

Opinion on the notification for prior checking from the Data Protection Officer of the European Research Council Executive Agency (ERCEA) concerning IDEAS - ERCEA of Experts Selection and Management

Brussels, 09 July 2014 (case 2013-0575)

1. Proceedings

On 23 June 2013, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Research Council Executive Agency (ERCEA) a notification for prior checking concerning the processing operation "Specific Programme IDEAS–ERCEA Experts Selection and Management" organized by the ERCEA in the frame of the 7th Research Framework Programme (FP7).

On 7 August 2013, the EDPS requested additional clarifications in the form of an updated notification, which was received on 25 November 2013. An additional request for clarifications was sent on 11 February 2014 and additional information was received on 14 March 2014.

The draft Opinion was sent to the DPO for comments on 20 June 2014. These were received on 1 July 2014.

2. Facts

The ERCEA manages the operations of the European Research Council (ERC)¹ and implements the Specific Programme IDEAS in the frame of the FP7. In this context, the ERCEA is responsible for selecting proposals for funding with the aim to support research projects carried out by individual national or transnational research teams. Proposals submitted to the ERCEA are subject to a review by independent experts (peer review); the present Opinion deals with the *selection and management* of these experts².

The **main purposes** of the ERCEA Experts Selection and Management procedure are:

- ***Selection of experts (including identification, selection and appointment)***: The purpose of this first phase of the procedure is to identify, select and appoint independent experts able to assist the ERCEA in the selection of proposals.

¹ The ERC is a combined entity that consists of the ERCEA and the ERC Scientific Council (ScC). The ScC is the decision making body of the ERC and sets the ERC's scientific funding strategy. The chair of the ScC is also the President of the ERC.

² The notification refers to the full process of the selection and managements of experts at the ERCEA as part of the core business of the ERCEA (a process which includes the so called "Annual Information Exercise"). It does not refer to the possible selection of experts for other purposes (e.g. procurement). The exclusion of experts at the request of applicants is covered by the EDPS Opinion in case 2011-0661 and thus **not part of this Opinion**.

- **Management:** The purpose of this subsequent phase is to organize panels' work and meetings; to conduct contract management (appointment letters and task assignments) and execute payments; to ensure activities/calls reporting.
- **"Annual Information Exercise":** The ERCEA gathers and transfers data on the panel members to the ERC Scientific Council (ScC) to support the ScC's Annual Information Exercise³. According to the notification, this review exercise serves to maintain the integrity of the ERC's evaluation process, implement a rotation of experts, ensure that the panels continuously reflect the necessary breadth and diversity of scientific expertise needed to successfully identify the most excellent scientists and to warrant the gender and geographical balance of the panels. As a result of this exercise, panel members are regularly changed⁴.

The **procedure** consists of the following main steps⁵:

- **Identification experts eligible for selection:** The experts are proposed by the ScC, which relies on its members or panel members as well as on information provided by the ERCEA to identify candidates⁶. The ERCEA also has recourse to the list of experts resulting from calls for applications published in the Official Journal of the European Union, as well as other experts with the necessary qualifications, identified for example, through consultation with national research funding agencies and similar organisations⁷. Independent experts are required to have skills and knowledge appropriate to the areas of activity in which they are asked to assist, relevant language skills and may come from countries other than the Member States or countries associated to the FP7.
- **Appointment of experts:** A first e-mail contact to verify the interest of the expert to cooperate is usually based upon publically available information (e.g. contact details downloaded from internet websites).
 - Where the expert is interested, the ERCEA invites the expert to complete a profile online in a local ERCEA repository to provide the ERCEA with the necessary data to allow the issuing of an Appointment Letter.
 - The Appointment Letter, which is generated by the local ERCEA repository, defines the relationship between the ERCEA and the experts⁸. It contains (i) a confidentiality declaration by the expert; (ii) a commitment by the expert to disclose any conflict of interest⁹; (iii) an acceptance by the expert of a 'code of

³ The transfer of data to the ScC *in general* (i.e. not as regards the Annual Information Exercise) is covered by the EDPS Opinion in case 2012-0831, i.e. it is **not covered by this Opinion**.

⁴ See annex 2 to the notification, "ERCEA Documentation of Procedures - Annual Information Exercise for the Purpose of Composing Panels".

⁵ Under Section 3.1.4. of the Annex to Commission Decision 2010/767/EU, a breach of the Code of Conduct or other serious misconduct by the independent expert may be qualified as grave professional misconduct and may lead to the exclusion of this expert from the list of independent experts to be appointed by the ERCEA. Pursuant to such exclusion, the independent expert will be removed from the expert repositories and barred from re-registering for the duration of the exclusion. However, according to the additional information received on 14 March 2014, "no other exclusion activity has been included in the notification - other than the Annual Information Exercise". Any exclusion of experts based on a breach of the Code of Conduct or other serious misconduct is thus **not covered by this Opinion** but Has been notified by the ERCEA already in the separate notification on "IDEAS - Exclusion of independent experts by applicants", case number 2011-661.

⁶ See Section 3.1.2. of the Annex to Commission Decision 2010/767/EU.

⁷ According to additional information received from the DPO on 1 July 2014, although this options exists, it has never been used in practice.

⁸ See Section 3.1.4. of the Annex to Commission Decision 2010/767/EU.

⁹ As defined in the Appointment Letter, see annex 2 to the notification (there annex 4.1).

- conduct¹⁰; (iv) the conditions of reimbursement; (v) a specific privacy statement. On the "*Use of personal data*" it contains the following statement: "*I agree to the use of my personal data for the sole purpose of peer review and in compliance with European legislation*" (with a footnote referring to the Regulation).
- Further information about research interests and expertise of the expert may be collected by ERCEA staff via official internet websites (i.e. Host Institution webpage). It is stored in the ERCEA internal expert repositories by means of keywords identifying expertise to allow allocation of appropriate proposals to the expert for review.
 - The identification information of *paid* experts is transferred to ABAC (Accrual Based ACcounting of the European Commission).
- *Management of experts*: Appointed experts can be called upon to cooperate with the ERCEA at any time after they signed the Appointment Letter according to the actual ERCEA needs.
 - To allocate tasks to an expert, the ERCEA sends an Assignment of Tasks letter¹¹, which reminds the expert to "*use any personal data you receive only for the purposes for which they are transmitted to you*".
 - The ERCEA publishes lists of names of appointed experts once a year without indicating which proposals they have evaluated, which peer review evaluation session they have observed or which projects they have examined¹².
 - "*Annual Information Exercise*": The ScC undertakes an "Annual Information Exercise", for which the ERCEA gathers and transfers data on the panel members to the ScC to facilitate its review of the composition of the 25 different scientific panels¹³. According to the additional information provided on 14 March 2014, the information collected by ERCEA could be considered to be evaluative, "*...However, any of these criteria are objective criteria collected by the ERCEA for the ScC, therefore do not include evaluation on the part of the ERCEA. They are later used by the ScC, which is acting outside the scope of the ERCEA, to evaluate if an expert should be invited to participate in evaluations again*".

The notification refers to the following **legal bases**:

- **Selection and management**

- Article 17(2) of Regulation (EC) No. 1906/2006¹⁴ and its Preamble 16 that "*...to govern the submission, evaluation and selection of proposals and award of grants, as well as redress procedures for participants, ...the rules governing the use of independent experts should be established*";
- Council Decision 2006/972/EC¹⁵, particularly its Article 4 explaining the ERC's structure and Annex 1, which explains the ScC's role in the selection of experts;

¹⁰ As defined in the Appointment Letter, see annex 2 to the notification (there annex 4.1).

¹¹ See annex 3 to the notification.

¹² See Section 3.1.2. of the Annex to Commission Decision 2010/767/EU and §9 of Annex II of the Code of Conduct (annex 3 to the notification).

¹³ See Section 3.1.10. of the Annex to Commission Decision 2010/767/EU and annex 2 to the notification.

¹⁴ Regulation (EC) No. 1906/2006 of the European Parliament and of the Council of 18 December, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:391:0001:0018:EN:PDF>.

¹⁵ Council Decision 2006/972/EC of 19 December 2006, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:400:0243:0271:EN:PDF>.

- Commission Decision 2010/767/EU¹⁶ amending Commission Decision C(2007)2286 (as regards the ERC rules for the submission of proposals and the related evaluation, selection and award procedures);
- Commission Decision C(2011)7216¹⁷ (as regards Appointment Letters).
- "**Annual Information Exercise**"¹⁸:
 - Article 17(2) of Regulation (EC) No 1906/2006;
 - Points 3.1.2. and 3.1.3 of Commission Decision C(2010)8695¹⁹;
 - Commission Decision C(2011)7216;
 - Article 5(6) and Annex III of Commission Decision (2011/12/EU) amending Decision 2007/134/EC establishing the European Research Council²⁰.

The **controller** is the ERCEA as a whole, represented by its Director; the primarily responsible person for the processing operation within ERCEA is the Head of Department B-Scientific Management.

Data subjects concerned are all categories of independent experts supporting the ERCEA in the peer review evaluation of frontier research proposals and the review of funded projects.

According to the notification, the following **data categories** are processed²¹:

- **Selection:**
 - First name, name, previous family name; passport number, place/date of birth, nationality, gender;
 - Phone number, fax number, e-mail address;
 - Employment details (current employer, if any, and, optionally, five previous employers);
 - Expert type + candidature reference, including repository identification numbers;
 - Host institution;
 - Professional experience, research interest, expertise (classified by means of key-words);
 - Bank account details (for reimbursement);
 - Disability or other reason for specific requests for special tools needed during evaluations.
- **Management (incl. expert reimbursement)**
 - unavailability due to health or other personal reasons including supporting evidence;
 - travel information including transportation type, place of departure/arrival, class of travel, price, supporting documents, disability or other personal reason for special travel arrangements;

¹⁶ Commission Decision 2010/767/EU of 9 December, see

http://erc.europa.eu/sites/default/files/document/file/erc_rules%20for%20submission.pdf.

¹⁷ Commission Decision C(2011)7216 of 5 October 2011 amending Commission Decision C(2010)9271, not published in the Official Journal, but available at request by external users through the "Commission Register", see <http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=home>.

¹⁸ See annex 2 to notification, Section 1.2.

¹⁹ Commission Decision C(2010)8695 of December 2010 amending Decision C(2007) 2286, see http://erc.europa.eu/sites/default/files/document/file/erc_rules%20for%20submission.pdf.

²⁰ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:009:0005:0010:EN:PDF>.

²¹ In addition, certain categories of data are processed for the purpose of excluding other experts from participation in the grants evaluation process for reasons of "direct scientific rivalry", "professional hostility" and "similar situation which would impair or put in doubt the objectivity of the potential evaluator" in the sense of Commission Decision 2010/767/EU. These aspects of the processing operation have been analyzed and prior checked by the EDPS Opinion in case 2012-0661 and are consequently **not assessed in this Opinion**.

- amount of the daily allowance and of the accommodation allowance as well as cost claim/invoice;
 - meeting days and/or amount of days worked;
 - amount of projects screened/reviewed within a call for proposal.
- ***Annual Information Exercise***²²
 - General information (in addition to personal data under "Selection" above): Expert ID, last call in which the panel member served, panel, role (Panel chair/member), first year of appointment; number of calls served, future non-availability.
 - According to the additional information provided on 14 March 2014: (a) number of reviews handed in late, (b) number of characters in review short of average, (c) attendance of panel meetings, (d) failure to comply with confidentiality or conflict of interest rules, (e) failure to meet an already accepted commitment, (f) lack of participation during the panel meeting discussion or during the final evaluation decision on proposals, (g) reproduction of text from other experts or from the proposal and (g) submissions requiring correction.
 - The information above is completed by a graphic illustration summarising for each expert the availability, past participation in the peer review process, failure to comply with the terms and conditions of the Appointment letter and ERC procedures, gender of the panel members, country of their institution and current status as ERC grantees (if applicable).

Data processed may be disclosed to the following **recipients**:

- ***Selection and management***
 - Internal authorised ERCEA staff that manage the operational and financial aspects of research proposals and projects;
 - Other European institutions linked to the "IDEAS" Specific Programme;
 - (a) Civil Service Tribunal, at its request, (b) Ombudsman, (c) European Data Protection Supervisor (EDPS), at his request, and (d) audit and control bodies such as OLAF and the Court of Auditors.
 - The public has access to basic information on experts as follows²³. The full name of experts that have participated in evaluations (without link to specific proposals/projects they reviewed) is published on CORDIS²⁴ and the list of panel members is published on the ERC public website;

Provided the expert has given prior consent as foreseen in Section 3.1.10. of the Annex to Commission Decision 2010/767/EU of 9 December 2010²⁵, data processed may further be disclosed to:

²² See annex 2 to notification on "Procedure on the Information gathering exercise for the purpose of composing panels" (there Section 4.4).

²³ See Section 3.1.2. of the Annex to Commission Decision 2010/767/EU of 9 December 2010.

²⁴ Community Research and Development Information Service, see http://cordis.europa.eu/fp7/experts_en.html.

²⁵ "For purposes related to monitoring, study and evaluation foreseen by the Ideas Work programmes, the ERCEA may need that submitted proposals be processed by third parties (Contractors and/or beneficiaries of Coordination and Support Actions) in compliance with the requirements of Regulation (EC) No 45/2001 of the European Parliament and of the Council. Applicants (The PIs and/or the host institutions) are asked to give their free individual consent to the processing of proposals. The individual consent is not requested on a compulsory base and it is only provided on a voluntary base by the applicants. Refusal to give the individual consent does not affect the evaluation process".

- External researches on the basis of a "Common Support Action" to review specific issues such as the influence of gender on panel decisions;
 - Public research funding bodies/other programmes and initiatives of Member States and associated states and departments of the European Commission not involved in the administration of the research framework programme that seek particular scientific or technical expertise to assist in the administration of other EU programmes may receive access to the experts' profile data.
- **Annual Information Exercise**

For the Annual Information Exercise, members of the ScC receive information²⁶; this data transfer is regulated by the procedure on transfer of data to the ScC²⁷. Under Annex III of Commission Decision (2011/12/EU):

- the ERCEA shall provide the ScC with documents and data necessary for the performance of the tasks entrusted to the ScC as long as this is done in compliance with and within the limits of the obligations on confidentiality, security and protection of personal data as provided by EU law;
- The members of the ScC shall use such documents and data only for the purposes and tasks for which they are provided and shall be bound by an obligation of confidentiality;
- Appropriate organisational and technical measures to ensure the security and confidentiality of access and processing shall be set out, in order to prevent any unauthorised disclosure or access, accidental or unlawful destruction, loss or alteration of data and documents;
- For the processing of personal data, the members of the ScC who receive these personal data shall guarantee the level of protection of personal data in accordance with the provisions of the Regulation (EC) No 45/2001 and the Directive 95/46/EC of the European Parliament and of the Council;
- They shall not process any personal data in a way incompatible with the purposes and tasks for which they are transmitted and they shall give due care to the legitimacy, adequacy, relevance, accuracy, necessity and the limitation in time of personal data collected and processed.

The following **retention policy** applies:

- **Selection and management**²⁸: Personal data of experts involved in ERC evaluation activities are kept by ERCEA for 10 years after the end of the project on which they provided their service (the notification refers to the Commission's Common Retention List SEC(2007)970 revised by SEC(2012)713);
 - Paid experts with a profile in the *Experts Management Participants Portal (EMPP)* may themselves update or delete online their personal data stored in EMPP through the Participant Portal. Data in EMPP not updated during the last 10 years is removed automatically;
 - As regards personal data stored in the *local ERCEA expert repository*, the same retention period applies; experts wanting to update or remove their data earlier have to notify the ERCEA, which will satisfy their request on demand.
- **Annual Information Exercise**: Personal data related to the Annual Information Exercise is kept for 10 years following the completion of the yearly exercise by the ERCEA.

²⁶ See annex 2 to the notification (there Section 4.5).

²⁷ See also EDPS Opinion in case 2012-0831 on the transfer of data to the ScC *in general*.

²⁸ See annex 2 to the notification (there Section 3).

The **information to data subjects** is provided as follows:

- A specific privacy statement on **Experts Selection and Management**²⁹ stipulates inter alia the following: "*If the ERC experts want to access, verify, correct or delete any personal data, they should apply to the ERCEA Director or the Head of Department B, who are responsible for such processing (i.e. respectively the Controller and the Co-Controller), by sending an e-mail giving details of your request to the mailbox indicated in point 6. For the ERC experts having access to Experts Management Participant Portal (EMPP), corrections can be made directly on-line; however, for having data corrected in the ERCEA local database they have to proceed as above by contacting ERCEA Director or the Head of Department B.*" In addition, the Appointment Letter includes a data protection clause³⁰;
- Information on the **Annual Information Exercise** is published on a ERC public website³¹, noting inter alia "*On the one hand, you may update or delete your personal data stored online in the EMPP through the Participant Portal. On the other hand, with regard to the data stored in the local ERCEA database, if you want to check, modify, correct or delete any personal data, you should apply to the ERCEA Director or the Head of Department B, who are responsible for such processing (i.e. respectively the Controller and the Co-Controller), by sending an e-mail giving details of your request to the mailbox indicated in point 6...*". In addition, at the outset of the evaluation process, panel members are informed by letter that and which factual information about their participation in the ERC evaluation process and their procedural compliance will be gathered and annually transferred to the ScC as part of the Annual Information Exercise³².

Data subjects are granted the **rights of access and rectification**:

- *Paid experts* receiving remuneration can access and update their own data in the EMPP.
- *Unpaid experts* (whose information is stored locally at the ERCEA) can access and update their data with the help of ERCEA staff as their under section 4 of the specific privacy statement on "*Experts Selection and Management*"³³.
- Article 13 of Steering Committee decision StC210610/6 on the "implementing rules concerning the Data Protection Officer"³⁴ spells out the details on the general rights given to any data subject by the ERCEA (duty of the ERCEA to reply to any request without delay, right of recourse to the DPO/EDPS etc.)³⁵.

As regards **security measures**:

...

3. Legal aspects

²⁹ See http://erc.europa.eu/sites/default/files/document/file/specific_privacy_statement_2013.pdf = annex 1 to the notification as well as under <http://erc.europa.eu/space-erc-reviewers>.

³⁰ The clause reads inter alia as follows: "... *Independent experts may, on written request, gain access to their personal data and correct any information that is inaccurate or incomplete. They should address any questions regarding the processing of their personal data via the official who signed the present appointment letter. Independent experts may lodge a complaint against the processing of their personal data with the European Data Protection Supervisor at any time*", see annex 3 to the notification, Annex I.

³¹ [http://erc.europa.eu/sites/default/files/content/Specific_Privacy_Statement%20 Annual_Information_Exercise.pdf](http://erc.europa.eu/sites/default/files/content/Specific_Privacy_Statement%20Annual_Information_Exercise.pdf)

³² See annex 2 to the notification, (there Sections 4.2 and 4.3).

³³ See http://erc.europa.eu/sites/default/files/document/file/specific_privacy_statement_2013.pdf = annex 1 to the notification as well as under <http://erc.europa.eu/space-erc-reviewers>.

³⁴ http://erc.europa.eu/sites/default/files/document/file/data-protection_Implementing_Rules_DPO.pdf .

³⁵ See also annex 2 to the notification (there Section 3).

3.1. Prior checking

Applicability of Regulation (EC) No 45/2001 ("the Regulation"). The processing by the ERCEA of data relating to experts constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*", Article 2 (a) of the Regulation). In selecting and managing experts for the peer review of proposals for funding with the aim to support research projects, the ERCEA acts within the scope of EU law (Article 3(1) of the Regulation in the light of the Lisbon Treaty). According to the notification, the collection of data processed is mostly done by automatic means (online) and, at any rate, introduced into an expert repository (either ERCEA local database or EMPP). Therefore, the Regulation is applicable.

Grounds for prior checking. According to Article 27(1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks.

The list includes "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27 (2)(b) of the Regulation). The selection of experts implies evaluation of their personal aspects such as academic and professional experience as well as their specific skills and knowledge.

In proposing experts, the ScC relies on information provided by the ERCEA to identify candidates. According to the notification, the ERCEA "*has recourse to the list of experts resulting from calls for applications published in the Official Journal of the European Union, as well as other experts with the necessary qualifications, identified for example, through consultation with national research funding agencies and similar organisations. Independent experts are required to have skills and knowledge appropriate to the areas of activity in which they are asked to assist, relevant language skills and may come from countries other than the Member States or countries associated to the FP7*". The ERCEA is thus evaluating these aspects for experts it proposes to the ScC.

Conclusion: The processing operation at hand is thus prior-checkable under Article 27(2)(b) of the Regulation.

Prior checking. 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 however, the EDPS notes with regret that the processing operation has already been established.

In any case, any recommendations made by the EDPS should be adopted accordingly.

The EDPS Public Procurement Guidelines explicitly cover the "*selection and appointment of external experts on a basis of calls for expression of interest for tasks involving assistance in evaluation of grant applications, projects and tenders, and for providing opinions and advice in specific cases; as well as conclusion and management of contracts with the selected experts*" (emphasis added). In the light of the accountability principle guiding his work, the EDPS would want to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place in the frame of the ERCEA Experts Selection and Management procedure.

Deadlines. The notification of the DPO was received on 10 July 2013; its update was received on 25 November 2013. As this is an ex-post case, the deadline of two months for the

EDPS to issue his Opinion under Article 27(4) of the Regulation does not apply; this case has been dealt with on a best-effort basis.

3.2. Lawfulness of the processing

The identification, selection and appointment of experts able to assist the ERCEA in the selection of proposals as well as the gathering and transfer of personal data of the experts (panel members) to the ScC to support the ScC's Annual Information Exercise is based on the ERCEA's mandate and EU objectives and policies.

The set of processing operations of personal data implemented by ERCEA seem necessary for the performance of the tasks described above and are carried out in the public interest. The EDPS therefore considers the processing operations lawful within the meaning of Article 5(a) of the Regulation (read together with its recital 27).

However, insofar as the ERCEA relies on the consent of experts as a legal basis under Article 5(d) of the Regulation for transferring their personal data to contractors and/or beneficiaries of coordination and support actions³⁶, the EDPS notes the absence of provisions outlining when and how such consent will be sought³⁷.

The EDPS therefore recommends that the ERCEA procedurally ensure that such consent meets the requirements stipulated in Article 2(h) of the Regulation, according to which "*the data subject's consent' shall mean any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed*".

3.3. Processing of special categories of data

The Regulation provides for specific rules for categories of data considered by their nature of affecting fundamental rights and freedoms. According to Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and 10(3).

In the present case, the processing of health related data submitted by appointed paid experts due to special needs or illness can be regarded justified in terms of Article 10(2)(b) of the Regulation given that there is no reason to believe that the information collected goes beyond what is necessary in order to certify the existence of special needs or an illness in the context of managing those experts.

Due to the sensitive nature of such data, the EDPS recommends that staff working in the expert management team sign confidentiality declarations mentioning that they are subject to an obligation of professional secrecy equivalent to that of a health professional. This organisational measure aims at maintaining the confidentiality of personal data and at preventing any unauthorised access to them within the meaning of Article 22 of the Regulation.

3.4. Data quality

Without prejudice to the conclusion on processing of health data, the collection of other personal data as listed above seems to be justified and necessary for the selection of experts, their management and the Annual Information Exercise. Where the personal data are provided by the respective data subjects, the procedure itself helps to guarantee accuracy of data being processed. The rights of access and rectification contribute further to ensuring that the data

³⁶ Section 3.1.10. of the Annex to Commission Decision 2010/767/EU of 9 December 2010; the notification (section 12) insofar refers to the transfer to "Public research funding bodies/other programmes and initiatives of Member States and associated states and departments of the European Commission not involved in the administration of the research framework programme and to external researches on the basis of a Common Support Action to review specific issues such as the influence of gender on panel decisions".

³⁷ Section 3.1.10. of the Annex to Commission Decision 2010/767/EU of 9 December 2010 does not specify this.

processed are accurate and up to date, subject to considerations and recommendations set out in section 3.8 of the present Opinion.

The EDPS takes note that the specific privacy statements, the Appointment Letter as well as the other information made available to experts provides extensive information on the categories of data requested for the purpose of the selection and management of experts as well as the Annual Information Exercise. However, it cannot be excluded that despite this guidance provided, experts may submit via their supporting documents information that might not be necessary or excessive for the purpose pursued by the procedure.

In order to ensure compliance with the principles relating to data quality as stipulated by Article 4(1)(c) of the Regulation, the EDPS suggests that the ERCEA procedurally ensure that any such non-necessary and excessive information submitted by experts is not further processed.

3.5. Data retention

Personal data of experts having contributed to ERC evaluation activities are kept by ERCEA for 10 years after the end of the project on which they provided their service (the notification refers to the Commission's Common Retention List SEC(2007)970 revised by SEC(2012)713) and personal data related to the annual information exercise is kept for 10 years following the completion of the yearly exercise by the ERCEA.

The EDPS does not see any reason to keep data of experts having contributed to ERC evaluation activities for ten years after the end of the project on which they provided their service. 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*". Against this background, the EDPS considers that a seven years period after the end of the project would correspond to the maximum time limit 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 Regulation³⁸.

The EDPS consequently invites the ERCEA to reconsider the data retention period applicable for personal data of experts having contributed to ERC evaluation activities.

3.6. Transfer of data

- **Article 7 of the Regulation**

As indicated above, intra- and inter-institutional transfers of personal data take place within the processing operations for expert selection and management as well as the Annual Information Exercise. Pursuant to Article 7 of the Regulation, the transfers within the ERCEA and to other institutions or bodies have to be "*necessary for the legitimate performance of the tasks 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). Pursuant to Article 21 of the Regulation, a person employed with a Community institution having access to personal data shall not process them except on instructions from the controller.

In the present case, the transfers of personal data to other EU institutions and organisational structures associated with the Research Framework Programmes are considered necessary for the administration and management of these procedures. Similarly, transfers to the General Court or the Court of Justice, the Ombudsman, the European Data Protection Supervisor, to audit and control bodies such as OLAF, Court of Auditors, ERCEA Internal Audit Office and

³⁸ See EDPS Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts, pp. 4/5 and EDPS Opinion in case 2011-0738.

the Internal Audit Service and other would be necessary for the legitimate performance of tasks covered by the competence of the recipient.

To ensure compliance with Article 7(3) of the Regulation, the EDPS recommends that all of the above mentioned recipients of data are always reminded of the purpose limitation of the respective transfer.

- **Article 8 of the Regulation**

Public research funding bodies/other programmes and initiatives of Member States and associated States and departments of the European Commission not involved in the administration of the research framework programme that seek particular scientific or technical expertise to assist in the administration of other EU programmes may receive access to the experts' profile data. Also, external researches on the basis of a "Common Support Action" to review specific issues such as the influence of gender on panel decisions. Under Article 8(b) of the Regulation, personal data shall only be transferred to such recipients "*if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced*".

Under Section 3.1.10. of the Annex to Commission Decision 2010/767/EU³⁹, the above transfers are (1) limited to the purposes of monitoring, studying and evaluating *as foreseen by the Ideas Work programmes* and (2) conditional upon the consent of the expert. In the light of Article 8(b) of the Regulation and under these specific circumstances, the limitation to the purposes of monitoring, studying and evaluating *as foreseen by the Ideas Work programmes* indicates that these transfers are necessary for their implementation. In particular in the light of the consent requirement, there is also no reason to assume that the data subjects' legitimate interests might be prejudiced as regards these transfers.

3.7. Rights of access and rectification

Data subjects are granted rights of access and rectification to their personal data upon a request to the controller or co-controller.

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.

Furthermore, the EDPS would like to recall that data subjects should also be given access to their evaluation results regarding the respective selection procedure unless a restriction provided for by Article 20(1) of the Regulation applies. This restriction may imply that access should be granted neither to the comparative data concerning other experts (comparative results), nor to the individual opinions of the members of the ScC if such access would undermine the rights of others applicants or the freedom of members of the ScC. In any case the data subjects should be provided with aggregated results and informed of the principal

³⁹ "*For purposes related to monitoring, study and evaluation foreseen by the Ideas Work programmes, the ERCEA may need that submitted proposals be processed by third parties (Contractors and/or beneficiaries of Coordination and Support Actions) in compliance with the requirements of Regulation (EC) No 45/2001 of the European Parliament and of the Council. Applicants (The PIs and/or the host institutions) are asked to give their free individual consent to the processing of proposals. The individual consent is not requested on a compulsory base and it is only provided on a voluntary base by the applicants. Refusal to give the individual consent does not affect the evaluation process*".

reasons on which the application of the restriction of their right of access is based and of their right to have recourse to the EDPS as required by Article 20(3) of the Regulation⁴⁰.

3.8. Information to the persons concerned

The EDPS notes that the specific privacy statements and the general information provided to data subjects in principle contain all necessary information under Articles 11 and 12 of the Regulation with the exception of information on the publication of the list of independent experts that have assisted in the evaluation of proposals received under a call related to the Ideas Specific Programme as foreseen under Section 3.1.2. of the Annex to Commission Decision 2010/767/EU⁴¹.

However, as regards personal data not obtained from the data subject, under Article 12(1) of the Regulation, the ERCEA " *shall at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed...*" provide respective information to the data subject. Against that background, concerns exist as to the timeliness of that information in cases where, to identify candidates to the ScC, the ERCEA collected certain personal data of experts even before these are proposed by the ScC and before the ERCEA makes any initial contact (see above on the procedural steps). In such cases, additional concerns regard those experts that are initially identified by the ERCEA, but not proposed by the ScC later. These experts will seemingly not be informed at all.

For the above cases, the EDPS thus recommends that ERCEA inform of their identification as experts in the sense of this processing operation at the latest when transferring their personal data to the ScC and of the publication of the list of independent experts foreseen under Section 3.1.2. of the Annex to Commission Decision 2010/767/EU.

3.9. Security measures

...

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 recommendations made above are taken into account. This means, in particular, that the ERCEA should:

- make Human Resources Officers sign confidentiality declarations mentioning that they are subject to an obligation of professional secrecy equivalent to that of a health professional to maintain the confidentiality of personal data...;

⁴⁰ See EDPS Guidelines concerning the processing operations in the field of staff recruitment, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf

⁴¹ The public has access to personal data of experts as follows: The full name of experts that have participated in evaluations (without link to specific proposals/projects they reviewed) is published on CORDIS and the list of panel members is published on the ERC public website. Section 3.1.2. of the Annex to Commission Decision 2010/767/EU of 9 December 2010 stipulates in this context that "The names of the independent experts assigned to individual proposals are not made public. However, the list of independent experts that have assisted in the evaluation of proposals received under a call related to the Ideas Specific Programme will be published yearly on Commission website(s). In addition the list of Panel members will be published on the ERC website".

- procedurally ensure that any data supplied by the experts that is irrelevant or excessive compared to what is required for the purpose of the processing operation is not further processed;
- reduce the data retention period applicable to personal data of experts having contributed to ERC evaluation (10 years after the end of the project on which they provided their service/following the completion of the yearly exercise by the ERCEA);
- data recipients should be always reminded of the purpose limitation of the transfer in question and the obligation of confidentiality;
- in cases where the ERCEA collected certain personal data of experts even before these are proposed by the ScC, inform experts of their identification by the ERCEA as experts in the sense of this processing operation at the latest when transferring their personal data to the ScC and of the publication of the list of independent experts foreseen under Section 3.1.2. of the Annex to Commission Decision 2010/767/EU.

Done at Brussels, on 09 July 2014

(signed)

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