

## **Opinion on the notification for prior checking from the Data Protection Officer of the Council of the European Union regarding the "accident record" dossier**

Brussels, 25 July 2006 (Case 2005-379)

### **1. Procedure**

By e-mail dated 29 November 2005, the Data Protection Officer of the Council of the European Union sent a request for consultation on the need for prior checking (Article 27(3) of Regulation No 45/2001) for the "accident record" dossier. Processing notification was attached to the e-mail. By e-mail dated 1 December 2005 the European Data Protection Supervisor stated that the data-processing operation should be subject to prior checking. Having already received the processing notification which was sent by e-mail on 30 November 2005, the EDPS then began analysis.

Since the processing operations for the "accident record" are already in place, they 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.

Information was requested by e-mail dated 5 December 2005. An answer was given by e-mail on 11 April 2006. A supplementary answer was given on 12 April 2006. Additional information was requested on 21 April 2006. The information requested was obtained at a meeting with the Health and Safety Department of the General Secretariat of the Council on 13 June 2006.

### **2. Examination of the case**

#### **2.1. The facts**

The processing involves recording data on accidents occurring on General Secretariat of the Council (GSC) premises. The treatment given is recorded. Data are also recorded for the purposes of investigation; the purpose of the processing is to determine accident liabilities and ensure accident prevention.

Data subjects comprise all those who have been the victims of an accident on GSC premises: officials, temporary staff, auxiliary staff, staff of outside firms, Council visitors, etc.

When an accident occurs on GSC premises, the Medical Service draws up a report, using two forms. The white form is intended for the GSC Health and Safety Department. It shows

the data subject's identity (name, GSC official or not, other status if necessary, telephone, fax), particulars of the accident (place, date, time, circumstances and outcome, type and time of call reporting the accident) and, if the accident victim is a GSC official or other servant, his/her signature). GSC officials and other servants receive an "accident declaration" after they have signed the form. This declaration is a standard document to be filled in by the accident victim and the doctor; it is intended for the Joint Sickness Insurance Scheme. The white form is sent to the Health and Safety Department by internal mail so that an investigation can be initiated without infringing medical confidentiality. The investigation is intended to determine who was responsible for causing the accident.

Where the accident victim is a GSC official or other servant, the Health and Safety Department compiles an accident report which is forwarded to the data subject's superior, the data subject, the Director-General for Administration, the medical officer and the Accident Insurance Department. The accident report is based on an interview with the accident victim. The damage/injury suffered is described by the accident victim and recorded in the report. Where the accident victim is a visitor to the GSC, the white form is stored in the same file but is not generally further acted upon. Where the accident victim is employed by an outside firm, the firm draws up the accident report. If the firm does not make a report, the Health and Safety Department does so and informs the officials or other servants responsible for contacts with the firm of the causes of the accident.

Responsibility is never determined on a personal basis. Determination simply takes the form of appropriate safety directives to the department responsible.

The yellow form is kept by the GSC Medical Service (doctors and nurses in the GSC Accident Service) and contains identical information (the forms are filled in as carbon copies) together with the medical data (description of injuries, description of treatment). The form is stored by the GSC Medical Service. It should be noted that the Medical Service does not issue any medical certificate for sick leave. The official or other servant must consult his/her general practitioner who will provide a certificate.

The data processing involved is manual. Data are stored only on paper (the two forms and the accident report).

The Medical Service does not automatically send copies of the yellow forms to the data subject or his/her doctor. A copy will, however, be sent if the data subject or his/her doctor so requests.

In the section on the rights of data subjects, the notification refers to the Council Decision of 13 September 2004 (2004/644) 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/CE), and particularly to Section 5 of the Decision: "procedure for data subjects to exercise their rights".

Processing is also used to establish anonymous statistics for inclusion in the Medical Service's activity reports and anonymous statistics for the Health and Safety Department (types of injury, accident localisation, accident sites, etc.).

The forms are kept indefinitely. The white forms are kept for 10 years in accordance with Article 28 of the Royal Decree of 27 March 1998 on the Internal Service for Health and Safety and Protection at Work.

Security measures have been adopted. The accident reports (yellow sheets) are stored in a locked cupboard in a dispensary office. That office is fitted with an electronic lock for which only Medical

Service staff have the key. In the Health and Safety Department, forms and accident reports are stored in a cupboard. Only Health and Safety Department staff (currently 8 people) can enter the Department's premises. There is a secure lock.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The notification received by letter 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 white forms and the accident reports for the Health and Safety Department and the hand file containing the yellow forms stored by the Medical Service (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".

Article 27(2) of the Regulation contains a list of processing operations likely to present such risks. The record of accidents on GSC premises is subject to prior checking by the EDPS under Article 27(2)(a) of the Regulation because it contains data relating to health. It should be pointed out at this stage that the "accident record" involves two separate processing operations (and therefore two separate controllers): processing by the Medical Service and processing by the Health and Safety Department. Medical data are clearly involved in the first processing operation, carried out by the Medical Service. With regard to processing by the Health and Safety Department, the accident report details the injuries suffered by the data subject. The processing of such health-related data is also subject to prior checking by the EDPS.

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 the recommendations issued by the European Data Protection Supervisor should 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 therefore had to deliver his opinion by 31 January 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 181 days by requests for further information; the opinion will therefore be delivered by 31 July 2006 at the latest.

## **2.2.2. Lawfulness of processing**

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 an official authority vested in the Community institution (Article 5(a)). In the case under consideration, the task is one being carried out in the public interest (comprising the processing of personal data necessary for the management and functioning of the institution, recital 27 of Regulation (EC) No 45/2001): compiling and processing data relating to persons – from within the GSC and from outside – who are victims of accidents on GSC premises in order to come to their assistance and contribute to preventing future accidents. That being so, the processing operation proposed is therefore lawful.

The legal basis for processing varies depending on the category the data subject belongs to. In the case of officials and other servants of the Council, Article 1e of the Staff Regulations of Officials of the European Communities (Staff Regulations) provides that officials in active employment are to be accorded working conditions complying with appropriate health and safety standards, which means that first aid and emergency care needs to be organised for workers who have accidents and that there must be a department responsible for accident prevention. The Council has a duty of care towards persons from outside the institution under a general principle of responsibility. In both instances, the Council refers to the principles set out in the Royal Decree of 27 March 1998 on the Internal Service for Health and Safety and Protection at Work. The Royal Decree is not part of the legal basis on data-protection matters but the principles it sets out may be taken into account where relevant.

## **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) or (3) of the Regulation.

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

As has been explained above concerning the legal basis with regard to officials and other servants of the GSC, the justification for processing such data can be found in Article 1e of the Staff Regulations and therefore complies with Article 10(2)(b) of the Regulation, which provides that the prohibition does not apply where the 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".

The ban on processing health-related data can also be lifted for all data subjects where the processing is "necessary 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 case under consideration concerns the provision of care by doctors and nurses, health professionals subject to the obligation of professional secrecy in the Medical Service. For the purposes of preventive medicine, it also involves the management of accident data by the GSC Health and Safety Department. Obviously, given the nature of the data processed by the Health and Safety Department, its officials are also subject to an equivalent obligation of professional secrecy.

#### **2.2.4. 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 accident forms for the Health and Safety Department and for the Medical Service are the same, except for the medical data which appear only on the form for the Medical Service. The medical data will obviously vary from case to case. Steps must be taken to ensure compliance with the principle of data quality. They could take the form of a general recommendation to the persons handling the files asking them to ensure that they comply with Article 4(1)(c). 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 section 2.2.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see section 2.2.8 below; information to be given to the data subject).

In accordance with 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". In the case of the accident report prepared by the Health and Safety Department, the EDPS would stress that the data relating to injuries (medical data) provided by the accident victim may prove to be inaccurate. Only a health professional should be authorised to provide such data. In the case under consideration, the white form sent to the Health and Safety Department could therefore contain only medical data relevant to the Health and Safety Department. That part of the form should be filled in directly by medical staff. The EDPS also wonders about the relevance of such medical data in a report intended to help prevent accidents in the future. If the Health and Safety Department cannot demonstrate that the description of injuries is relevant for the purposes for which the data are collected, the EDPS would request that, in order to comply with Article 4(1)(d), such data not be forwarded to the Health and Safety Department either on the white form or by the data subject.

The procedure itself must ensure that data are accurate. The fact that the official or other servant of the GSC is required to sign the "accident declaration" is a way of guaranteeing that the data subject agrees with the description of the circumstances of the accident and with the general identification data and is thus a guarantee of accuracy. Asking all concerned to sign, whether they are internal, employed by outside firms, or visitors, is a way of checking that the information on all the data subjects is accurate. It should be noted that staff of outside firms and visitors are not at the moment required to sign. The EDPS would request that a signature be obligatory for all concerned. In the case of the notes taken by the doctor, it is not easy to ensure or assess the accuracy of the data. The data subject's right of access to his/her accident report is a further means of ensuring that the accident victim's 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). There is currently no limit on the storage period for the yellow forms (Medical Service). The EDPS considers that a storage period proportional to the purposes for which the data were collected should be established. The white forms and the accident reports are kept for 10 years in accordance with the Royal Decree of 27 March 1998 on the Internal Service for Health and Safety and Protection at Work (Article 28). The EDPS regards that as a reasonable period for the purpose of the processing: accident prevention.

Under that provision, if personal data have to be kept for historical, statistical or scientific purposes, the Community institution or body must ensure that they will be stored only in an anonymous form. The Medical Service and the Health and Safety Department report to GSC management on their activities through anonymous statistics on consultations, treatment, visits, types of injury, accident localisation, accident sites, etc. This is fully consistent with Article 4(1)(e).

#### **2.2.6. Transfer of data**

Article 7(1) 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.

In the case under consideration, the yellow form may be transferred only to GSC doctors or nurses, the white form only to the Health and Safety Department and the accident report only to the data subject's superior, to the Administration, to the medical officer and to health insurance. The recipients can be regarded as competent and Article 7(1) is therefore complied with.

Article 8 of the Regulation provides that personal data can be transferred to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC only 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 (yellow form) can be transferred to the data subject's GP if the GP establishes that the data are necessary and that the transfer does not prejudice the data subject's legitimate interests or if the data subject consents.

Article 9(1) provides that personal data may be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, only 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. Article 9(6) provides that, by way of derogation from paragraph 1, the institution may transfer data if the data subject has given his or her consent unambiguously to the proposed transfer or if the transfer is necessary in order to protect the vital interests of the data subject. Therefore, transfers may be made to third countries and to international organisations provided there is an adequate level of protection (Article 9(1)) and, given that transfers are on a one-off basis, in accordance with the two derogations referred to (Article 9(6)(a) and in certain instances Article 9(6)(e)).

#### **2.2.7. Right of access and rectification**

Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, 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 EDPS considers that the data subject should have access for both forms of processing. In the case of the Health and Safety Department, the data subject is already assured of access to the accident report; the data subject receives a copy.

In the case of medical data, the right of rectification is limited by definition since these are data resulting from an assessment of the data subject's state of health. However, the EDPS considers that it should be possible to rectify the general data under both processing operations (the two forms and the accident report).

### **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 them (Article 12).

In this instance, identification data may be collected from the data subject. They may also be collected from a third party if the data subject is unable to respond. The doctor's notes and comments and the description of the circumstances of the accident may be collected without involving the data subject. Articles 11 and 12 therefore apply in this case. The EDPS is of the opinion that the Medical Service and the Health and Safety Department should provide the data subject with appropriate information concerning his/her right to access the forms, the period during which the forms and the report 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/her right to have recourse to the EDPS at any time to effectively exercise his/her rights.

Since the Council has adopted implementing rules to Regulation No 45/2001, it would also be desirable, for both processing operations, to refer to Section 5 of the 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) in order to ensure that the data subject is treated as fairly as possible.

### **2.2.9. Safety**

Following a careful examination of the security measures in place, the EDPS considers that the measures put in place for both processing operations are adequate in the light of Article 22 of Regulation (EC) No 45/2001.

### **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 means in particular that:

- if the Health and Safety Department demonstrates that the description of injuries is relevant for accident prevention, the medical staff must provide the description

(only information relevant to the Health and Safety Department), on the white form for instance; if that is not the case, medical data (injuries) must not be transferred to the Health and Safety Department;

- all data subjects, whether they are internal, employed by outside firms, or visitors, should be required to sign the forms;
- a storage period proportional to the purposes for which the data were collected should be established for the yellow form;
- the data subject should have access for both forms of processing (the two forms);
- the data subject should have the right to rectification for both forms of processing (the two forms and the accident report);
- the data subject should be given appropriate information concerning his/her right to access the accident forms, the period during which the forms and the report 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/her right to have recourse to the EDPS at any time to effectively exercise his/her rights;
- a reference should be made to Section 5 of the Council Decision of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001.

Done at Brussels, 25 July 2006

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