

Opinion on a notification for prior checking received from the Data Protection Officer of the European Parliament concerning "CAME – management of absences due to illness"

Brussels, 4 March 2008 (Case 2007-688)

1. Procedure

By letter received on 19 November 2007, the European Data Protection Supervisor (EDPS) received a notification within the meaning of Article 27 of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the European Parliament regarding "CAME – management of absences due to illness" (2007-688).

The notification was accompanied by a series of documents, including:

- a notification from the controller to the DPO, received by the latter on 9 November 2007;
- a copy of the Intranet page informing staff of the procedures for submitting medical certificates;
- internal rules of 2 June 2004 relating to medical examinations (Articles 59 and 60 of the Staff Regulations);
- a blank "Notification of absence due to sickness or accident" form;
- a blank "Accident report" form;
- a letter to the attending physician.

In the course of the proceedings, the EDPS also received:

- a blank "Conclusions of the medical examination" form;
- a blank "Medical report" form.

In that connection, a number of questions were put to the controller via the intermediary of the DPO on 20 December 2007. The answers were provided by the controller on 18 January 2008. In order to enable the DPO to provide the additional information and relevant comments, the draft opinion was forwarded for consultation on 5 February 2008 and received on 27 February 2008.

2. The facts

The management of absences due to illness is the responsibility of a specific department (the Sickness Absence Management Department), and covers officials, temporary staff, contract staff and detached national experts working at the European Parliament.

Pursuant to Article 59 of the Staff Regulations¹, "an official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave". In addition, "the official may at any time be required to undergo a medical examination arranged by the institution. If the examination cannot take place for reasons attributable to the official, his absence shall be considered as unauthorised as from the date that the examination is due to take place. If the finding made in the examination is that the official is able to carry out his duties, his absence shall, subject to the following sub-paragraph, be regarded as unjustified from the date of the examination".

The Decision of the Secretary-General of the Parliament of 2 June 2004 on medical examinations lays down the procedures for implementing this provision.

Purposes of the examination

The objective of the procedure for monitoring absences due to illness is, firstly, to protect the interests of the service and ensure compliance with all statutory and other regulations concerning absences by preventing unauthorised absences due to illness, and, secondly, to exercise a duty of care towards the official or other servant concerned by taking steps to resolve difficult social and professional situations.

Decision-making process leading to the summons to a medical examination

A medical examination may be requested either by the Director-General and Director to which the official or other servant is assigned or by the medical officer responsible for managing absences due to illness.

In all cases, it is for the medical officer responsible for managing absences due to illness to assess, either on the basis of medical certificates or in the light of any other aspect brought to his attention, whether an examination should be conducted. He may ask the attending physician to provide a medical certificate stating the reasons why the official is unable to work. Recommendations for medical examination are submitted to the AA by the medical officer responsible for managing absences due to illness after consulting the institution's medical officer.

The decision to conduct a medical examination is taken by the AA, which informs the Directorate-General or autonomous unit to which the official or other servant is assigned.

The criteria for conducting a medical examination are not clearly defined in the decision concerning medical examinations.

Examination procedure

The medical examination is conducted either by the medical officer responsible for managing absences due to illness himself or by an examining doctor duly authorised by the institution and acting under the responsibility of the medical officer responsible for managing absences due to illness.

The sole purpose of the examination is to verify the state of health and incapacity for work of the official or other servant examined, and to determine whether his state of health permits him to resume his professional activities.

The medical examination is conducted during the period of absence of the official or other servant on working days between 08.30 and 18.30.

¹ With regard to other servants, see Articles 16, 59, 60 and 91 of the Conditions of Employment of Other Servants (CEOS).

The medical examination is conducted either on the Parliament's premises, in which case the official or other servant is summoned to attend by the medical officer responsible for managing absences due to illness, or at the place of residence of the official or other servant. If the official or other servant who has been summoned to an examination is unable to attend, he must provide the medical officer responsible for managing absences due to illness with a medical certificate stating that he is unfit to travel. If the official or other servant refuses the examining doctor permission to come to his residence, he must present himself immediately for examination on the Parliament's premises. If the official or other servant is absent when the examining doctor calls, he will be summoned to undergo an examination on the Parliament's premises.

Where, pursuant to the second paragraph of Article 60 of the Staff Regulations, the official or other servant has obtained prior permission to spend his sick leave elsewhere than at the place where he is employed, the institution will bear the costs of his travel to the Parliament's premises.

Examination by the examining doctor and outcome of the examination

The examining doctor questions and (where an examination is warranted by the medical condition) examines persons summoned to an examination. At the end of the examination, two documents are drawn up and signed by the examining doctor: the "Conclusions of the medical examination" and the "Medical report".

The "Conclusions of the medical examination" state the following: the person's name, the name of the examining doctor, the time and date of the examination, the place of the examination and the examining doctor's decision (absence is justified/absence is justified but another examination will be necessary in the event of an extension/an additional medical examination is necessary/absence is unjustified). This document is completed in five copies: the original is forwarded to the official or other servant and the copies are sent to the Director of Personnel and Social Affairs, to the Directorate-General to which the official or other servant is assigned and to the Leave Office. The last copy is placed in the person's file in the Sickness Absence Management Department.

The "Medical report" states the following: the person's first name and surname, staff number, date of birth, date of entry into the service of the Communities, grade, attachment, number of days of absence during the preceding three years and number of days of absence since the beginning of the year, together with the precise diagnosis and the results of the examinations conducted. This document is then sent to the institution's medical officer, partly in order to inform him of the medical situation of the official or other servant and partly for use in the context of a possible Invalidity Committee, participation in which is one of the medical officer's duties. If the data subject considers the examining doctor's conclusions to be unjustified, he or a doctor acting on his behalf may within two days submit to the AA a request that the matter be referred for an opinion to an independent doctor chosen by mutual agreement between the examining doctor and the patient's attending physician. Failing such agreement within five days of the request, the institution will select a person from a list of independent doctors revised regularly as required for that purpose by mutual agreement between the Appointing Authority and the Staff Committee. The official may within two working days object to the institution's choice, whereupon the institution will choose another person from the list, which choice will be final.

The independent doctor's opinion given after consultation of the official's doctor and the institution's medical officer is binding. Where the independent doctor's opinion confirms the

conclusions of the examination arranged by the institution, the absence will be treated as unjustified from the date of that examination. Where the independent doctor's opinion does not confirm the conclusion of that examination, the absence will be treated for all purposes as having been justified.

Information to be given to the data subject

According to the information provided by the DPO, data subjects are informed solely via a general notice regarding "Personal data protection" on the European Parliament's website.

A confidentiality statement specific to this processing operation is not sent to the data subject when he is summoned to attend an examination and is not attached to the form completed during the examination.

Rights of the data subject

After each examination by the examining doctor, the data subject receives a copy of the latter's decision. Pursuant to a decision of the College of Heads of Administration of 19 February 2004 (Conclusion 221/04), by making a request in writing to the examining doctor, all data subjects have access to their file of medical examinations for the purposes of checks and to a copy of the medical report drawn up following an examination.

Where justified and legitimate, data subjects are entitled to have the factual content of the medical examination files updated by making a request to the Sickness Absence Management Department.

Data retention

In principle, the files of the medical officer responsible for monitoring absences due to illness are kept by the Sickness Absence Management Department for a period of 12 years. However, no data have been deleted to date.

Annual statistics on absences due to illness are compiled by the Sickness Absence Management Department.

Recipients

As mentioned above, the written conclusions of the medical examination are sent to the Director of Personnel and Social Affairs, to the Directorate-General to which the official or other servant is assigned and to the Leave Office.

The "Medical report" is sent to the institution's medical officer.

In certain exceptional cases, administrative data may be made available to the European Parliament's Legal Service, the Civil Service Tribunal, the European Ombudsman, at his request, or the EDPS.

In the event of arbitration, the data are transmitted to an independent external doctor chosen by mutual agreement between the official's or other servant's doctor and the medical officer.

Security measures

[...]

3. Legal aspects

3.1 Prior checking

The procedure for checks on absences due to illness as described in the notification given by the Data Protection Officer relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a) of Regulation (EC) No 45/2001). The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing of the files examined is not automated at present, but the data are intended to form part of a filing system. Article 3(2) is thus applicable in this case. Furthermore, automated data processing is envisaged in the future.

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

Article 27(1) of Regulation (EC) No 45/2001 makes "*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*" subject to prior checking by the European Data Protection Supervisor.

In accordance with Article 27(2)(a) of the Regulation, "*processing operations likely to present such risks include the processing of data relating to health (...)*". The data processed in the case at hand undoubtedly fall within the scope of "data relating to health".

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, due to the delay in notifying the European Data Protection Supervisor, the check necessarily has to be performed ex-post. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The Commission Data Protection Officer's notification was received on 19 November 2007. Pursuant to Article 27(4) of the Regulation, the European Data Protection Supervisor had two months within which to deliver his opinion. However, in view of the 51-day suspension, the European Data Protection Supervisor had to submit his opinion by 11 March 2008.

3.2. Lawfulness of the processing operation

The lawfulness of the processing operation should be scrutinised in the light of Article 5(a) of Regulation (EC) No 45/2001. Article 5(a) provides that the processing operation may not be carried out unless "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution ...*". Recital 27 of the Preamble to the Regulation also states that "*Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies*".

Checks on absences due to illness are carried out not only in the context of the management and functioning of the institution but also on the basis of the Staff Regulations, which were adopted under the Treaties². The processing operation is therefore lawful.

However, the EDPS considers that there is no legal basis allowing the data collected in the medical report to be used for the purposes of preventive medicine. The EDPS therefore recommends as a good practice that results should not be used for such purposes by the Parliament's Medical Service without the data subjects' freely given and informed consent.

As stated in the Facts section, under Article 59 of the Staff Regulations³, "*an official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave*". Furthermore, "*the official [on sick leave] may at any time be required to undergo a medical examination arranged by the institution*". The Decision of the Secretary-General of the Parliament of 2 June 2004 concerning medical examinations lays down the procedure for conducting such examinations.

The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless it is justified on the grounds provided for in Article 10(2) and (3) of Regulation (EC) No 45/2001. The present case very clearly relates to the processing of personal data on health.

Article 10(2)(b) ("*Paragraph 1 [prohibition of the processing of data concerning health] shall not apply where (...) processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)*") applies in the case in point. The processing operation has been put in place by the controller in compliance with the provisions of the Staff Regulations concerning medical examinations in the context of absences due to illness.

3.4 Data quality

Data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001).

With regard to the data entered in the "Conclusions of the medical examination", the EDPS considers that the data are adequate, relevant and not excessive for the purpose of monitoring and managing absences. He is fully satisfied that, in the document sent to the Director of Personnel and Social Affairs, the Directorate-General to which the official or other servant is assigned and the Leave Department, no medical information as such is communicated.

With regard to the data entered in the medical report prepared by the examining doctor after an examination, this is a document containing medical data. The drawing up of such a document is not strictly necessary for the purpose of managing absences. However, it is right that the medical officer responsible for managing absences should draw up such a document in order to justify the conclusions of the examination and for use as a basis during an

² See Article 59 of the Staff Regulations.

³ Articles 16, 59, 60 and 91 of the Conditions of employment of other servants (CEOS) provide that the same arrangement applies to temporary agents, contractual agents and SNEs.

arbitration procedure and/or a possible Invalidation Committee. To that end, the medical report is submitted to the institution's medical officer.

Under Article 4(1)(d) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date*", and "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.*" The procedure in place gives sufficient cause to believe that the data are accurate and kept up to date on the basis of the data subject's state of health. By returning the document to the data subject at the end of the examination, the latter is able to verify the accuracy of the administrative data. The arbitration procedure also provides a certain degree of assurance that the data concerning the data subject's state of health are accurate.

Finally, the data subject has the right to access and the right to rectify data so as to render them as accurate as possible (see section 3.8 below). Lastly, the data must be *processed fairly and lawfully* (Article 4(1)(a)). The matter of lawfulness has already been reviewed (see section 3.2 above). Given the sensitivity of the subject, fairness is an issue which warrants considerable attention. It is linked to the information to be given to the data subject (see section 3.9 below).

3.5 Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that 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*".

Copies of the document resulting from the medical examination ("Conclusions of the medical examination") are sent to the Director of Personnel and Social Affairs, the Directorate-General to which the official or other servant is assigned and the Leave Department. A copy of the document is kept in the data subject's file within the Sickness Absence Management Department. The medical report is sent to the Medical Service for filing in the data subject's medical file *per se*.

The retention of data in a data subject's medical file was the subject of a separate prior-checking analysis (see EDPS opinions 2004-203 and 2004-205).

Data are retained in the Sickness Absence Management Department for a period of 12 years. This duration is justified by the examining doctor by the fact that the latter does not have access to the data subject's medical file and must decide on the appropriateness of a medical examination in full knowledge of the facts. The EDPS considers that while the retention period in question may be necessary in terms of the purpose of this processing operation, it cannot be applied systematically to all files, and in particular those relating to officials or other servants who have left the institution. However, no data have been deleted to date. The EDPS therefore recommends that data which have been retained for more than 12 years should be destroyed.

The EDPS considers that the data retention period for the Director of Personnel and Social Affairs, the Directorate-General to which the official or other servant is assigned and the Leave Department must be identical to that which applies to the Sickness Absence Management Department.

Under Article 4(1)(e) of the Regulation, data may be stored for a longer period than is required for the purpose for which they have been collected, and especially for statistical use,

provided that they are kept either in anonymous form or, if that is not possible, with the identity of the data subject encrypted. In any event, the data may not be used for any purpose other than for historical, statistical or scientific purposes.

According to the notification, annual statistics on absences due to illness are produced by the Sickness Absence Management Department. In view of the number of officials and other servants employed by the European Parliament, the EDPS is satisfied that the statistical data are indeed anonymous and do not reveal information concerning any individual in particular. He therefore considers that the retention of data for statistical purposes is in keeping with the Regulation.

3.6. Transfer of data

The conclusions of the medical examination are sent to the Director of Personnel and Social Affairs, the Directorate-General to which the official or other servant is assigned and the Leave Department. The medical report is sent to the institution's medical officer and filed in the data subject's medical file. In certain exceptional cases, administrative data may be made available to the Legal Service, to judges of the Civil Service Tribunal, to the European Ombudsman or to the EDPS.

The processing should therefore be examined in the light of Article 7(1) of Regulation (EC) No 45/2001 which concerns 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*".

There must consequently be assurance that the conditions of Article 7(1) are fulfilled, which there is in this case since the data collected are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". The Directorate of Personnel and Social Affairs, the Leave Department and the hierarchy of the official or other servant need to be informed of the outcome of the medical examination in order to be able to decide whether the absence is justified or not and to draw any administrative or disciplinary conclusions. As regards the transfers, only relevant data (the conclusions of the medical examination) are transferred. The transfer in this case is therefore indeed lawful insofar as the purpose is covered by the competences of the recipients. Article 7(1) is therefore duly complied with.

As regards the transfer of the medical report to the institution's medical officer, the transfer is justified as the latter may take part in a possible arbitration procedure and/or an Invalidity Committee.

Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". There should be explicit assurance that no member of the European Parliament's Medical Service receiving and processing data may use them for other purposes.

As regards transfers in exceptional cases to other parties such as the Legal Service, the Civil Service Tribunal, the European Ombudsman or the EDPS, the EDPS is of the opinion that such transfers comply with Article 7 of the Regulation as they are necessary for the legitimate performance of the tasks covered by the competence of the recipient. However, the European Data Protection Supervisor would like particular attention to be paid to the fact that personal data should be transferred only if such a transfer is strictly necessary for the legitimate performance of the tasks covered by the competence of the recipient. This is particularly important with regard to the transfer of medical reports.

In the event of arbitration, the data may be communicated to an external doctor chosen by mutual agreement between the examining doctor and the official's or other servant's doctor. If the arbitrating doctor is in a country which has adopted legislation transposing Directive 95/46/EC, Article 8 of the Regulation applies. In principle, under Article 8(b), it is for the recipient to establish the necessity of having the data transferred and there must be no reason to think that the data subject's legitimate interests might be prejudiced. In this case, the recipient has no difficulty in establishing the necessity of the transfer since he needs the data in order to reach a decision on the contested case. Furthermore, the transfer does not in any way prejudice the legitimate interests of the data subject because it assists an arbitration procedure initiated by the data subject himself.

In the unlikely event that the arbitrating doctor is in a country not covered by Directive 95/46/EC, Article 9 of the Regulation applies. Under Article 9, the transfer may only take place to a country offering an adequate level of protection. If the level of protection is not adequate, the data subject must give his consent to the transfer in accordance with Article 9(6)(a).

Finally, the EDPS would point out that he himself may be considered a data recipient under Regulation (EC) No 45/2001. For instance, pursuant to Article 33 (complaints by Community staff) or Article 47(2)(a), he is entitled to obtain access, from the controller or Community institution or body, to any personal data and any information he needs for his enquiries. This should be reflected in the information given to data subjects (see below – 3.9 Information to be given to the data subject).

3.7. Processing including the staff or identifying number

The staff number of the person undergoing an examination is mentioned in the medical report resulting from the medical examination. In this case the use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the personal data controller. That said, such use may have significant repercussions, which is why the European legislator decided to regulate the use of such identifiers or personal numbers under Article 10(6) of the Regulation. Here, it is not a case of establishing the conditions under which the European Parliament may use the staff number but rather of drawing attention to this point in the Regulation. In this instance, the European Parliament's use of the staff number is reasonable because it provides a better means of monitoring the management of absences.

3.8. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for a right of access at the request of the data subject. 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 its source.

The right of access in relation to the management of sick leave examinations is governed by the Decision of the College of Heads of Administration of 19 February 2004 (Conclusion 221/04)⁴. By making a request in writing to the examining doctor, all data subjects can have access to their file of medical examinations for the purposes of checks and to a copy of the medical report concerning those examinations.

⁴ It should be noted that a new decision is currently being prepared.

Article 20 of the Regulation provides for certain restrictions on this right, notably where such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others. In certain specific cases where the data are of a psychological or psychiatric nature, they may be communicated to the data subject indirectly via a doctor of his choice.

Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification. In addition to being given access to their personal data, data subjects may also have the data amended if necessary.

In relation to data processed under the procedure for the management of absences due to illness, and where justified and legitimate, data subjects are entitled to have the factual content of their medical examination files updated by making a request to the Sickness Absence Management Department.

In relation to medical data, the arbitration procedure constitutes an appropriate means of rectification. Bearing in mind the specific nature of medical data, and to the extent that the accuracy or completeness of such data is difficult to guarantee, the EDPS is of the view that the Regulation has been complied with.

3.9. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 provide that the data subject must be informed whenever his or her personal data are processed and lists a series of specific items of information that must be provided.

Those provisions apply in this case, since the information is collected from the data subject and from the various participants in the process (Sickness Absence Management Department, the examining doctor and the independent doctor in the event of arbitration).

The EDPS considers that the information provided to data subjects is particularly unsatisfactory. A general statement on data protection posted on the European Parliament's website is clearly not enough to satisfy the provisions of the Regulation.

The EDPS recommends that a confidentiality statement be added systematically to the summons to undergo a medical examination. This statement must cover the following: the identity of the controller; the purpose and stages of the procedure; the categories of data concerned; the recipients of the data; the existence of a right of access and rectification and the arrangements for exercising it; the legal basis for the processing operation; the data retention period and the possibility of recourse to the EDPS. The EDPS takes the view that such a statement should also be posted on the Parliament's Intranet site, on the page covering absences due to illness. This would help to ensure maximum transparency vis-à-vis data subjects.

The EDPS would also point out (see section 3.4) that data subjects should be asked explicitly for their freely given and informed consent to medical data collected during examinations being used by the Parliament's Medical Service for purposes other than the strict monitoring of absences due to illness, in particular for preventive purposes.

3.10. Security measures

In accordance with Article 22 of Regulation (EC) No 45/2001 on 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".

The EDPS considers that, on the basis of the information obtained in the notification, Article 22 has been complied with as regards the medical examination files.

However, the EDPS recommends that all staff in the Sickness Absence Management Department should sign a specific document respecting the confidentiality of the information which comes to their knowledge in connection with their activities.

The EDPS cannot at this stage comment on the security measures in the event that the Sickness Absence Management Department decides to retain data in electronic form since the exact nature of those measures is not yet known.

Conclusion:

The proposed processing operation does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that:

- data should not be used by the Parliament's Medical Service for any purpose other than the monitoring of absences due to illness and the associated administrative procedures without the data subjects' freely given and informed consent;
- the data retention period should be reconsidered in respect of officials or other servants who have left the institution, and data which have been retained beyond the specified period should be destroyed;
- the data retention period for the Director of Personnel and Social Affairs, the Directorate-General to which the official or other servant is assigned and the Leave Department must be identical to that which applies to the Sickness Absence Management Department;
- members of the Sickness Absence Management Department and the European Parliament's Medical Service receiving and processing data should be explicitly reminded that such data may be used only for the legitimate purposes of the procedure in question;
- data subjects should be provided with the appropriate information.

Done at Brussels, 4 March 2008

(signed)

Peter HUSTINX
European Data Protection Supervisor