Opinion on the notification for prior checking from the Data Protection Officer of the Court of Auditors of the European Communities regarding the "double allowance" dossier

Brussels, 30 August 2005 (Case 2005-68)

Procedure

On 20 July 2004 the European Data Protection Supervisor (EDPS) sent a letter to the Data Protection Officers asking them to contribute to the preparation of an inventory of data processing operations that might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001. The EDPS requested the communication of all processing operations subject to prior checking, including those that commenced before the Supervisor was appointed and for which checking could never be regarded as prior, but which would be subject to "*ex post*" checking.

On 28 September 2004 the Data Protection Officer of the Court of Auditors presented the list of cases that required prior checking *ex post*, and in particular the one concerning double allowances, insofar as it could contain data relating to health care (Article 27(2)(a)).

The European Data Protection Supervisor identified certain priority topics and selected a number of processing operations subject to prior checking *ex post* that required notification. The "double allowance" dossier is among them.

On 16 March 2005, the European Data Protection Supervisor received the notification for prior checking regarding requests for double allowances from the Data Protection Officer of the Court of Auditors. The dossier consists of the formal notification, with no annexes.

On 22 April 2005, a number of queries regarding the dossier were sent by e-mail. The request was renewed on 30 June 2005 since that e-mail failed to reach its recipients. Replies were given by e-mail on 12 August 2005. Information was exchanged by telephone on 18 and 25 August 2005.

Facts

Article 67(3) of the Staff Regulations of Officials of the European Communities provides that:

> *"The dependent child allowance may be doubled by special reasoned decision of the appointing authority based on medical documents establishing that the child concerned is suffering from a mental or physical handicap which involves the official in heavy expenditure."*

Further to Article 67(3) of the Staff Regulations, the Court of Auditors has established a procedure for obtaining an opinion from the Medical Officer regarding the granting of a double dependent child allowance on the basis of medical supporting documents.

The procedure is as follows:

The Member of the Court, official, other servant or other person entitled to receive the allowance (if the child is in the care of a third party) may apply for the allowance to be doubled by submitting a request in writing.

The request must be sent to the AA, possibly together with a sealed envelope containing the medical information. On receipt of a request for a double allowance, the Human Resources Directorate (HRD) forwards a copy, in an envelope marked "confidential", to the Medical Officer for an opinion on the merits of the request. The sealed envelope containing the child's medical information, if any, is sent with the copy of the request. The Medical Officer may ask for additional information from the child's doctor. The Medical Officer may also ask to examine the child in his surgery.

The Medical Officer's opinion is notified to the HRD in a confidential letter which contains no medical information. If the opinion is favourable, the period in respect of which the allowance is to be granted is also specified. On the basis of the Medical Officer's opinion, a decision is established, signed by the AA and sent to the applicant. The entire procedure is confidential.

The following persons and departments are involved in the procedure:
– the Medical Officer of the Court of Auditors, who is the only person in possession of the medical data;
– the authorising officer/AA;
– the *ex ante* unit (*Cellule ex-ante* – responsible for internal financial control);
– the administrative implementation unit (*Cellule applications administratives* – responsible for paying the allowance);
– the Sickness Fund (to deal with any possible increase in treatment reimbursement rates);
– the member of staff of the Court of Auditors with authorised access to personal files (adds the decision to the data subject's file).

The data provided are as follows:
- Name and forename
- Personnel number
- Name, forename and date of birth of the child
- Medical data of the child (sent to the administration in a sealed envelope to be forwarded to the Medical Service or sent directly by the applicant to the Medical Service)
- Administrative decision.

The file is processed manually. The administrative decision results in an amendment to a component in the remuneration processed by the New Payroll System (NAP).

The Medical Officer's opinion and AA's decision are added to the personal file of the data subject. The conditions of retention are therefore those applicable to all documents added to personal files: the documents are kept for an unlimited period.

The medical data are added to a medical file kept by the Medical Service of the Court of Auditors. That medical file is kept by the Medical Service for:
– the entire period of employment of the data subject;
– five years after the data subject ceases to be employed (because he or she has reached retirement pension age or in case of death).

After that period, the files are archived in a place intended for that purpose at the Commission for a period of 30 years, and are subsequently destroyed.

Security measures have been established to manage these files.

Legal aspects

1. Prior checking

The notification received by e-mail on 18 May 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)) and therefore falls within the scope of Regulation (EC) No 45/2001.

Furthermore, the decision taken on the basis of the conclusions of the Medical Officer is entered into an automated system. Processing by the Medical Officer is entirely manual but the content is intended to form part of a filing system. Article 3(2) of Regulation (EC) No 45/2001 therefore applies in the case in point.

Article 27(1) of Regulation (EC) No 45/2001 makes "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" subject to prior checking by the European Data Protection Supervisor.

Processing is also subject to the provisions of Article 27(2)(a): "The following processing operations are likely to present such risks: processing of data relating to health …", which is the case here since the data fall within the scope of "data relating to health"[1] and medical data.

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, as the European Data Protection Supervisor was appointed after the system was set up, the check necessarily has to be performed *ex post*. However, this does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The notification from the Data Protection Officer of the Court of Auditors was received by e-mail on 16 March 2005. An e-mail requesting additional information was sent on 22 April 2005. In accordance with Article 27(4) of the Regulation, the two-month period within which the European Data Protection Supervisor must deliver an opinion was suspended. The request was renewed on 30 June 2005 since the previous e-mail failed to reach its recipients. Replies were given by e-mail on 12 August 2005. Information was exchanged by telephone on 18 and 25 August 2005.

The European Data Protection Supervisor therefore had to deliver his opinion by 5 September 2005 at the latest, as laid down in Article 27(4) of the Regulation.

2. Legal basis and lawfulness of the processing operation

The legal basis for this processing operation is contained in Article 67(3) of the Staff Regulations of Officials of the European Communities. The Court of Auditors is therefore justified in organising a procedure for obtaining the opinion of the Medical Officer with

[1] Judgment of the Court of Justice of the European Communities of 6 November 2003, Lindqvist, C-101/01, ECR p. I-0000.

respect to the granting of a double dependent child allowance on the basis of conclusive medical documents. The legal basis is therefore valid.

Alongside the legal basis in relation to Regulation (EC) No 45/2001, the lawfulness of the processing operation must also be considered. Article 5(a) of Regulation (EC) No 45/2001 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 in the legitimate exercise of official authority vested in the Community institution*". Establishing a procedure to obtain the conclusions of the Medical Officer with respect to the granting of a double dependent child allowance on the basis of conclusive medical documents is part of the legitimate exercise of official authority vested in the institution. The processing operation is therefore lawful.

Moreover, data relating to health are among the data which Article 10 of Regulation (EC) No 45/2001 classes as "special categories of data".

3. The processing of special categories of data

Article 10(2)(b) (*"Paragraph 1* [prohibition of the processing of data concerning health] *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 …"*) applies in the case in point. The Court of Auditors, in its capacity as employer, is complying with Article 10(2)(b) by processing the data submitted.

Lastly, in the case in point, certain data (relating to this procedure in particular) are forwarded to the institution's Medical Officer. Owing to the nature of the data involved, which concern health, Article 10(3) (special categories of data) of Regulation (EC) No 45/2001 applies in this instance. It provides that "*Paragraph 1* [prohibition of the processing of data concerning health] *shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy*". On account of his position, the Medical Officer is subject to the obligation of professional secrecy and is the sole recipient of these data. Article 10(3) is duly complied with.

4. Data quality

Data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation to the processing operation.
Great care appears to be taken during processing to ensure that non-authorised persons are not sent or given access to purely medical data.

Furthermore, the data must be *processed fairly and lawfully* (Article 4(1)(a) of Regulation (EC) No 45/2001). The matter of lawfulness has been reviewed above. Given the sensitivity of the subject, fairness is an issue which warrants considerable attention. It is linked to the information to be given to the data subject (see section 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).

Some officials of the Sickness Fund Department or other administrative units (internal financial control and payment of allowances), as well as the authorising officer/AA, have access to the files and programs so as to be able to change certain data relating solely to entitlement to the double allowance and thus preserve the quality of the information. In this instance, Article 4(1)(d) of the Regulation is duly complied with. 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. These rights are the second means of ensuring data quality. They are discussed in section 10 below.

5. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that 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 Medical Officer's opinion and AA's decision are added to the personal file of the data subject. The conditions of retention are those applicable to all documents added to personal files: the documents are kept for an unlimited period.

The medical data are added to a medical file kept by the Court of Auditors' Medical Service. The Medical Department keeps that medical file during the entire period of employment of the data subject, and for a further five years after the person ceases to be employed (because he or she has reached retirement pension age or in case of death). After that period, the files are archived in a place intended for that purpose at the Commission for a period of 30 years, and are subsequently destroyed.

As regards data retention for the purposes of granting a double allowance, and in the light of Regulation (EC) No 45/2001, the question arises as to why the retention period depends on the period of employment of the data subject rather than the period of that person's entitlement to the allowance. It would seem more suitable to keep the medical data relating to the double allowance while that allowance is being paid, plus a further five years after it ceases to be paid. Furthermore, long-term retention of data must be accompanied by appropriate safeguards. The data that are being kept are sensitive. The fact that they are archived for long-term retention does not make them any less sensitive. Accordingly, even where long-term retention is concerned, appropriate transmission and storage measures must be applied when handling these data, as is the case for all sensitive information.

According to the notification, the possibility of storing data for historical, statistical or scientific reasons is excluded.

The European Data Protection Supervisor requests that the data be kept for the period of entitlement to the allowance plus a further five years. Furthermore, he recommends that staff be informed about the data retention period for the purposes of this procedure (see section 9 below).

6. Change of purpose/compatible use

Data are retrieved from or entered into the staff databases. Furthermore, these data have an incidence on the remuneration components processed by the New Payroll System (NAP). The

processing operation being reviewed involves no general change of the specified purpose of staff databases and is not incompatible with that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 is not applicable to the case in point and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

7. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The case in point concerns transfers within the same institution (to the authorising officer/AA, *ex ante* unit (responsible for internal financial control) and administrative implementation unit (responsible in particular for paying the allowance)). It also concerns transfers between institutions since the personal data are also transferred to the European Commission department responsible for archiving the files and – to determine the reimbursement rate – to the Sickness Fund, which is an interinstitutional scheme.

Care should therefore be taken to ensure that the conditions of Article 7(1) are fulfilled; that is the case since the data collected are necessary for carrying out the processing and, furthermore, are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". In this case, the task is the responsibility of the various departments of the Court of Auditors, the Sickness Fund and the Commission. As regards the transfers, only relevant data must be transferred. This transfer is therefore indeed lawful insofar as the purpose is covered by the competences of the recipients. Article 7(1) is therefore duly complied with.

8. Processing including the personnel or identifying number

The Court of Auditors uses the personnel number. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller, its effects may nevertheless be significant. This was why the European legislator decided to regulate the use of identifying numbers in Article 10(6) of the Regulation, which makes provision for action by the European Data Protection Supervisor. In the case in point, use of the personnel number may allow the linkage of data processed in different contexts. The point here is not to establish the conditions under which the Court of Auditors may process the personnel number, but rather to draw attention to that provision of the Regulation. In this instance, the Court of Auditors' use of the personnel number is reasonable because it is a means of facilitating the processing task, in particular archiving.

9. Information for data subjects

The notification states that the data subject is informed as soon as the AA receives the conclusions of the Medical Officer.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply in this case. The data subject must be notified of the information specified in subparagraphs (a) (identity of the controller), (b) (purposes of the processing operation), (c) (recipients or categories of recipients of the data), (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) and (e) ("the existence of the right of access

to, and the right to rectify, the data concerning him or her"). The same goes for subparagraph (f), which stipulates the following: *legal basis of the processing operation*, *time-limits for storing the data* and *right to have recourse at any time to the European Data Protection Supervisor*. It guarantees that processing is carried out completely fairly.

The provisions of 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 apply in this case because information may be obtained from external doctors or even the Medical Officer himself. The information specified in the various subparagraphs of Article 12 must be supplied to the data subject.
The European Data Protection Supervisor recommends that all the information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001 be supplied to the data subject. This information could be supplied in a note when the data subject requests the allowance and could also be included in the description of the procedure when it is brought to the attention of the institution's staff as a whole.

10. Right of access and of rectification

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for right of access at the request of the data subject. In the case in point, data subjects have access to their personal file containing the Medical Officer's opinion and the AA's decision.

Article 14 of Regulation (EC) No 45/2001 allows the data subject a right to rectification. In addition to being given access to their personal data, data subjects may also have them amended if necessary.

This set of provisions satisfies the conditions laid down in Articles 13 and 14 of Regulation (EC) No 45/2001.

11. Security

In accordance with Article 22 of Regulation (EC) No 45/2001 on security of processing, "*the controller shall implement 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 entire procedure is confidential. Appropriate security measures are provided for with respect to consultation of the file by the data subject and retention of such files. Article 22 of Regulation (EC) No 45/2001 is therefore duly complied with.

Conclusion

The proposed processing operation does not breach the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This implies, in particular, that the Court of Auditors should:

- supply data subjects concerned by that procedure with all the information referred to in Articles 11 and 12 of Regulation (EC) No 45/2001;
- amend the period of retention of medical data so as to keep the data for the period of entitlement to the allowance plus five years;
- ensure that the long-term retention of data is accompanied by appropriate safeguards.

Done at Brussels, 30 August 2005.

Peter HUSTINX
European Data Protection Supervisor