

## **Opinion on a notification for prior checking received from the Data Protection Officer of the European Medicines Agency on part time requests**

Brussels, 1 April 2008 (Case 2007-500)

### **1. Proceedings**

On 3 September 2007, the European Data Protection Supervisor (EDPS) received by mail a notification for prior checking from the Data Protection Officer (DPO) of the European Medicines Agency (EMA) concerning part time requests.

On 13 September 2007 the EDPS made a request for further information. The DPO of the EMA sent the reply on 16 October 2007 but it was not received by the EDPS. Following a request from the EDPS, the reply was sent again and received by the EDPS on 8 February 2008. It was accompanied by the following documents:

- EMA part-time working scheme (Document ref. 4058) (Implementing Rules);
- Application for part-time working (template);
- Data Protection Declaration;
- Consolidation of Leave Rules and Working Conditions at EMA;
- Personal Data Access Request Form (template).

On 12 March 2008, the EDPS sent the draft opinion to the DPO of the EMA and consequently the case was suspended pending comments until these were provided on 14 March 2008.

### **2. The facts**

The European Medicines Agency manages part-time applications of the staff. The data processing operations are both automated and manual. A staff member fills in a form which is collected in hard copies and subsequently the data of each staff member are entered in the COMPEL Database. The processing operation is based on Articles 55a, 55b and Annex IVa of Staff Regulations of Officials of the European Communities, Articles 16, 57 and 91 of Conditions of Employment of other Servants of the European Communities. In addition, the Executive Director of EMA issued a decision on part-time working scheme (Doc. ref. 4058, provided by the EMA's DPO).

Data subjects include temporary and contractual agents at the EMA. In exceptional circumstances, the family members of staff can also be concerned.

An application should be submitted through the Head of Sector (with copy to Administration) to the Head of Unit who will forward it together with a recommendation to the Executive Director for decision. Before submitting the recommendation to the Executive Director, the

Head of Unit together with the Head of Sector concerned assess the personal situation within the sector, the appropriateness of granting part-time working and - in conjunction with Administration - possibilities to fill the vacancy. Administration will inform the Executive Director and the Head of Unit and Head of Sector concerned about options to fill the vacancy. Applications for part-time working must arrive in Administration at least two months before the staff member wishes to start working part-time. Following the decision of the Executive Director, the Sector for Personnel and Budget will notify applicant of the decision with a copy to the applicant's personnel file and the Head of Unit.

The application form for part-time working contains the following data:

- date of request,
- personnel number,
- last and first names,
- unit and sector,
- reason for application,
- date on which the applicant would like to start working part time,
- type of part time working preferred,
- comments by Head of Sector with date and signature,
- comments by Head of Unit with date and signature,
- confirmation by administration that part time can be arranged with comments,
- approbation by the Executive Director with date and signature.

The data might be disclosed to the following recipients or categories of recipient:

- Executive Director,
- Head of Administration,
- Head of Unit and Head of Sector of the applying staff member,
- Personnel and Budget Sector Staff.

If the part time is granted, the final decision only is transferred to<sup>1</sup>:

- Information Technology Sector Staff,
- Infrastructure Service Sector Staff,
- Security and Reception Staff.
- Pay Master's Office

Concerning the information of the data subjects, the EMEA provides with all the relevant information in the form of a "Data Protection Declaration" which is signed for acknowledgement by the staff members, as well as published on the EMEA website. The data protection notice covers all the processing of personal data within the EMEA and it is not specific for part time requests; for this reason it is signed as soon as each staff members starts a new contract at the EMEA.

The general Data Protection Declaration provides information about:

- the identity of the data controller;
- general purposes for which personal data are processed ("administrative purposes and/or purposes of the tasks pursued by the Agency within Article 57 of Regulation 726/2004");
- categories of recipients of staff member's personal data;

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<sup>1</sup> Those recipients do not have access to the application form itself but they are only informed on the fact that a given staff member has been granted a part time.

- the rights of data subjects and how they assert those rights; and
- the right to recourse to the EDPS.

However, there would appear to be no information provided about the specific purpose of the part time related processing operations or the respective storage periods.

Furthermore, once the data are submitted to the EMEA the data subject has the possibility to exert his right pursuant Section 5 of the Regulation (EC) 45/2001 filing a request, the template of which is provided in the EMEA internal website.

The form EMEA has produced for staff (Personal Data Access Request Form) demands the following information:

- name and surname,
- place and date of birth,
- nationality,
- home address,
- postcode
- telephone and/or fax number,
- email address,
- ID number (provided in declaration).

The form also states that a data access request may be refused if it is not made on the form. In case a request for blocking of data is accepted, it shall be implemented within 45 working days from receipt of a valid request. In the case of a request regarding the erasure of data, the Data controller shall reply within 15 working days from the request. The erasure shall follow without delay once a motivated request has been accepted.

The data submitted in the part time request follow the same archiving policy foreseen for the Personal File. Consequently the documents are disposed after staff member is deceased and pension payment to dependents ends. Further processing for historical, statistical or scientific purposes is envisaged on anonymous basis. Data are processed anonymously in the form of statistics.

The data are stored in house both electronically and in hard copies. [...]

### **3. Legal aspects**

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

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as *"any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity"*. The data processed in the part time requests therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by the EMEA, a Community body whose activities fall within the scope of Community law.

Regulation 45/2001 shall apply to *"the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system"*. In this case, the personal data are held as part of a paper filing system and electronically.

Regulation 45/2001 therefore applies.

Article 27(1) of Regulation 45/2001 subjects to prior checking by the EDPS all *"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) of the Regulation contains a list of processing operations that are likely to present such risks. According to the notification, the part time requests falls within the category of the *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct"* (Article 27(2)(b)). The processing in question contains indeed an evaluation of the data subject. The EDPS notes that it is highly probable that the applicants justify the part time requests by medical condition of themselves and/or of their family members. Therefore the processing of data relating to health is also potentially concerned (Article 27(2)(a)).

Thus the processing operations have to be prior checked by the EDPS.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 3 September 2007. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 1 April 2008 taking into account suspensions for a total of 150 days.

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

Article 5(a) of Regulation 45/2001 stipulates that personal data may be processed if *"the processing is 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 or body"*.

The processing of personal data in relation to the part time requests is necessary for the EMEA to provide the rights to part time work provided by the Articles 55a, 55b and Annex IVa of Staff Regulations of Officials of the European Communities, Articles 16, 57 and 91 of Conditions of Employment of other Servants of the European Communities and the implementing rules of the EMEA. The EDPS is therefore satisfied that this processing is lawful.

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

Under Article 10(1) of the Regulation, the processing of personal data revealing political opinions, trade-union membership or data concerning health is prohibited, unless grounds can be found in the second paragraph of this Article.

In the application form for part time request, such a data concerning may be included. For example references to the external activities or the health problems of the applying staff members may be quoted in order to justify the request.

In the present case, the exceptions laid down in Article 10(2)(a) and (b) of the Regulation are applicable, according to which the prohibition to process the above mentioned sensitive data can be lifted in case "*the data subject has given his or her express consent to the processing*" and "*the processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law*". The EDPS considers that the processing of the data in question is justified.

### **3.4. Data Quality**

Article 4(1)(c) of Regulation 45/2001 states that personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.*" In this case the data are collected and processed for the purposes of the management of the part time applications.

The EDPS is satisfied that the data processed are required to establish eligibility for part time working and therefore he does not regard the processing of these personal data as excessive.

However, the EDPS does have some recommendations on excessive personal data being required on the form provided by the EMEA for requesting access to personal data. This is dealt with in point 3.9.

Article 4(1)(d) of Regulation 45/2001 states that personal 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.*"

Concerning the factual data provided by the data subject, the EDPS is satisfied that the procedure used by the EMEA in the part time requests management helps to ensure accuracy and, by using a simple form to be filled in by the applicant, the data are up to date and complete. Concerning the comments written by the Head of Sector and the Head of Unit of the staff member, they are subjective by nature. It is therefore difficult to assess the accuracy of such data. In any case, the invitation to make use of the rights of access, rectification and appeal allows ensuring that the data are accurate and up to date (cf. point 3.9).

### **3.5. Conservation of data/ Data retention**

Article 4(e) of Regulation 45/2001 states that 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. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific purposes should be kept in an anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes*".

The data submitted in the part time request form are stored in the personal file and follow the same archiving policy foreseen for the personal file. Consequently the documents are destroyed after staff member is deceased and pension payment to dependents ends.

Further processing for historical, statistical or scientific purposes is envisaged on anonymous basis. Data are processed anonymously in the form of statistics.

The EDPS is convinced that the retention of data in a form which permits identification of the data subject is necessary for period stated in the notification and is therefore in accordance with the requirements of Article 4(e) of Regulation 45/2001.

### **3.6. Compatible use / Change of purpose**

Article 4(1)(b) of Regulation 45/2001 states that personal data must be *"collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes"*.

The data processed during the part-time request procedure are stored in the staff member's personal file and the COMPEL database. The EDPS is satisfied that this is compatible with the purpose of the procedure.

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

Article 10 (6) of the Regulation provides that *"the European Data Protection Supervisor determines the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body"*.

The part-time request form contains the personal number of the staff member concerned. The EDPS considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates the follow-up in an appropriate way. There is no reason to determine any further conditions in this case.

### **3.8. Transfer of data**

Article 7(1) of Regulation 45/2001 states that *"Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

In this case, the whole application form is passed to the Executive Director, Head of Administration, Head of Unit and Head of Sector of the applying staff member, Personnel & Budget Sector Staff. The final decision is transferred to the Information Technology Sector Staff, Infrastructure Service Sector Staff, Security and Reception Staff and Pay Master's Office. In each of these cases the transfer is necessary for the discrete tasks each of these recipients is required to perform.

As such, the EDPS is satisfied that, in each case, the transfer of personal data within the EMEA is in accordance with Article 7(1) of Regulation 45/2001. However, the EDPS recommends that, in accordance with Article 7(3), each of the recipients is made aware that they shall process the personal data they receive in the course of the part time request procedure only for that purpose.

In addition, in case of disputes, the personal file containing the part time requests may be transferred to the Civil Service Tribunal. The data contained in the part time request forms can also be subjected to an audit by the Court of Auditors or an internal auditor. Finally, the data can be transferred to the OLAF, to the European Ombudsman or to the EDPS.

These transfers have a legitimate purpose because they are necessary for the human resources management, disciplinary procedure, judicial proceedings, internal audit or the exercise of supervisory tasks.

In case of an inter-institutional transfer of the staff member concerned, his part time request forms stored in the personal files are transmitted to the respective institution. This transfer is necessary for the legitimate performance of tasks covered by the competence of the receiving institution.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. Therefore, Article 7 (1) of the Regulation is being complied with.

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

Article 13 of Regulation 45/2001 grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

As mentioned in point 2, EMEA has produced a particular form to be used for all access and rectification requests concerning personal data processed. The EDPS has already made recommendations concerning the need to revise the Personal Data Access Request Form in his Opinion on a notification for Prior Checking received from the EMEA DPO on the public declaration of interests dated of 6 December 2007 (Case number 2007-0419). In particular, the EDPS has requested that the statement on mandatory use of the Personal Data Access Request Form is replaced by a simple recommendation to use the form, as well as that the identification data required on the form are limited to name, surname, telephone and/or fax number, email address and the ID number. The EDPS is satisfied that if the recommendations from the case 2007-0419 are effected by the EMEA, this will address any issues relating to the part time requests, as the form is a general form.

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

Article 11 of Regulation 45/2001 provides that information be provided when the personal data have been received directly from the data subject. Article 12 of Regulation 45/2001 provides that information be provided to the applicant when they have been obtained from someone else. In this instance, employees will be informed through the decision on part time working scheme and the *Data Protection Declaration* signed for acknowledgement by each staff member, as well as published on the EMEA website.

The EDPS recommends that the information provided in the Data Protection Declaration to data subjects who are staff members is amended as follows, so that it is in accordance with the requirements of Articles 11 and 12 of Regulation 45/2001:

- There should be an introductory paragraph which states that this is a general data protection statement, and that further information on specific processing operations can be found in the links in an annex to this document.

- An annex should be added to the document with links to the specific Data Protection Declaration for the part time applications. That specific declaration should be attached to the part time application form and/or to the EMEA's implementing rules.
- The specific Data Protection Declaration should include, on top of the information provided by the general Data Protection Declaration: the identity of the controller for that specific processing, the purposes of the processing, the recipients of the data, the legal basis of the processing, the time-limits for storing the data and the information whether replies to the questions in the application form are obligatory or voluntary as well as the possible consequences of failure to reply.
- The email address provided in the Data Protection Declaration should correspond with that provided on the personal data access request form.

As to information provision to family members whose personal data are processed in connection with part-time request, the EDPS acknowledges that direct provision of such information would involve disproportionate efforts on a part of EMEA. Nevertheless, there are other steps EMEA could take which would be appropriate, such as instructing its staff members who submit such a data to inform their respective family members about the processing of their personal data and their rights.

### **3.11. Security measures**

After careful analysis of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation 45/2001.

#### **Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the above considerations are fully taken into account. In particular, the EMEA should ensure that:

- Each of the recipients is made aware that they shall process the personal data they receive in the course of the part time management procedure only for that purpose.
- The Personal Data Access Request Form is modified in such a way that:
  1. The statement on mandatory use of this form is replaced by a simple recommendation to use it.
  2. Identification data required on the form are limited to name, surname, telephone and/or fax number, email address and the ID number.
- Information provided in the Data Protection Declaration to data subjects who are staff members is amended as explained above in point 3.10.

Done at Brussels, 1 April 2008

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