

## **Opinion on the notification for prior checking received from the Council's Data Protection Officer on "double dependent child allowance for a handicapped child"**

Brussels, 29 September 2008 (Case 2008-405)

### **1. Procedure**

On 7 July 2008 the Council's Data Protection Officer (DPO) sent the European Data Protection Supervisor (EDPS) a notification for prior checking concerning "double dependent child allowance for a handicapped child", on the grounds that it might involve data relating to health (Article 27(2)(a)).

This processing operation supplements that for assessment of a handicap, on which the EDPS ruled on 7 March 2008<sup>1</sup>.

The draft opinion was sent to the DPO on 19 September 2008 for comments, which were received on 29 September 2008.

### **2. The facts**

Article 67(3) of the Staff Regulations of officials of the European Communities states that:

*"The dependent child allowance may be doubled, by special reasoned decision of the appointing authority based on medical documents establishing that the child concerned is suffering from a mental or physical handicap which involves the official in heavy expenditure."*

Pursuant to Article 67(3) of the Staff Regulations, the Council has laid down a procedure for obtaining the opinion of the medical officer on the award of double dependent child allowance on the basis of probative medical documents.

The procedure set out in Internal Directive No 1/2008 (Staff Note 23/08) is as follows:

Under Article 67(3) of the Staff Regulations, the dependent child allowance may be doubled by special reasoned decision of the appointing authority based on medical documents establishing that the child concerned is suffering from a mental or physical handicap which involves the official in heavy expenditure.

The existence of "heavy expenditure" is established by the appointing authority on the basis of the opinion of the institution's medical officer, who, having taken account of the detailed

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<sup>1</sup> See EDPS case 2008-017 of 7 March 2008, on the EDPS website.

opinion<sup>2</sup> of the child's attending physician, assesses the degree of handicap with reference to the European physical and mental disability rating scale for medical purposes.

If it is established, on the basis of that scale, that the child's physical and/or mental handicap is 50 % or more, the dependent child allowance provided for in Article 2 of Annex VII to the Staff Regulations is automatically doubled.

If it is established that the child's physical handicap is 30 % or more or that his mental handicap is 20 % or more, but is less than 50 % in either case, the allowance is doubled if the total amount of expenditure – i.e. all the specific expenses resulting from the nature of the handicap which are incurred by the applicant – is higher than the amount of the dependent child allowance.

**The data provided** are as follows: Identity of the official, "handicap" field for the child concerned (in ARPEGE) and possibly a date for review.

**Information:** the procedure is initiated by the data subject himself. The medical certificate given him for completion by the attending physician contains all the relevant information on the procedure.

**The rights of the data subject** are set out in Section 5 of the Council Decision of 13 September 2004: 2004/644/EC (OJ L No 296, 21.9.2004, p. 20). The data subjects obviously have the right to relinquish the allowance and then have the data concerning the handicapped child rectified.

**Manual/automated procedure:** the handicap is assessed by the medical service and the decision itself is taken by the appointing authority (Director of DGA 1B) on the basis of Internal Directive 1/2008, which was published in Staff Note 23/08. The decision is forwarded to the Individual Entitlements Unit; if the decision is favourable, the corresponding field is altered in the ARPEGE database (the handicap status of the child and possibly the deadline for review of the case) and a copy of the decision is forwarded to the Salaries Department for implementation. The procedure is partially automated, in that the child and its severe handicap status are included in ARPEGE (possibly with a deadline for review).

**The recipients** are all within DGA 1B (Individual Entitlements Unit – Salaries Unit). Only members of the Individual Entitlements Unit (and the IT support team) can enter, alter or validate the data. The information can be consulted via ARPEGE and/or GPWin. Access to the information in these two systems is allowed on a "need to know" basis and is covered by a separate notification.

**Storage:** The data are kept on paper throughout the official's career and for thirty years after he/she leaves the Council. The data in electronic format are kept in the ARPEGE application for an indeterminate period (this point is under review).

**Security measures** are taken as part of the administration of these files. [...]

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<sup>2</sup> The opinion must be given using the form entitled "certificat médical destiné à l'évaluation d'un handicap", drawn up by the Interinstitutional Medical Board and approved by the Board of Heads of Administration on 19 April 2007.

### **3. Legal aspects**

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

The notification received by post on 7 July 2008 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). 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)). Also, the decision based on the medical officer's conclusions is fed into an automated system (ARPEGE). Article 3(2) thus applies in this instance.

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

Under Article 27(1) of Regulation (EC) No 45/2001 "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" are subject to prior checking by the EDPS. The processing also comes within the provisions of Article 27(2)(a): "the following processing operations are likely to present such risks: processing of data relating to health ...", which is the case here, where the dependent child allowance is doubled if the child is handicapped; by that token, the operation is subject to prior checking by the EDPS.

In principle, checks by the EDPS should be performed before a processing operation is set up. In this case, the EDPS emphasises that it would have been preferable for the processing to be submitted to him before it was set up. Otherwise, the check necessarily has to be performed *ex post*. However, this does not alter the fact that it would be desirable for the EDPS' recommendations to be implemented.

The prior checking covers only the appointing authority's decision, its entry in ARPEGE and forwarding to the Salaries Unit for the relevant adjustment to the data subject's pay. The stage of the processing operation involving the medical officer's determination of a handicap was analysed in prior check 2008-017.

The notification was received by post on 7 July 2008. The draft opinion was sent to the DPO on 19 September 2008 for comments, which were received by the EDPS on 29 September 2008. The EDPS will therefore deliver his opinion by 19 October 2008 at the latest (8 September plus 10 days suspension plus the month of August).

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

Article 5(a) of Regulation (EC) No 45/2001 provides 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*". Setting up a procedure for implementing the conclusions of the medical officer's opinion on whether the dependent child allowance should be doubled on the basis of probative medical documents comes within the legitimate exercise of official authority vested in the Community institution; the processing operation is therefore lawful.

The legal basis for this processing operation can be found in Article 67(3) of the Staff Regulations of officials of the European Communities and the Council's Internal Directive No 1/2008 (Staff Note 23/08). It is therefore legitimate for the Council to organise a procedure to implement the medical officer's conclusions on whether the dependent child allowance should

be doubled on the basis of probative medical documents. The legal basis is thus compliant and supports the lawfulness of the processing.

In addition, data on health are described in Article 10 of Regulation (EC) No 45/2001 as "special categories of data".

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

Article 10 of the Regulation prohibits the processing of personal data concerning health, unless it can be justified on one of the grounds given in Article 10(2) and (3) of Regulation (EC) No 45/2001. The case under consideration very clearly relates to the processing of personal data concerning health, as a reference to the handicap field in ARPEGE in itself constitutes information relating to health.

Article 10(2)(b) applies in the case in point : *"Paragraph 1 (prohibiting the processing of data concerning health) shall not apply where: (b) 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 (...)"*. The Council, in its capacity as employer, is complying with Article 10(2)(b) by processing the data submitted.

### **3.4 Data quality**

Pursuant to Article 4(1)(c) of the Regulation, data must be *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"*. The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation to the processing operation. In this regard the EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been complied with.

Moreover, the data must be processed *"fairly and lawfully"* (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see point 3.2 above). Great care must be taken to be fair on such a sensitive subject. This holds for the information which has to be given to the data subjects (see point 3.9 below).

Lastly, the data must be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified"* (Article 4(1)(d) of the Regulation). The procedure as defined requires data to be updated by the data subjects if necessary. Moreover, the data subject has the right to access and rectify data, which helps to guarantee that the data are kept up to date and that the file is as comprehensive as possible. These rights are the second way of ensuring data quality. See point 3.8 below on these two rights.

### **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"*.

For the record, the appointing authority's decision is placed in the data subject's personal file. It is stored for up to thirty years after the data subject has left the Council (paper version).

Since it is only the appointing authority's decision which is kept on file, the EDPS considers this an acceptable length of time.

There are no limits on the length of time for which data may be stored in electronic format (in ARPEGE), but this point is under review. The EDPS recommends that an appropriate and proportionate data storage period should be set.

Long-term data storage must be accompanied by appropriate safeguards. The data that are being kept are sensitive. The fact that they are archived for long-term storage does not make them any less sensitive. Accordingly, even where long-term storage is concerned, appropriate transmission and storage measures must be applied when handling this data, as is the case for all sensitive information. The EDPS emphasises that a maximum storage period should be set, even for long-term retention.

According to the notification, there is no question of the data's being stored for historical, statistical or scientific reasons.

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

Data are retrieved from or entered into the staff databases (ARPEGE and GPWin). The processing under review involves no general change in the purpose of staff databases, and is not incompatible with that purpose. Article 6(1) of Regulation (EC) No 45/2001 does not therefore apply in this instance and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

### **3.7. Transfer of data**

The processing must 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 under consideration involves a transfer within one and the same institution, within one and the same Directorate (Individual Entitlements Unit and Salaries Unit and the IT support team).

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 various Council departments. The case may also involve a transfer between institutions, since if the official is transferred to another institution; the appointing authority's decision is forwarded to the other institution if the double allowance is still being paid. 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*". Anyone receiving or processing data in connection with the procedure for granting double child allowance for a dependent handicapped child must be informed that the data may not be used for any other purpose.

### **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. Article 14 of Regulation (EC) No 45/2001 establishes the data subject's right of rectification. Just as data subjects have a right of access, they may also alter their personal data directly or have them altered, if necessary.

The rights of data subjects are guaranteed under Section 5 of the Council Decision of 13 September 2004 (2004/644/EC) on the procedure for data subjects to exercise their rights. Obviously it must be possible for the child concerned (depending on his/her handicap and level of maturity) or any other legal representative or authorised person to exercise those rights of access and rectification, by decision of the appointing authority. Provided that this provision is covered by Section 5 of the Council Decision of 13 September 2004, all the provisions of Articles 13 and 14 of the Regulation have been complied with.

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

Regulation (EC) No 45/2001 provides that the data subject must be informed of the processing of his or her personal data and lists a series of particulars that must be given in that information. In the present case some of the data are obtained directly from the data subject and some from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information of the data subject applies in this case as the data subjects themselves fill in the data they are asked for.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information of the data subject also applies here, since information is obtained from various persons involved in the process, in particular from the Medical Service.

In the present case data subjects are given information in a note on the protection of personal data, but this is supplied with the medical certificate which they have to have filled in, i.e. at the beginning of the procedure. It does not cover the procedure for implementing the medical officer's conclusions. The EDPS therefore requests that the controller should draw up a comprehensive information note setting out all the provisions of Articles 11 and 12 of Regulation No 45/2001 or supplementing the note provided by the medical officer.

### **3.10. Security**

In accordance with Article 22 of Regulation (EC) No 45/2001 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 the consultation of files by data subjects and the retention of such files. It may therefore be regarded as complying with 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:

- set an appropriate and proportionate period for the retention of data in ARPEGE;
- provide appropriate safeguards for long-term data storage;
- inform recipients that the data cannot be used for any other purposes;
- draw up an information note on the procedure for implementing the medical officer's conclusions on the award of double child allowance for a handicapped dependent child or supplement the note provided by the medical officer when the handicap is assessed.

Done at Brussels, 29 September 2008

(Signed)

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