

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Court of Auditors on processing of personal data by the social services**

Brussels, 8 November 2007 (Case 2007-302)

### **1. Proceedings**

1.1. On 15 May 2007, the European Data Protection Supervisor (EDPS) received notification for prior checking of processing of personal data by the social services from the Data Protection Officer (DPO) of the Court of Auditors.

1.2. On 31 May 2007, the EDPS sent an e-mail to the DPO of the Court of Auditors requesting further documents necessary to be able to examine the case.

1.3. On 22 June, the EDPS received an e-mail from the DPO of the Court of Auditors provided part of these documents. The remaining documents were received on 27 July 2007. A draft opinion was sent to the controller and DPO on 11 October 2007. Comments were received during a meeting held between members of the EDPS staff and the controller and the DPO of the Court of Auditors on 6 November 2007. Further clarifications were requested to the controller by telephone on 7 November 2007.

### **2. Facts**

#### **2.1. Context**

The Social Service of the Court of Auditors is provided by one professionally qualified social worker, who has been employed by the Court since August 2005. The social worker is based in the Welcome and Welfare Office, and is the only person responsible for the provision of social financial assistance and psychosocial support.

#### **2.2. Types of Assistance**

##### **2.2.1. Financial assistance**

The procedure relates to the provision of the following social financial assistance:

- home help (partial reimbursement of the cost of help in the home where the beneficiary is no longer able to perform household tasks),

- assistance for disabled officials or disabled dependents of officials (partial reimbursement of care, education, transport and residence costs, or of certain equipment not reimbursed under the Joint Social Insurance System (JSIS)),
- loans and aid granted on social grounds (special assistance in extreme circumstances).

As a rule, personal data are processed in the following manner:

- (i) The relevant data are compiled by the social worker in an interview with the applicant. In the case of home help and assistance for disabled persons, the applicant is requested to complete certain forms. Data such as serious illness of the official or agent or of his/her spouse, the illness or handicap of a child or other medical reasons are collected in the forms handed to the social worker.
- (ii) Where necessary, additional information is requested from the Salaries Department.
- (iii) If need be, medical approval is sought from the Medical Service (in respect of assistance for disabled persons), or from the JSIS's medical officer (in respect of home help). Medical data are provided in a sealed envelope by data subjects and passed on to the relevant doctor, and are not seen by the social worker.
- (iii) A decision, drawn up by the social worker, is submitted to the Appointing Authority (Head of Division, Human Resources) for signature.
- (iv) The beneficiary is informed of the decision.
- (v) Invoices and any other relevant supporting documentation are collected by the social worker, who then makes arrangements for payment.
- (vi) Payments are made as laid down in the decision and are subject to a financial procedure involving four parties (triggering event agent, internal control, ex-ante checks, and authorising officer by sub-delegation).
- (vii) Data are stored in paper form [...] and electronically on a hard disk [...]. The data stored on paper include applications, decisions, calculations, supporting documents, correspondence and invoices. The electronic data consist of correspondence and decisions, as well as Excel tables used for statistical and record-keeping purposes.

### **2.2.2. Psychosocial support**

The psychosocial support offered professionally by the social worker is more than mere information provision. Normally, the person seeking support wishes to confide his/her concerns, emotions and personal problems to a social worker, and to receive counselling/advice in relation to these concerns. The basis of this helping relationship is that others are not involved, and that the nature of the concern remains confidential.

The issues raised may relate to financial matters (such as family or personal finances, debts), but may also include personal problems (such as relationship difficulties with family members, mental health problems, problems with children etc), and work-related issues (harassment, stress etc.). The Court's policy for protecting people against harassment outlines the role and responsibility of the Social Worker (Welfare Officer):

*"The Welfare Officer shall be available to discuss any problems and to provide advice and assistance in the strictest confidence. He/she shall inform the person who has contacted him/her, of the possibilities for finding a solution, discuss the possibility of lodging a complaint and provide him/her with assistance in any action undertaken"<sup>1</sup>.*

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<sup>1</sup> Decision of the Court of Auditors N0 61-2006 on the protection of persons working at the Court of Auditors against harassment. This decision has been the object of a prior check by the EDPS see opinion 2005-145.

The social worker offers psychosocial support to officials and their families, retired officials, and the surviving family members of deceased officials.

When the social worker meets with the client, personal and private data are compiled in a personal record, which is only accessible to the social worker. The client personally supplies the information to the social worker, who informs him/her that she is bound by professional secrecy and that all conversations will be confidential. The social worker may make personal notes concerning the client's situation as a memory aid and for future reference.

Any documentation in the file supplied by the applicant remains the property of the applicant and, on request, may be returned to the persons concerned.

### **2.2.3 Practical Assistance**

The social worker also provides practical assistance chiefly in the form of information as to the availability of resources and services in specific areas. For example, an official may request information regarding addiction /psychological / educational/ day care services in Luxembourg or neighbouring countries, for themselves or for members of their families. In such cases, the social worker may meet with the official concerned, and compile personal information to be used to inform the client as to the most relevant service available. The information will not be passed on to outside agencies without the prior consent of the client.

### **2.3. Information for data subjects**

The Welcome and Welfare Office publishes a brochure given to all newcomers, which outlines the services provided by the social worker. Staff are also advised of the availability of the Social Service during Newcomers' Meetings and at the compulsory induction training for all newcomers. A handbook for former officials and members of their families is given to all officials who are retiring. During the interview with the client, the social worker informs the client that their personal data are to be stored securely, that they are entitled to obtain a copy of those data and to request that they may be blocked or erased. Any individual may gain access to his/her data by contacting the social worker.

### **2.4. Types of data and data subjects**

The data subjects of processing operations are working and retired staff of the European Court of Auditors and their families. This encompasses officials, temporary staff, contract staff, seconded national experts, trainees, retired officials, together with the families of people in these categories.

The categories eligible for assistance depend on the service and the type of assistance. The data relating to the data subjects are:

- surname and first name
- staff number
- address
- family situation
- income and expenditure
- and any relevant financial, social, health, psychological and family information, etc. and in some cases the medical opinion of the JSIS or Medical Service.

## **2.5. Recipients**

The recipients of the processing operations are as follows:

- Social financial assistance: medical information is passed on to the Medical Service and to the Medical Officer of the JSIS for their opinion where medical information is necessary to support a request for financial assistance.
- Psychosocial support and practical assistance: in some cases the name of the person and a description of the problem are communicated to external specialised social services for professional advice, but only with the consent of the person concerned. However, in the majority of cases, the client is given the details of the external service and the client makes direct contact with the service. As a rule, contact is made by telephone. No written communication containing personal data is ever communicated to an external service.

## **2.6. Conservation of data**

As the social work function is a relatively new one at the Court of Auditors, and as it was previously provided by the Social Service of the Commission, the Commission's arrangements governing storage limits have been retained at the Court.

- Financial, psychosocial support and practical assistance: for this type of assistance, familiarity with a client's background is vital. Data are therefore to be retained until the data subject's death and, if need be, for a further 3 years, since assistance may continue to be given following the person's retirement, or even after his death (assistance for families of deceased officials).
- In harassment cases, all personal information is destroyed once the social worker's involvement in the informal procedure has ended (as per Decision No 61-2006 of the Court of Auditors). In the case of a formal procedure, the documents relating to the procedure are kept for 5 years (as per Decision of the Appointing Authority No 77-2006 implementing 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 in the context of human resources policies).

Decisions in response to requests for blocking or erasure of data are taken within one month of receipt of such requests.

## **2.7. Security measures**

[...]

## **3. Legal aspects**

### **3.1. Prior checking**

The management of data in respect of social welfare service constitutes processing of personal data ("any information relating to an identified or identifiable natural person", as stated in Article 2, subparagraph (a) of Regulation (EC) No 45/2001). The data processing in question is performed by an institution and is carried out in the exercise of activities which fall within the scope of Community law.

The data are produced and managed manually, but form part of a filing system and to this effect fall under the scope of Regulation (EC) 45/2001 (see Article 3(2) of the Regulation).

It follows that such processing falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 subjects processing operations posing specific risks to the rights and freedoms of data subjects to prior checking by the European Data Protection Supervisor. Article 27(2) lists the processing operations likely to present such risks, which are detailed in Article 27(2)(a) as being "processing of data relating to health and to suspected offences, offences, criminal convictions or security measures", and in Article 27(2)(b) as being "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct".

The provision of social and financial assistance involves the processing of personal data as covered by Article 27(2)(a) and (b) and is therefore subject to prior checking by the European Data Protection Supervisor. Article 27(2)(a) applies insofar as health related data may be processed. Indeed, health related data included not only medical data as such but also any data which reveals information on the data subject's state of health. Data such as the serious illness of the official or agent or of his/her spouse, the illness or handicap of a child or other medical reasons are collected in the forms handed to the social worker when requesting financial assistance and are all considered as data relating to health. Furthermore, when requesting psycho-social support, officials or agents may also reveal data relating to their health (physical or mental health problems). Article 27(2)(b) also applies, in that processing operations by the social welfare service may be intended to evaluate personal aspects relating to the data subject. Ability, efficiency and conduct are just some of the personal aspects that may be evaluated. The notified processing operations are intended to evaluate personal aspects relating to the data subject, in particular, his or her financial, social, and family circumstances.

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, the social worker was appointed after the European Data Protection Supervisor was appointed and the checking of the processing of personal data should therefore have been carried out prior to the start of the procedure rather than on *ex post basis*. However, 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 formal notification was received by e-mail on 15 May 2007. An e-mail requesting additional information was sent on 31 May 2007. The full information was given on 27 July 2007. The deadline for rendering the opinion was also suspended for the month of August and for 27 days for reception of comments from the DPO. The EDPS must therefore render his opinion by 8 November 2007 at the latest.

### **3.2. Lawfulness of the processing and legal basis**

Article 5(a) of Regulation (EC) No 45/2001 stipulates that the processing must be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution*".

In the case in point, the social welfare service is operating in the context of a task carried out in the public interest, pursuant to Articles 1e, 76 and 76a of the Staff Regulations and to Articles 30, 71 and 98 of the CEOS. Social services offered in the context of harassment cases are carried out in view of prevention of harassment in conformity with Article 12a of the Staff Regulations. The proposed processing is, therefore, lawful and backed up further by the legal basis of the Staff Regulations and the CEOS.

Article 1e of the Staff Regulations stipulates that:

- 1. Officials in active employment shall have access to measures of a social nature adopted by the institutions and to services provided by the social welfare bodies referred to in Article 9. Former officials may have access to limited specific measures of a social nature.*
- 2. Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties.*
- 3. Measures of a social nature adopted in accordance with this Article shall be implemented by each institution in close cooperation with the Staff Committee, on the basis of multi-annual proposed actions. These proposed actions shall be transmitted each year to the budgetary authority in the framework of the budget procedure.*

Article 12a of the Staff Regulations specify that:

- 1. Officials shall refrain from any form of psychological or sexual harassment.*
- 2. An official who has been the victim of psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution. An official who has given evidence on psychological or sexual harassment shall not suffer any prejudicial effects on the part of the institution, provided the official has acted honestly.*

Article 76 states that: *Gifts, loans or advances may be made to officials, former officials or where an official has died, to those entitled under him who are in a particularly difficult position as a result inter alia of serious or protracted illness or by reason of a disability or family circumstances.*

Article 76a continues thus:

*A surviving spouse who has a serious or protracted illness or who is disabled may receive financial aid increasing the pension from the institution for the duration of the illness or disability on the basis of an examination of the social and medical circumstances of the person concerned. Rules implementing this Article shall be fixed by common accord between the institutions, after consulting the Staff Regulations Committee.*

Articles 30, 71 and 98 of the CEOS refer to the application of Article 76 to temporary staff, auxiliary staff and contract staff respectively.

The legal basis therefore supports the lawfulness of the processing.

Furthermore, data concerning health are classed as "special categories of data" under Article 10 of the Regulation.

### **3.3. Processing of special categories of data**

The data processed by the social services may include details relating to the health of an official or other staff member and/or information on his or her religious or philosophical beliefs, sex life and any other aspect of his or her private life (cf. point 2.4).

Article 10(1) states that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited*".

As explained above concerning the legal basis, the justification for processing health data in connection with social assistance can be found in Articles 1(e), 12(a), 76 and 76(a) of the Staff Regulations. Therefore, the processing falls under Article 10(2)(b) of the Regulation, according to which the prohibition shall 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".

Additionally, in the current case, the legal basis for processing of health data is complemented by Article 10(2)(a) of the Regulation, which allows processing of data in case "the data subject has given his or her express consent".

Based on these provisions, the EDPS considers that ECA's data processing operations are permissible, provided that they are limited to the purposes of providing the requested social assistance, and further provided that data subjects give their express consent for any processing of their health data (e.g. express consent is required for the social worker to contact a specialist on behalf of the data subject).

Article 10 of Regulation (EC) No 45/2001, concerning special categories of data, is fully observed.

### **3.4. Data Quality**

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

Data processed in the context of the social service's files, as described in paragraph 2.4 of this opinion, may be quite extensive in character, with the result that it is difficult to establish *a priori* and without knowledge of the specific case whether they are "adequate, relevant and not excessive". Consequently, it is important that the staff involved in processing data for the various files are properly informed of the requirement to comply with the principle laid down in Article 4(1)(c), and that they take account of this in processing the data. It should be noted that the foregoing applies not only in relation to all the data supplied by the applicant but also to the social worker's personal notes.

Data must also be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has already been discussed in paragraph 3.2 above. Concerning fairness, this relates to the information which is to be communicated to the data subject (see below, paragraph 3.9).

Finally, data must be "accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified" (Article 4(1)(d) of the Regulation).

This provision, in the case of social files, relates primarily to factual data. As concerns the personal notes of the social worker, the quality of the data amounts to enabling data subject to have the opportunity to give his or her point of view and to corroborate the accuracy of the data. The data subject has access and rectification rights, in order to ensure that the file is as complete as possible; on these two rights see paragraph 3.7 below.

### **3.5. Conservation of data**

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).

Data concerning financial, practical and psycho-social assistance are kept for 3 years after the data subject's death (because of dependants who may qualify for certain benefits). After this period the data are destroyed. The EDPS considers these periods to be reasonable concerning long term types of assistance. He recommends, however, that as concerns short term assistance (exceptional financial difficulties, for example), that the period of conservation be assessed in the light of Article 4(1)(e) of the Regulation.

In harassment cases, all personal information is destroyed once the social worker's involvement in the informal procedure has ended (as per Decision No 61-2006 of the Court of Auditors). In the case of a formal procedure, the documents relating to the procedure are kept for 5 years (as per Decision of the Appointing Authority No 77-2006 implementing 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 in the context of human resources policies). The EDPS considers this period as adequate as already expressed in his opinion on the "Harassment procedure" at the Court of Auditors (2004-0255).

Excel tables are kept for statistical and record-keeping purposes. The Court of Auditors should ensure, in compliance with Article 4(1)(e), that the data are kept in an anonymous form or with the identity of the data subject encrypted.

### **3.6. Transfer of data**

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation. The processing covered by Article 7(1) is the transfer of personal data within or between Community institutions or bodies "if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

Article 7(1) of the Regulation is complied with, since the transfers are made initially within the institution: Medical Service (e.g. where medical information is necessary to support a request for financial assistance); Appointing authority/ Authorising officer, staff in ex-ante verification and accountancy (e.g. for financial assistance). The purpose of such transfers is to enable a decision to be taken on the dossier submitted and in the light of the Staff Regulations. Article 7(1) is therefore complied with. The Court of Auditors should ensure that Article 7(3) is also respected and that the recipients only process the data for the purposes for which they were transmitted.

In some cases the person's name and a description of the problem are sent to specialist external social services to ensure professional follow-up (e.g. drug/alcohol services/ psychotherapy). External services are regarded as recipients insofar as they are given the



names of the persons directed to them so that they can help them. They are not regarded as processors. In most of these cases, it is the persons themselves who contact the services. In all cases, the data subject's gives his/her consent to this transfer of data.

In this case, Article 8 of the Regulation is applicable: such data may be transferred "*if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced*", which is clearly the case here, since the object is to establish a helping relationship for the data subject.

The European Data Protection Supervisor would point out the need for extreme care to be exercised in all communications with external services, because of the nature of the data being transferred.

### **3.7. Processing including a personnel number or other identifier**

In the various forms filled in order to be granted financial or practical support, the Court of Auditors uses the personnel number. In itself, the use of an identifier is simply a means – in this case, a legitimate means – of assisting the work of the controller, although it can have important consequences. This is why the European legislator regulated the use of identifying numbers in Article 10(6), which provides for the intervention of the EDPS.

In this case, use of the personal number can allow the interconnection of data that are processed in different contexts. The point here is not to lay down the conditions in which the Court of Auditors may process the identifying number but to emphasise the attention that must be given to this aspect of the Regulation. In the present case, the Court's use of an identifying number is reasonable because it is done for the purposes of identifying the person and following up the dossier, thereby simplifying processing. The EDPS considers that the number can be used in the management of financial and social assistance provided by the Court of Auditors.

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

Article 13 of Regulation (EC) No 45/2001 establishes a right of access upon request by the data subject. Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification.

Any individual may gain access to his/her data by contacting the social worker. He/she may also obtain the rectification of any inaccurate or incomplete factual data. The request must be complied with within one month of its reception. As concerns subjective data introduced by the social worker in his/her personal notes, the right of access and rectification amount to the data subject having the opportunity to give his or her point of view, especially where the subjective opinion might have repercussions in the exercise of the data subject's rights.

Articles 13 and 14 are therefore complied with.

### **3.9. Information to the data subject**

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case. Insofar as data subjects fill in forms and are called for interviews, they provide the data themselves.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since the information is collected from the different participants in the process (opinion of the medical officer, personal record drawn up by the social worker, information from the external services consulted).

Information is given in writing about the existence of a social service in various documents such as the "Welcome to the Court of Auditors' booklet" and the handbook for former officials and their families, Volumes 1 and 2, April 2007. The Decision 61-2006 on the protection of persons working at the Court against harassment also provides (Article 8) that personal data collected in the framework of a procedure against harassment will be processed in accordance with Regulation (EC) 45/2001. During the interview with the client, the social worker informs the client that their personal data are to be stored securely, that they are entitled to obtain a copy of those data, and to request that they may be blocked or erased.

However this information does not cover the items of information which must be provided to data subjects in accordance with Articles 11 and 12 of Regulation (EC) 45/2001. The EDPS underlines that information must be provided about the identity of the controller, the purposes of the processing operation, the recipients or categories of recipients, the legal basis of the processing operation, the time limits for storing the data and the right to have recourse at any time to the EDPS. The forms to be filled in by the person requesting assistance must also specify whether replies to questions are obligatory or voluntary as well as the possible consequences of a failure to reply.

### **3.10. Security measures**

Under Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, "the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected".

As mentioned in point 2.7, all documents are stored in a locked cabinet, in the Social worker's office, which is only accessible to the social worker. All electronic data are stored on an internal drive at the Court of Auditors which is only accessible to the social worker. The social worker is subject to the obligation of professional secrecy.

The EDPS considers the measures adequate in terms of Article 22 of the Regulation.

### **Conclusion:**

The processing proposed does not seem to involve any infringement of Regulation (EC) No 45/2001, as long as the above comments are taken into account. In particular, this means that:

- The social worker who processes the personal data must be properly informed of the requirement to comply with the principle laid down in Article 4(1)(c) of the Regulation, namely that the data processed must be "adequate, relevant and not excessive in relation to the purposes for which they are further processed". This principle must be complied with in relation to the data supplied by the applicant and the social worker's personal notes;
- As concerns short term assistance, the period of conservation be assessed in the light of Article 4(1)(e) of the Regulation;
- The Court of Auditors should ensure, in compliance with Article 4(1)(e) that the data stored in Excel tables for statistical and record-keeping purposes are kept in an anonymous form or with the identity of the data subject encrypted;
- The Court of Auditors should ensure that Article 7(3) is respected and that the recipients of the data within the Court of Auditors only process the data for the purposes for which they were transmitted;
- Extreme care needs to be exercised in all communications with external services, because of the nature of the data being transferred;
- Further information must be provided to data subjects in accordance with Articles 11 and 12 and notably about the identity of the controller, the purposes of the processing operation, the recipients or categories of recipients, the legal basis of the processing operation, the time limits for storing the data and the right to have recourse at any time to the EDPS. The forms to be filled in by the person requesting assistance must also specify whether replies to questions are obligatory or voluntary as well as the possible consequences of a failure to reply.

Done at Brussels, 8 November 2007

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