

Opinion on a notification for prior checking received from the Data Protection Officer of the Translation Centre for the bodies of the European Union on the "The processing of absences on medical grounds and the archiving of medical certificates"

Brussels, 21 April 2006 (Case 2005-123)

1. Procedure

On 20 July 2004 the European Data Protection Supervisor (EDPS) wrote to the Data Protection Officers (DPOs) asking them to prepare 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 notification of processing operations subject to prior checking, including those begun before the Supervisor was appointed, for which checking could never be regarded as prior, but which would be subject to "*ex post facto*" checking.

On the basis of the inventories received from the Data Protection Officers, the EDPS identified priority topics, namely data processing operations involving disciplinary, staff evaluation and medical files.

On 14 April 2005 the EDPS repeated his request for an inventory of data processing operations in the priority areas.

On 2 May 2005, the DPO of the Translation Centre for the bodies of the European Union (ETC) sent an inventory of data processing operations in the priority areas, including the case of "The processing of absences on medical grounds and the archiving of medical certificates".

In an email dated 9 November 2005, the DPO gave notification as laid down in Regulation (EC) No 45/2001, regarding "The processing of absences on medical grounds and the archiving of medical certificates".

The EDPS sent requests for additional information on 22 November 2005, to which the DPO replied on 4 December 2005. A further request for information was made on 11 January 2006. The Data Protection Officer responded on 15 February 2006. Further questions were asked on 21 February 2006; some replies were provided at a meeting in the EDPS' offices on 6 April 2006. The outstanding replies were given on 7 April 2006. The EDPS decided on a 15-day extension to give him more time to analyse the additional information provided. The opinion is therefore to be delivered by 26 April 2006.

2. The facts

This case concerns a data processing carried out by the Translation Centre for the bodies of the European Union relating to the absences of officials, other servants and trainees on medical grounds. The absences of those persons are recorded, and their medical certificates are archived. This processing makes it possible to manage absences on medical grounds in

accordance with the application by analogy of the Commission Decision introducing implementing provisions on absences as a result of sickness or accident, the Staff Regulations of Officials of the European Communities and the Conditions of employment of other servants of the European Communities.

The collected data is recorded as follows: the surname, first name and period of absence on medical grounds, but without the medical reason, are recorded in the IT application "GESTURES". No information concerning absences is published on the intranet. The managers of the absent persons only have access via GESTURES to information about the absences of the persons they manage. Others concerned with the absence of the person, because it affects their activities, automatically receive an email informing them of the absence, giving the following information: the surname, first name and period of absence but without any details on the reason for absence.

All the data – surname, first name, period of absence and the indication "absence for sickness with a medical certificate" or "absence for sickness without a medical certificate" – are contained in two applications, GESTURES and the "CDT application".

Data on the surname and first name come from (i.e. are entered and managed in) the "CDT application", and are automatically recopied every day into GESTURES.

Data on the period of absence and the indication "absence for sickness with a medical certificate" or "absence for sickness without a medical certificate" come from (i.e. are entered and managed in) GESTURES and are immediately automatically recopied into the "CDT application".

Data on the period of absence and the indication "absence for sickness with a medical certificate" or "absence for sickness without a medical certificate" cannot be changed, and can only be seen by staff in the Human Resources section, in GESTURES and the "CDT application".

Medical certificates are stored in a folder which contains a list, namely an Excel file with absences per person. All other medical information is handled by the Commission's Medical Centre. These folders are annual and contain all the absences of any one individual, whether for sickness or some other reason.

The paper versions of the medical certificates are not destroyed but are archived permanently, so that in the case of occupational disease the necessary information can be provided to the medical services. The data on absences, which are entered in the Excel file, indicate the period, person's name and the date of the absences, which makes it possible to find the medical certificates if need be. The Excel files are permanently accessible to the authorised persons, in particular the Human Resources section. However, the ETC has become aware of the existence of a working party of Commission doctors, working to define the periods of time for which documents of a medical nature should be kept. The ETC has indicated that it will apply the recommendations made by that working party when they have been officially announced.

Archives for data more than two years old in the GESTURES database are stored on CD-Rom. Current data (less than two years old) is directly accessible in GESTURES.

Medical certificates are processed on ETC premises because it is impossible for the Commission to do this in the Commission medical centre as in the past. ETC staff have their medical examinations at the Commission's medical service in Luxembourg. The medical

service is also consulted when an opinion is needed on whether long-term absence for sickness is justified, and when requests are made for special leave for medical examinations abroad and for exemptions in connection with special leave.

A notification of absence, not giving the reason, is sent via GESTURES to the human resources section, the line manager, and the department of the data subject and its secretariat, if any. The human resources manager may have access to this information to ensure the proper administrative management of notifications of absence and their accuracy. If necessary, he processes cases requiring an opinion from the doctor at the Commission's medical centre in Luxembourg.

The data subject sends the medical certificate to the human resources section responsible for administrative processing. This currently involves two people in the human resources section and the head of the human resources section. The Commission's medical service may receive medical certificates where the human resources manager asks it to carry out a check, for example relating to the absences of ETC staff for long-term sickness or sickness of an unjustifiable duration. The persons responsible for the management of medical certificates are administrative officers who do not have medical knowledge and are not bound by medical secrecy, but they have to respect the rules of secrecy relating to their duties.

A personnel number is issued to every person at the ETC, but this number is not shown on the medical certificate or on the lists. By way of exception, when the medical certificate is in a name other than that used in the ETC information system (maiden name), the administrator puts a note on the medical certificate adding the personnel number, to facilitate entry in GESTURES and the filing of the document.

Data subjects have the right to have data rectified and deleted at any time. Even after they have left the ETC they may have access to their individual file, and to their medical certificates stored in the folders.

On taking up employment, the file of documents to be filled in and signed by a new staff member includes a certificate of awareness about access to information concerning Regulation 45/2001 which must be signed by the person concerned, and information concerning the processing of personal data. This states that there is a heading on this subject on the intranet "Infokiosque". The notification contains two information sheets. One is entitled "General information on the processing of personal data concerning all staff at the Translation Centre: CDT-DA-1 Administrative processing of information about staff at the Centre" and a second is entitled "Processing of personal data about a person working at the Translation Centre".

Both the medical certificates and the Excel file are kept "for life" (as long as the data subject is alive). The data are rendered anonymous for annual statistics by department and section.

The security measures are as follows: the medical certificates are stored in cupboards which are locked with a key, and the archives are only accessible to the staff of the human resources section. The computer files are stored in an area which can only be seen by the recipients of the notifications of absence.

3. Legal aspects

3.1. Prior checking

Regulation (EC) No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)). The current case involves data processing by the ETC, i.e. a Community agency, and processing in the framework of activities which fall within activities under the first pillar and thus within the scope of Community law.

The processing of absences on medical grounds and the archiving of medical certificates is both manual and automatic. The manual processing forms part of a filing system or is intended to form part of a filing system (Article 3(2) of the Regulation).

This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 lays down that "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" shall be subject to prior checking by the European Data Protection Supervisor. Article 27(2)(a) of the Regulation lists the processing operations likely to present such risks, including the processing of data relating to health. Absences on medical grounds may indicate the state of health of the data subject, and medical certificates contain data relating to health, particularly since they could provide information on the specialisation of the doctor signing the certificate, if the specialisation of the doctor is indicated on the medical certificate. The processing concerns data relating to health and falling within the special category of data subject to the provisions of Article 10 of the Regulation (see section 3.3 below).

Since prior checking is designed to address situations which are likely to present certain risks, the EDPS should give his opinion before the processing operation begins. However, in the current case, the processing has already started. This is not a serious problem, as all the recommendations made by the EDPS may still be adopted accordingly.

The EDPS received notification from the DPO on 8 November 2005. In accordance with Article 27(4), this opinion must be delivered within two months, or in this case on 9 January 2006 at the latest. The requests for additional information postponed this date by 92 days, until 11 April 2006. The EDPS decided on a 15-day extension to give more time to analyse the additional information provided to him. The opinion will therefore be delivered by 26 April 2006.

3.2. Legal basis, and lawfulness of the processing

The processing of data relating to absence on medical grounds and the archiving of medical certificates is based on Articles 59 and 60 of the Staff Regulations of Officials of the European Communities, and on Articles 16, 59, 60 and 91 of the Conditions of employment of other servants. The provisions of the Commission Decision (Administrative Notice No 92-2004 of 6 July 2004) introducing implementing provisions on absences as a result of sickness or accident are also applicable by analogy as a legal basis for the processing.

Since the ETC recruits officials, Article 59 of the Staff Regulations applies. This states that "*An official who provides evidence of being unable to carry out his duties by reason of illness*

or accident shall be entitled to sick leave. The official concerned shall notify his institution of his incapacity as soon as possible (...). He shall produce a medical certificate if he is absent for more than three days. This certificate must be sent on the fifth day of absence at the latest, as evidenced by the date as postmarked".

Articles 16, 59 and 91 of the Conditions of employment of other servants, applying to others servants recruited by the ETC, provide for the application of Articles 59 and 60 of the Staff Regulations by analogy.

For trainees, ETC internal Administrative Decision No 01/2003 on traineeships states that a trainee is obliged to give reasons for absences. In particular, Article 4(7) of the Administrative Decision provides that *"In the event of sickness, the trainee shall notify the Personnel Department immediately. Should the period of absence extend to four days, the trainee shall provide a medical certificate indicating how long he/she is likely to be absent. Where required in the interests of the department, the trainee shall undergo medical examinations"*.

To implement these legal provisions, the controller is obliged to record absences on medical grounds and to archive the medical certificates of officials, other servants and trainees at the ETC.

The lawfulness of the processing is based on Article 5(a) of Regulation (EC) No 45/2001, since 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 and in the legitimate exercise of official authority vested in the Community institution. Recital 27 of Regulation (EC) No 45/2001 states that processing *"includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*. The legal basis appearing in the provisions of the Commission Decision introducing implementing provisions on absences as a result of sickness or accident and in the Staff Regulations and the Conditions of employment, as well as in the internal Administrative Decision of the ETC on traineeships, reinforce the lawfulness of the processing.

3.3. Processing of special categories of data

Article 10 of Regulation (EC) No 45/2001 lays down that the processing of personal data concerning health is prohibited, unless it is justified for the reasons given in Article 10(2) and (3) of the Regulation.

The current case relates to the processing of personal data concerning health, since absences on medical grounds may reveal information about the state of health of the data subject. Furthermore, when a medical certificate is issued, the specialisation of the doctor might provide additional information about the health of the data subject, for example if the specialisation of the doctor is indicated on the medical certificate.

As indicated above in relation to the legal basis, the processing of such data finds its justification in the Conditions of employment and in the internal ETC Administrative Decision on traineeships, and therefore fulfils Article 10(2)(b) of the Regulation, which states that the prohibition does 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"*. Since the processing of data relating to health is based on the Staff Regulations (Article 59(1)), the Conditions of employment (Article 16) and the internal ETC Administrative Decision applicable to officials, other servants and trainees of the ETC

(Article 47.1), it may be considered as necessary for the purposes of complying with the rights and obligations of the controller.

3.4. Data quality

In accordance with Article 4(1)(c) of the Regulation, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed. The data collected regarding absences on medical grounds, whether with or without a medical certificate, appears to be adequate, relevant and not excessive in relation to the purpose of managing sick leave.

The data must also be processed "*fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing has already been considered in section 2 of this opinion. As for fairness, this is connected with the information which must be transmitted to the data subject (see section 3.10 below).

Article 4(1)(d) of the Regulation states that the data must be "*accurate and, where necessary, kept up to date*". That Article also states that "*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*". The system described must ensure a reasonable accuracy of the data. The rights of access and rectification by the data subject are the second means of ensuring accuracy and the updating of the data concerning him (see Right of access, section 3.9 below).

3.5. Conservation of data

The general principle stated in Regulation (EC) No 45/2001 is that 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 (Article 4(1)(e) of the Regulation).

In the current case, both the data recorded in GESTURES and the medical certificates are kept "for life". It should be remembered that data which is more than two years old is stored on CD-Rom, while the most recent data is accessible in the GESTURES database.

Firstly, the EDPS welcomes the fact that the ETC has become aware of a working party of Commission doctors, working to define the periods of time for which documents of a medical nature should be kept, and that the ETC intends to apply the recommendations of that working party once they have been officially announced.

As regards the recording of absences for sickness, the EDPS considers that the time for which such data is kept appears to exceed what is necessary for the purposes of managing absences on medical grounds. The keeping of data on absences for sickness is justified for at least three years by the implementation of Article 59(4) of the Staff Regulations ¹. This is supported by the fact that when a person transfers to another institution, only data concerning absences for sickness in the three preceding years is handed on. One might ask whether it is justified to keep data beyond three years. The EDPS therefore believes that a reasonable time-limit must be determined, and that data should be deleted at the end of the period in which they may be contested or revised.

¹ "*The Appointing Authority may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years*".

It is also important to note the fact that the duration of employment contracts for other servants and trainees is different. This is why this reasonable time-limit for these two specific categories will be different in each case.

As regards medical certificates, the paper versions are not destroyed but are archived permanently in folders which contain absences for each individual. The medical certificates are archived permanently so that, in the case of occupational illness, they can provide the information necessary to the Commission medical service. There seems to be nothing to justify keeping medical certificates permanently. A precise and reasonable time-limit should therefore be established. This time-limit will also have to be different for each category of data subject. Original medical certificates should be destroyed at the latest some years after the end of the time period during which such data may be contested or revised.

Regarding the fashion in which they are archived, the folders only store the medical certificates and the Excel file with the absences per person. The EDPS considers that medical information, in particular medical certificates, should in no case be kept in the personal file of the data subject; this is respected in the case in hand. The principle of separation of the personal file and the medical file is observed, since the folders where the medical certificates are archived are not part of the personal file. Nevertheless, it should be noted that those folders are annual and that they contain all the absences for any one person, whether for sickness or some other reason. The EDPS would like absences on medical grounds, with or without a medical certificate, to be filed separately from those for any other reason (for example, annual leave).

As regards the retention of medical certificates in the case of occupational illnesses, it should be noted that the possibility of retaining them for 30 years was raised at a meeting of the Board of Heads of Administration on 6 October 2005 (CA6D1975/00). This discussion was based on a survey of the Member States which showed that the medical consequences of prolonged exposure to certain substances (for example asbestos) requires the retention of data for a period of up to 30 years, so as to measure the effects of such exposure. Since time-limits for retention are still under discussion, the

EDPS would like to be consulted when the ETC learns of the proposals of the working party of Commission doctors working to define the periods of time for which documents of a medical nature should be kept.

Finally, by virtue of Article 4(1)(e), the Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form or with the identity of the data subjects encrypted. The EDPS welcomes the fact that data is rendered anonymous for the purposes of the annual statistics, as laid down in Article 4(1)(e) of the Regulation.

The EDPS recommends that a reasonable time-limit should be established for the recording of personal data concerning absences for sickness, and that a precise and reasonable time-limit should be established for the conservation of medical certificates. It is indispensable that the data be deleted at the end of the period in which they may be contested or revised. This reasonable time period should be different for officials, other servants and trainees. Finally, the EDPS recommends that absences on medical grounds, with or without a medical certificate, should be filed separately from those for any other reason.

3.6. Change of purpose/compatible use

Article 4(1)(b) lays down that the purposes for which data are further processed must be compatible with the purpose for which they were collected.

It should be remembered that data consisting of the surname and first name and extracted from the "CDT application" and automatically recopied into GESTURES. Also, data on the period of absence and the indication "absence for sickness with a medical certificate" or "absence for sickness without a medical certificate" are extracted from GESTURES and are automatically recopied into the "CDT application".

The processing under consideration here does not involve a general change of purpose for GESTURES and the "CDT application" respectively, and this processing allows the implementation of the legal provisions relating to absences for sickness. This means that Article 6(1) of Regulation (EC) No 45/2001 does not apply in the current case, and that Article 4(1)(b) of the Regulation is observed.

3.7. Transfer of data

Article 7(1) of the Regulation lays down that personal data shall only be transferred 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.

In the current case, the recipients of notifications of absence without details of the medical grounds, via GESTURES, are the human resources section and the line manager, as well as the department of the absent person and its secretariat if any.

As regards the medical certificate, the absent member of staff sends it to the staff of the human resources section who are responsible for handling medical certificates, namely two members of staff and the manager of the human resources section. These staff do not have medical knowledge and are not bound by medical secrecy, but they must respect the rules of secrecy relating to their duties. Article 10(3) of the Regulation stipulates that the processing of data related to health shall be "*processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy*". The EDPS is therefore of the opinion that those responsible for the management of medical certificates should be subject to an obligation of secrecy equivalent to the professional secrecy of health professionals, and that great care should be taken in processing so as not to transmit or give access to purely medical data to unauthorised persons.

Also, it has been indicated that the data appearing in the GESTURES database and in the Excel files, which make it possible to refer to the medical certificates in case of need, are permanently accessible to the authorised persons. The EDPS believes that this sharing of information is necessary for the legitimate performance of tasks covered by the competence of the recipient. However, it should be ensured that the recipient only processes the data for the purposes for which they were transmitted, namely the management of absences for sickness.

The EDPS recommends that those responsible for the management of medical certificates should be subject to an obligation of secrecy equivalent to that of the professional secrecy of health professionals in accordance with Article 10(3) of the Regulation and that great care should be taken in processing so as not to transmit or give access to purely medical data to unauthorised persons.

Finally, data may be transferred to the Commission medical service in Luxembourg when the latter is consulted about a request for an opinion concerning the correctness of a long-term absence for sickness. These transfers are legitimate in the case in hand, since they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

3.8 Processing including the personnel number or identification number

Article 10(6) of the Regulation 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 issue here is not to establish conditions under which the ETC might process the personnel number, but rather to draw attention to this point of the Regulation. In the current case, the ETC uses the personnel number only in one exceptional circumstance. This is when a medical certificate is in a name other than that of the person as described in the ETC information system (maiden name), in which case the member of staff puts a note on the medical certificate, adding the personnel number to facilitate its entry into the IT application GESTURES and the filing of the document.

It would seem that the use of the personnel number by the ETC is reasonable, since it is a means of facilitating processing. The EDPS therefore considers that there are no comments to be made concerning the use of the personnel number.

3.9. Right of access and rectification

By virtue of Article 13 of Regulation (EC) No 45/2001 on the right of access, the data subject has the right to obtain confirmation as to whether or not data related to him or her are being processed; information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed; and communication in an intelligible form of the data undergoing processing and of any available information as to their source.

Article 14 of Regulation (EC) No 45/2001 provides a right of rectification for the data subject. Just as the data subject has a right of access, he may also have his personal data amended if necessary.

It should be remembered that data subjects may rectify or delete the data concerning them at any time, and also have access to their individual file even after they have left the ETC. They also have access to the medical certificates stored in the folders.

The obligations mentioned in Articles 13 and 14 of the Regulation are therefore complied with in the current case.

3.10. Provision of information to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be provided to data subjects to ensure transparency in the processing of personal data. Article 11 provides that, where data are collected from the data subject, certain information must be provided at the moment when that data is collected. When the data have not been collected from the data subject, the information must be provided when the data is recorded or first disclosed, except when the data subject already has that information (Article 12).

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on the provision of information to the data subject applies to data subjects who provide data to controllers.

The provisions of Article 12 apply in the current case, insofar as the Commission medical service in Luxembourg is consulted when a request is made for an opinion on whether a long-term absence for sickness is justified.

In the current case, the first information sheet entitled "General information on the processing of personal data concerning all staff at the Translation Centre: CDT-DA-1 Administrative processing of information about staff at the Centre" does not refer to the processing presented here. The second information sheet, entitled "Processing of personal data about a person working at the Translation Centre" is not relevant with regard to the processing subject to prior checking.

For this reason, the provisions of Article 11 listed under (a) (the identity of the controller), (b) (the purposes of the processing operation for which the data are intended), (c) (the 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) should be specified to the data subjects in an internal note and a declaration indicating the processing in question.

The provisions of Article 12 listed under (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) and (e) (the existence of the right of access to, and the right to rectify, the data) should also be specified to the data subjects.

Paragraph (f) of Articles 11 and 12, which refers to non-obligatory information (legal basis of the processing operation, time-limits for storing the data, right to have recourse at any time to the European Data Protection Supervisor) could usefully be mentioned, for the transparency of the processing to be fully respected.

The EDPS therefore recommends that all the information contained in Articles 11 and 12 of Regulation (EC) No 45/2001 should be the subject of an internal note or declaration specifically mentioning the processing in question and addressed to the staff of the ETC.

3.11. Security

Under Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and processor 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. Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

After careful analysis of the security measures adopted, the EDPS is of the opinion that they are adequate under Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing appears not to violate the provisions of Regulation (EC) No 45/2001, so long as account is taken of the observations set out below. In particular, the ETC must:

- determine a reasonable time-limit for the recording of personal data concerning absences for sickness, and also adopt a precise and reasonable time-limit for the conservation of medical certificates. The data must be deleted at the end of the period in which they can be contested or revised. This reasonable time-limit must be different in the cases of officials, other servants and trainees.
- file absences on medical grounds, with or without a medical certificate, in a separate folder from absences for any other reason.
- ensure that the administrative staff responsible for the management of medical certificates are subject to an obligation of secrecy equivalent to that of the professional secrecy of health professionals in accordance with Article 10(3) of the Regulation. It is essential that great care should be taken in processing so as not to transmit or give access to purely medical data to unauthorised persons.
- inform staff, by means of an internal note or declaration or any other appropriate means, of all the information contained in Articles 11 and 12 of Regulation (EC) No 45/2001, specifically in relation to this processing.

Done at Brussels, 21 April 2006

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