance with Commission Decision 28/04/2004), the purpose of the processing operation under analysis is to collect spontaneous CVs in order to constitute a reserve of potentially suitable candidates for future job openings at BEPA.

Upon analysis of the above legal framework, the EDPS considers that the data processing that takes place in connection with the procedure under analysis is carried out on the basis of (i) the Staff Regulations (Article 7(2)) and (ii) Commission Decision of 28 April 2004 as amended. In conclusion, the EDPS considers that the data processing that occurs in the context of the selection of suitable candidates to constitute a reserve of potentially suitable candidates for future job openings at BEPA is legally based on the above legal instruments.

Necessity Test. According to Article 5(a) of Regulation (EC) No 45/2001, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing that occurs in the context of the selection procedure is "*necessary*" for the performance of a task, in this case, for the selection of the best suited candidates.

As outlined above, under the Staff Regulations and secondary legislation, the Commission is entitled to adopt procedures to recruit candidates for temporary senior positions. To put into practice this provision, it is necessary for the Commission to collect and further process personal information of candidates. Unless the Commission collects CVs and motivation letters and unless it can test the candidates through various procedures in order to evaluate their competences and whether they match the selection criteria, it would not be possible for the Commission to ensure a fair selection of candidates. In conclusion, it is the EDPS's view that the data processing that takes place in the context of the selection of suitable candidates for a position at BEPA is necessary to ensure the selection of the best candidates in an open, fair and transparent way.

3.3. Processing of Special Categories of Data

Article 10.1 of Regulation 45/2001 establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject ex Article 10(2)(a).

In the context of spontaneous applications job applications at BEPA, applicants may reveal information on their disability or other types of special categories of data. If this occurs, it should be considered that candidates have given their consent to the processing of that data, thus, the condition of Article 10(2) (a) would be met. In addition, this consent is given in the context of recruitment in order to enable the employer to comply with his specific obligations in the field of employment law notably to provide for possible facilities in the interview process and thus the processing is in accordance with Article 10(2)(b) of the Regulation according to which the prohibition shall not apply where the processing is "*necessary for the purpose 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*".

Article 10.5 of Regulation (EC) No 45/2001 establishes that "*[processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor.*" According to the Notification no such data are collected in the context of the processing operation under examination.

3.4. Data Quality

Adequacy, Relevance and Proportionality. Pursuant to Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This is referred to as the data quality principle.

Data included in CVs submitted by internal candidates applying spontaneously for posts at the BEPA will vary since the data is submitted by the candidates themselves. Data will in principle contain information such as personal details, working experience and education, training, languages, skills and competences, publications and references. In principle, the candidate will only submit relevant data. As for data submitted by external candidates/competition laureates, this data is submitted through submission of the EU CV online and has already been examined in the frame of the EDPS Opinion on this processing operation⁴.

The EDPS therefore considers that the information collected from candidates in the context of the selection of candidates for positions in the BEPA at the Commission complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

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 also closely related to what information is provided to data subjects which is further addressed in Section 3.8.

Accuracy. According to Article 4(1)(c) 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 the 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"*". In this case, an important part of the data has been provided by the applicant himself/herself. This procedure itself helps to guarantee the accuracy of the personal data. However, other information is not provided directly by the individual but generated by the various assessment bodies. In this regard, as further developed below, it is important for the candidate to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data hold about them is accurate. In this respect, see also Section 3.7.

3.5. Conservation of Data

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

The EDPS is particularly satisfied that data relating to unsuitable candidates or trainees are not kept by the BEPA human resources unit. He is also satisfied that data relating to other candidates is only kept for a maximum of 6 months. The note to the file recording the outcome to interviews is kept for administrative reasons for a period of one year. This has been justified by the controller on the grounds that this may be useful should the same candidate reapply for recruitment a year later. The EDPS considers that this further conservation of the data for one year may serve the purpose of future recruitments and is therefore lawful.

According to the Notification, the possibility for storing data for historical, statistical or scientific reasons appears to be excluded.

3.6. Transfers of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made to (i) Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

⁴ See EDPS Opinion 2006-310 referred to above.

According to the Notification the data is only transferred to the BEPA management team and in case of trainees, the trainee application is forwarded to the Traineeship's Office of the Commission. Article 7 of Regulation (EC) No 45/2001 requires personal data to be transferred within or between Community institutions or bodies only "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary.

The EDPS considers that the transfers of information to the recipients described in the Notification for the purposes stated comply with the first requirements. Indeed, the BEPA management team have the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the candidates. Furthermore, the transfer of the CVs is necessary for the management team to be able to select candidates. The same is true for the trainee applications sent to the Traineeship's Office.

Article 7(3) also provides that the recipient shall process the data only for the purposes for which they were transmitted. The EDPS therefore reminds the Commission that members of the BEPA management team should be instructed only to use the CVs submitted to them for the selection of job openings at BEPA.

3.7. Right of Access and Rectification

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

According to the standard reply sent to potentially suitable candidates, individuals may exercise the right to access, check, update or delete their CV by contacting a functional mailbox created to this effect. Access to data introduced through EU CV Online is also granted through this system. There is no reference in the notification, nor in the information provided to candidates, to the possibility to access any information generated by the selection procedure, notably the note to the file recording the outcome of the interview with a candidate.

The EDPS recalls that as a principle candidates should be able to have access to their entire file, comprising the assessment notes concerning them drafted by the BEPA management team in the frame of a possible interview. The EDPS is however aware that there is a limitation to this rule; this is the principle of the secrecy of selection committee's proceedings, as set out in Article 6 of Annex III to the Staff Regulations. This principle should be read in the light of Article 20(1)(c) which states that "*The Community institutions and bodies may restrict the application of () Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject f of the rights and freedoms of others*". The EDPS therefore notes that in the area in which the management team is covered by the principle of secrecy, the right of access may not apply even though personal data are processed, if that area is covered by the exception in Article 20(1)(c) for the protection of the rights of others, in this instance the right of selection board member themselves and their need to have their independence reinforced. This implies that according to this rule it is possible on a case-by-case approach to exclude from personal data requested by a data subject exercising his or her right of access information regarding particular remarks made by the members of the BEPA management team.

Furthermore, Article 20(1)(c) may in certain cases also be applied to protect the rights of other applicants. In cases where comparative data is involved, Commission may assess on a case by case basis whether full access to the data should be granted to the data subjects or whether certain restrictions should be applied in order to protect the rights and interests of others. The EDPS

reminds the Commission that Article 20(1)(c) should be applied restrictively and that limitations to the right of access should only be applied when strictly necessary to protect the rights and freedoms of others. The EDPS calls upon the Commission to ensure the application of the right of access as described above.

The right of rectification on the other hand, can obviously apply only to factual data. Marks allocated could not under any circumstances be open to a right of rectification by the data subject, except in the context of the appeals established appeals procedures.

In the light of the above, the EDPS recommends that the Commission establishes the possibility for candidates to have access to all data in their file taking into account possible restrictions mentioned above. Candidates will need to be informed of this accordingly (see below Section 3.8).

3.8. Information to the Data Subject

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.

The EDPS is satisfied that trainees and unsuitable external candidates are informed in accordance with Regulation (EC) 45/2001 that no personal data is kept on them by the BEPA services. As for potentially suitable candidates they are informed when they submit their application of the identity of the controller and possible recipients; the conservation period of the data; the possibility to access, check, update or delete the CV; and the right to have recourse to the Commission's DPO or to the EDPS. The EDPS is satisfied with this information, but recommends that, as mentioned above, candidates should be informed of the possibility to access any data generated by their application and any possible restrictions to this right (see above Section 3.7).

3.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

[...]. The EDPS is globally satisfied with these measures in conformity with the Commission Decision on security of information systems adopted in August 2006 C(2006) 3602 .

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations in this Opinion are fully taken into account. In particular, the Commission must:

- remind the members of the BEPA management team should be instructed only to use the CVs submitted to them for the selection of job openings at BEPA.;

- establish the possibility for candidates to have access to all data in their file taking into account possible restrictions in accordance with Article 20(1) of Regulation (EC) 45/2001 and inform candidates of this right accordingly.

Done at Brussels, 29 October 2009

(signed)

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