

Opinion on a notification for Prior Checking received from the Data Protection Officer of European Parliament and the Data Protection Officer of the Council on the Selection of European Data Protection Supervisor and Assistant Supervisor

Brussels, 21 October 2008 (Case 2008-280 + 2008-292)

1. Proceedings

On 6 May 2008, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the European Parliament (EP) a notification for prior checking relating to the processing of personal data in the procedure of selection of the EDPS and Assistant EDPS. The documentation supplied included a covering note from the DPO placing the processing operation in context and copies of correspondence between the Parliament and the European Commission about the procedure.

On 15 May 2008, the EDPS made a request for information to the EP. This request was answered to on 27 May 2008 (12 days suspension).

On 21 May 2008, the EDPS received from the DPO at the Council a notification for the processing of personal data by the Council concerning the selection of EDPS and Assistant EDPS. On 3 June 2008 the EDPS made a further request for information which was replied to on 16 July 2008 (43 days suspension).

A draft opinion was sent to the Council and the EP for comments on 29 July 2008. Comments were received from the Director General in the Secretariat General of the Council on 11 August 2008. Further information on the procedure was received from the European Parliament on 9 October 2008 (72 days suspension). The draft opinion was therefore sent on 10 October 2008 to Council and the EP for confirmation of these procedural aspects. Comments were received on 14 October 2008 from Council and EP.

Since both of these notifications concern the same procedure, the EDPS has decided to treat them jointly in one opinion.

The selection of candidates by the Commission prior to this phase of the selection has been the object of a separate prior checking opinion of the EDPS adopted on 16 May 2008¹.

This prior checking Opinion has been under the exclusive direction of the Assistant EDPS.

¹ See EDPS Opinion on a notification for prior checking on the selection of candidates in order to establish a short-list for the position of European Data Protection Supervisor and the position of Assistant Supervisor (Case 2008-222)

2. Examination of the matter

2.1 The facts

In accordance with Article 42(1) of Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation (EC) 45/2001), the European Parliament and the Council shall appoint by common accord, the EDPS for a term of five years on the basis of a list drawn up by the Commission following a public call for candidates. An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same period.

Article 3 of Decision (EC) 1247/2002 further provides that the EDPS and Assistant EDPS shall be appointed following a public call for candidates. The call for candidates shall enable all interested parties throughout the Community to submit their applications. The list of candidates shall be public. On the basis of the list drawn up by the Commission in accordance with Article 42(1) of Regulation (EC) 45/2001, the competent committee at the European Parliament may decide to arrange a hearing in order to enable it to express a preference.

The Commission is responsible for the selection of candidates following a public vacancy notice published in the Official Journal on 23 May 2008². This notice established the criteria for selection. Once the procedure at the Commission is terminated, the names of the short-listed candidates, their CVs and their motivation letter are transmitted to the European Parliament and to the Secretariat General of the Council.

Procedure at the European Parliament:

The LIBE Committee of the European Parliament will, on receipt of the short list of candidates and other relevant documents from the European Commission, proceed to organise hearings of the candidates at a public meeting of the Committee.

After the auditions, the EP will carry out discussions with the Presidency of the Council, who will have already defined first orientations (see below).

The LIBE Committee will then give its opinion on the shortlist by expressing its order of preference in a secret ballot in accordance with Article 162 of EP Rules of Procedure. The result of the vote and the order of preference will be notified to the EP Conference of Presidents which have the power to agree with Council the final appointment of the EDPS and Assistant EDPS.

The LIBE Committee intends to make public the names of the candidates, their CVs and the result of the vote.

Procedure at the Council:

The procedure at the Council will follow the Internal rules of procedure of the Council which leave a certain margin of manoeuvre for the organisation and sequence of the meetings. The precise procedure therefore has yet to be determined. In principle, the shortlist of the Commission will be discussed at the COREPER II meetings. In particular, the COREPER will examine the profiles of the short listed candidates, their level of competence and the

² O.J. C 126 A/1

adequacy of their application in relation to the established criteria in the vacancy notice. The internal consultations should enable Council to establish a list of priority candidates in view of the subsequent discussions with the EP.

The result of the negotiations between the Council and the EP will be formally endorsed by Ministers; the act (Decision) will be signed by the President of the Council and the President of the EP in view of its publication in the Official Journal.

The **criteria for selection** are notably provided for in Article 42(2) of Regulation (EC) 45/2001, which provides that the EDPS shall be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of the EDPS, for example, because they belong or have belonged to the national data protection supervisory authorities.

According to the vacancy notice candidates must also have a good knowledge of Community policies in the area of data protection as well as practical experience in the assessment of their impact on European citizens, enterprises and public administrations; the ability to act with the required independence and actual experience in communication and networking. It would be desirable for candidates to have hands-on experience with regard to the implementation and ensuring compliance with data protection rules, the ability to develop and communicate a vision, to think in global terms of systems and processes, and to propose concrete recommendations and practical solutions and high level managerial experience and necessary leadership skills. The vacancy notice further elaborates these criteria: Accordingly applicants should:

1. be a citizen of one of the Member States;
2. hold a university degree that gives access to undertake postgraduate studies;
3. have at least 15 years professional experience following the date on which the qualification in point 2 was obtained. This experience must be of a kind appropriate to the level of that qualification. At least 5 years of that professional experience must have been gained in a management function at high level;
4. have a thorough knowledge of one of the official languages of the European Union (main language) and a satisfactory knowledge of at least another official language (second language). Applicants must indicate in their applications which is their main language and which is the language they wish to be treated as their second language.

The **categories of data** collected and processed by the European Parliament and the Council will include data collected in the CV-Online application including personal details (surname, forename, address, date of birth, sex, citizenship and other nationality); studies (diploma giving access to doctoral studies and date of this diploma); languages (mother tongue and other languages) and level; and whether the candidate has worked for the European Institutions before, if so for which institution and what was his/her personnel number; data collected in the CV submitted by the candidate; data collected in the motivation letter of the candidate; any other relevant data submitted by the candidates and the names of short listed candidates.

Data conservation

The EP keeps the data relating to the selection procedure for six months from the date of the LIBE Committee hearing. After this period the data are kept in the archives of the EP for 30 years in accordance with Council Regulation n° 1700/2003.

The Council keeps the data for three years. This conservation period has been justified in order to keep the data for as long as is necessary in the event of an appeal against the appointment decision. The data on paper are then transmitted to the GSC current archives in compliance with Council Regulation n° 1700/2003. The data may only be processed after these three years for future relevant legal proceedings or evidential historic use.

Information

Candidates are informed of the processing of their data by the European Commission via links to a Privacy Statement and an Important Legal Notice accessible from the registration page of the European Commission. This information includes that data are communicated to the EP and Council, as responsible institutions for the final procedure of appointment and for further processing of the data linked to this procedure. They are further informed that data communicated in this procedure could be the object of publication, including on the Internet.

The European Parliament will inform the persons concerned when inviting them to a public audition at the LIBE Committee.

The Council will provide specific information on the processing personal data and the procedural aspects of handling within the Council to the short listed candidates, once the short list has been communicated to the Council. This information notice will compromise the identity of the controller, the categories of data processed, the recipients or categories of recipients of the data, the existence of a right of access and rectification for the data processed, the possible restrictions to these rights and the conservation periods. .

Rights of data subjects

At the EP, the notification to the EDPS provides that the rights of the data subjects can be exercised in accordance with the EP Bureau decision of 22 June 2005 (Articles 8-13) which provides the procedures for a right of access, rectification, blocking and erasure.

At the Council, the rights of the data subjects can be exercised in accordance with Section 5 of the Council decision 2004/644/EC implementing data protection rules.

Security

The CVs at the European Parliament are treated as public Committee documents. The results of the vote and order of preference of the candidates will also be available electronically to the public [...]

2.2 Legal aspects

2.2.1 Prior checking

Regulation (EC) 45/2001 applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her

physical, physiological, mental, economic, cultural or social identity (Article 2(a) of the Regulation).

In order to appoint the EDPS and Assistant EDPS, the EP and the Council collect, process and store personal data relating to candidates who apply for these positions and are short listed by the Commission. The data notably relate to the professional and personal profile of candidates (i.e. curriculum vitae and accompanying documents: motivation letter, copies of certificates, references...).

The processing of personal data is carried out by Community institutions in activities which fall within the scope of Community law.

Regulation (EC) 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. The processing is carried out both electronically and in a structured paper filing system.

Regulation (EC) 45/2001 therefore applies.

Article 27(1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS "processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of selecting candidates for the position of EDPS and Assistant Supervisor precisely aim at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, the data controller will perform various assessment activities such as judging his/her performance during the interviews, judging the performance of each candidate in his/her current positions, etc. Clearly the data processing operations fall within Article 27(2) (b) and must therefore be prior checked by the EDPS.

This opinion relates to the procedure which takes place within the EP and the Council for the selection of candidates short listed by the European Commission in order to appoint persons for the position of EDPS and the position of Assistant Supervisor. The selection of candidates by the Commission prior to this phase of the selection has been the object of a separate prior checking opinion of the EDPS adopted on 16 May 2008. The present Opinion does not address the issues raised by the processing of personal data in the recruitment phase of the selected candidates.

The prior checking Opinion is based on procedures described by the EP and the Council. Both these procedures are subject to changes in practice since Article 42 of Regulation (EC) 45/2001 leaves a certain margin of manoeuvre to both institutions. Should the procedure differ from the one described in the facts, this should not be a problem provided that the changes do not have a substantial impact on the issues analysed in this opinion.

The Notification from the European Parliament was received on 6 May 2008. The Notification from the Council was received on 21 May 2008. Taking into account that a common opinion will be adopted, the date of the first notification must be considered. The opinion must therefore be issued by 15 November 2008 (7 July + 131 days of suspension).

2.2.2. Lawfulness of the processing

Article 5 of Regulation (EC) 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the *"processing is necessary for 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"*.

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) 45/2001 two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

As mentioned above, Article 42(1) of Regulation (EC) 45/2001 provides that the European Parliament and the Council shall appoint by common accord the EDPS for a term of five years on the basis of a list drawn up by the Commission following a public call for candidates. An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same period.

Furthermore, Article 3 of Decision (EC) 1247/2002 further provides that the EDPS and Assistant EDPS shall be appointed following a public call for candidates. The call for candidates shall enable all interested parties throughout the Community to submit their applications. The list of candidates shall be public. On the basis of the list drawn up by the Commission in accordance with Article 42(1) of Regulation (EC) 45/2001, the competent committee at the European Parliament may decide to arrange a hearing in order to enable it to express a preference.

The Council rules of procedure (Council Decision 2006/683/EC, Euratom of 15 September 2006, as amended) define the procedure to be followed at the Council.

The procedures in place at the European Parliament and the Council are based on Article 42(1) of Regulation (EC) 45/2001 and Decision (EC) 1247/2002 and the Council rules of procedure.

It must then be assessed whether the processing which occurs in the context of the procedure to establish a short list of candidates is "necessary" for the performance of this task. To put Article 42(1) of Regulation (EC) 45/2001 into practice, it is necessary for the European Parliament and the Council to collect and further process personal information of candidates. The data processing by the European Parliament and the Council that takes place in the frame of this procedure is therefore considered as necessary to ensure the selection of candidates.

Public access to personal data in the context of the procedure at the EP due to the fact that the LIBE Committee sessions are open to the public or that the Council deliberations are made public is in accordance with the criteria which the EDPS has developed in the context of the tension between Regulation (EC) 1049/2001 and Regulation (EC) 45/2001³. This approach implies a balance of the interests at stake: on the one hand, the need to inform the public and, on the other, the protection of the persons concerned. In this particular case there is an obvious public interest in the transparency of the procedure and the privacy of the individuals concerned is not at stake. This is all the more so since the persons concerned were informed by the Commission, before introducing their application, of the fact that the data could be

³ See EDPS background paper series "Public access to documents and data protection", July 2005

made available to the public. Making the data available to public access is therefore considered as lawful. The same approach applies to the possible publication of the data on the Internet.

The processing of personal data by the European Parliament and the Council in the frame of the procedure of selection of European Data Protection Supervisor and the position of Assistant Supervisor is therefore considered as lawful.

2.2.3. Processing of special categories of data

Article 10(1) of Regulation (EC) 45/2001 establishes that "the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject (Article 10(2)(a)).

The EDPS considers that in the context of selecting the EDPS or Assistant EDPS, applicants may reveal information revealing special categories of data. If this occurs, it should be considered that candidates have given their consent to the processing of that data, thus, the condition of Article 10(2) (a) would be met.

Article 10(5) of Regulation (EC) 45/2001 establishes that "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." According to the notification no such data are collected in the context of the selection of the EDPS and the Assistant Supervisor.

2.2.4. Data Quality

According to Article 4(1)(c) of Regulation 45/2001 *"personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed"*.

The personal data collected and processed by the EP and Council in the frame of this procedure, are all personal data included in the CV and motivation letters of the short listed candidates and any further data submitted by them in the frame of their candidacy. The EDPS considers in principle that this data complies with the Regulation.

Article 4(1)(d) of the Regulation provides that the data must be accurate and kept up to date. The fact that the personal data are collected from the data subjects themselves and the right of access of the candidates to their data (see below 2.2.7. Right of access and rectification) both serve to guarantee the accuracy of the data. However, other information is not provided directly by the individual but generated by the various bodies involved in the procedure. In this regard, as further developed below, it is important for the candidate to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data held about them are accurate. In this respect, see also Section 2.2.7.

Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.8.

2.2.5. Conservation of data

Pursuant to Article 4(1)(e) of Regulation (EC) 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

According to the information received, the EP keeps the data relating to the selection procedure for six months from the date of the LIBE Committee hearing. The Council keeps the data for three years in the event of a possible appeal.

After these conservation periods the data is transmitted to the archives of the EP/Council in accordance with EC rules on archiving.

The EDPS is satisfied that the period of conservation of the data is justified in the light of Article 4(1)(e) of Regulation (EC) 45/2001. As concerns conservation in the historical archives of the EP and the Council for a longer period, the EDPS reminds that this conservation is subject to specific guidelines and that in any case those data shall not be used for any purpose other than for future relevant legal proceedings or evidential historic use.

2.2.6. Transfer of data

Articles 7, 8 and 9 of Regulation (EC) 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made (i) to or within Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

According to the notification of the EP, data are transferred to the members of the LIBE committee and their assistants, staff in the LIBE Committee secretariat and of the political groups. The public in general may have access to the documents as the LIBE Committee sessions are public. In the Council the data are disclosed to GSC officials involved in the handling of the procedure with the Council's preparatory groups (Cabinet, DG C and Council legal service); to Member State's delegations participating in the Working Party on data protection, the ANTICI Group and COREPER II and to any further delegates in the Permanent Representations or in the relevant Ministries in the EU Member States (if considered as appropriate by the Council's preparatory bodies). The data may also be made known to the public in general, should the Council decide to make the data accessible at all, in accordance with the Council rules of procedure.

For the transfers within or between Community institutions and bodies, Article 7 of the Regulation applies. Article 7 of Regulation (EC) 45/2001 requires personal data to be transferred only "for the legitimate performance of tasks covered by the competence of the recipient". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the data are necessary for the performance of this competence.

The EDPS considers that the transfers of information to the recipients within the EP or the Council and for the purposes stated comply with Article 7(1). Indeed, all the recipients have the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the candidates. The level and concrete tasks vis-à-vis the assessment varies depending on the recipient, but all the recipients, at some point of the procedure, have the

obligation to assess the candidates. The transfer of the personal data is therefore considered as falling within the tasks covered by the competence of the recipient.

As to the necessity of the data transferred, these are considered as necessary in accordance with the Regulation.

Article 7(3) states that "*The recipient shall process the personal data only for the purposes for which they are transmitted*". The EDPS underlines that at all stages of the procedure, the recipients to whom the data are transferred must be reminded that they can only process the data for the purposes of the selection candidates for the position of EDPS and Assistant Supervisor.

According to the Council notification, data may also be communicated to recipients which are not Community institutions and bodies but which are subject to Directive (EC) 95/46 (delegates in the Permanent Representations or in the relevant Ministries in the EU Member States). In such cases, Article 8 of the Regulation must be respected. In such cases, the data may only 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. This would be the case in the case at hand since the data would only be communicated to the relevant national authorities in their capacity of public authority participating in the official task of selection of an EDPS and Assistant EDPS.

The communication to the public in general due to the fact that the LIBE Committee sessions are open to the public or that the Council deliberations are made public, is considered to be lawful as well as the publication of the data on the Internet, which does not qualify as a transfer⁴ (see point 2.2.2.).

2.2.7. Right of access and rectification

According to Article 13 of Regulation (EC) 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

Both the notification of the EP and of the Council refer to the general rights of the data subjects according to the Bureau decision of 22 June 2005 (EP) and Council decision of 13 September 2004. The EDPS is satisfied that the right of access is therefore recognised, but also underlines that certain restrictions to this right may exist on the basis of Article 20§1(c) of Regulation (EC) 45/2001. This provision specifies that "The Community institutions and bodies may restrict the application of Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others". This may imply that information comparing the data subject with other applicants should not be provided and information regarding the particular remarks or evaluations of members of the selection boards or committees may be limited. Should these restrictions be applied in practice, the persons concerned will need to be informed of such restrictions and of the possibility of recourse to the EDPS.

Article 14 of Regulation (EC) 45/2001 provides data subjects with the right to rectify inaccurate or incomplete data. This right can obviously apply only to factual data. Merit points allocated or individual assessments, for example, could not under any circumstances be

⁴ Lindqvist case, Judgement of the European Court of Justice of 6 November 2003 (C-101/01)

open to a right or rectification by the data subject, except in the context of an appeal lodged according to an established appeals procedure.

2.2.8. Information to the data subject

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the selection procedure of the EDPS and the Assistant EDPS at the EP and Council, personal data are not obtained directly from the data subject since the data relating to the short listed candidates is received from the Commission. Thus Article 12 will apply.

As mentioned in the facts, candidates are initially informed of the processing of their personal data by the European Commission through a Privacy Statement on the registration page of the European Commission. The Privacy Statement explicitly provides that "The candidates' attention is drawn to the fact that all candidates' data provided by the Commission in its proposal to the European Parliament and to the Council for the appointment of the EDPS and his/her Assistant will be processed for the strict purpose only of the candidates' evaluation. The Council and the European Parliament may decide to make some of the data accessible to the public, including through publication on the institutions' websites, on the basis of their rules of procedure".

Since Article 12 provides that the controller must only provide the information listed if the data subject does not already have it, this implies that the EP and Council would only need to provide information not already provided by the Commission. This information would need to include at least information on the identity of the controller at the EP and at the Council; the categories of data processed; the recipients or categories of recipients; the existence of a right of access and of rectification for the data processed by the EP or the Council and the possible restrictions to these rights (see above 2.2.7); and the conservation periods in each institution.

The LIBE Committee intends to provide information on the processing of data by the EP in the invitation to a public hearing before the Committee. Information concerning processing by the Council will be provided by the Council to the short listed candidates once their identity has been revealed to the Council.

2.2.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

After review of the security measures, the EDPS considers that Article 22 and 23 are respected.

3. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that information is provided to the candidates in accordance with the present opinion and notably that information is provided on the identity of the controller at the EP and at the

Council; on the categories of data processed; on the recipients or categories of recipients; on the existence of a right of access and of rectification for the data processed by the EP or the Council and the possible restrictions to these rights and the conservation periods in each institution.

Done at Brussels, 21 October 2008

(signed)

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