

Opinion on a notification for prior checking received from the Data Protection Officer (DPO) of the General Secretariat of the Council (GSC) concerning the "Form for assessing a handicap"

Brussels, 7 March 2008 (Case 2008-17)

1. Procedure

On 15 January 2008 the European Data Protection Supervisor (EDPS) received a notification for prior checking regarding a data processing operation in relation to the "form for assessing a handicap". The notification was accompanied by various documents, including a copy of the medical certificate form used for assessing a handicap, the EDPS's opinion of 2 October 2007 concerning the draft form (Case 2007-0555), a draft information note from the Medical Service on personal data protection, Staff Note 31/04 concerning access by officials or other servants to their medical files and a model administrative notice from the Medical Service to the AA. The DPO also forwarded Internal Directive No 1/2008 concerning the doubling of the dependent child allowance for a child suffering from a handicap, and in particular the definition of "heavy expenditure" incurred by an official.

The draft opinion was sent to the DPO on 27 February 2008 for comments, which were forwarded on 5 March 2008.

2. The facts

The **purpose** of the processing operation is to establish the physical or mental handicap of the child and the expenditure incurred by the official or other servant or their dependants as a result of such a handicap, in order to enable the Appointing Authority (AA) to decide whether to grant allowances. Such allowances are provided for in Article 67(3) of the Staff Regulations of the European Communities ("the Staff Regulations") and Article 2(5) of Annex VII thereto. Article 67(3) of the Staff Regulations provides for the doubling of the dependent child allowance by special reasoned decision of the AA based on medical documents establishing that the child concerned is suffering from a mental or physical handicap which involves the official in heavy expenditure. Article 2(5) of Annex VII to the Staff Regulations also provides for the continued payment of the dependent child allowance if the child concerned is prevented by serious illness or invalidity from earning a livelihood, to continue throughout the period of that illness or invalidity. Moreover, it is possible in certain cases to obtain additional assistance in the event of a handicap in respect of costs which are not reimbursed by the JSIS (this is provided for by budget heading 164).

The assessment of a dependent child's physical or mental handicap is based on a form (also referred to as the "medical certificate for the assessment of a handicap"), which has already been the subject of a request for an opinion from the Interinstitutional Medical Board and a letter from the EDPS dated 2 October 2007.

The **procedure** is as follows: the data are collected via a form provided on-line (on DGA 1B's website) which the data subject completes with the assistance of his attending physician, who signs the document after specifying the degree of invalidity. The completed form is sent on paper to the Medical Service. The Medical Officer evaluates the data and adopts an opinion concerning the handicap and the expenditure incurred by the applicant as a result of that handicap. The Medical Officer of the GSC then sends an administrative opinion to the AA.

Data storage forms an integral part of the personal medical file of the official or other servant who has submitted the request. If the official is subsequently transferred to another European institution, the form and any annexes thereto which justify the current opinion are forwarded to that institution.

The certificate is divided into four parts: 1. General information, 2. Description of impairments, 3. Consequences of impairments, and 4. Assessment of handicap. All the data collected in parts 2 and 3 are used both to establish the existence of a physical or mental handicap and to determine the expenditure incurred by the official as a result of that handicap.

It is a **non-automated, paper-based processing operation**.

The **data subjects** are the officials or other staff of the Council pursuant to the Staff Regulations or their dependants and the dependent children of such persons.

The **data processed** are: the surname, first name, address and staff number of the official (or other servant or dependant), the date of birth of the dependent child and data concerning the dependent child's physical and/or mental health.

The principal **recipient** of the data is the institution's Medical Officer. He is obliged to examine the information submitted and assess the degree of handicap. The administrative opinion is forwarded to the Director of DGA 1B and to that Directorate's personnel management unit. It does not contain any medical data; it takes the form of an opinion which may be either favourable or negative.

The form, together with any attached medical reports (medical certificates, doctors' opinions), forms part of the medical file of the official who submitted the request.

With regard to the **data storage** policy, data are stored if a favourable opinion is issued in respect of the request for as long as the allowance is paid. In the event of a negative opinion, or if the granting of the allowance is not renewed, the data are kept for at least five years. The data are destroyed after that period if no request for renewal is made.

Data concerning the physical and mental health of the data subject and the assessment of the consequences of impairments in terms of independence include data of a sensitive nature which are processed for the aforementioned purpose with due regard for medical ethics and medical secrecy.

3. Legal aspects

3.1. Prior checking

The notification received on 15 January 2008 constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a) of the Regulation). Processing of personal data includes operations to collect, record, consult and erase personal data. The processing operation presented is carried out by a Community institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

Data processing with regard to the "form for assessing a handicap" is a non-automated, paper-based operation within a structured whole, in this case the medical file of the official or other agent. Article 3(2) is thus applicable in this case. Accordingly, the processing falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. Article 27(2)(a) defines as processing operations likely to present such risks "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*", while Article 27(2)(b) refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". In this case, data relating to health are being processed for the purposes of the form for assessing a handicap. Moreover, in order to be able to decide whether to grant allowances, certain aspects relating to the personality of the applicant and child are evaluated, including data relating to their family, medical, professional and social situation. This case therefore falls within the scope of the prior checking procedure pursuant to Articles 27(2)(a) and 27(2)(b) of the Regulation respectively.

The official notification was received by e-mail on 15 January 2008. The draft opinion was sent to the DPO on 27 February 2008 for comments, which were forwarded to the EDPS on 5 March 2008. The EDPS will therefore deliver his opinion by 23 March 2008.

3.2. Lawfulness of the processing operation

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which 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 in the legitimate exercise of official authority vested in the Community institution*".

Furthermore, recital 27 of the preamble to the Regulation provides 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*". In the case in point, the processing operation relating to the management of files concerning the disability of an official's dependent child is necessary for the proper management and functioning of the GSC, and is therefore also necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities.

The legal basis for the processing can be found in Article 67(3) of the Staff Regulations (doubling of the dependent child allowance) and Article 2(5) of Annex VII thereto (continued payment of the dependent child allowance). Account should also be taken of budget heading 164 relating to further assistance in the event of disability in respect of costs not reimbursed by the JSIS.

The legal basis is therefore compliant with and supports the lawfulness of the processing operation.

Moreover, data concerning health are defined in Article 10 of the Regulation as "*special categories of data*".

3.3. Processing of special categories of data

Article 10(1) of Regulation (EC) No 45/2001 provides that the processing of personal data concerning health is prohibited, unless it is justified by one of the reasons referred to in Article 10(2) and (3) of the Regulation.

In this case, the collection of data concerning health is justified by Article 67(3) of the Staff Regulations and Article 2(5) of Annex VII thereto, as it is necessary in connection with the specific rights and obligations of the Council in the field of employment law. The processing operation thus complies with Article 10(2)(b) of the Regulation, pursuant to which the prohibition on the processing of data concerning health does 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*".

Moreover, in this case, health-related data are forwarded to the institution's Medical Officer. Owing to the very nature of the health-related data, Article 10(3) of Regulation (EC) No 45/2001, which relates to special categories of data, applies in this instance. It states: "*Paragraph 1 [prohibiting the processing of data relating to health] shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy*". Because of his duties, the doctor is acting to establish a medical diagnosis. Moreover, he is subject to the obligation of professional secrecy and is the sole recipient of this data. In this instance, Article 10(3) of the Regulation is duly complied with.

3.4. Data quality

In accordance with Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

Following a consultation by the Chairman of the Interinstitutional Medical Board on 10 September 2007 (Case 2007-0555), the EDPS examined the medical certificate for assessing a handicap. After examining the certificate, the EDPS concluded that the data were relevant and adequate within the meaning of Article 4(1)(c) of the Regulation. In the event that any medical reports are annexed to the certificate, data quality may be evaluated only on a case-by-case basis. Such data must also be adequate, relevant and not excessive in relation to the purposes for which they are collected.

Moreover, the data must be processed "*fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing has already been discussed (see point 3.2 above). As regards fairness, this relates to the information which must be given to the data subjects. That point is discussed in point 3.9 below.

Article 4(1)(d) of the Regulation stipulates that personal data must be "*accurate and, where necessary, kept up to date*", and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*". In this case, the official completes the form himself with the assistance of his attending physician, and this ensures the quality of the data. Moreover, the data subject's right to access, rectify and erase data is enshrined in the information note on personal data protection. See point 3.8 below on this point.

3.5. Data storage

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes 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*".

The form, together with any attached medical reports (medical certificates, doctors' opinions), forms part of the medical file of the official who submitted the request. The data are stored in the medical file if a favourable opinion is issued in respect of the request for as long as the allowance is paid. In the event of a negative opinion, or if the granting of the allowance is not renewed, the data are kept for at least five years. The data are destroyed after that period if no request for renewal is made.

The EDPS approves of this specific retention rule in connection with the establishment of a child's physical or mental handicap and the expenditure incurred by the applicant as a result of such a handicap in order to enable the AA to decide whether to grant allowances.

There is no intention to store data for historical, statistical or scientific purposes.

3.6. Data transfer

In the case of the planned procedure, the processing should be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. Article 7(1) relates to the transfer of personal data within or to other Community institutions or bodies "*if necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The principal recipient of the data is the institution's Medical Officer, who is obliged to examine the information submitted in order to assess the degree of handicap. The administrative opinion is forwarded to the Director of DGA 1B and to that Directorate's personnel management unit.

In the event that the data subject is transferred to another EU institution, and insofar as the allowance requested is still in force, the form, like the official's medical file, is forwarded to the Medical Service of the new institution. Finally, the EDPS would point out that he himself may be considered a data recipient, as may the European Ombudsman in the event of a complaint or the Civil Service Tribunal in the event of an appeal.

Care should therefore be taken to ensure that the conditions of Article 7(1) are fulfilled; this is indeed the case, since the data collected are needed to carry out the processing and, furthermore, are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". In this case, the task is the responsibility of the various departments of the GSC or the institutions concerned. As regards the transfers, only relevant data must be transferred. Therefore this transfer is indeed lawful, insofar as the purpose is covered by the competences of the recipients. Article 7(1) is therefore duly complied with.

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*". In view of the sensitivity of the data processed, recipients must be reminded that the data should be processed solely for the purpose of determining whether or not to grant the doubled allowance.

3.7. Processing including the staff or identifying number

The Council uses the staff number in the medical certificate for assessing a handicap. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller, such use may have significant consequences. This is why the European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation, which makes provision for action by the EDPS. In the case in point, use of the staff number may allow the linkage of data processed in different contexts. Here, it is not a case of establishing the conditions under which the Council may process the staff number, but rather of drawing attention to this point in the Regulation. In this instance, the Council's use of the staff number is reasonable because it is a means of facilitating the processing task, in particular archiving.

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.

Rectification, blocking, erasure and objection rights are dealt with in Section 5 of the Council Decision of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Section 5 of that document sets out the procedures for enabling data subjects to exercise their rights.

As stated above, the form, together with any attached medical reports, forms part of the medical file of the official who submitted the request.

Internal Directive No 2/2004 concerning access by officials or other servants to their medical files (new Article 26a of the Staff Regulations) lays down the conditions under which officials, temporary staff and auxiliary staff may have access to their medical files. Pursuant to that Directive, the file must be consulted on the premises of the Medical Service of the institution, in the presence of a person designated by the Medical Service.

Access by the official, other servant or assignee to personal notes by doctors may be restricted on the basis of Article 20(1)(c). Such restriction is based on a case-by-case examination. Such restricted access is justified if it is necessary to guarantee the protection of the person concerned or the rights and freedoms of others. The EDPS welcomes the fact that this is subject to examination on a case-by-case basis in accordance with the principle of proportionality. The above restriction must not be allowed to result in a general refusal of access to the personal notes of doctors in the medical file. As the child's legal representative, the official, other servant or dependant may exercise his or her right of access on the child's behalf, always acting in the latter's best interests.

The EDPS would point out that, where appropriate in view of his handicap and degree of maturity, the child himself must also have access to all his personal data, including the notes of the Medical Officer. Any restriction on the right of access to the Medical Officer's notes may be based only on a case-by-case examination, as is the case for the applicant.

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. This right is somewhat limited as regards medical data, in that it is difficult to guarantee the accuracy or completeness of such data. It may, however, apply to other types of data contained in medical files (administrative data, for example). Furthermore, the applicant or the child may request that his or her medical file be complete in the sense that he or she may request that information such as the counter-opinion of another doctor be placed in his or her file to ensure that it contains up-to-date information.

3.9. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subject and some from other persons.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be supplied to the data subject apply in this case. Insofar as the data subject completes the form himself with the assistance of his attending physician, the data subject provides the data himself.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) also apply here, since the Medical Officer assesses the child's handicap and the subsequent expenditure incurred by the applicant and takes notes for that purpose.

The information note informs data subjects that, pursuant to the provisions of Articles 11 and 12 of Regulation (EC) No 45/2001, the processing operation comes under the responsibility of the Medical Officer, Head of Unit.

The note also provides for the possibility of requesting information from the Medical Service secretariat on the following:

1. The purposes and recipients of the processing operations.
2. Rights of access, rectification and deletion.
3. The period for which medical data may be stored.

The EDPS welcomes the fact that the GSC has devoted a specific information note to the subject of data processing. However, he would like the above three items to be made explicit, i.e. described in the text, so as to provide immediate information to data subjects.

Provision is also made for the right to appeal to the EDPS.

The EDPS would draw attention to the lack of any specific reference in the information note to the aspects covered by Article 11(1)(d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply). It must be ensured that the data subject is fully informed on this point. Regarding Article 11(1)(d), this could entail informing the data subject of the consequences of refusal to reply to some of the questions contained in the form which are necessary for the procedure, or by indicating which replies in the form are obligatory and which replies may, where appropriate, be regarded as specific to the case in question.

The EDPS also welcomes the fact that the information note covers the points referred to in Article 11(1)(f): *the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*, which show that the fairness of the processing operation is fully respected.

The child must also be informed, in a manner appropriate to his or her level of maturity. The provision of such information would involve a considerable effort (Article 12(2)), which may be bypassed in the following way: the GSC will have to ensure that the data subject relays such information to the child himself.

3.10. Security

In accordance with Article 22 of the Regulation on 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 entire procedure is confidential. Ad hoc security measures are in place for consultation of files by data subjects and retention of such files. In relation to these measures as a whole, the

EDPS considers that they can be regarded as satisfactory within the meaning of Article 22 of the Regulation.

Conclusion

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

- confer on the child concerned and on the dependant of the official or other servant the right to access and rectify data;
- provide the information referred to in Article 11 of the Regulation directly in the information note in lieu of indirect access via the medical secretariat;
- rectify the absence of any specific reference in the information note to the aspects covered by Article 11(1)(d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply);
- ensure that the child is informed pursuant to Article 12 of the Regulation. To do this, the GSC will have to ensure that such information is conveyed to the child by the applicant himself.

Done at Brussels, 7 March 2008

(Signed)

Peter HUSTINX
European Data Protection Supervisor