

Opinion on the notification for prior checking from the Data Protection Officer of the European Investment Bank regarding the "internal mobility" dossier

Brussels, 18 November 2009 (Case 2009-253)

1. Procedure

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "internal mobility" dossier was given by the European Investment Bank Data Protection Officer (DPO), by e-mail dated 7 April 2009.

The notification form was accompanied by a PowerPoint presentation entitled "Internal mobility - training tool for staff and management". On 28 May 2009 the EDPS received a document of 25 May 2004 entitled "Guidelines on Internal Mobility and Promotions".

Some questions were addressed to the DPO on 15 May 2009. The replies were provided on 28 May 2009. The draft opinion confined to the facts was sent to the DPO for checking on 12 June 2009. The DPO's response, containing a substantial amendment to the facts, was received on 21 October 2009. The draft opinion was sent to the DPO for comments on 29 October 2009. The comments were received on 16 November 2009. An additional question was put to the DPO on 16 November 2009 and the reply was received on 17 November 2009.

2. Facts

Purpose and legal basis of the processing

The general purpose of the processing is to select and recruit staff for vacant posts in the EIB via internal transfer.

Processing is based on the EIB's Staff Regulations and the "Guidelines on Internal Mobility and Promotions" it adopted on 24 May 2004. Processing is carried out by the Resources/Recruitment Division in the EIB's Human Resources Directorate.

Description of the processing operation

The following is the procedure for filling a vacant post:

The person applies on line, using the "PeopleSoft" (Psoft) function which is the Bank's human resources management program. Since all the Bank's staff members' personal data are already in the Psoft memory, the application form is filled in automatically. All the data subject needs to add is the letter of motivation and information about the possibility of discussing the application with hierarchical superiors.

The coordination office in the Directorate with the vacancy has access to the list and the data relating to all applicants via Psoft. It may access those data up to the end of the selection procedure. In practice, two people per directorate are designated and given access to applicants' data. The security system (PSFT) is designed to allow access to the data at a given time to one person from coordination, the other person being a replacement.

At the request of the person responsible for the vacant post, the HR/Resources Division organises and supervises the professional tests. The person responsible for the vacant post is notified of the result of the tests. The applicant has access to the results of his/her tests.

A recommendation on the choice of applicant for high-level posts (C and above) is made by a panel¹. The panel has at least five members, including a representative of the HR Directorate, a member of a Directorate other than the one in which the post is to be filled and a member of the Joint Committee on Equal Opportunities (COPEC). The use of the panel is compulsory only for posts at grade C and above. The panel is established jointly by the relevant Director-General and by the representative of the HR Directorate who must be of a higher grade. Applicants are interviewed. The panel members mark each applicant on a summary table and annotated minutes are drawn up including the remarks and discussions by the members of the panel. The panel makes a recommendation to the Senior Staff Committee (the Bank's Management Committee), which makes the final decision on the choice of applicant.

For high-level posts (C and above), in addition to the selection panels, the Bank also systematically seeks an independent opinion from an assessment centre. The Assessment Centres (AC) are organised by the EIB in collaboration with an outside service provider (Cubiks – the same provider is used for external recruitment, already notified to the EDPS (2009-254) and tool 360°, also notified to the EDPS (2009-215)) which assesses internal and external applicants, makes recommendations to the EIB selection panel and conveys information to the applicants. A final report is drawn up on the skills and characteristics of each applicant. It is stored by the service provider for a period of a year. The personal data given to the external service provider are: applicants' surnames, forenames, e-mail addresses and CVs. Applicants are given an appointment by the HR Resources manager who forwards the document explaining the Assessment Centre process and giving the date and time and the name(s) of the psychologist(s).

¹ According to the DPO, specific notification regarding data processing for selection by the panels is to be sent to the EDPS.

Data subjects

Data subjects whose data are processed are EIB staff with a minimum of two years' service at the Bank. The holders of a contract for a specified period or those not having two years' service at the Bank may apply as external applicants.

Personal data processed

Data on the application form:

- surname
- personal number
- date of birth
- nationality
- sex
- type of contract
- date of recruitment
- date on which trial period ended
- date of end of contract (if contract for a specified period)
- career at the EIB
- academic training
- professional experience
- internal training
- external training
- level of language knowledge
- letter of motivation (open window - no template)

Where applicable, the results of tests.

Information to be given to the data subject

The managing department provides information to the data subjects on the protection of their personal data. This information is in the Psoft system on the page showing the conditions of eligibility for internal applicants.

It contains a reference to the purposes of the processing, the data recipients, rights of access and rectification and blocking of data, information on how to exercise them and the possibility of appealing to the EDPS.

Access to and rectification of data

Data subjects can access their application data via Psoft throughout the selection process, using the system's self-service functions.

Any results of aptitude and personality tests can be accessed on application to the HR/Resources Division solely at the end of the selection procedure for reasons of fairness and equal treatment². Internal applicants' CVs are automatically filled in using data stored on the HR information system. They are automatically updated as the data subject's career progresses.

Factual data can be rectified at any time by contacting the HR Division.

Data storage and conservation

Application forms and the complete files (publication of the vacancy, selection note by the Directorate and applicant's letter) are kept on paper for five years. That is longer than the usual limit of two years, on account of the possibility of appeal.

The Psoft system keeps internal applicants' letters of motivation for an indefinite period.

The managing department also keeps data relating to the number of applicants for each post, their surnames and forenames, the surname and forename of the applicant selected, the date of selection, the evaluation tables, the replies from the selection panel relating to all applicants (these are reasoned replies appearing in the panel's minutes), and the date of communication. These data are kept for a period of five years.

Internal applicants' data are stored for statistical and resource-planning purposes.

Recipients or categories of recipients to whom data may be transmitted

Personal data are processed by the members of the HR/Resources Division, those responsible for the posts vacant and the decision-making bodies (President of the Bank). Access is mainly via the Psoft system and is given on a case-by-case basis to the relevant management staff for a particular recruitment procedure. The person responsible for a post which is vacant will have access only to vacancies under his authority for which he has been named as the person responsible. At HR level, the members of the HR/Resources Division involved in recruitment procedures have permanent access to the Psoft system.

No data are transferred outside the Bank except in the event of appeal. In such cases, the Court of Justice of the European Communities may receive the data and those handling the dispute in the legal service also receive them.

Measures taken to ensure security of processing

[...]

3. Legal issues

² The information accessible is in compliance with the EDPS reply of 6 October 2005 to the EIB DPO's request for consultation on 15 September 2005.

3.1. Prior checking

The notification represents processing of personal data within the meaning of Regulation (EC) No 45/2001. The data are processed by a Community institution in the exercise of activities which fall within the scope of Community law (Article 3(1)). Processing involves the collection, recording, organisation, storage, retrieval, consultation, etc. of personal data (Article 2(b) of Regulation (EC) No 45/2001) as part of the EIB's internal mobility procedure. These activities constitute partially automated and partially manual processing. Where processing is manual, the data form part of a filing system (Article 3(2)). 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) of the Regulation contains a list of processing operations likely to present such risks. Data processing in the internal mobility procedure must be subject to prior checking by the EDPS because it involves data used to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct. Data processing during the management of the staff mobility procedure requires an evaluation of staff members' capacities for a specific post. To make this evaluation, the controller carries out a number of activities, such as examining the CVs, assessing certain staff members' capacity to fill certain posts, and judging their performance on the basis of interviews and tests. Data processing therefore comes under Article 27(2)(b) and is subject to prior checking by the EDPS.

The Data Protection Officer's notification was received on 7 April 2009. Under Article 27(4) this opinion must be delivered within two months. The time limit within which the EDPS was to deliver his opinion was suspended for 163 days; the EDPS would therefore deliver his opinion by 18 November 2009 at the latest.

3.2. Lawfulness of the processing

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

The specific legal basis for processing is the EIB's Staff Regulations and the "Guidelines on Internal Mobility and Promotions" it adopted on 24 May 2004. This procedure is part of a policy of guaranteeing EIB staff members' right to professional mobility, which constitutes performance of a task carried out in the public interest and in the legitimate exercise of official authority vested in the Bank. As a consequence, the processing is lawful.

3.3. Processing of special categories of data

Article 10(1) of Regulation (EC) No 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*". This prohibition may be lifted for one of the grounds laid down in Article 10(2) and (3) of the Regulation. Among others, such grounds include the consent of the data subject derived from Article 10(2)(a); such consent would be deemed to exist if those categories of data were put forward by the official concerned, provided they are relevant. 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*." No such data seem to be collected in the context of this data processing.

3.4. Data quality

Personal data must be "*adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed*" (Article 4(1)(c)). With regard to data collected as described in point 2 of this opinion, the question is whether all the data gathered are relevant for the purposes for which they are collected. The EDPS considers that these data are necessary in terms of the purpose of the processing operation in question and that they are not excessive. The data transmitted to the external assessment body would seem necessary for the body in question to exercise all the rights and obligations associated with its task. The EDPS therefore considers that Article 4(1)(c) of the Regulation is complied with.

Data must also be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). An initial analysis of the lawfulness was undertaken in points 3.2 and 3.3 of this opinion. For the processing to be lawful, the specific provisions of the Regulation must be complied with. As for fairness, this relates to the information which must be transmitted to the data subject (cf. 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 case in question concerns administrative data and evaluation data. The administrative data are collected by means of a computer application, Psoft, and may be easily verified by data subjects, which contributes to their accuracy.

As regards evaluation data, it is not easy to ensure, or assess, their accuracy. Data subjects' right to access and rectify their data is a means of ensuring that their data are accurate and up-to-date (see point 3.7).

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*".

As indicated in point 2 of this opinion, data is stored for two or five years. Given the possibility of appeal, the EDPS considers that this period complies with the Regulation.

The data stored in the Psoft database are stored for an unspecified duration. The EDPS considers that appropriate practice would be to store the data for a specific period and invite the data controller to set a time limit in accordance with the purpose of data storage.

If the data are stored for historical, statistical or scientific purposes (Article 4(1)(b)), as envisaged in the notification, the data must first be rendered anonymous.

3.6. Data transfer

The processing should be examined in the light of Article 7(1) of Regulation (EC) 45/2001 which concerns the transfer of personal data within or between Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

As regards transfers within the EIB (cf. point 2), the EDPS considers that the transfer of data to the indicated recipients complies with the Regulation's requirements.

As for the transfer of certain data to an outside service provider (Cubiks), you are referred to the EDPS opinion on external recruitment, notified to the EDPS (Case 2009-254).

Article 7(3) of the Regulation provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". The EDPS recommends that recipients be explicitly reminded, at the time of transfer, to process the data exclusively for the purposes for which they were transmitted.

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. Article 14 of the Regulation allows the data subject a right of rectification.

For the record, data subjects may access and rectify their data using the Psoft system or by requesting the department responsible to do the necessary. As regards access to data generated by selection boards, you are referred to the specific notification issued by the DPO.

The right of rectification on the other hand can obviously apply only to factual data. Subjective by definition, evaluation data cannot therefore be open to a right of rectification by the data subject, except in the framework of the appeals provided for.

The EDPS therefore welcomes the fact that the obligations in Articles 13 and 14 of Regulation (EC) No 45/2001 are duly complied with.

3.8. Information to be given to the data subject

Article 11 of Regulation (EC) No 45/2001 (Information to be supplied where the data have been obtained from the data subject) applies in this case, as does Article 12 (information to be supplied where the data have not been obtained from the data subject), as information may be collected from other sources, in particular the Psoft system.

The EDPS notes that the information provided (cf. point 2) should be supplemented with information on the legal basis of the processing and the time limits for data storage (Article 11(1)(f) of the Regulation).

3.9. Security measures

Under Article 22 of Regulation (EC) No 45/2001 concerning the security of processing, "*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*".

From the information provided, the EDPS has no reason to believe that the EIB has not implemented the security measures required under Article 22 of the Regulation.

Conclusion:

The proposed processing operation does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001, provided that the comments made above are taken into account. This means in particular that:

- an appropriate data storage period should be fixed in the Psoft system corresponding to the purposes of data storage.
- the data should be rendered anonymous before being stored for historical, statistical or scientific purposes.
- at the time of transfer, recipients be explicitly reminded to process the data exclusively for the purposes for which they were transmitted.

- data subjects should be given full and easily accessible information in accordance with point 3.8 of this opinion.

Done at Brussels, 18 November 2009.

[Signed]

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