



**Opinion on the notification for prior checking from the Data Protection Officer of the Court of Auditors of the European Communities regarding the "Invalidity Committee" dossier**

Brussels, 30 August 2005 (Case 2005-119)

**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 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 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 case concerning the Invalidation Committee, 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 "Invalidity Committee" dossier is among them.

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "Invalidity Committee" dossier was given by Mr Jan KILB, Court of Auditors Data Protection Officer, by e-mail dated 18 May 2005. By e-mail of 30 June 2005 questions were put to the Data Protection Officer of the Court of Auditors. Answers were given on 12 August 2005. Information was exchanged by telephone on 18 and 23 August 2005.

**Facts**

Article 59(4) of the Staff Regulations of Officials of the European Communities provides that:

"The Appointing Authority may refer to the Invalidation Committee the case of any official whose sick leave totals more than 12 months in any period of three years."

Section 3 (Articles 7, 8 and 9) of Annex II to the Staff Regulations sets out the practical arrangements for the Invalidation Committee.

#### **Article 7**

*The Invalidation Committee shall consist of three doctors:*

- *one appointed by the institution to which the official concerned belongs;*
- *one appointed by the official concerned; and*
- *one appointed by agreement between the first two doctors.*

*Should the official concerned fail to appoint a doctor, the President of the Court of Justice of the European Communities shall appoint one.*

*In the event of failure to agree on the appointment of a third doctor within two months of the appointment of the second doctor, the third shall be appointed by the President of the Court of Justice of the European Communities at the request of one of the parties concerned.*

[...]

#### **Article 9**

*The official may submit to the Invalidation Committee any reports or certificates from his regular doctor or from any medical practitioners whom he may have consulted.*

*The Invalidation Committee's conclusions shall be communicated to the appointing authority and to the official concerned.*

*The proceedings of the Committee shall be secret.*

In accordance with Article 59(4), the Court of Auditors established a procedure for obtaining the conclusions of the Invalidation Committee, in order to be able to allow officials/servants to receive an invalidity allowance or resume their professional activities.

The Medical Department of the Court of Auditors is involved only to the extent that it sets the dates on which the three doctors meet. It also sets the appointment for the official to be heard by the three doctors. The Invalidation Committee is an ad hoc committee that meets only at the request of the institutions and on a case by case basis.

The data provided are as follows:

- patient's name and forename
- personnel number
- grade
- description of duties in the institutions
- conclusions of the Invalidation Committee.

Cases are referred to the Invalidation Committee on the basis of the attendance register taken by the Court of Auditors which records absences; this attendance register records only the number of absences and the length of sick leave with or without a medical certificate. When sick leave totals more than 365 days over a three-year period the Court of Auditors refers the matter to the Invalidation Committee.

The data subject is officially informed of the referral and of the conclusions of the Invalidation Committee.

The data subject has access to his/her personal file containing the Invalidation Committee's procedural documents for the referral. The data subject is informed of the conclusions of the Invalidation Committee and of the decision taken by the AA.

The data are transmitted to the Invalidation Committee doctors and the conclusion of the Invalidation Committee is transmitted to the authorising officer/AA, the ex ante unit (responsible for internal financial control), the administrative implementation unit (responsible, in particular, for paying salaries) the department within the European Commission responsible for paying the invalidity allowance, and to the Sickness Fund which might, where appropriate, increase the treatment reimbursement rate.

The conclusions of the Invalidation Committee and the AA's decision are placed in the data subject's personal file for an unlimited length of time. In fact, the conclusions do not specify the expected period of incapacity for work.

At the same time, the Medical Department keeps the medical documents as follows:

- for the entire period of employment of the official or servant;
- for five years after the person concerned 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 premises intended for that purpose at the Commission for a period of 30 years, and are subsequently destroyed.

Medical records are processed exclusively by the three Invalidation Committee doctors, one of whom is a regular medical officer at the institution. The Invalidation Committee's conclusions are placed in the personal file by the official/servant responsible in the human resources department.

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, automated processing is used as necessary for referral to the Invalidation Committee, and the conclusions of the Invalidation Committee are entered into an automated system. Processing by the Invalidation Committee 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 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"<sup>1</sup> and medical data.

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

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 introduced.

The notification from the Data Protection Officer of the Court of Auditors was received by e-mail on 18 May 2005. An e-mail requesting additional information was sent on 30 June 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. Replies were given by e-mail on 12 August 2005. Information was exchanged by telephone on 18 and 23 August 2005.

The European Data Protection Supervisor therefore had to deliver his opinion by 30 August 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 59(4) of the Staff Regulations of Officials of the European Communities and Articles 7, 8 and 9 of Annex II to the Staff Regulations. The Court of Auditors is therefore justified in organising a system for referral to the Invalidity Committee. 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 Invalidity Committee with a view to allowing an official/servant to receive an invalidity allowance or to resume his/her professional activities 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 health-related data are forwarded to the Invalidity Committee doctors. Owing to the nature of the data involved, which concerns 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 their position, the doctors are subject to the obligation

of professional secrecy and are the sole recipients of this data. In this instance, Article 10(3) of the Regulation 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 warrants considerable attention. It is linked to the information that has to be forwarded 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 in the various administrative units (internal financial control or payment of allowances, the Sickness Fund Department) have access to the files and programs so as to be able to change certain data relating solely to entitlement to the invalidity 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 conclusions of the Invalidity Committee and the AA's decision are placed in the data subject's personal file for an unlimited length of time. In fact, these conclusions do not specify the expected period of incapacity for work.

The Medical Department keeps the medical documents during the entire period of employment of the official, 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 premises intended for that purpose at the Commission for a period of 30 years, and are subsequently destroyed.

As regards the retention of data in the context of granting an invalidity allowance, in the light of Regulation (EC) No 45/2001 it seems reasonable to keep the data as described above, bearing in mind the fact that no time-limit is set for incapacity for work. Nevertheless, long-term retention of data must be accompanied by appropriate safeguards. The data that is being kept is sensitive. The fact that it is archived for long-term retention does not make it any less sensitive. Accordingly, even where long-term retention is concerned, appropriate transmission

and storage measures must be applied when handling this 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 also recommends that the staff concerned be informed of the duration of the data retention (see section 9 below).

## **6. Change of purpose / compatible use**

Data are retrieved from or entered into the staff databases. 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 salaries). It also concerns transfers between institutions since the personal data are transferred not only to the Invalidity Committee, which is the ad hoc committee provided for by the Staff Regulations of Officials of the European Communities, but also to the European Commission department responsible for paying the invalidity allowance, and, lastly, 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 Invalidity Committee, 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 under 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 of the referral, the conclusions of the Invalidity Committee and the decision of the AA.

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. In fact, insofar as officials are heard by the three Invalidity Committee doctors the data subjects provide the data themselves. Data subjects 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 is true of 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. Data subjects must be notified of the information specified in subparagraphs (a) (the identity of the controller), (b) (the purposes of the processing operation), (c) (the categories of data concerned), (d) (the recipients or categories of recipients of the data), (e) ("the existence of the right of access to, and the right to rectify, the data concerning him or her"), and (f) (*the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*).

The European Data Protection Supervisor recommends that all this information be supplied to data subjects, by whatever means necessary. It would also be possible, for instance, to communicate this information in the context of the documentation for this procedure.

## **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 procedural documents for the referral to the Invalidity Committee, the conclusions of the Invalidity Committee and the corresponding AA 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 the 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 the Regulation is therefore duly complied with.

### **Conclusion**

The proposed processing operation does not appear to infringe 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;
- 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