



## **Opinion on the notification for prior checking from the Data Protection Officer of the European Commission concerning "Selection of participants to (internal/external) learning and development actions"**

Brussels, 17 October 2011 (case 2011-0627)

### **1. Proceedings**

On 28 June 2011, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Commission a notification for prior checking concerning the "Selection of participants to (internal/external) learning and development actions". The notification was accompanied by a "Privacy Statement" covering the procedure.

On 1 September 2011, the EDPS sent a request for additional information to the DPO which was answered on 9 September 2011. The comments on the draft opinion sent to the DPO on 5 October 2011 were submitted on 12 October 2011.

### **2. Facts**

This prior checking Opinion deals with selection of participants to (internal/external) learning and development actions.

The purpose of the processing is to organise and manage the selection process of candidates who intend to take part in learning and development actions (internal or external) requiring specific pre-requisite and/or with limited number of places available (i.e. information programme in Member States, Fellowship programme, HR professionalization programme).

The controller is the European Commission represented by the Head of the Human Resources Unit in charge of Learning and Development (Unit HR.B.3).

### **Procedure:**

- A call for applications is published on the intranet of the Commission with all relevant information on the programme (objectives, organisation, logistics contacts, deadline for submission) as well as eligibility and selection criteria.
- Registration may be collected either by e-mail or by Syslog functionalities.
- At the expiry of submission deadline, eligibility criteria are verified by HR.B.3 staff (these may include grade, function group, contractual status, seniority, managerial functions, approval from hierarchy, etc).
- In a second stage, selection criteria are examined by a selection panel whose composition is indicated in the call for applications. Selection criteria may include the link between the objectives of learning and development action and the functions of the candidate, his professional experience, career path and motivation. In some cases the selection committee may interview the applicants, and the performance of

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candidates during interviews is assessed. Applicants are informed by e-mail on the outcome of their applications. If appropriate, the final list of selected candidates may be published on the intranet.

The following data are processed within the selection of the applicants to learning and development programmes:

- the application form, including personal data like surname, first name, service, office, telephone number, (e-mail) address, grade, functions. These data may be extracted from or checked against Sysper2.
- motivation letter and supporting documents (degrees, certificates, diplomas length and field of professional experience);
- languages (and level);
- the assessment as regards the eligibility of candidates, the matching of the application with the selection criteria and the performance (if applicable) during the interview(s);
- the evaluation of candidates who have been invited for an interview;
- information indicating which candidates have been selected or short-listed.

The data collected are submitted by candidates themselves with their curriculum vitae or by filling a form. They are handled by DG HR.B.3 and the selection committee.

#### **Conservation:**

- Data entered with the applications will be kept for 1 year following the date of closure of the call for applications, or following the end of the action for successful applicants.
- Data relating to the learning and development action (all data related to the participation in the action, the results achieved, notations, certificates, diplomas, etc) are kept for the duration of the staff member's career, according to the Staff Regulations. Certain data need to be kept for a longer period if they are related to ongoing rights and obligations (i.e. certifications).
- Data relating to the selection procedure itself (all data produced by the selection committee (evaluation sheets, deliberations minutes, etc) will be kept for a period of 1 year or -in case of complaints- the entire duration of the proceedings plus one full year following the date on which a final decision has been taken.

#### **Storage and security:**

[...]

#### **Recipients:**

Personal data processed in this context may be transferred to the following recipients:

\* Applications files are transmitted to the members of the selection committee;

\* A list of successful candidates is transmitted to:

- Director-General of DG HR and/or other DGs;
- Associated services (DGs involved in the conception and/or organisation of the action);
- Candidate's hierarchy and HR services.

#### **Rights of the data subjects**

Applicants receive the mandatory legal information related to the processing of their data via a Privacy Statement published on the registration page of their application and which contains the information foreseen in Article 11 of the Regulation.

Candidates can change their data up to the end of the deadline for applications. After the deadline, they can request factual corrections by addressing themselves to the course manager.

Candidates can ask for oral or written feedback regarding decisions taken on their application. They can ask for explanations on how eligibility or selection criteria are applied and how they relate to their specific case. If a priority ranking is established, candidates can ask what is their positioning. No comparative data including other candidates' data can be transmitted. Moreover, access to some documents containing comparative data on candidates might be restricted to protect the rights and freedoms of others on the basis of Article 20 (1) c) of Regulation (EC) No 45/2001.

### **3. Legal aspects**

**3.1. Prior checking:** The processing of personal data for the purpose of selection of participants to (internal/external) learning and development actions by the European Commission falls within the scope of Regulation 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2)(b) since it clearly intends to evaluate the ability of persons wanting to participate in the programmes.

The notification of the DPO was received on 28 June 2011. 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 for a total of xxxx days ( ) to allow for provision of additional information, as well as comments on the draft. Due to the fact that in this case the month of August does not count in the calculation of the deadline, the present Opinion must be delivered no later than on xxx x 2011.

### **3.2. Lawfulness of the processing:**

Under Article 5(a) of Regulation (EC) No 45/2001, 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 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 or body*".

The selection of participants to learning and development actions is based on:

- Staff Regulations Article 24 (a);
- Common rules laying down the procedure for implementing Article 24(3) of the Staff Regulations (I.A. n° 839 du 18.3.1994- 11);
- Commission Decision E(2002) 729 of 7 May 2002 on Staff Training.

The respective processing of personal data is necessary for the performance of a public interest task, namely the training of EU staff members through learning and development actions. Thus, the processing is lawful in accordance with Article 5(a) of Regulation 45/2001 (read together with recital 27 of the Regulation).

**3.3. Processing of special categories of data:** A photograph revealing racial or ethnic origin may be communicated on a CV of a candidate. It is also possible that any other special

categories of data may be provided by a candidate without being requested (for instance in a free field box or in the CV).

Processing of data revealing racial or ethnic origin is prohibited unless it could be justified on grounds mentioned in Article 10(2) of Regulation 45/2001. These data may be processed on a basis of an express consent of the data subject or in case it is necessary to comply with the controller's obligation in the field of employment law.

The spontaneous communication of the photograph should be considered as authorised in terms of Article 10(2)(a) of the Regulation. In fact, by communicating this non-requested data, the data subject is providing his/her consent to its processing<sup>1</sup>. Furthermore, the EDPS invites the Commission to specify in the procedure and in the documents requested whether some data may be compulsory. In this case, data subjects would know which data are relevant.

**3.4. Data quality:** Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate and kept up to date.

As to the proportionality of the data processed, the EDPS notes that the contact, application and evaluation data referred to above are considered necessary for the organisation of the selection procedure with a view of selecting candidates for learning and development actions. Article 4(1) (c) of the Regulation is therefore complied with.

The accuracy of the data processed is partly ensured by the fact that some data are provided by the respective data subjects. In addition, the invitation to make use of the rights of access and rectification (cf. point 3.7 below) helps to ensure that the processed data are accurate and up to date.

Lawfulness of the data processing has been already discussed (cf. point 3.2), whereas fairness has to be assessed in the context of information provided to data subject (cf. point 3.8 below).

**3.5. Data retention:** According to Article 4(1)(e) of Regulation 45/2001, personal data may be kept in a form enabling the identification of data subjects for no longer than necessary for the purposes for which they were collected or further processed.

According to the facts, three different retention periods are applied and they are based on the type of relevant data: a) data submitted with the applications; b) data relating to the learning and development action and c) data relating to the selection procedure itself.

The EDPS does not find these conservation periods excessive, as long as the necessity of the conservation is justified, but he wants to make the following comments:

- regarding conservation of certain data (in this case data relating to the learning and development action) for a longer period than the duration of the staff member's career, data are conserved for a long, but unspecified period. In his Guidelines concerning the processing of personal data in the area of staff evaluation (adopted July 2011) the EDPS considers for instance that certification files related documents of successful applicants (application, training attendance and exam results) containing personal data are kept in personal files in

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<sup>1</sup> cf. also the EDPS Guidelines of 10 October 2008 concerning the Processing Operations in the Field of Staff Recruitment.

line with Article 26 of the Staff Regulations for up to ten years after the termination of employment. The European Commission should align to this conservation period;

- regarding data relating to the selection procedure itself, the procedure foresees that they will be kept for a period of 1 year or -in case of complaints- for the time the proceedings might take plus one full year following the date a final decision has been taken. The EDPS considers that a period of one year could be considered as sufficient in order to introduce a complaint against the decision of the selection procedure itself. However, in the light of the two year period during which a complaint can be introduced to the European Ombudsman, the EDPS would invite the European Commission to consider aligning its retention period with the period to introduce complaint to the European Ombudsman.

**3.6. Transfer of data:** The internal and inter-institutional data transfers mentioned above are subject to Article 7 of Regulation 45/2001. They should be necessary for legitimate performance of the task covered by the competence of the particular recipient who can process the data only for the purposes for which they were transmitted.

The EDPS notes that the transfers to the members of the selection committee, the Director General of DG HR and/or other DGs, the associated services and the candidate's hierarchy and HR services are considered as necessary for the execution of the selection procedures.

However, the EDPS stresses that the recipients should be reminded that they are required not to use the data for any other purposes other than the tasks carried out in the exercise of their respective competences in order to comply with Article 7(3) of the Regulation.

**3.7. Right of access and rectification:** Articles 13 and 14 of Regulation 45/2001 provide for data subject's rights of access and rectification with respect to their personal data processed. These rights may be restricted in terms of Article 20(1) of the Regulation, in particular when it would be necessary to for the protection of rights and freedoms of others, including the evaluators in terms of Article 6 of the Annex III to the Staff Regulations.

According to the personal data protection notice, data subjects have a right to obtain from the data controller access to the documents relating to them, as well as updates and rectifications of material errors. Data can also be modified by the data subjects until the closing of the application call. Furthermore, they can ask corrections by contacting directly the data controller. Feedbacks can also be asked by the candidates about their applications and their performance as long as access are not requested about some documents containing comparative data on candidates, which might be restricted to protect the rights and freedoms of others on the basis of Article 20 (1) c) of Regulation (EC) No 45/2001.

The EDPS welcomes the fact that the data subjects are provided access to all data categories processed within this particular procedure and that the right of rectification can apply only to the factual data processed, as it is reflected in the data protection notice to data subjects.

**3.8. Information to the person concerned:** As indicated above, the "personal data protection notice" provides for certain information as required in terms of Articles 11 and 12 of Regulation 45/2001.

The EDPS notes that the information provided to the data subjects through the personal data protection notice.

**3.9. Security measures:** According to Article 22 of Regulation 45/2001, technical and organisational measures need to be implemented in order to prevent, in particular, any unauthorised disclosure or access, accidental or unlawful destruction, accidental loss or alteration, as well as any other forms of unlawful processing.

On a basis of the available information, the EDPS considers that the European Commission seems to have implemented security measures appropriate to the processing operation under analysis.

#### **4. Conclusion**

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

- the data controller should consider reviewing its retention periods in line with the comments above
- the recipients should be reminded of their obligations in the light of Article 7(3)

Done at Brussels, 17 October 2011

**(signed)**

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Assistant European Data Protection Supervisor