

Opinion on the notification for prior checking from the Data Protection Officer of the European Monitoring Centre for Drugs and Drug Addiction concerning "Procurement procedures and contract management"

Brussels, 16 December 2010 (case 2010-635)

1. Proceedings

On 31 August 2010, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) a notification for prior checking concerning "Procurement procedures and contract management". The notification was accompanied by a "Privacy Statement for Legal Entity and Bank Account Validation".

On 15 October 2010, the EDPS sent a request for additional information to the DPO. The replies were provided on 5 November 2010.

The draft opinion was sent to the DPO for comments on 19 November 2010. These were received on 15 December 2010.

2. Facts

The **purpose** of the processing in question is the management and administration of the procurement procedures and contract related operations by the EMCDDA.

The **controller** is the EMCDDA, represented by the Head of Unit Administration.

Data subjects are (natural) persons willing to participate in procurement procedures, tenderers, their staff and subcontractors.

The following **data categories** may be processed within procurement and related contract management procedures at the EMCDDA:

- name (first name, family name),
- function,
- contact details (e-mail address, business phone number, mobile phone number, fax number, postal address, company and department, country of residence, internet address),
- passport number or other ID number,
- date and place of birth,
- certificates for social security contributions and taxes paid,

- extracts from judicial records,
- bank account reference (IBAN and BIC codes),
- VAT number,
- expertise, technical skills and languages, educational background, professional experience including details on current and past employment (information for the evaluation of selection criteria),
- declaration of honour that the candidates are not in one of the exclusion situation referred to in Article 93 and 94 of the Financial Regulation.

Personal data processed in relation with procurement procedures and contract related operations are currently being **retained** for 10 years and invoices and other documents supporting financial transactions for 7 years. Documents concerning bank account/financial identification and legal entity are retained for an unlimited period.

The paper files are stored in locked cupboards and/or storage offices with limited access.

The electronic files are stored on servers of the EMCDDA. Only designated staff has access to these files via user ID and password.

Data processed within procurement and related selection procedures may be disclosed (on a need-to-know basis) to the following **recipients**:

- EMCDDA staff:
 - o procurement process: financial and contractual support officers, members and secretariat of the opening and evaluation committees;
 - o contract management: relevant project managers, authorising officers, financial and contractual support officers, financial initiating officers, financial verifying officers, accounting officer
 - o legal entity and financial identification: financial and administrative assistant in charge of the creation of files in ABAC system, European Commission's DG BUDG officer to validate the information and include in the third party file of the ABAC
- in specific situations staff of: the European Court of Auditors (ECA), the Internal Audit Service of the European Commission (IAS), European Anti-Fraud Office (OLAF), the Financial Irregularities Panel (FIP), the Investigation and Disciplinary Office of the Commission (IDOC), the European Ombudsman (EO) and the EDPS.

According to the privacy statement, **access and rectification** can be granted upon a request to the controller.

Information to data subject is provided at the different stages of the respective procedure in the following documents:

- data protection statement included in the invitation to tender,
- data protection clause included in contracts,
- "Privacy Statement for Legal Entity and Bank Account Validation".

Every invitation to tender contains the following information:

- categories of data processed,
- purpose of the processing,
- identity of the data controller,
- certain data recipients,

- existence of rights of access and rectification and the procedure to follow,
- legal basis of the processing,
- time-limits for storage of the data,
- existence of a right to have a recourse to the EDPS.

The model data protection clause included in contracts applies to data included in the contract and contains information about:

- purpose of the processing,
- potential data recipients,
- existence of rights of access and rectification and the procedure to follow,
- identity of the data controller,
- existence of a right to have a recourse to the DPO and the EDPS.

Privacy Statement for Legal Entity and Bank Account Validation contains information about:

- legal basis of the processing,
- identity of the data controller,
- purpose of the processing,
- certain data recipients,
- security measures
- existence of rights of access and rectification and the procedure to follow,
- retention period
- existence of a right to have a recourse to the DPO and the EDPS.

3. Legal aspects

3.1. Prior checking: The processing of personal data related to public procurement and contract management procedures falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(a) and (b) since it clearly is intended to evaluate personal aspects of the data subjects and also involves processing of data relating to (suspected) offences and criminal convictions.

In principle, prior checks by the EDPS should be carried out before the processing operation is implemented. Since the relevant data processing operations have already been established, the check has to be carried out ex post. In any case all recommendations made by the EDPS should be fully taken into account and the processing operations should be adjusted accordingly.

The notification of the DPO was received on 31 August 2010. According to Article 27(4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended during the month of August 2010 and for a total of 47 days (21+26) to allow for provision of additional information, as well as comments on the draft opinion. Therefore, the present opinion must be delivered no later than on 20 December 2010.

3.2. Lawfulness of the processing: Processing of personal data within public procurement and contract management procedures at the EMCDDA can clearly be considered as being necessary for the performance of a public interest task, namely the management and functioning of this institution within the meaning of Article 5(a) of Regulation 45/2001 (read together with its recital 27).

Legal basis confirming the lawfulness of the respective processing operations can be found in Article 74 of the Financial Regulation, applicable to the EMCDDA by decision of the EMCDDA's Management Board of 9 January 2009.

3.3. Processing of special categories of data: The processing of personal data contained in the extracts from judicial records, other certificates to this respect¹ or the above mentioned declarations of honour is explicitly authorised in Article 93(1) of the Financial Regulation. Thus, the condition for processing of data relating to (suspected) offences and criminal convictions set out in Article 10(5) of Regulation 45/2001 is fully met.

3.4. Data Quality: The collection of personal data listed above seems to be necessary either for the identification of candidates, tenderers or contractors within the procurement and/or related contract management procedure, or for the evaluation of their eligibility and/or capacity pursuant to the respective provisions of the Financial Regulation, as well as its Implementing Rules.

The accuracy of the factual data processed is ensured by the fact that they are provided by the respective data subjects so that the procedure itself helps to guarantee the accuracy. Also, the rights of access and rectification contribute to ensure that the data processed are accurate and up to date (cf. point 3.7. below).

3.5. Data retention: As indicated above, the following time limits are currently applicable to the storage of public procurement files containing personal data (in the archives):

- Ten years after the signature of the contract for successful tenders (if the contract is not in force) for files relating to the procurement procedures and contract management, The reduction of this time to seven years is being considered;
- Five years following the signature of the respective contract for unsuccessful tenders;
- Unlimited period for documents concerning bank account/financial identification and legal entity.

The EDPS is of the opinion that the seven years time limits are in compliance with Article 4(1)(e) of Regulation 45/2001 as it would correspond to the maximum time period for which personal data necessary for control and audit purposes can be kept in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation². The EDPS considers that the retention of the data in point for longer than seven years is in breach Article 4(1)(e) of Regulation 45/2001.

In any case, he would like to point out that according to Article 49(3) of the Implementing Rules as modified by the Commission Regulation 478/2007 of 23 April 2007 "personal data contained in supporting documents [relating to the budget implementation measures] shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes".

Should it be necessary to keep personal data for historical purposes, the further processing of sampled public procurement files can be considered as in full compliance with Article 4(1)(b) and (e) of Regulation 45/2001 on condition that the EMCDDA makes sure that the personal

¹ mentioned in Article 134(3) of the Implementing Rules to the Financial Regulation

² cf. case 2007-222 – EDPS Comments on the Draft Common Conservation List (CCL) of 7 May 2007 as well as EDPS Note concerning the CCL adoption of 12 October 2007

data contained in these file are not processed for any other purposes and/or used in support of measures or decisions regarding any particular individual³.

3.6. Transfer of data: As indicated above, within the respective procurement or contract management procedures, intra- and inter-institutional transfers of personal data are taking place. Pursuant to Article 7 of Regulation 45/2001, the transfers within the EMCDDA and to other institutions have to be necessary for the legitimate performance of the task covered by the competence of the recipient (paragraph 1) and the recipients can process the data only for the purposes for which they were transmitted (paragraph 3).

In the present case, the transfers of the personal data to the relevant staff of EMCDDA are necessary for the administration of the respective procurement or contract management procedures. The transfers to the staff of IAC, IAS, IDOC, FIP, OLAF, ECA, EO and EDPS are necessary in the context of official investigations, control or audit.

Provided that all the above mentioned recipients are always reminded of the purpose limitation of the transfer in question, full compliance with the Regulation is ensured.

3.7. Right of access and rectification: As mentioned above, data subjects are granted rights of access and rectification upon a request to the controller.

Pursuant to Article 20(1) of Regulation 45/2001, these rights can be restricted if it is necessary to safeguard, *inter alia*, an important economic interest of the EU, including budgetary matters, or the protection of the rights and freedoms of others (points b) and c)).

In particular, the limitation of the rectification right after the opening of tenders foreseen in Article 148(3) of the Financial Regulation aiming to ensure transparency and equality of treatment can be considered as justified in light of Article 20(1) of the Regulation.

3.8. Information to the person concerned: The EDPS notes that some information set out in Articles 11 and 12 of Regulation 45/2001 are mentioned in the different privacy statements and data protection clauses referred to above.

In order to ensure full compliance with the Regulation, the EDPS requests that missing information is added in line with the Articles 11 and 12 of Regulation 45/2001 in the three relevant privacy statements and data protection clauses.

3.9. Security measures: On the basis of the information available, the EDPS has no reason to believe that the measures implemented by the EMCDDA are not adequate in light of Article 22 of the Regulation 45/2001.

³ cf. case 2007-222 - EDPS Comments on the Draft Common Conservation List of 7 May 2007

4. Conclusion

In order to ensure that there is no breach of the provisions of Regulation 45/2001, the above considerations have to be fully taken into account. In particular,

- the time limits for storage of personal data should be actually reduced in line with the section 3.5 of the present opinion (Article 4(1)(e) of the Regulation),
- all data recipients should be reminded of their obligation not to use the data received for any further purpose than the one for which they were transmitted (Article 7(3) of the Regulation);
- comprehensive information should be provided to data subjects in relation to every procurement and contract management procedure (Articles 11 and 12 of the Regulation).

Done at Brussels, on 16 December 2010

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