

## **Opinion on the notification for prior checking from the Data Protection Officer (DPO) of the European Commission regarding the case "Authorisations to give evidence in court"**

Brussels, 28 March 2008 (Case 2007-721)

### **1. Procedure**

By e-mail received on 4 December 2007, notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was given to the European Data Protection Supervisor (EDPS) by the Commission's Data Protection Officer (DPO) regarding the case "authorisations to give evidence in court". Attached to the notification was the specific privacy statement concerning the processing operation.

Questions were put to the Commission's DPO by e-mail on 20 December 2007. The reply was forwarded to the EDPS on 7 February 2008. The draft opinion was sent to the DPO for comment on 17 March 2008. The comments were received on 27 March 2008.

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

Article 19 of the Staff Regulations of officials of the European Communities (Articles 11 and 54 of the Conditions of Employment of Other Servants of the European Communities) stipulates that "*An official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any legal proceedings information of which he has knowledge by reason of his duties. Permission shall be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned. An official shall continue to be bound by this obligation after leaving the service. (...)*". The Commission has put in place a data processing operation which is intended to authorise the court appearance of an official or servant in response to a request from a national court or any other national body authorised to undertake investigations.

The data subjects are officials, former officials and staff members who are, or have been, subject to the Conditions of Employment of Other Servants (CEOS) and who are required to disclose in legal proceedings information of which they have knowledge by reason of their duties.

The national authority sends a request for an official to attend a court hearing to a contact department at the Commission (ADMIN, OLAF, Secretariat-General) or to the official directly. The request must be forwarded to the competent department (ADMIN.B.3), for processing. A draft decision is drawn up by ADMIN.B.3 then adopted by the Appointing Authority following the agreement of the Legal Service. The decision is then sent to the applicant: either the contact department at the Commission which received the request from the national authority (and which forwards the decision to that authority), or the official if he received the request. The decision may not be forwarded to the official if the national

authority has asked for it to be kept confidential. In such cases it is the authority which informs the official, by means of a summons.

The procedure is manual and automated. The data needed for managing the file (request from the national authority, copy of the authorisation, exchanges of e-mails) are stored in files and on a network hard disk.

The decision is placed in the official's personal file as soon as it can be communicated to him. For that purpose, ADMIN.B.3 asks the contact department for precise information on the point from which the decision may be placed in the file. After six months, the ADMIN.B.3 Unit checks the file to make sure it is complete.

The processed data must contain the following information: name, first name, personnel number, grade, department, administrative status, reason for the court appearance and reference to the summons from the national authority.

The data needed for the management of the file (request from the national authority, copy of the authorisation, exchanges of e-mails) are kept for five years. The decision by the Appointing Authority is kept in the personal file and therefore complies with the conservation rules (until the rights of the data subject and his successors and the possibilities for appeal have lapsed).

The files are managed by the competent managers of the ADMIN.B.3 Unit. The data are forwarded to the national authority, the Legal Service (for agreement) and the Commission department which is contact with the national authority (ADMIN, Secretariat-General, OLAF). On individual request, some departments may be given access to the Appointing Authority decision in the personal file (Legal Service, IDOC, OLAF, Inspection of the Delegations, Security Directorate). The Human Resources manager in the data subject's DG may also have access to the Appointing Authority decision.

The data subject is ensured a right of access and a right to have data rectified. The specific privacy statement concerning the processing operation sets out the scope of these rights. The right of access may be limited and deferred at the request of a national authority which asks for the obligation of discretion to be waived, in which case the data subject is informed that under Article 20 of Regulation (EC) No 45/2001 he has recourse to the European Data Protection Supervisor. The data are blocked and erased within 15 days of a reasoned request by the data subject.

On the Commission Intranet page there is a link to the specific privacy statement which explains the relevant procedures and rules. More specifically, the statement contains the following information: the controller, the purposes of the processing operation, the categories of data concerned, the legal basis, the rights of access and rectification, the data recipients and the data retention period.

If they are to be kept confidential, requests for authorisation must be forwarded by the requesting department in a double envelope, and managers, not floor messengers, follow the circuit of signatories. All mail is sent in a double envelope. The data needed for managing the file are stored in folders in locked cupboards and/or on the network hard disk. The documents are not attached when they are recorded in ADONIS (mail register) and have confidentiality level 2. The Legal Service is consulted by electronic means only; e-mails are encrypted if the request stipulates confidentiality.

### **3. Legal aspects**

#### **3.1. Prior checking**

The operation described by the notification received on 4 December 2007 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). 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 "authorisations to give evidence in court" processing operation is partially automated insofar as the lists of data needed to manage the authorisation files are recorded on the network hard disk. The data are also stored on paper in folders and the Appointing Authority decision is kept in the personal file. Article 3(2) is therefore applicable in this case.

Consequently, such processing comes under Regulation (EC) No 45/2001.

Article 27 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. Article 27(2) contains a list of processing operations that are likely to present such risks. These are described in Article 27(2)(a) as "processing of data relating to health and to suspected offences, offences, criminal convictions or security measures". The "authorisations to give evidence in court" processing operation deals specifically with data relating to suspected offences, offences and criminal convictions and therefore falls within the scope of Article 27(2)(a).

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this specific case, the processing was set up before consultation of the EDPS, so the check necessarily has to be performed ex-post. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The formal notification was received through the post on 4 December 2007. In accordance with Article 27(4) of the Regulation, the EDPS must issue his opinion by 5 February 2008. Since the time-limit in which the EDPS has to deliver his opinion has been suspended by 49 days (+ 10 days for comments), the EDPS will deliver his opinion by 4 April 2008 at the latest (5 February + 59 days' suspension).

#### **3.2. Lawfulness of the processing**

The lawfulness of the processing must be examined in the light of Article 5(a) of Regulation 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".

The Commission cannot impede the course of justice and must therefore waive the official's obligation of discretion, where it is not required by the Community's interests, and authorise him to disclose his knowledge. The processing relates to a task performed in the public interest.

In this case the legal basis is particularly important; the data processed may be highly sensitive. The basis is Article 19 of the Staff Regulations of officials of the European Communities (Articles 11 and 54 of the Conditions of Employment of Other Servants of the

European Communities), which stipulates that "an official shall not, without permission from the appointing authority, disclose on any grounds whatever, in any legal proceedings information of which he has knowledge by reason of his duties. Permission shall be refused only where the interests of the Communities so require and such refusal would not entail criminal consequences as far as the official is concerned. An official shall continue to be bound by this obligation after leaving the service (...)". The legal basis in the Staff Regulations is therefore valid and supports the lawfulness of the processing operation.

From the description of the processing given, the EDPS concludes that it may also involve sensitive data within the meaning of Article 10 of the Regulation.

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

Article 10(5) of the Regulation provides that "processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)". In the case in point, Article 19 of the Staff Regulations, adopted on the basis of the Treaties, authorises the "authorisations to give evidence in court" processing operation. Article 10 is therefore duly complied with.

### **3.4. Data quality**

In accordance with Article 4(1)(c) of the Regulation, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed. The processed data described at the beginning of this opinion are to be regarded as satisfying these conditions. The data required are necessary for the administration of the authorisations to give evidence in court. The EDPS is satisfied that Article 4(1)(c) of Regulation No 45/2001 is duly complied with in this respect.

The data must also be processed "*fairly and lawfully*" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 3.2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.9 below on this point.

Article 4(1)(d) of the Regulation stipulates that data must be "*accurate and, where necessary, kept up to date*". The system itself ensures that data are accurate and kept up to date. The processing operation concerns only the authorisations themselves, and the fact that in certain cases the national authority asks for the official not to be informed directly that his obligation of discretion has been waived, in which case the decision is not placed directly in the data subject's personal file. In order to establish whether the files are up to date, ADMIN.B.3 checks them after six months. Within the limits of Article 20, the data subject has rights of access and rectification, to make the file as complete as possible. This also makes it possible to ensure the quality of data. See point 3.8 below on the dual rights of access and rectification.

### **3.5. Data retention**

The general principle set out in Regulation (EC) No 45/2001 is 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*" (Article 4(1)(e) of the Regulation).

The data needed to manage the files are stored for a period of five years from the closure of the file. The Appointing Authority decision is kept in the personal file and is thus covered by the conservation rules for such files.

The EDPS considers that this period of five years is reasonable in relation to the purposes for which the data were collected (authorisation to give evidence in court) and for which they are further processed (file management).

Furthermore, as regards the decision kept in the personal file, the long-term storage of data must be accompanied by appropriate guarantees. The stored data are personal. The fact that they are archived for long-term storage does not divest them of their personal nature.

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

The processing should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The case in point involves transfer within one and the same institution. In particular, the recipients of the processing operations are the Legal Service, the Appointing Authority, the ADMIN.B.3 Unit responsible for file management and the Commission department that is in contact with the national authority (ADMIN, OLAF, SG etc.). On individual request, some departments may be allowed access to the Appointing Authority decision kept in the personal file. That is the case for the Legal Service, IDOC, OLAF, the Inspection of the Delegations and the Security Directorate. The Human Resources manager in the data subject's DG also has access to the Appointing Authority decision. Lastly, the EDPS emphasises that he himself, the European Ombudsman and the Court of Justice may be considered as data recipients in the event of complaints or appeals, for example.

The transfer thus complies with Article 7(1), since the data collected are necessary for the processing operation and are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

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 processed data, the recipients should be reminded that the data may be processed only for the purpose of granting authorisations to give evidence in court.

In the case under review, the data (the Appointing Authority decision) are also communicated to the national authority which asks for the obligation of discretion to be waived. Two scenarios can be observed in the Member States: (a) those Member States where the national data protection law adopted pursuant to Directive 95/46/EC covers every sector of the national legal system, including the judicial sector; (b) those Member States where the national data protection law adopted pursuant to Directive 95/46/EC does not cover every sector, and in particular not the judicial sector.

As to the first scenario, Article 8 of the Regulation provides that: "*Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or (...)*". In the case under review, the judicial authorities request the authorisation to give evidence in court and, by so doing,

demonstrate the need for data to be transferred, as those data are necessary for justice to be done.

For those countries that have not extended their implementation of Directive 95/46/EC to their judicial authorities, Article 9 of the Regulation has to be taken into consideration. In those countries, Council of Europe Convention 108, which in this case can be considered as providing an adequate level of protection, is in any case applicable to judicial authorities.

If the national authority is in a country not covered by Directive (EC) 45/96, Article 9 of the Regulation applies. Under Article 9, the transfer may only be made to a country offering an adequate level of protection. If this is not the case, the processing operation must be based on the exceptions laid down in Article 9(6), for example Article 9(6)(d): "the processing is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims, (...)".

### **3.7. Processing including the personnel or identifying number**

The Commission uses the personnel number to manage authorisations to give evidence in court. While the use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the personal data controller, such use may have significant consequences. That 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 personnel number may allow the linkage of data processed in different contexts. Here, it is not a case of establishing the conditions under which the Commission may process the personnel number, but rather of drawing attention to this point of the Regulation. In this instance, the Commission's use of the personnel 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 establishes a right of access – and the arrangements for exercising it – upon request by 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 of any available information as to their source. Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In addition to being given access to their personal data, data subjects may also have the data amended if necessary.

The data subject is ensured a right of access and a right to have data rectified. In accordance with Article 20(1), both rights may be limited and deferred upon request by a national authority for the obligation of discretion to be waived. In such cases, the Commission has in a general sense informed the data subject that he may have recourse to the EDPS under Articles 20(3) and 20(4). However, Article 20(5) states that "*provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.*" It may be necessary to defer the provision of such information in accordance with this provision, in order to safeguard the investigation. Moreover, as stated in this opinion, these restrictions are temporary.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. Given the sensitivity of the processing operation, this right is of key importance in guaranteeing the quality of the data used which, in this specific case, is connected to the right of defence. Any restriction under Article 20 of the Regulation must be

applied in the light of what has been said in the preceding paragraphs regarding the right of access. If there is no restriction arising from Article 20(1) – in particular if there is no request for confidentiality from the national authority – the data subject must be given the opportunity to comment on the case concerning him before the decision is taken by the Appointing Authority. The data subject must, for example, be given the opportunity to comment when the Commission as an institution is cited as a witness and the department in question designates the person who appears to be most competent to reply to the judge as a witness. This provision will also apply when the official or servant asks on his own initiative for the obligation of discretion to be waived. The EDPS recommends that this possibility be introduced in the procedure governing authorisations to give evidence in court. Other than this recommendation, the EDPS considers that Articles 13 and 14 of the Regulation are complied with.

The data are blocked and erased within 15 days of a reasoned request by the data subject. Articles 15 and 16 of the Regulation are therefore duly complied with.

### **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 of information. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are necessary to guarantee fair processing in respect of the data subject. In this case, some of the data (the request for authorisation) are forwarded by the person himself or by the person in the Commission department that is in contact with the national authority.

The provisions of 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 apply in this case. In certain cases the data subject himself forwards the request for authorisation from the national authority to ADMIN.B.3; he therefore supplies 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 in this case. In other cases, the national authority forwards the request for authorisation via a Commission department.

In the case under review, the data subjects are given general information via the specific privacy statement on the Intranet. The statement sets out all the measures contained in Articles 11 and 12 apart from the right to have recourse to the European Data Protection Supervisor at any time. The EDPS asks that this be included in the statement.

As for specific information, when a data subject is the subject of a request for authorisation he must be informed of the processing operation at the latest when the data are first communicated, if the authorisation was requested via one of the Commission departments; if the request for authorisation was made by the data subject himself, he must be informed immediately. This applies in the case in point. Provision of information may also be deferred, in accordance with Article 20(1), at the request of the national authority. In that case the national authority will inform the data subject. This restriction of the right to information of the data subject is in conformity with the Regulation.

### **3.10. Security**

Technical and organisational measures have been taken to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.

After a careful analysis of these measures, the EDPS considers that, generally speaking, these measures are adequate in the light of Article 22 of the Regulation (EC) No 45/2001. However, in terms of managing access and in view of the sensitivity of the processed data, the EDPS recommends that the managers of the ADMIN.B.3 Unit and of the Legal Service be allowed access only to those files for which they are specifically responsible. Only the manager of a file, his replacement and their hierarchical superior must be allowed access to that particular file; the same applies for the Legal Service.

#### **Conclusion**

The proposed processing 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 the Commission should ensure that:

- the data subject is given the opportunity to comment on the case which concerns him before the decision is taken by the Appointing Authority and where there are no restrictions arising from Article 20(1);
- the information on the right to have recourse to the European Data Protection Supervisor at any time is included in the specific privacy statement;
- the managers of ADMIN.B.3 and of the Legal Service and their replacements are allowed access only to those files for which they are responsible.

Done at Brussels, 28 March 2008

*(Signed)*

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor