Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Ombudsman on PERSEO

Brussels, 7 May 2007 (Case 2007-134)

1. Proceedings

On 27 February 2007, the European Data Protection Supervisor (EDPS) received by electronic mail a notification for prior checking from the Data Protection Officer (DPO) of the European Ombudsman (EO) concerning PERSEO, software developed by the European Ombudsman's Administration Sector, and which was *in test phase* at the time of receiving the notification. The attachments contain three explanatory documents: PerseoUser, PerseoHelp and PerseoAdmin.

On 13 March 2007 the EDPS made a request for further information to which he received the responses on 15 March 2007. On 28 March 2007, the EDPS made another information request. He received the responses on 3 April 2007.

On 27 April 2007, the EDPS sent the draft opinion to the DPO of the European Ombudsman and consequently suspended the procedure for a period of 7 days to enable him to provide comments and further information on the draft, if necessary.

2. Examination of the matter

2.2.1. The facts

The European Ombudsman (EO) manages leaves (annual leave and special leave), absences and over-time of the staff and trainees. The data processing operations are as far as possible automated, except for the calculation of overtime and special leave. The automated processing concerns the application of the software called PERSEO for the management of leaves. The processing operation is based on Articles 57, 59a and Articles 1-5 of Annex V (annual leave), Article 59 (sick leave), Article 57 and Article 6 of Annex V (special leave) of the Staff Regulation of officials of the European Communities.

The categories of personal data concerned are:
A) as appears in PERSEO for the user:
1) Identification data in order to validate the logged person: logged user, office, telephone, email.
2) Information panel, which contains personal data related to the person logging in PERSEO. Matricule: grade, service entry date, place of origin, date of birth, date end of contract. This information is used by PERSEO to calculate leave rights that each person has the right to take during the current year. These data are obtained form the data subjects when they take up their duties.

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3) Leave rights panel, which displays the rights calculated from the information panel:
 - working time of the staff member (full time, part time);
- annual leave: calculated based on the working time of the staff member,
- grade: entitles the official to one or more extra days per year,
- place of origin: gives extra days to the staff member per year based on the distance between the place of work and the place of origin,
- age: extra days are given,
- credits from last year: number of days transferred from the previous year,
- annual leave taken: number of days taken up to the current date from the 1st January of the current year,
- Total: the total number of leave hours/days that a staff member is entitled in the current year,
- Credits left: the remaining hours/days for the current year that can be taken.
- Staff members can also see the list of leaves taken in detail during a current year and the list of leaves requested.
B) Data used for the management of annual leave: dates of leave requested/taken and place where the staff member can be reached during his annual leave (optional).
C) Data used to manage special leave: reason for special leave and proof of the event or for the situation that justifies the special leave (including medical certificates).
D) Data used to manage absences: reason for the absence; four categories: justified and the reason; not justified; medical reason with or without medical certificate.

The handling of medical certificates: The staff members are advised to send medical certificates in a sealed envelope with marking the words: "Secret Médical". An entry is put on the envelope by the central mail service and it is left unopened. It is then given to the *official in charge of medical absences* within the office. This official or his/her backup are the only staff members who are entitled to deal with the medical certificate. The *official in charge of leaves is instructed* to refer all staff members to the official entitled to handle medical certificates when such documents are presented to support a special leave request. This is also the case where staff members handle the medical certificates very openly and are not particularly concerned by the medical secret. In case of practical difficulties with a certificate (missing information, etc) or if it is drafted in a language that is not mastered by the official in question, the certificate may be shown to the Head of the Administrative Sector for further action (translation request in an anonymous form).

According to the information received from the controller, the institution specific procedure to handle mails at the European Ombudsman requires that the term "secret médical" is marked on the envelope. The Ombudsman has one central office where all the mails are opened. The staff member in charge (and two substitutes) are authorised to open all the mails except the letters marked as "personnel" or "secret médical".

Special leave requests: *The official in charge of leave is also in charge of special leave and over-time.* Special leave requests are prepared on paper jointly by the official/ agent asking the special leave and the official in charge of leave who will advise his colleagues regarding their rights. The paper version of the special leave request is then submitted to the Head of the Administrative Sector who will authorise the leave after having checked that the conditions are fulfilled. The special leave will then be inserted into PERSEO and the superior of the official/ agent in question be informed by e-mail only of the dates of the special leave (the circumstances justifying the special leave are not provided). Additional proof of the circumstances justifying the special leave shall be provided to the official in charge of leaves.

In case of special leave, the blank leave application form requests the staff member to attach supporting documents (or forward them later).

Regarding special leave the official/agent has to submit supporting documents either to the person in charge of leaves or to the person in charge of medical absences for all the documents containing medical information regarding third parties. The documents are checked by these officials or in case of difficulties by the Head of the Administrative Sector. In case of medical data, the Medical Service of the European Parliament may be asked for advice regarding the degree of seriousness of an illness of a third party. These documents are also compared to similar previous requests to ensure that the requests are coherent with each other.

Leave management in PERSEO: Each action in PERSEO which implies the sending of an email (leave request, leave authorisation, cancellation of leave, notification of an absence) is sent from or to a mailbox called "leave". This mailbox is accessible to the Head of the Administrative Sector, to the person in charge of leaves and to the IT specialists in charge of the maintenance and development of PERSEO (4 persons in total). PERSEO checks the e-mails in the mailbox and determines whether a leave request that was sent by an official/agent was approved by the colleague's superior.

A leave request entails the sending of an email from the official asking the leave to his superior and to the leave mailbox (the e-mail is sent automatically from the official's mailbox by PERSEO). The superior has two options on the e-mail he receives: Accept/Reject. By ticking one of these options, an e-mail is sent from the superior to the mailbox "leave". PERSEO then analyses the e-mails received and when PERSEO finds a reply to a request it takes over the reply and stores both e-mails for verification purposes in case of malfunction or contestation.

Over-time management: Staff members are authorised by e-mail to do overtime by the Head of the Administration and Finance Department. Once the overtime was authorised, it needs to be validated by the hierarchical superior before the official managing overtime adds the additional hours to the list of overtime that can be compensated by additional leave. The official who has a credit in terms of overtime will submit a leave request in paper using a blank form and indicating that he/she intends to use the credit. Officials are invited to use their over-time credit in priority before using their annual leave.

Information to data subject:

The data subject is informed of the existence of the processing and of its modalities when he/she takes up his/her duties. He/she uses part of the processing software to submit leave requests and may at any time submit a request to get a leave statement for the current year. This statement summarises both the entitlements and the periods of leave and absences for the current year. It also indicates the missions that were authorised for a given staff member.

It was stated that after the EDPS issues his opinion, and before the final version of PERSEO will be launched, a privacy statement summarising the information contained in the notification, including all the necessary changes, shall be made available to the user through a button on the user interface.

Rights of data subjects:

Users have direct access only to their own personal data concerning the annual leave. For the rest of the data the procedures below are envisaged.

The data subject is requested, on a yearly basis, to correct all personal data kept by the institution in relation to his/her personal situation. He/she receives a document in which he/she is invited to make modifications and to return it to the administration. This procedure ensures that data used for the calculation of entitlements are approved by the data subject.

On a yearly basis the data subject is also requested to approve a final leave statement which will summarise the leave and absences for the whole year. Regarding annual leave, the data subject may at any time contest the calculation made for each leave request which he/she submits through PERSEO and which is confirmed to him/her by email.

An already requested leave can be cancelled, in which case an e-mail is sent to the secondary central e-mail box, where all requests are collected for validation purposes. Equally, a leave request can also be deleted (if it was submitted by mistake), but it should occur before the leave has been accepted electronically by the leave management team.

Transfer of data:

Data will be disclosed to leave managers, who will control the attribution of rights by the application that are based on contractual or personal data. The manager can switch an unjustified absence into a justified absence.

Data may be disclosed to the Invalidity Committee, to the hierarchy and to auditors for management, control and audit purposes.

Storage of data:

 Time span to store and keep data relating to *annual leave* is envisaged to be five years for audit purposes.

The data related to the *special leave* shall be kept during the whole career of the agent. The data may be used by PERSEO's manager to verify the coherence of special leave requests.

The *data relating to absences* shall be kept during the agent's whole career and may be used by managers to prepare files for the Invalidity Committee (Art. 59(4) of Staff Regulation).

Security of processing:

PERSEO imports the data relevant for the calculation of leave entitlements from ARPEGE, the database managing personnel run by the European Parliament. PERSEO does not export data to other databases.

[...]

2.2. Legal aspects

2.2.1. Prior checking

The prior checking notification received on 27 February 2007 relates to processing of personal data ("any information relating to an identified or identifiable natural person") under Article 2(a) of Regulation (EC) 45/2001 (hereinafter as: "the Regulation"). The processing of personal data on leave management, absences and over-time of the staff members/trainees is

carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation).

Moreover, the processing of personal data wholly or partly by automatic means comes within the scope of the Regulation under Article 3(2) thereof, which means that the application in question is covered, just as the handling of paper documents, since those are intended to form part of a filing system.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all processing operations which are "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 that are likely to present such risks, among those processing of data relating to health (Article 27(2)(a) of the Regulation).

The processing operation at question involves data related to health condition of staff members and trainees (sick leave with or without medical certificates) and of third parties in case of special leave (which may concern serous illness of spouse, or of a child or of a relative in the ascending line, or adoption of a disabled child, etc according to Article 6 of Annex V of the Staff Regulations). It is therefore subject to prior checking on the basis of Article 27(2)(a) of the Regulation.

The notification also stated that Article 27(2)(d) of the Regulation applies because the processing involve operations which allow to verify the reality of certain facts invoked to request special leave or invalidity. As the processing operation does not have as its purpose to exclude a person from a benefit, right or contract, Article 27(2)(d) does not apply.

The notification of the DPO was received on 27 February 2007. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 28 April 2007. The information request suspended the procedure for a period of 2+6+7 days, thus the opinion should be delivered no later than the 14 May 2007 (13 of May 2007 being a Sunday).

2.2.2 Lawfulness of the processing

Article (5)(a) of the Regulation makes a processing operation lawful if it is *"necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof"*. The EO exercising his right to manage leaves, absences and overtimes performs tasks carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties. Recital 27 of the Regulation specifies that the "*processing of personal data for the performance of tasks carried out in the public interest includes the processing necessary for the management and functioning of those institutions and bodies*", which is the case concerning the management of leaves, absences and overtime.

The legal basis below supports the lawfulness of the processing. The present processing is based on Articles 57, 59a and Articles 1-5 of Annex V (annual leave), Article 59 (sick leave), Article 58 (maternity leave), Article 60 (prior authorisation by superior) and Article 57 and Article 6 of Annex V (special leave) of the Staff Regulation of officials of the European Communities.

Article 57 of the Staff Regulations stipulates the annual leave entitlements (24-30 working days per calendar year). Article 58 of the Staff Regulations sets the additional weeks of leave

for pregnant women. Article 1-5 of Annex V of the Staff Regulations stipulate annual leave entitlements in more details. The provisions of Article 59 of the Staff Regulations lay down the rules for officials who provides evidence of being unable to carry out his/her duties by reason of illness or accident. The official should produce a medical certificate if he/she is absent for more than 3 days. Failure to follow the required procedure, the official`s absence shall be considered as unauthorised. The official may at any time be required to undergo a medical examination arranged by the institution. Article 59(1) lays down the further rules in relation to that medical examination. Article 59 (2) of the Staff Regulation stipulates that if over a period of 12 months, an official is absent for up to three days because of sickness for a total of more than 12 days, he should produce a medical certificate for any further absence because of sickness. His/her absence should be considered as unjustified as from the thirteenth day of absence on account of sickness without a medical certificate. Article 59a lays down the annual entitlements of officials who are authorised to work part time (proportionally reduced). Article 60 stipulates that except in case of sickness or accident, an official may not be absent without a prior permission from his immediate superior and the consequences of any unauthorised absence. Apart from his/her annual leave an official, on application may, exceptionally be granted special leave (second indent of Article 57 of the Staff Regulation). Article 6 of Annex V of the Staff Regulations lays down the situations where an official is entitled to the defined days of special leave, including situations of serious illness of spouse, a relative in ascending line, of a child, very serious illness of a child, etc.

Article 16 of the Conditions of Employment of Other Servants (CEOS) stipulates that the provisions of Article 57-60 of the Staff Regulation on leave apply by analogy to temporary staff (with some specificity of their status). Special leave shall not extend beyond the term of the contract. Article 59 of CEOS stipulates that Article 16 concerning sick leave and Article 58 of the Staff Regulations concerning maternity leave applies to auxiliary staff. A member of the auxiliary staff may, in exceptional circumstances and at his/her own request, be granted special leave in accordance with the rules laid down by the institution on the basis of the principles of Article 57 of the Staff Regulation and Article 6 of Annex V of the Staff Regulation (Article 58 of CEOS). Article 91 of CEOS requires that Article 16 applies to contract staff, too.

2.2.2 Processing of special categories of data

In principle the processing of personal data concerning health is prohibited (Article 10(1) of the Regulation), unless it comes under Article 10(2) or 10(3) of the Regulation.

Although the information recorded in PERSEO as sick leave does not contain any medical information as such, the data concern health insofar as they provide information on the state of the data subject's health. On the screen of PerseoAdmin the reason of special leave appears, e.g. adoption of a disabled child, which concern the health state of a third party. In addition, a special procedure is put in place to handle medical certificates of staff members/trainees and third parties (in the case of relatives concerning special leave).

Article 10(2)(b) provides for an exception from the general prohibition of Article 10(1) 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.*" Since the bases for processing data concerning health are Articles 59(1)(2)(4)(5) and Article 6 of Annex V of the Staff Regulations, and Articles 16, 59 and 91 of CEOS, such processing of data may be considered as being necessary for the purposes of complying with the rights and obligations of the controller in the field of employment law.

2.2.3. Quality of data

Data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed (Article 4 (1)(c) of the Regulation). The information provided in the dossier confirms that the data processed for the purposes of managing leaves (annual, special), sick leaves with/ without medical certificates, and overtime hours are adequate, relevant and not excessive.

Data must be processed fairly and lawfully (Article 4(1)(a) of the Regulation). The lawfulness has already been examined and the issue of fairness is linked to the transparency entailed by the information which must be transmitted to the data subject (see below in part 2.2.8).

Data must be accurate, necessary and kept up to date (Article 4(1)(d) of the Regulation). The yearly procedure to request data subjects to 1) correct all personal data kept by the institution about them, 2) approve a final leave statement which summarizes the leave and absences for the whole year, and 3) the feedback received by the data subject in email which he/she can contest any time is one aspect of the system put in place to guarantee the quality of data. The other main aspect to guarantee data quality and to provide for the completeness of the data are the right to access and the right to rectify data by the data subjects (see below in part 2.2.7).

2.2.4. Conservation of data

Personal data should be kept in a form which permits identification of data subjects for not longer than is necessary for the purposes for which the data are collected and/or further processed (Article 4(1)(e) of the Regulation).

As the facts described, the time limit to keep data relating to annual leave is defined in five years for audit purposes. The EDPS is not persuaded by this argument to keep data on annual leave for such a long period. Article 49 of Commission Regulation (EC, Euratom) No 2342/2002 laying down the detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities requires that: "*The management systems and procedures concerning the keeping of original supporting documents shall provide for (…)(d) such documents to be kept for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate.*" The EDPS is not convinced that data on annual leave would have budgetary implications, therefore he invites the controller to reconsider whether it is necessary to keep such data for a five year storage period and whether a shorter data conservation period would be sufficient.

According to the controller, the data related to the special leave should be kept during the whole career of the agent, because the data may be used by PERSEO's manager to verify the coherence of special leave requests. The EDPS invites the controller to reconsider this storage period with the given justification. The list provided in Article 6 of Annex V of the Staff Regulation provides for very unique, one-time situations of the data subjects, where coherence can not always appear. While some of the listed data are registered and in principle

kept for the entire career of the official (marriage, birth of a child, etc), the EDPS does not see the need to keep other data for such a long storage period for coherence purposes. This is the case with keeping health related data concerning e.g. very serious illness of a child, serious illness of a relative in the ascending line, of spouse, etc. The entitlement of the official, upon request, is applicable annually if the situation giving rise to special leave occurs. A shorter data conservation period should possibly be reconsidered for those sensitive categories of data.

The controller noted that the data relating to absences shall be kept during the agent's whole career and may be used by managers to prepare files for the Invalidity Committee (Art. 59(4) of Staff Regulation). The EDPS does not see the need to keep data on absences for such a long conservation period for the given justification. Article 59(4) of the Staff Regulation applies only to officials whose sick leave totals more than 12 months in any period of three years. The EDPS invites the controller to take as guidance the previous 3 years period in which the sick leave data may be relevant for the purposes of the Invalidity Committee. 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 over. In any case, a reasonable time - limit should be determined and data at the end of the period in which they may be contested or revised should be deleted. This conservation period can be extended in those cases where an invalidity procedure is in process and health related data are used as proof.

It was drawn to the attention of the EDPS that in principle staff members may request a certificate of their absences and leaves back to a given year, where according to the storage rules of PERSEO, such data may already not exist. In this regard, the EDPS would like to emphasise the importance of informing data subjects clearly about the data storage periods (see below in part 2.2.8).

The prior checking notification form states that data kept for statistical purposes do not require identification. Agreeing with that remark, the EDPS notes that wherever data are used for statistical purposes, Article 4(1)(e) of the Regulation should be respected (the identity of the data subject should be encrypted or data should be kept in anonymous form).

2.2.5. 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.

PERSEO imports the data relevant for the calculation of leave entitlements from ARPEGE, the database managing personnel run by the European Parliament. The purpose of the secondary processing is fully compatible as it allows the implementation of the legal provisions on leaves.

2.2.6. 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.

As a preliminary remark, the EDPS welcomes the fact that only one official (and his/her backup) is entitled to handle medical certificates of staff members and third parties, and another official is responsible for handling all other documents related to leaves and absences.

The categories of recipients vary according to the category of data. Medical certificates are given to the official (or to his/her backup) in charge of medical absences. In case of practical difficulties the Head of the Administrative Sector may become a recipient. These individuals do not have medical knowledge and are not bound by medical secrecy (see below in "Security of processing" part).

In case of medical data, the Medical Service of the European Parliament may be asked for advice regarding the degree of seriousness of an illness of a third party. The physicians in the Medical Service are bound by the obligation of professional secrecy.

Data may also be disclosed to the Invalidity Committee on the basis of Article 59(4) of the Staff Regulation. Article 7 of Annex II of the Staff Regulations of Officials of the European Communities stipulates that the Invalidity Committee consists 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. Doctors are subject to the obligation of professional secrecy.

Officials in charge of leaves can become the recipients of data related to special leave and overtime. The paper version of the special leave request is submitted to the Head of the Administrative Sector. The superior of the official is informed in an e-mail only of the dates of the special leave.

Five persons can have access to information in e-mails sent for or to the mailbox called "leave" (Head of Administrative Sector, person in charge of leaves, IT specialists in charge of maintenance and development of PERSEO and the superior who can decide whether to reject or accept a leave). Overtime data are accessed and authorised by the Head of Administration and Finance Department, and the validation of overtime is done by the superior of the official. Auditors can receive data for audit purposes.

The EDPS considers that the described data transfers are necessary for the legitimate tasks of the recipients, therefore Article 7(1) of the Regulation is complied with.

2.2.7. Right of access and rectification

According to Article 13 of the Regulation, the data subject shall have 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. He/she shall also have the right to obtain from the controller, the rectification of inaccurate or incomplete data (Article 14 of the Regulation).

Data subjects have a right at any time to submit a request to get a leave statement (summarising the entitlements and periods of leave and absences) for the current year. PERSEO users have direct access to their data concerning annual leave. Data subjects are requested annually to correct all personal data kept by the institution is relation to their own situation. This procedure is welcomed by the EDPS because it ensures not only that the calculation of leave entitlements are approved by the data subject, but also guarantees the accuracy and completeness of data. Data subjects are also requested to approve a final leave statement which will summarise the leaves and absences for the entire year. Data subjects

may at any time contest the calculation made for each leave request which they submit via PERSEO.

As to the processing by PERSEO, the EDPS finds appropriate the procedures put in place from a data protection perspectives. However, the EDPS would like to mention that in principle the right of access and rectification (in case a wrong certificate was submitted) should be provided to the extent possible also for paper files (medical certificates, attached documents for special leaves, etc).

2.2.8. Information to the data subject

Articles 11 and 12 of the Regulation 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 the data is collected. When the data is not collected from the data subject, the information must be provided when the data are recorded or first disclosed, except when the data subject already has that information (Article 12).

Data subjects receive information when they take up their duties about the existence of the processing and of its modalities. The controller stated that a Privacy Statement will be prepared and made available for staff members before launching PERSEO.

Article 11 of the Regulation applies to those situations where the data subject submits the information himself/herself, which is the case for example with the leave requests in PERSEO or with submitting documents (medical certificates) for a special leave request. Article 12 applies to those instances where the data have not been obtained for the data subject, which is the case for example with the data import to PERSEO from ARPEGE.

The EDPS finds it important that all items listed in Articles 11 and 12 are provided to the data subject in a comprehensible form: the identity of the controller; the purposes of the processing operation; the recipients of personal data; indicating whether replies are obligatory or voluntary and the consequences of failure to reply; the existence of right of access to, rectification of data concerning him/her. The EDPS finds it important that information is provided not only about the processing operations by PERSEO, but also of the processing of paper documents for special leave requests and the handling of medical certificates.

Paragraph (f) of Articles 11 and 12, which refers to non-obligatory information (legal basis of the processing operation, time-limits for storing data, right to have recourse at any time to the European Data Protection Supervisor) should also be mentioned to ensure transparency of the processing operation. The EDPS would like to emphasise particularly the importance of providing sufficient information to data subjects about the differentiated storage periods of the various categories of personal data (e.g. medical certificates, data on leaves/sick leaves and absences). The information on the storage period should be set with sufficient clarity to make data subjects understand what the period is within which they can request their data from the controller. Providing detailed and comprehensive information on how long the data are preserved by the EO enables data subjects to request for their certificates and documents in due time while the system process and stores those data. Thus, they will be in a position to have their proof had they need it years later (see above 2.2.4).

The proposed Privacy Statement can be an appropriate mean for providing this list of information.

2.2.10. Security measures

Article 22(1) of the Regulation stipulates that "*having regard to the state of art and the cost of implementation, 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 security measures set out in the notification and the information subsequently received appears to be adequate for the processing of data under Article 22 of the Regulation provided that the further remarks below are taken into consideration.

All officials who handle medical certificates (either because it is their professional duty or because by incident a staff member submitted the document to them) should receive information that as to the health related data they process, they are subject to the rules of confidentiality and that they must treat the health related data accordingly.

The term *"Secret Médical"* written on the envelope, besides drawing the attention to the content of the envelope (medical certificates and medical documentation), in principle gives health related information related to an identified sender. Although, the EDPS understands the specificity of the mail handling procedure for confidential mails sent to the European Ombudsman and finds the explanations of the controller useful, the EDPS still would prefer if a more data protection friendly approach is found. Therefore, the EDPS recommends to the controller to further consider the possible modification of that term on the one hand by not being too specific about the content of the envelope and on the other hand with keeping the in-house procedure.

Although, staff members are advised to send medical certificates in a sealed envelope, the blank form of the leave application may be an appropriate place to draw the attention of the data subjects to that: "supporting documents containing health related information should be sent in a *sealed envelope, having marked on it: "Secret Médical" (or preferably the modified equivalent term, see paragraph above).* The form could also draw the attention of the staff members specifically that medical certificates related to special leaves should only be sent to the official in charge of medical absences and handling medical certificates.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations above are fully taken into account, in particular:

● the controller reconsiders whether the keeping of data on annual leave for a five year period is necessary for audit purposes;

● the controller reconsiders whether the long storage period of health related data related to special leave requests is necessary for the given justification;

● sick leave related data are not kept for the purposes of launching a procedure with the Invalidity Committee for more than the previous 3 years,

● wherever data are used for statistical purposes, the identity of the data subject should be encrypted or data should be kept in anonymous form,

● the information listed in Articles 11 and 12 (including the optional information) is provided to the data subjects (the privacy statement may be an appropriate place for that), special attention is paid to giving information on the storage periods of various data categories,

● all officials who handle medical certificates receive information that as to the health related data they process, they are subject to the rules of confidentiality and that they must treat the health related data accordingly,

● further consideration is given to the possibility to replace the term *"Secret Médical"* on the sealed envelope,

● the blank form of the leave application draw the attention of the data subjects that supporting documents containing health related information should be sent in a *sealed envelope, having marked on it: "Secret Médical"(or preferably the new term)* ,

● the same blank form could also draw the attention of the staff members specifically that medical certificates related to special leaves should only be sent to the official in charge of medical absences and handling medical certificates.

Done at Brussels, 07 May 2007

Peter HUSTINX
European Data Protection Supervisor