

Opinion on a notification for prior checking received from the Data Protection Officer of the Council on the "procedure in the event of absence owing to illness or accident"

Brussels, 11 November 2008 (Dossiers 2008-0271 and 2008-283)

1. Procedure

By letters received on 5 May 2008 and 13 May 2008, two notifications pursuant to Article 27 of Regulation (EC) No 45/2001 were sent by the Council's Data Protection Officer (DPO) to the European Data Protection Supervisor (EDPS) concerning the "procedure in the event of absence owing to illness or accident". The two elements of this case ("data processing by the Medical Officer" - 2008-0271 - and "management of medical absences" - 2008-0283) were combined.

The notifications were sent together with a number of documents, including:

- Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident (Articles 59 and 60 of the Staff Regulations)
- Staff Note No 141/05 of 13 July 2005 setting out useful information in the event of illness or accident
- Form to be sent to the Medical Secretariat to obtain permission to spend sick leave elsewhere than at the place of employment
- seven specimen notes (non-acceptance of a medical certificate, medical absence which needs to be regularised, late submission of a medical certificate, reminder that the original certificate is required)
- four specimen letters (summons to attend for examination, summons to attend for examination following an application to work part-time for medical reasons, summons to attend for examination on certain conditions with or without a request to submit a report, request for a medical report, reminder type 1 and 2).

In connection with this case, questions were put to the controller via the DPO on 19 June 2008. The controller replied on 27 June 2008. To enable the controller to check and complete the facts, the "facts" section of the draft opinion was sent for consultation on 1 July 2008 and received on 11 September 2008. The draft opinion was sent to the DPO and the controller for consultation on 16 September 2008 and received on 3 November 2008.

2. Facts

Absences owing to illnesses are managed by a specific Medical Absences Management Department, responsible for officials, temporary staff, contract staff and seconded national and military experts working at the Council.

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

Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident (Articles 59 and 60 of the Staff Regulations) sets out the rules for implementing this provision.

Purposes of the processing operation

The purpose of the processing operation is to ensure compliance with all statutory and other regulations concerning absence owing to illness or accident and to prevent unjustified medical absences.

Procedure in the event of absence owing to illness or accident - submission of the medical certificate

An official who is unable to work owing to illness or accident is normally obliged to submit a medical certificate². The certificate must be handed or sent to the Medical Absences Management Department.

The medical certificate must indicate:

- the official's surname, forenames and date of birth,
- the dates when the official's inability to work began and when it ended, or is expected to end,
- the doctor's stamp and the date of issue of the certificate.

The medical certificate does not normally contain information on the nature of the illness or accident, such as diagnoses.

Recording and management of absences

Medical certificates are managed by the Medical Absences Management Department, which is part of the Welfare Unit.

Data on absences owing to illness or accident are recorded in the GFI Chronogestor system, which is networked with the Leave Department. Annual leave, special leave, sick leave etc. are recorded in this system. In addition to data entered by the Medical Absences Management Department and the Leave Department, staff in these departments have access to the following information:

- clocking data: date, time, terminal, etc.
- absences: missions, medical examinations, time off for health reasons, flexileave, etc.,
- regularisation requests submitted to the time manager,

¹ See Articles 16, 59, 60 and 91 of the Conditions of employment of other servants (CEOS) for other staff members.

² Some short absences are accepted without a certificate, in accordance with Article 59(2) of the Staff Regulations.

- anomalies in individual counters.

Medical Absences Management Department staff also have access to the GPWINN personnel database and to certain data produced by other departments:

- monthly lists, computerised and manual, showing the number of days' absence for medical reasons over the last 3 years (forwarded by the Leave Department);
- administrative notes on referrals and the administrative conclusions of invalidity committees (forwarded by the Medical Service);
- lists of staff retiring (forwarded by the Pensions Department).

The following arrangements are also in place:

- the Accident Insurance Department automatically sends the Medical Absences Management Department a copy of the accident reports it receives (report + medical certificate);
- the Medical Absences Management Department automatically sends the Accident Insurance Department the (original) accident medical certificates it receives.

The Examining Doctor draws up and retains various documents relating to medical absences:

- opinions regarding fitness to work,
- opinions in connection with applications to work part-time for medical reasons,
- opinions in connection with applications under Article 60 (for permission to spend sick leave elsewhere than at the place of employment),
- comments, and records of participation in meetings, in connection with the medical/legal and medical/administrative aspects of the medical absence procedure,
- anonymised statistics,
- notes concerning non-acceptance of certificates which have not been correctly drawn up,
- various administrative notes.

Decision-making process leading to a summons to attend for a medical examination

The decision to carry out a medical examination is normally taken by the Examining Doctor on the basis of medical certificates received and recorded by the Medical Absences Management Department. To that end, he will take into account the following criteria based on verifiable administrative information:

- total number, frequency and duration of days of absence owing to illness,
- repeated requests for permission to spend sick leave elsewhere than at the place of employment,
- link between the medical certificate and a holiday,
- late submission of medical certificates,
- systematic use of days of absence without a medical certificate.

A medical examination may also be carried out if the person's immediate superior expressly makes such a request, stating reasons, in writing or by electronic mail, to the Examining Doctor. A copy of that request will be forwarded to the Director of Personnel, to the person concerned, and to the applicant's immediate superior.

In all cases, the Examining Doctor is responsible for assessing, on the basis of medical certificates or in the light of any other information he receives, whether a medical examination is necessary.

The Examining Doctor sends a list of names of officials who may be examined to the heads of the Medical Department, Welfare Unit and Personnel Department, who may submit any arguments of which they are aware suggesting that the Examining Doctor should not examine any particular official. They do so by means of a password-protected e-mail. Each new e-mail causes the previous e-mail to be replaced in, and deleted from, the Examining Doctor's inbox. This list is also sent to the head of the Sickness Insurance Department so as to avoid a medical examination during any period of hospitalisation which that department has been informed of via a request for direct billing.

Officials who are not examined, in view of the arguments submitted to the Examining Doctor, are not informed of the "non-examination". The other officials are examined.

Arrangements for examinations

The Examining Doctor summons the official to attend the medical examination or asks him to submit a detailed report from the doctor who issued the certificate or any other relevant medical document (for instance a copy of specialised examination results or hospital reports), within a time-limit which he determines and at the Institution's expense within the limits of the maximum fees laid down for reimbursement of the annual medical examination.

The Examining Doctor may also contact the doctor who issued the certificate in order to elicit if necessary information on the medical aspects of the dossier and examine with him the conditions under which the official might return to work.

The official will be summoned to attend the Examining Doctor's surgery by a letter sent to his home or to his last known address, as well as by means of a note to his administrative address.

The official may, should he consider it appropriate, be accompanied by his doctor, a relative or a person of his choice. If, for medical reasons, the official is unable to travel, he must inform the Examining Doctor at once. In that case, the examination may be held at the place where the official is staying.

Checks on absence owing to illness may also be made at the official's home. Such checks are carried out at the request of the Examining Doctor or, at his request, by an external doctor designated by the Appointing Authority. Should the official not be at home, the doctor responsible for the examination will leave a notification in his letterbox informing him of the arrangements for another examination. Failure to comply with that notification without a valid reason will be taken as failure to attend for an examination.

Failure to attend for an examination without a valid reason will be taken as refusal to undergo a medical examination. The official's absence is considered as unjustified from the day the examination was due to take place. The official may also face disciplinary action.

Examination by the Examining Doctor and outcome of the examination

The sole purpose of the examination is to assess the state of health of the official or other servant concerned in order to determine whether he is fit to return to work.

The Examining Doctor questions and (where the alleged medical condition so warrants) examines the data subject. A medical report is not drawn up following the examination. If, however, the examination confirms that the official is fit to work, a note to that effect is sent to the head of the Welfare Unit (with a copy to the Director of Personnel). The note does not

contain any diagnostic information. A copy of the note is sent to the data subject. If the Examining Doctor concludes that the official is not fit to return to work, no document is drawn up.

After the medical examination of an official whose absence is still covered by a certificate, the Examining Doctor gives his opinion as to whether the official is fit to return to work. If the examining doctor finds that the official is unfit to return to work, the official remains on sick leave for the duration covered by the certificate.

If the Examining Doctor finds that the official is fit to return to work, the Director of Personnel will then write to him requesting him to return to work on a given date, enclosing the Examining Doctor's reasoned opinion. If the official does not return to work on that date and his absence is not covered by a medical certificate, that absence will be regarded as unauthorised.

If the data subject does not accept the Examining Doctor's conclusions, the official or a doctor acting on his behalf may, within two working days of receipt of the request by the Director of Personnel to return to work on a particular date, send the Appointing Authority a request for arbitration by an independent doctor in accordance with the fifth subparagraph of Article 59(1) of the Staff Regulations.

Any official may, within three months, lodge a complaint against an act adversely affecting him under Article 90(2) of the Staff Regulations.

Information to be given to the data subject

Data subjects are informed via:

- Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident (Articles 59 and 60 of the Staff Regulations),
- Staff Note No 141/05 of 13 July 2005 setting out useful information in the event of illness or accident.

These documents describe the procedure for submitting medical certificates and the arrangements for and consequences of a medical examination.

There is no specific confidentiality statement for this processing, nor is one sent to the data subject when he is summoned to attend a medical examination.

Rights of data subjects

An official who has been examined only receives the Examining Doctor's decision via the Administration if the Examining Doctor concludes that the official is fit to work. The Examining Doctor allows access to medical reports which he has received directly from the official in connection with the medical examination. If a report has been sent directly to him by a healthcare provider without a copy being sent to the patient, the Examining Doctor first contacts the healthcare provider to ensure that there is no objection to his forwarding the document(s) concerned). Exceptionally, a decision may be taken on medical grounds not to release a document to a patient unless specific support is available to him when he receives the document.

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

Data retention

Medical documents received by the Examining Doctor in connection with the examination are retained for a period of 30 years, in accordance with Article 46 of the Code of Medical Ethics drawn up by the National Council of the Belgian Medical Association.

Other documents processed by the Medical Absences Management Department (medical certificates, requests under Article 60, etc.) are retained for the following periods:

During a staff member's service, computerised and manual personal data are erased/destroyed three years after the year in which they were recorded, save as expressly stipulated by the Appointing Authority or, in the event of any challenge, pending expiry of the last possible time limit for appeal.

Retirements, deaths: personal files and electronic files are retained for two years after the termination of the staff member's service.

Invalidity: the same files are retained for two years after the statutory retirement age.

At the end of the specified data retention period, manual files are destroyed and computerised files deleted.

Statistics on medical absences are produced by the Medical Absences Management Department.

Data recipients

- The Institution's Medical Officer: list of examinations planned; at his request, calendar of periods of sick leave (for the purpose of convening invalidity committees); the medical documents supplied at the time of the examination, once the express written permission of the official concerned has been obtained.
- Data subject's doctor: the medical documents received at the time of the examination (at the express written request of the official concerned).
- Head of the Welfare Unit: notes following submission of a certificate outside the time-limits laid down by Staff Note 65/04 (for signature); notes confirming fitness to work, without any indication of the nature of the medical condition; various administrative notes; list of examinations planned.
- Director of Personnel: notes confirming fitness to work, without any indication of the nature of the medical condition; various administrative notes.
- Head of the Personnel Management Unit: list of examinations planned; opinions in connection with requests under Article 60.
- Leave Department:
 - copies of notes following submission of a certificate outside the time-limits laid down by Staff Note 65/04,
 - forms for requests under Article 60 (the reason for the request is not transmitted).

- Heads of language units: medical documents for translation.
- handwritten documents and short typed documents are sent directly to heads of language units according to the language in which they are written. They do not pass through the typing pool.
- long typed documents (more technical documents such as medical reports) are sent directly to the head of the English or French language unit.

The name, and any data in the document which could enable the data subject to be identified, are concealed (insofar as these data can be identified). Documents are sent by internal mail in a recognisable envelope (pre-printed with details of the sender).

In the case of an arbitration procedure, the data are sent to an independent external doctor.

In certain exceptional cases involving litigation, administrative data may be passed to the Legal Service of the Council, to the Civil Service Tribunal, the European Ombudsman and the EDPS.

Security measures

[...]

3. Legal aspects

3.1. Prior checking

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

The processing is partly automated (recording of sick leave and archiving of mail, medical documents, opinions and notes issued by the department responsible). Some operations are still carried out manually (medical certificates and reports addressed to the Examining Doctor, letters drawn up by the Examining Doctor, etc.)

Consequently, such processing 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 European Data Protection Supervisor.

Article 27(2)(a) of the Regulation states: "*the following processing operations are likely to present such risks: processing of data relating to health ...*", which is the case here since the data undoubtedly fall within the scope of "data relating to health".

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, since the notification was submitted late the check is ex-post. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The notification from the Council's Data Protection Officer was received on 5 May and 13 May 2008. Pursuant to Article 27(4) of the Regulation, the European Data Protection

Supervisor should have delivered his opinion within two months. Taking into account the 97-day suspension + the month of August, the European Data Protection Supervisor will give his opinion no later than 11 November 2008.

3.2. Lawfulness of the processing

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

Checks on absences due to illness are carried out not only in the context of the management and functioning of the institution but also on the basis of the Staff Regulations, which were adopted under the Treaties³. The processing operation is therefore lawful.

As stated in the Facts section, under Article 59 of the Staff Regulations⁴, "*an official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave*". Furthermore, "*the official [on sick leave] may at any time be required to undergo a medical examination arranged by the institution*". Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident lays down the implementing rules for examinations.

The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and 10(3). The present case very clearly relates to the processing of personal data on health.

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

3.4. Data quality

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

As regards the data requested on the medical certificate (official's surname, forenames and date of birth, dates when his inability to work began and is expected to end, doctor's stamp and date

³ Article 59 of the Staff Regulations

⁴ Articles 16, 59, 60 and 91 of the Conditions of employment of other servants (CEOS) provide that the same arrangement applies to temporary agents, contractual agents and SNEs.

of issue of the medical certificate), the EDPS considers that the data are adequate, relevant and not excessive for the purpose of monitoring and managing absences. The EDPS is fully satisfied that the medical certificate does not normally contain information on the nature of the illness or accident, such as diagnoses.

As regards the standard forms attached to the notification, namely: request to spend sick leave elsewhere than at the place of employment, note concerning absence for medical reasons to be regularised, note concerning late submission of a medical certificate, note requesting submission of the original medical certificate, summons to attend a medical examination and request for a medical report, the EDPS considers that the data are adequate, relevant and not excessive for the purpose of monitoring and managing absences.

As regards the data which the Examining Doctor may request the data subject to supply, namely a detailed report from the doctor who issued the certificate or any other relevant medical document (for instance, copy of specialised examination results or hospital report), these are documents containing medical data. The Examining Doctor is responsible for deciding, on the basis of objective criteria, whether it is legitimate to request these documents in order to assess whether an examination is required.

The EDPS is fully satisfied that the note drawn up following the examination stating that the data subject is fit to work contains that information only, and does not include any information on the nature of the illness or accident, such as diagnoses.

Under Article 4(1)(d) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date*", and "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.*" The procedure in place gives sufficient cause to believe that the data are accurate and kept up to date on the basis of the data subject's state of health. Documents relating to absences (certificates and in some cases medical reports) are normally submitted by the data subject, who can check that the factual data relating to him/her are accurate. The arbitration procedure also provides a certain degree of assurance that the data concerning the data subject's state of health are accurate.

The data subject can also exercise the right to access and rectify the factual content of the files (see section 3.8 below).

Lastly, the data must be "*processed fairly and lawfully*" (Article 4(1)(a)). The matter of lawfulness has already been analysed (see section 3.2 above). Given the sensitivity of the subject, fairness is an issue which warrants considerable attention. It is linked to the information to be given to the data subject (see section 3.9 below).

3.5. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

As regards the documents processed by the Medical Absences Management Department (medical certificates, requests under Article 60, etc.), their retention period, described in section 2 above, is necessary for the purposes of this processing operation.

The reports collected by the Examining Doctor are retained for a period of 30 years. The controller argues that this retention period is justified in view of Article 46 of the Code of Medical Ethics drawn up by the National Council of the Belgian Medical Association, since the Examining Doctor has the status of a contractor. The EDPS considers this period to be too long and unnecessary for the purposes of the processing operation. This processing operation, carried out by a Community institution, is governed by Community law, and national law provisions cannot be invoked in this context, regardless of the status of the Examining Doctor (contract staff member, official, etc.). The EDPS therefore recommends that this retention period be reconsidered in the light of the purposes of the processing operation⁵.

At the end of the specified data retention period, manual files are destroyed and computerised files deleted.

Under Article 4(1)(e) of the Regulation, data may be stored for a longer period than is required for the purpose for which they have been collected, and especially for statistical use, provided that they are kept either in anonymous form or, if that is not possible, with the identity of the data subject encrypted. In any event, the data may not be used for any purpose other than for historical, statistical or scientific purposes.

According to the notification, anonymous statistics on medical absences are produced by the Medical Absences Management Department. In view of the number of officials and servants employed by the Council, the EDPS is satisfied that these statistical data are indeed anonymous and do not reveal information concerning any individual in particular. He therefore considers that the retention of data for statistical purposes is in keeping with the Regulation.

3.6. Transfer of data

The processing should be examined in the light of Article 7(1) of Regulation (EC) 45/2001 which concerns the transfer of personal data within or between Community institutions or bodies "if *the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

It is necessary for personnel managers (Director of Personnel, heads of the Personnel Management Unit and Welfare Unit) and the Leave Department to be informed of various irregularities identified in the course of managing absences owing to illness, so that they can assess whether the absence is justified or not, and determine any administrative or disciplinary consequences which fall within their sphere of competence. Article 7(1) is therefore duly complied with. As regards these transfers, it should be borne in mind that only relevant data may be transferred and that medical data in the strict sense, relating to the nature of medical condition, may not be transferred in any case.

The transfer of medical data to the institution's Medical Officer is justified, since he may be required to take part in an invalidity committee.

As regards transfers in exceptional cases to other actors such as the Institution's Legal Service, the Civil Service Tribunal, the European Ombudsman or the EDPS, the EDPS considers that these transfers comply with Article 7 of the Regulation since they are, in

⁵ See the opinion of the EDPS of 26 February 2007 in case 2006-532 on conservation periods for medical documents:
http://edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Adminmeasures/2007/07-02-26_conservation_documents_medicaux_EN.pdf

principle, necessary for the legitimate performance of tasks covered by the competence of the recipient. However, the European Data Protection Supervisor wishes particular attention to be paid to the fact that personal data must only be transferred if the transfer is strictly necessary for the legitimate performance of tasks covered by the competence of the recipient. This is particularly important in the case of the transfer of medical reports.

In the event of arbitration, the data may be communicated to an external doctor chosen by common consent between the Examining Doctor and the data subject's doctor. The data subject's doctor may also, outside the context of the arbitration procedure, request that data collected in connection with the examination be transferred to him, provided that the official concerned gives his permission.

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

In the unlikely event that the doctor is in a country which has not adopted legislation transposing Directive (EC) 45/96, Article 9 of the Regulation applies. Under Article 9, transfer may only take place to a country offering an adequate level of protection. If the level of protection is not adequate, the data subject must give his consent to the transfer in accordance with Article 9(6)(a).

Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". There should be an explicit assurance that no individual receiving and processing data can use them for other purposes. In particular, medical data transmitted in connection with checks on absences may not be used for purposes of preventive medicine.

3.7. Processing including the personnel or identifying number

The data subject's staff number is given on some forms produced by the department responsible for the processing operation, for instance on the form for requests to spend sick leave elsewhere than at the place of employment. In this case the use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the personal data controller. That said, such use may have important repercussions, which is why the European legislator decided to regulate the use of such identifiers or personal numbers under Article 10(6) of the Regulation. In this instance, the Council's use of the staff number is reasonable because it provides a better means of monitoring the management of absences.

3.8. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 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 any available information as to their source.

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

The right of access and rectification is governed by Section 5 of the Council Decision of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 (2004/644/EC)⁶. No specific rules have been laid down by the Medical Absences Management Department.

In this case, it should be noted that the data subject is informed of the results of the examination carried out by the Examining Doctor as soon as possible, if the Examining Doctor's opinion is negative. In the case of a positive opinion, it should be borne in mind that the data subject may also exercise the right of access to his file.

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

As regards medical data, the arbitration procedure constitutes an appropriate means of rectification. Bearing in mind the specific nature of medical data, and given that the accuracy or completeness of such data is difficult to guarantee, the EDPS is of the view that the Regulation has been complied with since an arbitration procedure can be initiated.

As regards factual data, the EDPS recommends that a procedure for access to and rectification of data be established within the Medical Absences Management Department.

3.9. Information to be given to the data subject

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

These provisions apply in this case, since information is collected from the data subject and from the various actors involved in the process (data subject's doctor, independent doctor in the event of arbitration, etc.).

The EDPS notes that the provision of information to data subjects is particularly unsatisfactory. The Staff Notes describing the procedure to be followed in the event of absence are clearly not sufficient to comply with the provisions of the Regulation.

The EDPS recommends that a privacy statement be drawn up and added, in every case, to summonses to attend for an examination and requests for a detailed report from the data subject's doctor. This statement must indicate the legal basis of the processing operation; the identity of the controller; the purpose and stages of the procedure; the categories of data concerned; the potential recipients of the data; the existence of a right of access and rectification and the arrangements for exercising it; the data retention period and the

⁶ OJ L 296, 21.9.2004, p. 20.

possibility of recourse to the EDPS. The EDPS is of the opinion that this statement should also be displayed on the Council's Intranet site, on the page concerning absences owing to illness. It should also be incorporated into a future Staff Note describing the procedure to be followed in the event of absence. This would help to ensure the greatest possible transparency in relation to data subjects.

3.10. Security measures

Under Article 22 of Regulation (EC) No 45/2001 concerning the security of processing, "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*".

The EDPS considers that, on the basis of the information supplied in the notification, Article 22 is complied with.

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 period for which data are retained by the Examining Doctor should be reconsidered;
- all members of the Medical Absences Management Department and the Council's Medical Service who receive and process data should be explicitly reminded that the data may only be used for the legitimate purposes of the procedure in question;
- a specific procedure for access to and rectification of data should be put in place;
- data subjects should be provided with appropriate information in accordance with section 3.9 of this opinion.

Done at Brussels, 11 November 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor