

Opinion on the notifications for prior checking from the Data Protection Officer of the Community Fisheries Control Agency concerning the Call for expression of interest No. CFCA/2010/CEI/01 and subsequent contracts

Brussels, 13 January 2012 (case 2011-1001)

1. Proceedings

On 4 November 2011, the European Data Protection Supervisor (EDPS) received a notification for (ex post) prior checking from the Data Protection Officer (DPO) of the Community Fisheries Control Agency (CFCA) concerning the Call for expression of interest¹ with a view to compiling a list of experts to support activities in relation with the Common Fisheries Policy and contract management.

The Opinion is based on information from the notification form, additional information requested from the CFCA by the EDPS and information available at CFCA website².

2. Facts

This prior checking Opinion deals with two processing operations: the existing selection procedure for external experts on the basis of a Call for expression of interest and the processing of subsequent contracts. The experts chosen within the framework of this Call for expression of interest shall provide technical assistance as regards the development of training materials for fisheries inspectors.

Any interested applicant may submit an application at any time during the period of validity of the list, with the exception of the last three months of that period. The evaluation of submitted application forms with attached CVs is carried out by a selection committee at least once a year.

The CFCA will draw up a list of experts who meet the criteria. Inclusion on the list entails no obligation on the part of the CFCA concerning the award of a contract. The decision of the Executive Director of the CFCA to award a contract to an expert included in the CEI list is based on the expert's relevant experience in the field/subfield he is applying for. Reference is made in the contract to the fields of interest the applicant declared in the application form.

The **controller** is to be considered the CFCA as a whole. The **person responsible for the processing operations** is the Head of Unit Capacity Building.

¹ The Call for expression of interest (CFCA/2010/CEI/01) was published in the Official Journal S212 on 30/10/2010 and is valid from 30/10/2010 to 29/10/2012.

² http://cfca.europa.eu/pages/home/cfca_jobs_procurement.htm.

The **purpose** of the processing operations is to draw up a list of experts to support activities in relation to the Common Fisheries Policy by evaluating their personal aspects (fields of expertise, qualifications and experience). Secondly, the scope and purpose of data processing relates to conclusion and management of contracts with selected external experts.

Data subjects are natural persons who apply to the selection of independent experts pursuant to the Call for expression of interest.

Data are provided by the data subjects in their application form. The following **categories of data** are processed:

- data relevant to identify and contact the candidate (first name, family name, date of birth, gender, nationality, contact details, company and department);
- data in financial identification form (e.g. bank account reference);
- data in legal entities form (e.g. VAT number, ID number, passport number);
- other personal data contained in CVs and in additional information form (expertise, technical skills and languages, professional experience including details on current and past employment);
- declaration of honour with respect to the exclusion criteria and absence of conflict of interest;
- additional data in case of award of a contract (recent extract from the judicial record or equivalent document, certificates issued by the competent authorities providing evidence covering all taxes and social security contributions for which the applicant is liable).

For the purpose of submitting applications, applicants are requested to complete the application form and to provide evidence of all documents, including the financial identification form, the exclusion criteria form, the legal entities form, the curriculum vitae form and the additional information form.

The following **retention policy** applies.

Paper and electronic files relating to the selection procedure, including personal data of successful and unsuccessful applicants and subsequent contracts, are to be retained in the service in charge of the Call for expression of interest concerned until the end of the procedure for which it is submitted, and in the archives for at least five years from the date on which the European Parliament grants discharge for the budgetary year of the closure of the Call for expression of interest.

Files might be retained until the end of a possible audit if one started before the end of the above periods.

The data subjects are granted **rights of access to and rectification of data processed** upon a written request by post or by e-mail to the controller.

The following **information to data subjects** is provided in the Privacy statement for processing of personal data to Procurement Procedures on the website:

- information on the controller;
- categories of data processed;
- legal basis and purpose of the processing;
- technical means for processing;
- recipients of the data processed;
- time-limits for storing the data;
- right of access;

- rights to be informed on the results of the evaluation and to request a review of the application;
- right of data subjects to verify, modify or delete their data;
- right of data subjects to contact the head of Unit Resources and to have recourse to the EDPS.

Furthermore, a data protection clause is included in the Call for expression of interest published on the website.

Recipients of data: During the selection process, CVs and application forms are given to the selection committee. The committee is composed of internal members (Procurement Coordinator, Head of the Unit B, Senior Coordinator for Training and Developments, Project Officer for coordination and training) and external members (appointed by DGMare and a Member State). In the case where the external committee members cannot be present during the meeting at the CFCA, meetings are held as a video-conference. Application forms and CVs are sent either by e-mail or by post mail to the external members with reference to Regulation 45/2001 and the request to destroy the CVs after the meeting of the Selection committee. Members' copies of the CVs and applicants data are destroyed after the selection.

As regard **security measures**, personal data in paper format (original application forms with CVs and contracts) are stored in locked cupboards and access is limited to designated staff of the training section who prepare the contracts and to other designated staff for control and management purposes. Personal data in electronic format (application form with CVs and contracts) are stored on the CFCA's server with password restricted access to designated staff for the same purposes mentioned above. To keep track of the delivered contracts a database system has been developed. For use in data analysis, the contracts are only made available to the database administrator.

The CFCA premises and operations of the servers abide by the CFCA's security decisions.

3. Legal aspects

3.1. Prior checking

The processing of personal data within the management and administration of the selection procedure and, secondly the processing of personal data for the conclusion and management of contracts with selected external experts including the database system falls within the scope of Regulation (EC) No 45/2001 (hereinafter the Regulation).

The processing operations concerning the selection procedure for external experts are subject to prior checking by the EDPS pursuant to its Article 27(2) (b). The processing is intended to evaluate the technical and professional capacity of each applicant.

The processing of personal data relating to the conclusion and administration of subsequent contracts with external experts including the database system for the contracts is subject to prior checking pursuant to Article 27 (2) (a) since data relating to "suspected offences, offences, criminal convictions or security measures" may be processed. In case of award of a contract the applicant shall provide upon request an extract from the judicial records.

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 made in

the present Opinion should be duly implemented and the processing operations adjusted accordingly.

The notification was received by e-mail on 4 November 2011. According to Article 27(4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. Taking into account that the procedure was suspended for a total of 28 days to request complementary information, the present Opinion must be delivered not later than 31 January 2012.

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";³
- 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 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 to the Financial Regulation".

The purpose of the processing operations is to select experts able to provide technical assistance as regards the development of training materials for fisheries inspectors based on their recognised expertise, qualifications and experience in the respective field. In this respect, the processing of personal data under review can be considered as being necessary for the Agency's activities on the basis of the above mentioned legal acts. Therefore, the data processing 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 respect⁴ 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.

³ Available at CFCA website at: <http://cfca.europa.eu>.

⁴ As mentioned in Article 134(3) of the Implementing Rules of the Financial Regulation.

Lawfulness of the data processing has been already discussed (see point 3.2 and 3.3) whereas fairness has to be assessed in the context of information provided to data subjects (see point 3.8).

The accuracy of the data processed is facilitated by the fact that data are provided by the respective data subjects who can also make use of their right of access and rectification (see point 3.7).

The EDPS notes that for the purpose of being included in the CEI list, applicants are requested to complete the application form and to provide evidence of all documents as required. The application form includes a financial identification form to be filled out. The EDPS observes that the collection of financial data at this stage appears not to be in full compliance with Article 4 (1) (c) of the Regulation. Such data is excessive in relation to the purpose of the processing to draw up a list of experts and should only be collected upon conclusion of a subsequent contract.

In addition, it must be considered that the applicants may provide in their CVs information that may not be necessary for the respective selection procedure. The controller shall not process further data that are irrelevant or excessive to what is requested for the purposes of the processing operations.

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, paper and electronic files relating to the selection procedure, including personal data of successful and unsuccessful applicants and subsequent contracts, are to be retained in the service in charge of the call for expression of interest concerned until the end of the procedure for which it is submitted, and in the archives for at least five years from the date on which the European Parliament grants discharge for the budgetary year of the closure of the call for expression of interest. Moreover, personal data are to be retained also until the end of a possible audit if one started before the end of the above periods.

The EDPS notes, that the above mentioned retention policy applies to successful and unsuccessful candidates. The EDPS is of the opinion that keeping personal data of successful candidates within the specified period would correspond to the time period for which personal data is necessary for control and audit purposes in line with Article 49(1)(d) and (2) of the Implementing Rules to the Financial Regulation.

However, as regard data of unsuccessful candidates, the EDPS invites the CFCA to reconsider its data retention policy and also 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, the data retention period for data of unsuccessful candidates 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 "*personal data contained in supporting documents 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 external 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 members of the selection committee are in principle considered as necessary for the accomplishment of the respective selection procedures. This also applies to the transfer of the CVs and application forms to the external members of the selection committee who will participate in a video-conference meeting. However, the EDPS recommends that application forms and CVs are either sent by encrypted e-mail or by ordinary post to the external recipients due to the possible sensitivity of the data.

As regard the possible transfer of data to recipients other than Community institutions and bodies, such a transfer will be covered by Article 8 (a) of the Regulation 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 external members process data 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 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 CFCA's tasks was established in section 3.2.

As already mentioned, personal data are sent to external selection committee members with reference to Regulation 45/2011 and the request to destroy the CV's after the meeting of the Selection Committee. To ensure full compliance with the Regulation, the EDPS recommends that all data recipients are explicitly reminded of their obligation not to use personal data for any other purpose than the one for which they are transmitted.

3.7. Rights of access and rectification

In the case at hand, access and rectification of data processed will be granted upon request sent by post or e-mail to the head of the unit capacity building. The EDPS notes, that this procedure seems to ensure compliance with Article 13 of the Regulation.

3.8. Information to the persons concerned

Articles 11 and 12 of the Regulation provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order 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 of the CFCA provides for all information as required in terms of Articles 11 and 12 of the Regulation. However, he suggests that the retention period is revised in order to also reflect the retention periods for personal data of applicants included and not included in the CEI list. Moreover, he suggests that the application form and the CEI list should make a reference to the privacy statement.

4. Conclusion

The notified processing operations do not appear to involve any breach of the provisions of the Regulation, provided that the recommendations made above are taken into account. This means, in particular, that:

- financial data of the applicant is only collected upon conclusion of a contract;
- the controller should ensure that data that are irrelevant or excessive to what is requested for the purposes of the processing operations, are not processed;
- the controller should reconsider 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;
- application forms and CVs are only sent by encrypted e-mail or by ordinary post to the external recipients;
- all data recipients are explicitly reminded of their obligation not to use personal data for any other purpose than the one for which they are transmitted;
- information to data subjects is revised as outlined in section 3.8.

Done at Brussels, 13 January 2012

(signed)

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Assistant European Data Protection Supervisor