

Opinion on the notification for prior checking from the Data Protection Officer of the European Parliament regarding the "recruitment of officials and interinstitutional transfers" dossier

Brussels, 13 March 2008 (Case 2004-207)

1. Procedure

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "recruitment of officials and interinstitutional transfers" dossier was sent to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European Parliament, by letter dated 21 May 2007. This processing operation appears in the inventory of data processing operations subject to prior checking issued to the EDPS in 2004.

A number of questions were put to the DPO in an e-mail dated 12 June 2007. Replies were provided on 20 July 2007. At the DPO's suggestion, a meeting was held with the controllers to clarify the facts on 13 September 2007. Confirmation of the facts was requested of the DPO on 21 September 2007 and provided on 30 November 2007. The draft opinion was sent for comments to the DPO on 20 December 2007. Comments were provided on 7 March 2008.

2. Facts

The overall purpose of the processing operation under consideration is to select and recruit new officials and to carry out internal and interinstitutional transfers while complying with the provisions on conditions of employment laid down in the Staff Regulations of Officials of the European Communities (Staff Regulations). Those provisions are set out in Article 4 and in Chapter 1 (Recruitment) of Title III of the Staff Regulations.

The secondary purpose, in the case of a new official, is to obtain some of the information needed to establish the rights of the data subject on taking up his or her appointment.

Two separate procedures are involved in this: "competition" processing must be distinguished from "recruitment" processing, the controllers being different in the two cases.

2.1. Competitions

Officials may be selected by **external competitions** – in compliance with the Decision, taken by common accord, of the institutions of the European Union of 25 July 2002 establishing a European Communities Personnel Selection Office (EPSO) – or by **internal competitions**. Internal competitions are defined in Articles 29(1)(b), 29(3) and 29(4) of the Staff Regulations and the procedures for them in the Decision of the Bureau of the European Parliament (EP) dated 3 May 2004. Annex III to the Staff Regulations lays down the competition procedure. The validity of the reserve lists established following EP internal competitions is limited to

three years. The appointing authority may, following an opinion from the Joint Committee, extend their validity to meet the requirements of the institution. Data on the tests held for internal competitions are kept in the Competitions unit and are never passed on to other departments other than in the context of appeals or complaints (Article 90 of the Staff Regulations, European Ombudsman, EDPS, etc.).

Recruitment of senior officials (Directors-General or their equivalents in grade AD 16 or AD 15 and Directors or their equivalents in grade AD 15 or AD 14), provided for in Article 29(2) of the Staff Regulations, is also by competition, the procedure in this case too being governed by Annex III to the Staff Regulations.

2.2. Recruitment

The following is the procedure for filling a vacant post:

Internal and interinstitutional transfers: (1) advertising the post with the deadline for submission of applications; (2) receipt by the administrative department (internal organisation unit) of applications and filtering of applications; (3) forwarding of eligible internal European Community (EC) applications to the relevant DG; (4) selection through examination of files / interviews by the DG/unit concerned; (5) if the required profile is not found among the internal (EC) applicants:

Selection of new officials: consultation of the applicants on the reserve lists by the DG concerned; (6) communication to the appointing authority of preferred candidate(s); (7) appointing authority decision on the basis of that proposal. If the applicant in question is on a reserve list and not currently working for the EC, the applicant's file is forwarded by EPSO. If there is no competition reserve list corresponding to the job description, the DG concerned requests that a temporary agent be recruited, e.g. as described in Article 2(b) of the Conditions of Employment of other Servants (CEOS); that agent is selected from the contract staff list.

Once the person has been selected for the vacant post:

In the case of an internal transfer:

The data subject is sent an e-mail or receives a telephone call to check that he or she is still interested in the post. If so, an e-mail is sent to the two Directorates-General concerned to suggest a date for the transfer. Once the date is set, the decision is sent to the two Directorates-General.

In the case of a transfer from an EC institution:

The data subject is sent an e-mail or receives a telephone call to check that he or she is still interested in the post. When the official has accepted the offer, a letter requesting a transfer is sent to the institution for assent. Once the institution's assent is received, the applicant is informed of the date of the transfer. The personal files of transferred officials are transferred to the European Parliament.

In the case of a successful competition applicant:

Once the applicant has been selected, the European Parliament sends the applicant a job offer letter. Enclosed with the letter are the explanatory documents necessary to establish the entitlements of the successful applicant (allowances and an explanation of the social security

arrangements), forms for the reimbursement of costs incurred in the recruitment procedure (travel expenses) and the information needed for the pre-recruitment medical examination if it has not already been carried out.

The final offer, specifying the exact date of entry into service, will be confirmed at a later stage, if all the conditions imposed by Article 28 of the Staff Regulations are met. The job offer letter asks the successful applicant to send to the European Parliament:

- a letter expressing acceptance of the offer (within three weeks);
- a birth certificate;
- a certificate of nationality or a certified true copy of his or her valid passport;
- an extract from the judicial record less than a year old;
- a residence certificate (an official attestation of residence before taking up duties);
- certified true copies of documents from ALL previous employers, specifying the nature of duties and length of employment;
- certified true copies of qualifications and diplomas;
- four recent photographs;

and, where applicable:

- a marriage certificate;
- an official document certifying the status of unmarried partners;
- a copy of the Court judgment pronouncing divorce or legal separation and pronouncing on custody of children, birth certificate(s) of child(ren), document attesting to any allowances for dependent children received elsewhere;
- a recent payslip of the spouse;
- a school attendance certificate for the child(ren).

It is evident that if the person does not fulfil the conditions laid down by the Staff Regulations, the offer cannot be confirmed and is consequently deemed null and void. Possible reasons for exclusion include:

- medical unfitness;
- criminal record (though the appointing authority has discretionary power on this point. Acceptance of an applicant with a criminal record must be the subject of a reasoned decision by the appointing authority);
- insufficient educational level or professional experience.

Should the recruitment process not be completed at the level of the recruitment department, the file is returned to the competitions unit (if it is an EPSO competition, the file is sent back to EPSO) to be kept for as long as the reserve list is valid. The reserve list expires after six years, other than in exceptional cases. When the validity of the list has expired, data subjects are informed that their files may be destroyed immediately, and that in that case no appeal can be lodged. Files not immediately destroyed – the majority – are destroyed after 2,5 years.

The file on the procedure followed to fill a vacant post (names of applicants and applicants chosen) is at present kept indefinitely.

2.3. Other information provided on the processing

The subjects of the data processing are successful competition applicants in the process of being recruited, applicants in competitions internal to the institution as referred to in Articles 29(3) and 29(4) of the Staff Regulations, officials transferred within the institution, officials

transferred from another EC institution and officials covered by the procedure laid down in Article 29(2) of the Staff Regulations.

The categories of data processed are those by which the person can be identified (name, forenames, date of birth, nationality, staff number if already an official) and those concerning his or her career.

For data subjects not yet belonging to an EC institution: data concerning the character references mentioned in Article 28(c) of the Staff Regulations and the data needed to establish entitlements. Medical fitness (yes/no), data and information on a candidate's family members and civil status are also processed. Note that the documents assembled for this procedure will subsequently form part of the personal file.

The data are stored electronically and on paper.

The recipients of personal data are the officials and agents of the recruitment unit, the competitions unit, the career management unit, the individual rights unit and, for CVs, the unit responsible for selection (the unit seeking to fill the job vacancy) and the selection committee provided for by Annex III to the Staff Regulations, on a need-to-know basis. For example, CVs sent to the selection committee will be rendered anonymous.

In exceptional cases, other institutions may also be recipients in the case of successful applicants in EC competitions, though only at the specific request of those institutions. In that situation, the successful applicant is appointed and transferred simultaneously.

The conditions for exercising the rights of the data subject (right of access, right of rectification, right to erase and to block) are governed by the provisions applicable for Regulation (EC) No 45/2001 laid down in the Decision of the Bureau of the European Parliament of 22 June 2005. A form to enable data subjects to exercise these rights is available on the institution's intranet site:

http://www.europarl.ep.ec/services/data_protect/en/Formulaires.htm.

There is an "important legal notice" on the Parliament's general internet site, which contains general information on data protection and more particularly on Regulation (EC) No 45/2001. The notice is currently being revised. Newly recruited staff are issued with a vade-mecum. The vade-mecum has a section on data protection, giving the contact details of the data protection officer and his or her assistant, and referring the reader to the data protection web page link. The section also mentions Regulation (EC) No 45/2001.

3. Legal aspects

3.1. Prior checking

The notification received by mail on 21 May 2007 describes processing of personal data. Applicants' personal data are collected and processed within the meaning of Articles 2(a) and 2(b) of Regulation (EC) No 45/2001. Regulation (EC) No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)).

In the case in point, the data processing is carried out by the European Parliament and comes under the heading of activities falling within the scope of the Community . Both automated and manual processing are carried out. Thus this is partly automated processing (Article 3(2)

of the Regulation). This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27 of Regulation (EC) No 45/2001 makes processing operations likely to present specific risks to the rights and freedoms of data subjects subject to prior checking by the EDPS. Article 27(2) contains a list of processing operations likely to present such risks, such as *"processing of data relating to health and to suspected offences, offences, criminal convictions or security measures"* (Article 27(2)(a)) and *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"* (Article 27(2)(b)). In question are personal data processed in order to evaluate personal aspects relating to the data subject, namely his or her suitability for employment at the Parliament. Furthermore, since data relating to criminal convictions and health will also be collected, the processing operation is likely to present risks under Article 27(2)(a). This case therefore falls within the scope of the prior checking procedure under several heads.

The check is restricted to the recruitment of officials, i.e. to the filling of a vacant post as such and to internal competitions; external (EPSO¹) competitions are covered by a separate prior check.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed ex post. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The formal notification was received through the post on 21 May 2007. In accordance with Article 27(4), this opinion had to be delivered within two months, i.e. by 22 July 2007. The period within which the EDPS has to deliver his opinion was suspended for 241 days. The EDPS will therefore deliver his opinion no later than 19 March 2008 (22 July 2007 + 211 days' suspension + August).

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing must be *"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"*. Paragraph 27 of the preamble stipulates that (...) *"the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies."*

For the European Parliament to be well managed and to run smoothly, it is necessary for it to recruit officials possessing the highest levels of skills, performance and integrity, and to fill vacant posts by internal or interinstitutional transfer. These procedures are based on the Staff Regulations, which in turn is based on the Treaties establishing the European Communities. The processing operation is therefore lawful.

¹ The EDPS has examined EPSO's processing arrangements, "Recruitment, by competition, of permanent staff for the European institutions or for Community bodies, offices and agencies" in its opinion dated 24 February 2006 (File 2004-236).

The legal basis for the processing operation is set out in Chapter 1 (Articles 27 to 34) of Title III and in Article 4 of the Staff Regulations. The legal basis is valid and supports the lawfulness of the processing.

3.3. Processing of special categories of data

Article 10(1) of the Regulation provides that "*Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited*" unless grounds can be found in Article 10(2) or 10(3).

If the candidate reveals special categories of personal data, it may be considered that the data subject has given explicit consent to the processing of those data. That may be the case for example if the applicant, because of a handicap, requests special facilities in connection with the interview. The data processed in such a case should be deleted when they are no longer needed for recruitment or reimbursement. However, special categories of data in the application file of a successful applicant may be transferred into his personal file if it proves necessary to provide special facilities throughout his or her employment.

The justification of processing of data concerning offences, criminal convictions or security measures is taken from Article 28(a) of the Staff Regulations, and therefore complies with Article 10(5) of the Regulation, which stipulates that the "*processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards.*"

3.4. Data quality

According to Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". In this case, the data required are necessary for the procedure for recruiting officials to be properly run. In this respect the EDPS considers that the conditions imposed by Article 4(1)(c) of Regulation (EC) No 45/2001 appear to be fulfilled.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 3.2 above). As for fairness, this relates to the information which must be transmitted to the data subject (see section 3.9 below).

Lastly, under Article 4(1)(d) of the Regulation, data must be "*accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*". The system itself helps to ensure that data are correct, in that it is the responsibility of the applicant for the position him- or herself to produce the application and the responsibility of the applicant selected for the post to produce the documents needed to establish his or her entitlements. Moreover, the data subject has the right to access and rectify data to ensure that they are kept up to date and that the file is as complete as possible. This is a second way of ensuring the quality of data. See point 3.8 below on the rights of access and rectification.

3.5. Data retention

Under Article 4(1)(e) of the Regulation, personal data must be "*kept in a form which permits 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*".

For the record, the procedure for storing data makes a distinction between persons recruited and persons not recruited. Some elements of the application files on persons recruited are kept in the personal file of the recruited person indefinitely. In a similar case², the EDPS considered that it was reasonable to set the storage period at 10 years, starting from the moment when the official leaves or after the last pension payment. This would apply to those parts of application files stored in personal files.

This long-term data storage in personal files will have to be accompanied by appropriate safeguards. The data stored are personal.

As regards applicants not recruited, the EDPS considers that the two-and-a-half-year retention period set by the competitions unit is reasonable given the purpose; retaining the data makes it possible to provide justification for the failure of applicants, to deal with any complaint addressed to the European Ombudsman or the EDPS, to handle appeals to the Court of Justice and to respond to audit services that may need to see them pursuant to Article 49 of the implementing rules for the Financial Regulation.

For data on the procedure for filling a post, currently stored indefinitely, the EDPS recommends setting a data storage period, taking account of the time necessary to deal with the various eventualities mentioned in the preceding paragraph. Data stored over a long term will be restricted to those necessary for the institution to be properly managed (name, forename, competition number or selection procedure number, and so on). It is up to the Parliament to show the necessity of keeping these documents. In any event, a storage period will be set for the data, as for those kept in the personal file, e.g. ten years following the official's departure or the final pension payment.

As to the extract from the judicial record kept in the personal file, the EDPS is doubtful whether it is appropriate to keep such a document for so long. Any offences committed by the data subject will be gradually deleted from the records of the Member State concerned, according to criteria set by that State. The Parliament cannot keep these data longer than the Member State. In the same way, a clean judicial record is clean at a given point in time; one year later, the information is not subject to updating. Furthermore, the obtaining of the judicial record takes place where an official is appointed. This condition is laid down in Article 28 of the Staff Regulations, in the "Recruitment" chapter. The judicial record is therefore strictly necessary for the recruitment of the official, and once this has taken place, there is no need to keep the judicial record.

Finally, such long-term storage does not comply with the right to erasure of criminal records provided for by Member States by virtue of the right to oblivion. The EDPS therefore requests that the Parliament not keep the extract from the criminal record after recruitment. An attestation like that following the medical examination would be adequate as a supporting document.

² EPSO Case 2004/236 – see also Case 2004/274 (Staff appraisal – European Central Bank)

3.6. Transfer of data

Under Article 7(1) of the Regulation personal data may only be transferred within or to other Community institutions or bodies if the data are *"necessary for the legitimate performance of the tasks covered by the competence of the recipient"*.

The data are sent to the officials and agents of the recruitment unit, the competitions unit, the career management unit, the individual rights unit and, for CVs, the unit responsible for selection (the unit seeking to fill the job vacancy) and the selection committee provided for by Annex III to the Staff Regulations, on a need-to-know basis.

In exceptional cases, other institutions may be recipients in the case of successful applicants in EC competitions, though only at the specific request of those institutions.

Access may also be granted to the bodies authorised to carry out external checks, such as the Court of Auditors and OLAF. In addition, the Civil Service Tribunal³, the European Ombudsman and the EDPS may, on request, receive copies of items from these files in the context of cases before the Civil Service Tribunal or complaints to the Ombudsman or the EDPS. In the case of recruitment, such proceedings are a frequent occurrence. These transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks falling within the competence of the recipient.

The EDPS considers that data transfers carried out in the above conditions are necessary for the legitimate performance of tasks assigned to the recipients. The requirements set out in Article 7 of the Regulation are therefore fulfilled.

Moreover, Article 7(3) of Regulation (EC) No 45/2001 provides that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*. A reminder should be provided that no-one receiving and processing data in the context of the selection procedures for officials of the institutions may use them for other purposes.

3.7. Processing of staff number or unique identifier

In the case of officials transferred internally or interinstitutionally, the European Parliament used the staff number. The use of the staff number may have the consequence of allowing interconnection of data processed in different contexts. This is not the place in which to determine the conditions under which the Commission may process a personal number (Article 10(6) of the Regulation), but it is appropriate here to emphasise the attention that must be paid to this aspect of the Regulation. In the case in point, the Parliament's use of the staff number is reasonable as it is used for the purposes of identifying the person and keeping track of the file. The EDPS considers that this number may be used in the context of the recruitment procedure.

3.8. Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. Article 14 of Regulation (EC) No 45/2001 establishes the data subject's right of rectification. In the same way that the data subject has a

³ The European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), has jurisdiction, rather than the Court of First Instance. The Court of First Instance is the appeal body.

right of access, he or she may also directly change personal data or have them changed, if necessary.

The conditions for exercising the rights of the data subject (right of access, right of rectification, right to erase and right to block) are governed by the implementing provisions for Regulation (EC) No 45/2001 laid down in the Decision of the Bureau of the European Parliament of 22 June 2005. The rights of access and of rectification are therefore guaranteed by the Parliament, including, as regards the right of access, the scores (broken down into percentages for the different sections set out in the selection notice) for any oral examinations by the joint committee and the mobility committee (for internal competitions); Articles 13 and 14 of the Regulation are thus duly complied with.

However, as regards the implementation of those rights, in the case of internal transfers of officials, data subjects can easily gain access to the form enabling them to exercise their rights, which is available on the intranet. On the other hand, in the case of transfers from other EC institutions or recruitment of officials not yet belonging to an EC institution, this intranet link cannot guarantee the rights of access and of rectification to data subjects during the recruitment procedure or for persons not recruited. The EDPS regrets that these rights guaranteed by the Parliament are not implemented fairly for all the subjects of the data processing.

3.9. Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on informing the data subject applies in the case in point since the data subject provides some of the data collected. Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since some information is collected from the different participants in the process, inter alia the Medical Service and EPSO.

In this instance, information is provided to data subjects in the important legal notice on personal data protection on the European Parliament's website, and in a section of the vade-mecum distributed to new members of staff.

It must be noted that in this instance no specific information on the processing operation in relation to recruitment is provided to the data subjects. The information provided to the data subjects is of a general nature. However, Articles 11 and 12 are vital in ensuring fair data processing for the data subject. The EDPS therefore asks the Parliament to provide data subjects (internally and interinstitutionally transferred officials, officials recruited and failed applicants) with the information set out in Articles 11 and 12 of the Regulation in a comprehensive manner, and specifically relating it to the processing operation under consideration here. The EDPS also recommends that all data subjects be informed of the existence of the Bureau's Decision of 22 June 2005 concerning the implementing rules for Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Such information could easily be provided, for example, in the correspondence between the Parliament and the data subjects.

3.10. Security

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements *"appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"*.

The European Data Protection Supervisor considers that the full set of security measures and the other organisational and technical measures taken to ensure maximum processing security are such that they can be regarded as adequate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The processing proposed 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 European Parliament must ensure:

- that a storage period should be set for data concerning the procedure to fill a post; for data stored either short term or long term. This period will take account of the time needed to deal with any complaint addressed to the European Ombudsman or the EDPS, to handle appeals to the Court of Justice and to respond to audit services that may need to see them pursuant to Article 49 of the implementing rules for the Financial Regulation;
- that the extract from the judicial record is not kept after the recruitment procedure;
- that data subjects (internally and interinstitutionally transferred officials, officials recruited and failed applicants) are fully provided with the information itemised in Articles 11 and 12 of the Regulation;
- that all data subjects are informed of the existence of the Bureau's Decision of 22 June 2005 concerning the implementing rules for Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. A simple reference to the Decision in the EP's correspondence with the data subject, for instance, would be sufficient.

Done at Brussels, 13 March 2008

[Signed]

Peter HUSTINX
European Data Protection Supervisor