

Opinion on the notification for prior checking from the Data Protection Officer (DPO) of the Court of Auditors regarding the "use of reserve lists and lists of suitable candidates for the recruitment of officials, temporary staff and contract staff" case.

Brussels, 5 October 2009 (Case 2008-433)

1. Procedure

By letter received on 10 July 2008, the European Data Protection Supervisor (EDPS) received notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the Court of Auditors concerning the use of reserve lists and lists of suitable candidates for the recruitment of officials, temporary staff and contract staff. Questions were sent to the DPO on 5 September 2008. The replies were provided on 2 December 2008.

When examining the case, on 14 November 2008 the EDPS requested that the DPO withdraw the notification and replace it by a joint notification with case 2008-313 (selection procedures for the recruitment of officials, temporary staff and contract staff). On 12 March 2009 the DPO replied that these processing operations should in the data controller's opinion be notified separately and that the examination of prior checking 2008-433 could resume where it had been left on 5 September 2008¹.

Further questions were put to the DPO on 20 March 2009, and answers were received on 29 June 2009. Some more questions were put on 3 July 2009 and replies were provided on 23 July 2009.

The draft opinion was sent to the DPO on 9 September 2009 for comments by the DPO and the data controller. The comments reached the EDPS on 30 September 2009.

2. The facts

The competition unit of the Court of Auditors introduced a procedure for the recruitment of successful candidates in competitions and other selection procedures. The procedure applies to successful candidates in EPSO competitions as well as in competitions or "screening" procedures organised by the Court itself.

The legal bases for the procedure are Articles 27, 28, 31, 32 and 33 of the Staff Regulations of officials of the European Communities (the Staff Regulations) and of the Conditions of Employment of other servants of the European Communities (CEOS).

¹ The EDPS opinion for 2008-313 was adopted on 23 July 2009.

Data processing is both automated and manual. CVs of interest to the Court's requesting departments are made available to them either on paper or electronically. The competition unit keeps a file on each candidate containing only the correspondence with them as well as all documents obtained for the purposes of organising the recruitment interviews and medical examination. The only health-related document is the opinion on medical fitness established by the institution's medical officer in accordance with Article 33 of the Staff Regulations and Articles 13 and 83 of the CEOS.

Another file containing the CV and the different documents required for recruitment is compiled by the recruitment unit. The documents required for recruitment are in particular those concerning marital status (the official recruited and, where appropriate, the spouse and child(ren)), nationality, residence, criminal record, military service status, studies and professional experience (please note that aspects relating to determination of the recruited staff member's financial rights are handled by a different team and are not covered by the present notification).

The documents concerned by the processing operation are, therefore, those arising from the application of Article 28 of the Staff Regulations.

The documents received from EPSO are the application for the competition and the supporting documents attached, i.e. copies of an identity document, qualifications and, where appropriate, proof of professional experience.

All these documents are placed in the individual's personal file at the end of the recruitment procedure.

Data concerning successful candidates in EPSO competitions are stored in the e-RL and CAST databases, made available by EPSO. The Court has access to the reserve lists and the CVs of successful candidates in the EPSO databases. All data concerning successful candidates in Court procedures are stored in the paper files of the competition unit mentioned earlier and some data are stored in its electronic files.

The data controller sees the need to distinguish between two categories of successful candidates:

(1) Successful candidates who are recruited, to be subdivided into two sections (recruited or appointment/transfer)

(2) Successful candidates not recruited

For cases coming under (1)(a): The CV of a "successful candidate recruited by the Court of Auditors" is sent to the recruitment unit in order to launch the recruitment process. The data are incorporated into the personal file.

For cases coming under (1)(b): For an appointment/transfer, the successful candidate's file is sent to the relevant department in the other institution so that it can begin recruitment.

For cases coming under (2): The data are stored in the competition unit.

It is also specified that the data needed to use the reserve lists and lists of suitable candidates to recruit candidates who have been successful in selection procedures are kept for as long as the lists are valid and therefore usable.

For most interviews organised with a view to recruiting successful candidates in a competition or selection procedure giving rise to reimbursement of travel expenses, subsistence expenses and/or a medical examination, the data are stored for five years following the discharge relating to the budget exercise during which the cost linked to the reimbursement of expenses (travel, subsistence, medical examination) was incurred. According to the data controller, this storage time limit for files held by the competition unit has been extended to include files not incurring any expenses. The reason given by the data controller is that the files are organised in such a way that it is not possible to draw a distinction between the two types of files (successful candidates who have their travel expenses reimbursed and those who do not).

A file composed of data disclosed for the purpose of a reimbursement of travel expenses is sent and kept by the accounts department once the payment has been made, with a copy of the payment order (personal and banking data) being kept by the competition unit.

The officials in turn having access to these data are those involved in the procedure in the competition unit (initiators and verifiers, authorising officer) as well as officials from the ex ante unit and the accounts department.

The recipients of the successful candidates' CVs are the Court departments interested in recruiting. The data controller has supplemented this information by specifying that Directors and Heads of Unit are recipients of these data, as are subsequently the administration departments involved in recruitment, the Appointing Authority, the ex ante unit and, where appropriate, the Legal Service.

Successful candidates may, at any time, request in writing that their personal data be amended. Requests relating to lists resulting from selection procedures run by EPSO must be addressed to EPSO.

The following is published in the notices of competition/screening: *"As the institution responsible for organising the selection procedure, the Court of Auditors ensures that applicants' personal data are treated in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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. This applies in particular to the confidentiality and security of such data (Official Journal of the European Communities, L 8, 12.01.2001)."*

[...]

Access to data concerning successful candidates in selection procedures organised by the Court is limited to staff from the competition/selection procedures unit. They provide requesting departments with a paper or electronic version of the CVs of successful candidates with the required profile.

Access to the different databases made available by EPSO (e-RL/CAST) is restricted and "hierarchical" (administrator or user access), including within the competition/selection procedures unit. Any Court department may, on an ad hoc basis and for a limited period of time, have access to a particular reserve list. The Directorate for Translation has permanent access.

3. Legal aspects

3.1. Prior checking

The prior checking relates to the processing of personal data within the meaning of Article 2(a) of Regulation (EC) No 45/2001 (hereinafter "the Regulation") by the Court of Auditors for the recruitment of officials, temporary staff and contract staff. The processing consists of operations to collect, consult, store, etc., data.

The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation). The processing of data concerning the recruitment of officials and other staff is both manual and automated. Article 3(2) is therefore applicable in this case.

This processing therefore falls within the scope of the Regulation.

Article 27(1) of the Regulation requires prior checking by the EDPS of all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*".

Article 27(2) of the Regulation 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 Court. Furthermore, since data relating to criminal convictions 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.

In principle, checks by the EDPS should be performed before the processing operation is implemented. Otherwise the checking necessarily becomes ex post. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The DPO's notification was received on 10 July 2008. According to Article 27(4), the present opinion must be delivered within a period of two months. Owing to the 319-day suspension pending additional information, the months of August 2008 and 2009 plus 21 days for comments, the EDPS will deliver his opinion by 5 October 2009 at the latest.

3.2. Lawfulness of the processing

The lawfulness of the processing operation should be scrutinised in the light of Article 5(a) of the Regulation. That Article provides that personal data may be processed only if "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)*".

The processing operation under examination concerns the consultation of data concerning successful candidates in competitions (via the use of reserve lists and lists of suitable candidates) with a view to employing them at the Court. The procedure for recruiting officials and other staff falls under the scope 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 this case the Staff Regulations. The purpose of the task is in particular to secure for the Court the services of officials and other staff of the highest standard of ability, efficiency and integrity. The processing operation introduced by the Court is necessary to perform the task of recruiting the most suitable officials and other staff. The processing operation is therefore lawful.

The legal bases for the processing operation are Articles 27, 28, 31, 32 and 33 of the Staff Regulations of officials of the European Communities (the Staff Regulations) and of the Conditions of Employment of other servants of the European Communities (CEOS). The legal basis is valid and supports the lawfulness of the processing.

3.3. Processing of special categories of data

Under the processing operation established by the Court, the EDPS considers that the medical department's disclosure of the opinion on medical fitness produced by the medical officer does not contain any specific data relating to health. However, it is possible that personal data relating to health (especially regarding a disability) may be consulted. Under Article 10(1) of the Regulation, the processing of personal data relating to health is prohibited unless grounds can be found in Article 10(2) and/or (3) of the Regulation.

Article 10(2)(b) applies to the present case: *"Paragraph 1 (prohibiting the processing of health-related data) shall not apply where processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof ..."*.

Special categories of data in the application file of a successful candidate may be transferred into his personal file if it proves necessary to provide special facilities throughout his or her employment. In this respect it is worth highlighting that according to Article 1d(4) of the Staff Regulations of officials of the European Communities there should be no employment discrimination on the ground of disability provided that the person with a disability can perform the essential functions of the job when reasonable accommodation is made. General implementing provisions for this Article were adopted in Commission Decision C(2004)1318 of 7 April 2004 requiring European institutions to execute the reasonable accommodation which their disabled staff need in order to be able to perform their duties properly. The processing of disability-related data in this context falls within the scope of Article 10(2)(b) of the Regulation. Nonetheless, the EDPS would draw attention to the fact that since disability-related data are sensitive, they should be disclosed only to those individuals who really need to know.

The justification for processing 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

Article 4 of the Regulation lays down certain obligations as regards the quality of personal data. Personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)(c)).

The EDPS considers that the processed data described earlier in this opinion meet these requirements in relation to the purpose of the processing operation explained above. The EDPS is satisfied that Article 4(1)(c) of Regulation No 45/2001 is therefore duly complied with in this respect.

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). The issue of fairness is linked to the information given to the data subject (see point 3.9 below).

Lastly, the 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*" (Article 4(1)(d) of the Regulation). The system itself helps guarantee that data are correct and if necessary kept up to date. During the procedure under examination, the data subject is made aware of his or her right of access to and right to rectify data, in order to ensure that the file remains as comprehensive as possible. Successful candidates may, at any time, request in writing that their personal data be amended. (See point 3.8 below regarding the rights of access and rectification.)

3.5. Data storage

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*".

The procedure for storing data makes a distinction between individuals recruited and individuals not recruited. For individuals recruited, application files are kept for as long as is strictly necessary to process the candidate's file, i.e. until the signing of the contract (for contract staff and temporary staff) or the letter of appointment (for officials). Then, some parts of the application file are kept in the personal file and the storage rules for such files therefore apply. 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.

As for the files of successful candidates not recruited, the EDPS considers the storage period of two and a half years following the end of validity of the reserve list to be reasonable in relation to the purpose and insofar as it is necessary to justify the failure to select successful candidates, to respond to any appeals lodged with the European Ombudsman and/or the EDPS, and to cover an appeal to the Court of Justice.

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

As explained in the facts section, for most interviews organised with a view to recruiting successful candidates in competition or selection procedures giving rise to reimbursement of travel expenses, subsistence expenses and/or a medical examination, the data are stored for five years following the discharge relating to the budget exercise during which the expenditure linked to the reimbursement of expenses (travel, subsistence, medical examination) was incurred. According to the data controller, this storage time limit for files held by the competition unit has been extended to include files not incurring any expenses.

So as to comply with Article 49 of the implementing arrangements for the Financial Regulation, relevant documents concerning persons recruited as well as those not recruited may be kept until they are no longer required for the budget discharge or auditing purposes. The EDPS asks the Court to process files resulting in the transfer of certain data to the accounts department differently from those not requiring such a transfer, and to set a different storage period in compliance with the requirements of Article 49 of the implementing arrangements for the Financial Regulation.

As to the extract from the criminal records kept in the personal file, the EDPS wonders 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 Court cannot keep these data longer than the Member State. In the same way, a clean criminal record is clean at a given point in time; one year later, the information is not subject to updating. Furthermore, obtaining the judicial record is a condition of the staff member's or the official's engagement. This condition is laid down in Article 28(c) of the Staff Regulations and Article 12(2)(c) of the CEOS. The criminal record is therefore strictly necessary for the recruitment of the official or staff member. Once that purpose has been achieved, the criminal record does not need to be kept. 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 Court 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.

The EDPS advises the Court to review its storage policy in the light of the above.

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 EDPS believes that transfers of data under the circumstances specified are necessary for the legitimate performance of the recipients' tasks. The requirements of Article 7(1) of the Regulation are therefore met.

Access may also be granted to the bodies authorised to carry out external checks, such as OLAF. In addition, the courts with jurisdiction, the European Ombudsman and the EDPS may, on request, receive copies of items from those files in the context of an appeal or a complaint. The EDPS considers that data transfers carried out under 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*". It is

therefore important that all those receiving and processing data in the context of selection procedures for officials and other staff are reminded that they may not use them for other purposes.

3.7. Processing of staff number or unique identifier

Article 10(6) of Regulation (EC) No 45/2001 states that "*the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body.*"

The official's staff number may be collected in the context of processing the data of officials transferred internally and interinstitutionally. The EDPS considers that the staff number can be used in this context since it allows for the identification of the staff member and facilitates proper handling of the file. There is no reason to set other conditions in this case.

3.8. Right of access and rectification

Article 13 of the Regulation makes provision, and sets out the rules, for right of access at the request of the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to their source. Article 14 of Regulation (CE) No 45/2001 establishes the data subject's right of rectification. In the same way that the data subject has a right of access, he or she may also directly change personal data or have them changed, if necessary.

The EDPS points out that these rights are guaranteed in the Court of Auditors by Decision No 77/2006 of the Court implementing 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 in the context of the human resources policy. There is no reference to this Decision in the notification submitted by the data controller.

The notification states that successful candidates may, at any time, request in writing that their personal data be amended. If the right of rectification is guaranteed for data subjects, they should be able to exercise it. Consequently, the EDPS urges the Court to ensure that data subjects enjoy the right of access to their files in accordance with Article 13 of the Regulation. Moreover, as highlighted above (point 3.9), this right of rectification and the arrangements for exercising it should be brought to the attention of data subjects.

3.9. Information to be given to the data subject

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items of information. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject.

In this case, since data are obtained directly from data subjects, Article 11 of the Regulation applies (*Information to be supplied where the data have been obtained from the data subject*). Article 12 also applies insofar as data (in the case of staff transfers between institutions) may be obtained from other institutions (*Information to be supplied where the data have not been obtained from the data subject*).

The information notice relating to Regulation (EC) No 45/2001 published in the notices of competition/screening is very general and does not in any way cover the different categories of information provided for in Articles 11 and 12 of the Regulation. With regard to the use of reserve lists and lists of successful candidates, the Court should, as requested in the context of case 2008-0313, make such information available to data subjects. The drafting of an information notice containing all the details contained in Articles 11 and 12 may provide an effective means of doing so. Moreover, the EDPS recommends that Court Decision 77/2006 be expressly mentioned so that data subjects are informed.

3.10. Security

Under 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*".

On the basis of the information supplied, the EDPS does not have any reason to believe that the Court has not complied with the security measures set out in Article 22 of the Regulation.

Conclusion

The proposed processing 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 implies, in particular, that the Court of Auditors should:

- ensure that sensitive data (such as data relating to a disability) obtained with a view to the recruitment interview are not kept beyond the time limit necessary for the purposes of recruitment or reimbursement of expenses and that the data included in the personal file following recruitment are disclosed only to those individuals who really need to know;
- review its policy for storing data concerning files resulting in accounting transfers and files not resulting in such transfers, and concerning extracts from the criminal record;
- ensure that data subjects have the right of access to their files in accordance with Article 13 of the Regulation;
- state in an information notice, appearing in the notice of competition/screening itself or attached thereto, all the details contained in Articles 11 and 12 with regard to the use of reserve lists and lists of successful candidates.

Done at Brussels, 5 October 2009

[Signed]

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor