



Opinion on the notification for prior checking from the Data Protection Officer of the Community Fisheries Control Agency concerning procurement procedures

Brussels, 21 December 2011 (case 2011-0890)

1. Proceedings

On 3 October 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Community Fisheries Control Agency (CFCA) a notification for prior checking concerning procurement procedures and contract execution.

The draft Opinion was sent to the DPO for comments on 28 November 2011. These were received on 20 December 2011.

2. Facts

The **purpose** of the processing operations *under review* is the management and administration of procurement procedures intended to obtain the supply of goods, the execution of works or the provision of services necessary for the Agency's activities.

The processing operations include in particular evaluation of the eligibility of economic operators and other candidates (natural and legal persons) to participate in public procurement procedures and to be awarded a procurement contract in accordance with the selection and exclusion criteria as defined in the Financial Regulation and further specified in the calls for tenders.

The **controller** is the CFCA.

The **persons responsible for the processing operations** are the Head of Unit A - Resources, the Head of Unit B and the Head of Unit C.

Data subjects are tenderers - natural persons, subcontractors - natural persons, and tenderers' and subcontractors' staff and representatives. The data are collected from the tender offer and supporting documents.

The following **data categories** may be processed:

- name and function;
- contact details (e-mail address, business telephone number, mobile telephone number, fax number, postal address, company and department, country of residence, internet address);
- certificates for social security contributions and taxes paid, extract from judicial records;
- bank account reference (IBAN and BIC codes), VAT number, passport number, ID number;
- information for the evaluation of compliance with eligibility and selection criteria: expertise, technical skills and languages, educational background, professional experience including details on current and past employment;
- declaration on honour that they are not in one of the exclusion situation referred to in Article 74 of the CFCA Financial Regulation and Articles 93 and 94 of the General Financial Regulation.

The data subjects might provide additional information in their CVs (such as gender, age, nationality).

The following **retention policy** applies:

- Files relating to tender procedures, including personal data, are to be retained in the service in charge of the procurement procedure until it is finalised, and in the archives for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate.
- Until the end of a possible audit if one is started before the end of the above period.

Data processed may be disclosed on a need-to-know basis to the following **recipients**:

- CFCA staff as well as outside experts and contractors who work on behalf of the CFCA and participate in the procurement procedure, including tender evaluation, and the bodies charged with a monitoring or inspection tasks in application of Union law (e.g. internal audits, OLAF);
- members of the public in accordance with the CFCA's obligation to publish information on the outcome of the procurement procedure (Article 74 of the CFCA Financial Regulation and Article 90 of the General Financial Regulation). This information concerns in particular the name and the address, the amount awarded and the name of the project. It will be published in supplement S of the Official Journal of the European Union and/or on the website of the CFCA;
- certain categories of personal data (name, given name if natural person, address, legal form, registration number and name and given name of the persons with powers of representation, decision-making or control, if legal person) may be registered in the Early Warning System (EWS) only or both in the EWS and Central Exclusion Database (CED) should the data subject be in one of the situations mentioned in the Commission Decision 2008/969 of 16.12.2008 on the Early Warning System or the Commission Regulation 2008/1302 of 17.12.2008 on the Central Exclusion Database.

The data subjects are granted **rights of access and rectification** upon a request to the controller. The contact information is mentioned in the privacy statement and the tender specifications. As regard the right to request deletion of personal data, the privacy statement provides information that this may lead to exclusion as stated in Article 74 of the CFCA Financial Regulation and Article 148 of the Implementing Rules of the General Financial

Regulation. The privacy statement does not mention any deadlines for the exercise of these rights.

The following **information to data subjects** is provided in the privacy statement, confidentiality clause inserted in the invitations to tenders and data protection clause inserted in procurement contracts:

- identity of the controller;
- categories of data processed;
- purpose of the processing;
- legal basis of the processing;
- modalities for the processing operation;
- recipients of the data processed;
- retention policy;
- rights of access and rectification;
- right to submit a request for an investigation to the DPO and to have recourse to the EDPS.

Where the procurement contract requires processing of personal data on behalf of the controller, the *data protection clause inserted in procurement contracts* states that the contractor may act only under the supervision of the data controller, in particular with regard to the purposes of processing, the categories of data which may be processed, the recipients of the data, and the means by which the data subject may exercise his rights. Further, the clause refers to the obligations of the contractor to limit access to the data to the staff strictly necessary for the performance, management and monitoring of the procurement contract and to adopt appropriate technical and organisational security measures as required by Article 22 of the Regulation.

Tenders are submitted in a paper form. The processing operation includes the management, coordination and organisation of calls for tenders, in particular the reception of tenders and requests to participate (both referred to as "tenders"), their opening, evaluation, negotiation, ranking, copying, distributing, using, filing, archiving and destruction, the preparation of the opening report, the evaluation report, the award decision and the contract, the correspondence with tenderers or candidates (both referred to as "tenderers"), the generation of mailing labels and the publication of the results of the relevant procedure in the Official Journal of the European Union and / or the CFCA website. The processing operation as described implies that data are processed both **manually and by automatic means**.

[...]

3. Legal aspects

3.1. Prior checking

The processing of personal data related to procurement procedures falls within the scope of the Regulation and is subject to prior checking by the EDPS pursuant to its Article 27(2) (a) and (b).

Data are collected and processed with the purpose to evaluate information relating to the legal, financial, economic, technical and professional capacity of tenderers with a view to select the proposals which best satisfy the criteria set out in the call for tenders in accordance with Articles 93 to 97 of the Financial Regulation. It may also involve processing of data

relating to (suspected) offences and criminal convictions in the form of an extract of the judicial record.

The present Opinion relates to the processing of personal data within the management and administration of *procurement procedures* and does not relate to the execution of procurement contracts signed with the tenderers once selected. Having regard to the complexity of procurement procedures and the different scope and purpose of data processing relating to contracts execution, the EDPS considers that a separate notification for prior checking would ensure more clarity and transparency and would provide more adequate guarantees for the rights of data subjects where the data processing relating to contracts execution is likely to present specific risks to their rights as stipulated by Article 27 (1) of Regulation (EC) 45/2001 (hereinafter the Regulation).

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, the EDPS regrets that the processing operations have already been established *prior* his prior-checking opinion. However, the EDPS underlines that all his recommendations given in the present Opinion should be duly implemented and the processing operations adjusted accordingly.

The notification of the DPO was received on 3 October 2011. According to Article 27(4) of Regulation (EC) 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended to allow for comments on the draft opinion, which arrived 22 days later. Therefore, the present Opinion must be delivered no later than 26 December 2011.

3.2. Lawfulness of the processing

Under Article 5(a) of the Regulation, 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*".

The legal basis of the processing of personal data within procurement procedures can be found in the following legal acts:

- Decision No 09-W-01 of the Administrative Board of the CFCA of 9 January 2009 concerning the Financial Regulation of the CFCA, in particular Article 74 "the CFCA Financial Regulation";¹
- Council Regulation (EC, Euratom) N° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities "the General Financial Regulation";
- Commission Regulation (EC, Euratom) N° 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N°1605/2002 on the Financial Regulation applicable to the general budget of the European Communities "the Implementing Rules of the General Financial Regulation".

Since the purpose of the processing operations is the management and administration of procurement procedures intended to obtain the supply of goods, the execution of works or the provision of services necessary for the Agency's activities, the respective processing of personal data within these procedures can clearly be considered as necessary for the performance of tasks carried out in the public interest on the basis of the above mentioned

¹ Available at CFCA website at: <http://cfca.europa.eu>

legal acts. Therefore, the data processing under review is lawful within the meaning of Article 5(a) of the Regulation.

3.3. Processing of special categories of data

The processing of personal data contained in the extracts from judicial records, other certificates to this respect² 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 the Regulation is met.

3.4. Data quality

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

Lawfulness of the data processing has been already discussed in section 3.2. Furthermore, the collection of data listed above seems to be justified and necessary for the purpose of the procurement procedure. Data are provided by the respective data subjects; hence the procedure itself helps to guarantee accuracy of data being processed. The rights of access and rectification contribute further to ensure that the data processed are accurate and up to date subject to considerations and recommendations set out in section 3.7 of the present Opinion.

The EDPS takes note that the tender documentation provides information on the categories of data requested for the purpose of tender evaluation and management and administration of procurement procedures. However, it cannot be excluded that despite this guidance provided, applicants may submit via their CVs and other supporting documents information which might not be necessary or excessive for the purpose pursued by the procedure. Provided that the controller does not process data that are irrelevant and excessive to what is requested and necessary for the processing operations at hand, compliance with the principles relating to data quality as stipulated by Article 4 (1)(c) of the Regulation can be ensured. The EDPS invites the CFCA to procedurally ensure that unnecessary and excessive information submitted by tenderers is not processed (e.g. by providing specific guidance or instructions in this respect in the note of the controller to the persons responsible for the processing).

3.5. Data retention

According to Article 4(1)(e) of the Regulation, personal data may be kept in a form enabling 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 above, files relating to tender procedures, including personal data, are to be retained in the service in charge of the procedure until it is finalised, and in the archives for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate. Personal data are to be retained also until the end of a possible audit if one started before the end of the above period.

The EDPS notes that the above mentioned retention policy applies to successful candidates. In this context, the EDPS opinion is that the envisaged data retention period does not exceed the maximum period of time for which personal data are necessary for control and audit purposes in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation. As regard data of unsuccessful candidates, the EDPS invites the CFCA to define

² As mentioned in Article 134(3) of the Implementing Rules of the Financial Regulation

its data retention policy and to make respective changes in the privacy statement taking into consideration that to be justified in light of Article 4(1)(e) of the Regulation, this data retention period could not be longer than the deadlines to exhaust available legal remedies.

In any case, the EDPS would like to point out that according to Article 49(3) of the Implementing Rules to the Financial Regulation 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*".

3.6. Transfer of data

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

In the present case, the transfers of personal data to the CFCA staff participating in the evaluation and selection of tenders are in principle considered as necessary for the management and administration of procurement procedures. Similarly, the transfers to the bodies tasked with control and monitoring of the application of Union law (e.g. respective services of the European Commission, incl. Internal Audit Service and OLAF, EU Courts etc.) are considered necessary in the context of their specific competences.

As regard the possible transfer of certain categories of personal data to the Early Warning System (EWS) only or both to the EWS and the Central Exclusion Database (CED), it is aimed at preserving the Union's financial interests and ensuring the sound financial management of its general budget and is performed on the basis of respective legal acts³. The EWS and CED have already been prior checked by the EDPS.⁴

The EDPS notes that the persons responsible for the data processing are reminded by the data controller of their obligation to comply with the requirements of the Regulation and to ensure that the data recipients are reminded of their obligation not to use personal data for any other purpose than the one for which they are transmitted.⁵ This measure seems to ensure compliance with Articles 7 (3) of the Regulation.

Further, the notification for prior checking specifies that external experts may participate in tenders' evaluation as members of the evaluation committee on the basis of Article 74 of the CFCA Financial Regulation and Article 146 of the Implementing Rules of the General Financial Regulation when external expertise is required in accordance with Article 179a of the Financial Regulation. Consequently, data are transferred to recipients subject to national law adopted pursuant to Directive 95/46/EC. Such a transfer will be covered by Article 8 (a) of Regulation (EC) 45/2001 which provides that data may be transferred "*if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". In this case the external experts process data on behalf of the CFCA in connection with tasks described above which are carried out in the public interest. Given that the data are not requested by the recipient but

³ EC Decision 2008/969 of 16.12.2008 on the Early Warning System

EC Regulation 2008/1302 of 17.12.2008 on the Central Exclusion Database

⁴ Opinion on a notification for prior checking received from the Data Protection Officer of the European Commission on the Early Warning System (EDPS case 2005-0120);

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the processing operation on personal data concerning the "Registration of a Data Subject in the Central Exclusion Database" (EDPS case 2009-0681)

⁵ Note on data protection to the attention of the CFCA Heads of Units.

rather are transferred on the basis of a decision by the controller, it is for the latter to establish the "necessity" of the transfer. The EDPS notes that the "necessity" of the processing for the purposes of performing the Agency's tasks was established in section 3.2.

3.7. Rights of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the data subject concerned. Article 14 of the Regulation provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

In the case at hand, data subjects are granted rights of access and rectification to their personal data upon a request to the controller. The EDPS notes that the privacy statement does not mention any deadlines for the exercise of the right of rectification. In the context of the competitive character of the procurement procedure and the deadlines for submitting tenders, the EDPS would like to invite the CFCA to stipulate in the privacy statement appropriate time limits for the exercise of the right to rectify certain categories of data (e.g. expertise, technical skills, educational background, professional experience and possibly other data relating to the selection criteria). The EDPS considers that such clarification would contribute to the predictability and legal certainty of the respective processing operation and is necessary to ensure the fairness of the procurement procedure, i.e. safeguard the protection of rights of other applicants in terms of Article 20(1)(c) of the Regulation.

Nevertheless, the EDPS recalls that any restriction of the right to access and rectification should be justified on the basis of Article 20(1) of the Regulation and data subjects should be informed of the right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation.

3.8. Information to the persons concerned

Articles 11 and 12 of the Regulation provide that the data subjects must be informed of the processing of data relating to them and list a range of general and additional items which apply insofar as they are necessary to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

The EDPS notes that the privacy statement, the confidentiality clause inserted in the invitations to tenders and the data protection clause inserted in procurement contracts provide for all information as required in terms of Articles 11 and 12 of the Regulation with the exception of the time limits for the exercise of the right to rectify certain categories of data as stated above in section 3.7.

3.9. Processing of data on behalf of the controller

The present case implies two different aspects of processing of data on behalf of the controller:

a) processing of data on behalf of the controller where external experts participate in the evaluation and selection of tenders within the procurement procedure

As already mentioned, external experts may participate in tender evaluation as members of the evaluation committee on the basis of Article 74 of the CFCA Financial Regulation and Article 146 of the Implementing Rules of the General Financial Regulation. The EDPS takes note of the fact that where external expertise is required on the basis of Article 179a of the Financial Regulation, external experts and contractors participating in the evaluation of tenders sign a declaration of confidentiality and absence of conflict of interest. The following

statement is included: "I also confirm that I will keep all matters entrusted to me confidential. I will not communicate outside the committee any confidential information that is revealed to me or that I have discovered or any information relating to the views expressed during the evaluation. I will not make any adverse use of information given to me". A provision whereby external experts are legally bound to process personal data only on instructions from the controller will additionally contribute to ensuring compliance with Article 21 of the Regulation.

b) processing of data on behalf of the controller where the procurement contract to be signed with the selected contractor requires such processing

According to Article 23 of Regulation (EC) 45/2001, the carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating that the processor should act only on instructions from the controller. The processor should provide sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and comply with the obligation set out in Article 21 of Regulation (EC) 45/2001.

As already mentioned, the procurement contract to be signed with the selected contractor contains a *data protection clause* which refers to the obligations set out in Articles 21 and 22 of Regulation (EC) 45/2001. The security obligation in terms of applicable technical and organisational measures is explicitly mentioned and the obligations to act only under the supervision of the data controller and to respect confidentiality are included. The EDPS considers that this data protection provision contributes to guaranteeing compliance with Articles 21-23 of the Regulation.

[...]

4. Conclusion

The processing under review 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:

- the controller should define its data retention policy regarding data of unsuccessful candidates and make respective changes in the privacy statement in line with section 3.5 of the Opinion;
- the time limits for the exercise of the right to rectify certain categories of data (e.g. expertise, technical skills, educational background, professional experience and possibly other data relating to selection criteria) should be clearly stated in the privacy statement and other related documents;
- the controller should ensure that external experts participating in tenders' evaluation are legally bound to process personal data only on his/her instructions;
- the controller should procedurally ensure that data supplied by the data subjects but that are irrelevant or excessive to what is requested for the purpose of the processing operation, are not processed.

Done at Brussels, on 21 December 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor