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EUROPEAN DATA PROTECTION SUPERVISOR

Médiateur européen

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Date d'arrivée

GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Ms Emily O'REILLY
European Ombudsman
1 Av. du Président Robert Schuman

F-67001 Strasbourg Cedex

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European Ombudsman own initiative inquiry on the issue of disclosure of the names of Selection Board Members

Subject: Your letter dated 16-12-2013, Own-initiative inquiry OI/4/2013/CK concerning the EU Agencies regarding the issue of disclosure of the names of Selection Board members.

Dear Ms O'Reilly,

I am writing in response to your letter of 16 December 2013 about the issue of disclosure of the names of Selection Board members. Since disclosure of these names may raise issues concerning to the application of Regulation (EC) No 45/2001 (the Regulation), you have requested our opinion on the application of data protection principles, in accordance with the Memorandum of understanding signed between our two institutions on 30 November 2006.

As mentioned in your letter, the disclosure of the names of Selection Board members is a processing of personal data subject to the Regulation. In this specific case, data originally collected for the purposes of the selection and recruitment of EU staff are further processed to "guarantee transparency in selection procedures, helps to build and maintain public trust in the EU institutions and reassures candidates that the selection procedure has not been affected by conflict of interest". Article 4(1)(b) of the Regulation requires that further processing must not be incompatible with the purposes for which personal data were collected. This further

processing does not seem to be incompatible as such. Nonetheless, the new purpose must comply with data quality and legitimacy requirements.

Article 4(1)(a) of the Regulation requires that personal data must be processed fairly and lawfully. Article 5 of the Regulation goes on to stipulate a number of conditions under which the processing of personal data can be considered lawful. Article 5(a) allows the processing of personal data if it is necessary for the performance of a task carried out in the public interest based on the Treaties establishing the European Union or other legal instruments adopted on their basis. Therefore, Article 5(a) requires that the processing:

(i) is based on a legal instrument adopted on the basis of the Treaties, and
(ii) is necessary for the task carried out in the public interest (necessity test).

Here (i) Regulation (EC) No 1049/2001 lays down the principles of transparency and (ii) your letter states that the disclosure is necessary to guarantee transparency in selection procedures and to build and maintain public trust in the EU institutions as well as reassures candidates that the selection procedure has not been affected by any conflict of interest. One should therefore evaluate if the proactive (public) disclosure of the names of Selection Board members is necessary to the aims pursued. Indeed, in certain cases, only candidates (and not the public in general) will have an interest in receiving the data. As regards conflict of interest, candidates would have difficulties in assessing conflicts of interest between other candidates and the members of the Selection Board without knowing also the names of all candidates. Therefore, each EU institution should assess the necessity of disclosing the names of the Selection Board members. If the necessity of the public disclosure is demonstrated, EU institutions should make the balance between the public interest of transparency and the right to data protection .

If the balance shifts in favour of a proactive and public disclosure of the names, the Regulation requires, as per Article 11, that the members of the Selection Board be informed about the processing of their data at the time of the collection. This obligation of information given to the data subject is also an element stemming from the obligation of fair processing laid down in Article 4(1)(a). In addition to the information foreseen in Article 11, the communication should include a paragraph on the right of the members to object to such a publication on compelling legitimate ground in accordance with Article 18 of the Regulation. EU Institutions should also undertake to adopt security measures to prevent the re-use of the data published on internet by for e.g. search engines to prevent any undue impact on the data subjects.

Having said this, even if EU institutions decide not to proactively publish them, the names of Selection Board members could typically qualify for a public access request. Therefore, EU institutions must inform, in any case, the members of the Selection Board about the possible disclosure of their name and the existence of the right to object to this publication on compelling legitimate ground (Article 18).

Alternatively, the EU institutions could proactively send to candidates the names of the Selection Board members during the recruitment procedure. This transfer of data should respect Article 8(b) which states that personal data shall only be transferred (i) if the recipient establishes the necessity of having the data transferred and (ii) if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Regarding necessity, candidates for e.g. could ascertain that the members of the Selection Board have no negative conflict of interest. Moreover, the legitimate interest of the Selection Board members can be safeguarded if he/she has the right object to such a transfer (Article 18). EU institutions must

then inform the members of the transfer and this communication should include information on their right to object.

Please do not hesitate to contact us should you have any further questions.

Sincerely Yours,

Giovanni BUTTARELLI