



Opinion on the notification for prior checking from the Data Protection Officer (DPO) of the Council of the European Union regarding the "Record of medical consultations of persons from outside the Institution" dossier

Brussels, 4 May 2006 (Case 2005-380)

1. Procedure

Notification within the meaning of Article 27(2)(a) of Regulation (EC) No 45/2001 concerning the "Record of medical consultations of persons from outside the Institution" dossier was sent to the European Data Protection Supervisor (EDPS) by the DPO of the General Secretariat of the Council of the European Union by letter dated 30 November 2005.

Since the data processing system for the "record of medical consultations of persons from outside the Institution" is already in place, it cannot be subject to prior checking and must therefore be checked ex-post.

The EDPS identified certain priority topics and selected a number of processing operations subject to prior checking ex-post that required notification. These included processing operations relating to medical data.

On 5 December 2005 the EDPS requested further information on the processing operation in question. An answer was given on 16 January 2006. A further request for information was sent to the Council on 19 January 2006. An answer was given on 10 March 2006.

2. Examination of the case

2.1. The facts

The Council has a medical dispensary on its premises. Persons from outside the General Secretariat of the Council (GSC) can visit the dispensary for a consultation in the event of a medical problem while on GSC premises.

The Council keeps a record of medical consultations of all persons from outside the institution. Persons from outside the institution are also entered in the dispensary's daybook, as are officials and other agents of the institution. Persons from outside the institution include staff from permanent representations, delegates attending meetings, journalists, catering staff, workmen, visitors, etc.

A GSC doctor enters the data subject's forename and surname, his identity (permanent representation, press, visitor, etc.) and the reason for the consultation in a consultation form. The form also incorporates various medical headings including relevant personal and family medical history, the medical opinion and the doctor's recommendations. The forms are filled

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in on an electronic model, which is deleted as soon as the document has been printed. Data processing is manual.

Consultation forms are not given to patients but kept on paper and filed in chronological order. The files are subdivided by data subject identity (permanent representation, press, visitor, etc.). Files containing the forms of persons from outside the institution are kept separately from the files of the institution's own staff.

The data subject has right of access to his consultation form, as does his GP. The data subject can ask for a copy of the consultation form. However, there is no formal information about the right of access which the data subject has, nor is he given any specific information about data processing in general.

In the section on the rights of data subjects, the notification refers to the Council Decision ¹of 13 September 2004 (2004/644/EC) adopting implementing rules concerning Regulation (EC) No 45/2001 and, in particular, to section 5 of that Decision: "Procedure for data subjects to exercise their rights".

The processed data are intended for members of the medical profession, such as the data subject's GP.

The forms are kept indefinitely.

The consultation forms are used to produce anonymous statistics. These statistics are part of a wider study covering treatment given, accidents, etc. Their purpose is to provide Council management with information on the Council's medical activities.

Security measures have been adopted. The files are stored in a locked cupboard in one of the Medical Service's offices. The office in question is fitted with an electronic lock which can be opened by Medical Service staff only.

2.2. Legal aspects

2.2.1. Prior checking

The notification received on 30 November 2005 relates to processing of personal data within the meaning of Regulation (EC) No 45/2001 ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data are processed by a Community institution and the processing is carried out in the exercise of activities falling within the scope of Community law (Article 3(1)). Processing is manual but the processed data form part of a filing system, i.e. the hand files containing the consultation forms (Article 3(2)). The processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 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".

¹ Council Decision of 13 September 2004 adopting implementing rules concerning 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 by the Community institutions and bodies and on the free movement of such data (2004/644/EC)

Article 27(2) of the Regulation contains a list of processing operations likely to present such risks. The record of external consultations must be subject to prior checking by the EDPS under Article 27(2)(a) of the Regulation because it contains data relating to health,

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. 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 Council of the European Union was received on 30 November 2005. The European Data Protection Supervisor should therefore have delivered his opinion by 1 February 2006 at the latest, as laid down in Article 27(4) of the Regulation. The period within which the opinion had to be delivered was suspended for 92 days by a request for further information. The opinion therefore had to be delivered by 4 May 2006.

2.2.2. Legal basis and lawfulness of the processing operation

The legal basis for the processing operation is Article 207 of the Treaty establishing the European Community (under which the GSC was set up) together with Article 23 of the GSC's Rules of Procedure (which authorises the taking of measures necessary to ensure the smooth running of the institution).

The establishment of a dispensary open to persons from outside the GSC and the keeping of a record of consultations involving such persons are necessary to ensure the smooth running of the GSC. The Council has a duty of care towards its visitors under a general principle of responsibility.

Under the Regulation, the lawfulness of the processing is therefore based on the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of official authority vested in the Community institution (Article 5(a)). In the present case, the legal instruments mentioned above relate to the exercise of a task carried out in the public interest, such as gathering and processing data on persons from outside the GSC in connection with medical consultations. That being so, the processing operation proposed is therefore lawful.

2.2.3. Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and 10(3).

The present case very clearly relates to the processing of personal data on health.

The ban on processing health-related data can be waived where processing is "required for the purpose 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" (Article 10(3) of the Regulation). The present case concerns the provision of care by doctors and nurses – health professionals subject to the obligation of professional secrecy.

2.2.4. Data quality

Article 4(1)(c) of the Regulation provides that personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

The consultation forms contain only a minimum amount of general data including the data subject's forename and surname. The exact medical content of a consultation form obviously varies from case to case. Steps must be taken to ensure compliance with the principle of data quality; the data entered must be adequate, relevant and not excessive in relation to the purposes for which they are collected. Bearing in mind the specific nature of such medical consultations (i.e. the data subject is not visiting his family doctor or GP), the EDPS would stress the importance of the data quality principle. The EDPS considers the other general data to be adequate, relevant and not excessive in relation to the purposes for which they are collected.

Moreover, the data must be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in paragraph 2.2.2 of this opinion. Fairness is concerned with the information which has to be transmitted to the data subject (see section 2.2.8 below on information to be given to the data subject).

Under Article 4(1)(d) of the Regulation, personal data must be "accurate and, where necessary, kept up to date", and "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 procedure itself must guarantee this data accuracy. The data in this case include the results of medical examinations and doctors' notes. It is not easy to ensure or assess the accuracy of data of this kind. The consultation form gives a snapshot of one aspect of a data subject's state of health at a particular time. The form is not a part of a more general medical file on the data subject. The data subject's right of access to his medical file is a means of ensuring that these data are accurate and up-to-date (see section 2.2.7 below on right of access and rectification).

2.2.5. Conservation of data

The general principle in the Regulation is that personal data may 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). At present the consultation forms are kept indefinitely. The EDPS considers that a storage period proportionate to the purposes for which the data were collected (i.e. the provision of medical assistance to persons from outside the GSC) should be established.

Under that provision, if personal data have to be kept for historical, statistical or scientific use, the Community institution or body must ensure that they will be stored either in anonymous form or that they will be stored only if they are encrypted. The Medical Service gives account of its activities to the GSC administration through anonymous statistics on consultations, treatment, visits, etc. This measure is fully consistent with Article 4(1)(e).

Although data processing is manual, the documents are produced by electronic means. The EDPS welcomes the fact that the electronic files are destroyed immediately after the form has been printed out.

2.2.6. Transfer of data

Article 7 of the Regulation provides that personal data may be transferred within or to other Community institutions or bodies only if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.

When it receives a request for the transfer of a consultation form, the Medical Service is required to verify the competence of the recipient and to make a provisional evaluation of the need for the data transfer. Consultation forms can only be transferred to doctors and nurses of the GSC. The recipient is competent and Article 7 is therefore complied with.

Article 8 of the Regulation provides that personal data can only be transferred to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC if the recipient establishes that the data are necessary and there is no reason to assume that the transfer could prejudice the data subject's legitimate interests. The medical form can be transferred to the data subject's GP with the data subject's consent or if the GP establishes that the data are necessary and that the transfer does not prejudice the data subject's legitimate interests.

Transfers of data to a third country or to an international organisation must comply with the rules laid down in Article 9 of the Regulation. Accordingly, "Personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out."

If the country of the recipient does not ensure an adequate level of protection, consideration should be given to the exceptions under Article 9(6). Given the nature of the case at hand, Article 9(6)(a) and 9(6)(e) are particularly relevant: "By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if: (a) the data subject has given his or her consent unambiguously to the proposed transfer; or (...) (e) the transfer is necessary in order to protect the vital interests of the data subject; or (...)."

2.2.7. Right of access and rectification

Under Article 13 of the Regulation, the data subject has the right to obtain, without constraint, from the controller, communication in an intelligible form of the data undergoing processing and any available information as to their source. Article 14 provides that the data subject has the right to obtain from the controller rectification without delay of inaccurate or incomplete personal data.

The data subject has right of access to his consultation form(s). Article 13 of the Regulation is complied with.

The right of rectification in this case is limited since the personal data are data resulting from an assessment of the data subject's state of health. However, the EDPS considers that it should be possible for the general data to be rectified.

2.2.8. Information to be given to the data subject

Articles 11 and 12 concern the information to be given to data subjects in order to ensure transparency in the processing of personal data. Article 11 provides that when the data are obtained from the data subject, the information must be given at the time of collection. When

the data are not obtained from the data subject, the information must be given when the data are first recorded or disclosed, unless the data subject already has it (Article 12).

In this particular case, the information is obtained from the data subject at the time of the medical consultation (Article 11) and the doctor's notes and comments are then added to the form (Article 12). The EDPS is of the opinion that the doctor should provide the data subject with appropriate information concerning his right of access to the consultation form, the period during which the form will be stored, the identity of the controller, the purposes of the processing operation, the recipients of the data, the legal basis for the processing operation and his right to have recourse to the EDPS at any time to exercise his rights effectively.

The EDPS would also like a reference to Council Decision 2004/644/CE of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 to be included on one of the data carriers available to the data subject.

2.2.9. Security

Following a careful examination of the security measures in place, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion

The processing proposed 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 means, in particular, that:

- A storage period proportionate to the purposes for which the data were collected (i.e. the provision of medical assistance to persons from outside the GSC) should be established.
- The right to rectify general data (as opposed to data based on medical assessments) should be ensured.
- The GSC, through the doctor or another channel, should provide the data subject with appropriate information concerning his right to access the consultation form, the period during which the form will be stored, the name of the controller, the purposes of the processing operation, the recipients of the data, the legal basis for the processing operation and his right to have recourse to the EDPS at any time so that he can effectively exercise his rights.
- A reference to Council Decision 2004/644/CE of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 should be included on one of the data carriers available to the data subject.

Done at Brussels, 4 May 2006

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