

## **Opinion on the notification for prior checking from the Data Protection Officer of the GSC of the European Union on the "*Supplementary aid for the disabled*" case**

Brussels, 25 November 2008 (Case 2008-388)

### **1. Proceedings**

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "*Supplementary aid for the disabled*" case was given by the Data Protection Officer ("DPO") of the Council of the European Union ("GSC") on 23 June 2008.

Questions were put to the DPO of the GSC by e-mail on 24 July 2008. Replies were sent to the EDSP on 5 August 2008. On 22 September 2008 the draft opinion was sent to the DPO of the GSC for comments. Comments were supplied on 18 November 2008.

### **2. Facts**

Personal data on "*Supplementary aid for the disabled*" are processed in the Welfare Unit of the General Secretariat of the Council (Welfare Unit) as part of a policy of social assistance for disabled persons.

#### **Data subjects**

The data subjects are officials and temporary staff in active employment, retired officials and members of the family of an official or temporary member of staff (spouses and children).

#### **Purpose**

The purpose of the processing operation is to cover the non-medical expenses of a disabled person, with the individual making a contribution. After exhausting the possibilities of national aid under the Staff Regulations, and under conditions established by the 2004 Guidelines (see below, Legal basis), the data subject can request aid, and data are then collected for the purposes of payment/reimbursement of bills and establishing the level of the individual's contribution.

#### **Legal basis**

The legal basis for the processing operation is a decision by the Board of Heads of Administration taken at its meeting on 28 April 1994, based on Article 76 of the Staff Regulations, approving provisional guidelines for the implementation of the budget heading "*Supplementary aid for the disabled*" relating to appropriations intended for social assistance for disabled persons ("*the Guidelines*"). The latest revised version of the Guidelines, which entered into force on 1 May 2004, is available on the GSC's DOMUS site; it was made public through a Staff Note, No 186/05, issued on 28 October 2005, entitled "*Non-medical expenses resulting from a disability*". The controller states that these guidelines are currently still under

discussion in a subgroup. The conclusions of this subgroup have to be approved by the Board of Heads of Administration before the Guidelines can be adopted as a GSC Decision.

In addition to the other supporting documents provided by the data subject in the course of the processing operation, the data subject must also complete and sign a note authorising the salaries department to deduct a certain amount from his/her remuneration pursuant to the Guidelines.

### **Procedure**

Pursuant to Article 4.1 of the Guidelines, a person is considered to be disabled if he/she is suffering from severe deficiencies, disabilities, or handicaps resulting from physical impairment, including sensory, mental or psychological impairment, which limit or impede integration or prevent the person from performing an activity or function considered normal for a human being. To be eligible for financial support, the person concerned must be at least 30 % physically disabled and/or at least 20 % mentally disabled according to the evaluation of the institution's medical officer based on the scale laid down by the Interinstitutional Medical Board.

Certain appliances (see Article 5.2) may be reimbursed

- on the basis of a detailed report by the disabled person's doctor
- on presentation of a least two estimates by the person concerned
- after the GSC's medical officer or, if expenses are to be reimbursed by the Joint Sickness Insurance Scheme (JSIS), the medical officer of the Settlements Office has delivered his/her opinion and
- after the disabled person has claimed all possible national aid.

These conditions do not apply to residential costs, or the costs of education or training, care or transport (except transport by taxi, where a prior estimate is also required (Article 5.1(d)).

The application for recognition of a disability must be submitted to the GSC's AA by the person concerned. It should include a detailed assessment by the person concerned of the measures necessary to offset the effects of the disability and facilitate social integration. It should be submitted together with a medical report, under sealed cover, by the person's doctor, which, in so far as this is possible, should propose a degree of physical and/or mental invalidity. The GSC's Appointing Authority (AA) forwards the medical report to the GSC's medical officer for an opinion (Article 4.2 of the Guidelines).

The GSC's medical officer assesses the disability and issues an opinion on the degree and duration of the disability. The GSC's Welfare Unit prepares a decision recognising the disability and granting aid. At this stage, pursuant to Article 4.4 of the Guidelines, the AA may consult the ad hoc Committee, which assesses the social integration problems resulting from the disability and delivers an opinion on the measures which the person concerned advocates to offset its effects. The ad hoc Committee consists of a GSC medical officer, the social worker and the administrator responsible for the case concerned, and, where appropriate, two experts appointed by the GSC according to the nature of the disability. The two experts are to be chosen in Belgium by the GSC's medical officer. Where necessary, the experts will give their opinion on the disability and will supply additional information on the measures advocated. They will be requested to supply a service in the same way that the GSC's medical officer does in an invalidity procedure. The Welfare Unit does not supply data to the experts. It is the GSC's medical officer who receives the medical file and forwards it (in whole or in part) to the experts.

The social worker makes an oral presentation on the needs (i.e. a special school or institution or other treatment) and the arrangements for the disabled person proposed by the person concerned and the disabled person's doctor in the application to the GSC's AA. The ad hoc Committee gives its opinion on whether these arrangements are compatible with the Guidelines and checks whether there are sufficient funds available in the budget. The ad hoc Committee sends a written opinion to the AA in order that it can take an official decision and inform the person concerned.

The AA takes its decision on the basis of the medical officer's opinion and, where applicable, the opinion of the ad hoc Committee. The decision specifies the services to be covered by the financial support granted by the institution. It is notified to the person concerned (Article 4.5 of the Guidelines).

Financial support from the GSC is granted on presentation of original itemised bills specifying the nature of the expenses incurred and the corresponding amounts. Where it is impossible to supply itemised bills serving to distinguish between medical and non-medical expenses, on receipt of a bill from the person concerned at the Welfare Unit, the social worker asks the Settlement Office's medical officer whether it contains medical expenses in order to determine the exact amount of non-medical expenses and thus how much the person concerned must contribute from his/her own pocket. The Settlement Office determines the portion chargeable to the JSIS and, after setting the rate, forwards the bill to the Welfare Unit. The social worker then prepares the documents necessary for the accounts office to pay the bill or reimburse the expenditure.

### **Data processed**

The processing is both manual and automated (with SAP, "*Systeme, Anwendungen und Produkte der Datenverarbeitung*" and the IT medium which processes all accounting procedures).

The data processed manually are

- the calculation by the Welfare Unit of the rate of the personal contribution in the light of the provisions of the Guidelines and the documents submitted by the applicant
- the calculation by the Welfare Unit of the personal contribution to be deducted from the person's salary
- the authorisation signed by the applicant allowing this amount to be deducted by the salaries department and
- the payment order prepared by the Welfare Unit. The Welfare Unit prepares a payment file on paper (bill showing the name, address, amount, name of the special institution, calculation of the rate of personal contribution and calculation of the personal contribution to the bill).

The automated data processing (using ACCESS, WORD, EXCEL and SAP software) involves the following data:

- first name and surname of the data subject
- personnel number
- date and period of validity of the decision by the Welfare Unit granting financial aid
- name and address of the special school or institution
- rate of personal contribution from the data subject
- bills: using SAP software, the social worker monitors all payments of bills and personal contributions. In particular, this involves data relating to the taxable amount of the salary of the data subject, the taxable amount of the income of a spouse not working in

the institutions and other income/allowances/grants. A "payment request" document is issued, which is the basis on which the accounts office pays the sums required.

No data are extracted from a database. All the data are supplied by the applicant for supplementary aid.

### **Recipients**

Recipients in the course of the processing operation are as follows:

- the GSC's medical officer receives the medical report from the data subject's doctor
- the social worker receives documentary evidence of the professional income of the official/other servant and his/her spouse and any other income (retirement pensions, family allowances, chronic sickness allowances, etc.) referred to in Article 8.1 of the Guidelines
- the Settlement Office's medical officer checks bills to determine the percentage of medical costs chargeable to the Settlement Office
- the accounts department receives the bill and the supporting documents for the payment and the personal contribution, and
- the pay office receives a copy of the bill, a copy of the calculation of the personal contribution and a copy of the SAP accounting document (payment request) for the purposes of recovery from the salary of the official/other servant.

### **Right of access, rectification, blocking and erasure**

The rules applicable here are set out in Section 5 of the Council Decision of 13 September 2004, which lays down the procedures for the exercise of rights by data subjects. Data subjects can contact the Welfare Unit in writing in order to exercise their rights.

In cases where the data subject requests that data be blocked or erased, this is done the same day by the controller. If the data are processed in a computer, a maximum period of two days is necessary to stop all processing by the pay, accounts and settlements departments.

### **Right to information**

As soon as a data subject comes to talk to the social worker, he or she is able to read an information note for all aid applicants which is posted on the door to the office. The social worker also informs the data subject that social workers are subject to a duty of professional secrecy and that their conversation will be kept confidential.

This information note gives Regulation No 45/2001 in the subject line. It indicates the identity of the controller, the purpose of the processing, the existence of a right of access and rectification, the legal basis for the processing operation and the data storage period. The information note also states that there is a right of recourse to the EDPS.

### **Data storage**

The social worker's notes are usually destroyed once the AA has taken its decision. If the social worker takes personal notes, it is stated that they are kept on file at the Welfare Unit in the same way as data referred to in the EDPS's opinion on the GSC's social service (case 2004/255). According to the controller, the principle of access to these notes is clear: Article 20(c) of Regulation No 45/2001 will apply whenever access is requested.

All medical reports are kept in the data subject's medical file.

The AA's decisions and documentary evidence of income are held in the data subject's personal file, which is kept by the Administration, until such time as the institution stops its financial aid. In particular, if the medical officer has recognised the disability for a two-year period, the file is kept for two years. If the decision is not extended, the file is destroyed. If it is extended, the same file will continue to be kept. The new decision extending the aid will be added to the file. It is up to applicants themselves to submit any new application. If the medical officer has recognised the disability for an unlimited period, the file is kept while there is still a possibility that applications for payment/reimbursement may be submitted. It is therefore possible that the file may be kept for the whole of the disabled person's life.

If the AA rejects an aid application, then the welfare unit does not keep the file.

Bills and calculations of the amount of the personal contribution are kept (on paper) for five years. Every time a new bill is encoded in the computer and processed, the data on the last bill are automatically deleted.

For budget management purposes, an IT programme keeps total annual amounts grouped under a figure, not by officials' names. There are no plans to destroy these data. In particular, as it is the Welfare Unit which manages this budget heading, it must be able to demonstrate to budget units and to the AA, at any time, the extent of current needs and the trend over time, fluctuations in the prices of bills, the ratio between the number of disabled persons and prices, and the figures used to prepare the new budget, etc.

### **Storage and security measures**

Data on paper are held in a file which is kept in a locked cupboard in an office with an electronic lock which can only be opened using a staff card.

The data in a computer database are password-protected. For reasons of backup, this database is saved every day on the GSC's central server. There are therefore two versions in existence: the version for the particular day and the previous day's version. A password is always required for access. The Information Technology Division (ITD) which is a department of the division in charge of IT at the GSC, has made the coding of the ACCESS software itself available to the Welfare Unit, at its request, as the only additional means to the password.

## **3. Legal aspects**

### **3.1 Prior checking**

Regulation (EC) No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)). In the case in point, the data processing is carried out by the GSC and falls within the scope of Community law since it is part of activities under the first pillar.

The processing of data collected on supplementary aid for the disabled is both manual and automated. The data are therefore subject to manual processing intended to form part of a filing system and to processing partly by automated means. Article 3(2) of the Regulation is thus applicable in this case.

Accordingly, the processing falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes 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 subject to prior checking by the EDPS. Article 27(2)(a) presents "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*" as processing operations likely to present such risks, and Article 27(2)(b) refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". In the case in point, data on health are processed, because supplementary financial aid for disabled persons can only be granted on the basis of medical reports and invoices concerning the treatment necessary for the disability. Furthermore, supporting documents on occupational income, retirement pensions, family allowances and other information given to the Welfare Officer etc. are provided, so a number of aspects of the data subject's individual situation are assessed, namely financial, family, occupational and social circumstances. This processing operation therefore falls within the scope of the prior checking procedure based on Article 27(2)(a) and (b) of the Regulation.

The EDPS wishes to point out that the processing operation in relation to the form assessing a handicap has already undergone prior checking<sup>1</sup> and will not be reconsidered in connection with this processing operation.

In principle, checking by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed *ex post*. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The formal notification was received by letter on 23 June 2008. In accordance with Article 27(4) of the Regulation, the two-month time limit within which the EDPS must deliver an opinion has been suspended. Taking into account the ...days of suspension, the EDPS will thus deliver his opinion by 2 December 2008 at the latest (12 days of suspension + month of August + 57 days for comments).

### **3.2 Lawfulness of processing**

Article 5 of Regulation (EC) No 45/2001 provides that personal data may only be processed if at least one of its five conditions are met.

The processing operation under examination meets the condition in Article 5(a) of the Regulation, in accordance with which personal data may be processed if "*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 in the legitimate exercise of official authority vested in the Community institution.*"

Three matters have to be considered in relation to this condition: firstly, whether the processing operation is provided for under the Treaties establishing the European Communities or other legal instruments; secondly, whether the processing operation is in the public interest; and thirdly, whether the processing operation is necessary for the performance of the task (the necessity test).

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<sup>1</sup> See Opinion of the EDPS of 7 March 2008 on "form for assessing a handicap", case 2008/0017.

The **legal basis** for the processing operation in this case is Article 76 of the Staff Regulations and the provisions of the Guidelines of 1 May 2004. The EDPS wishes to point out that since the guidelines are provisional, they cannot constitute a legal instrument adopted on the basis of the EC treaties. According to the controller, these guidelines are under discussion in a subgroup and have to be approved by the Board of Heads of Administration before they can be adopted as a GSC Decision. The EDPS acknowledges that the procedure for obtaining the Board's approval is lengthy. Nevertheless, the EDPS wishes to be informed as soon as the provisional guidelines are approved by the Board and finally adopted in the form of a GSC Decision.

As for **the public interest** element, the EDPS considers that the Welfare Unit's action is in the public interest.

**The necessity** of the processing operation is also covered by recital 27 of the Regulation, which 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*". In the case in point, the processing operation for supplementary aid for the disabled is necessary for the management and smooth functioning of the GSC.

The processing operation also meets the requirements of Article 5(d) of the Regulation, whereby the data subject must give his or her consent in order for the processing to be lawful. It is the data subject who must supply all the data required if he or she wishes to receive supplementary aid for a disability, in order that the AA can decide whether or not to grant the aid. In addition to these data, the data subject is also asked to complete and sign a note authorising the salaries department to deduct a certain amount from his or her remuneration, pursuant to the Guidelines.

The processing operation proposed is therefore lawful.

Moreover, data relating to health are among the data which Article 10 of the Regulation classes as "*special categories of data*".

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

Under Article 10(1) of Regulation (EC) No 45/2001, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) or (3) of that Regulation.

The collection of data relating to health is justified under Articles 76 and 76a of the Staff Regulations, as it is necessary in the context of the specific rights and obligations of the GSC in the field of employment law. Processing of such data therefore complies with Article 10(2)(b) of the Regulation, which states that the prohibition on processing data concerning health does not apply where "*processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*".

Furthermore, the prohibition on processing data concerning health does not apply "*where the data subject has given his or her express consent*" (Article 10(1)(a) of the Regulation). In the

case under examination, the data subjects themselves apply to the Welfare Unit for financial aid and it is they who supply the medical reports from their doctors.

Under the procedure, the social worker collects data on the special institution or other treatment during an interview with the applicant. The administrator responsible, one of the members of the ad hoc Committee, is in charge of the case. It is therefore obvious that medical data relating to the nature and degree of the disability are revealed in connection with the data subject. It is stated that the social worker in charge of a file informs the data subject that social workers are subject to a duty of professional secrecy and that conversations will be kept confidential. The EDPS is pleased that the Unit has adopted this practice, which is in line with Article 10(3) of the Regulation. In addition, in order to ensure compliance with Article 10(3) of the Regulation, the EDPS recommends that the whole Welfare Unit team and all those in the various departments in charge of this processing operation be reminded that data relating to health must be processed according to the principle of medical confidentiality and that they are subject to a duty of professional secrecy equivalent to that of a health professional.

### **3.4. Data quality**

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

The data processed in connection with supplementary aid for the disabled described above under Facts are fairly wide-ranging, which makes it relatively difficult to determine whether they are "*adequate, relevant and not excessive*". From a study of the data processed, it seems that they are indeed relevant and proportionate in relation to the purposes for which they are collected. However, it is difficult to determine whether the data collected by the social worker during discussions are "*adequate, relevant and not excessive*". Hence, the quality of these data can only be assessed case by case. It is therefore important that the social worker who takes notes during discussions and the Welfare Unit team in charge of cases are properly informed of their duty to comply with the principle laid down in Article 4(1)(c) of the Regulation.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing operation has already been discussed in section 3.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see section 3.9 below).

Article 4(1)(d) of the Regulation stipulates that data must be "*accurate and, where necessary, kept up to date*". Furthermore, under that Article, "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*". In this case, the data subjects themselves provide the data required (medical reports, administrative and financial data and information for the social worker). There is therefore reasonable cause to believe that the data are accurate and up to date. Furthermore, the right of data subjects to access and rectify is a second means of ensuring that their data are accurate and up to date (see section 3.8 on the right of access).

### **3.5 Data storage**

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



For the record, it is stated that the social worker's notes are kept in the personal file. In addition, files with the AA's decisions and documentary evidence of income are held in the data subject's personal file at the GSC Administration, until such time as the institution stops its financial aid. In particular, if the medical officer has recognised the disability for a two-year period, the file is kept for two years. If the decision is not extended, the file is destroyed. If the medical officer has recognised the disability for an unlimited period, the file is kept while there is still a possibility that applications for payment/reimbursement may be submitted. It is therefore possible that the file may be kept for the whole of the disabled person's life. If an application for assistance is rejected by the AA, the Welfare Unit does not keep the file. As for the social worker's notes, in cases where these are kept and not destroyed once the AA has taken its decision, they are kept in the light of the EDPS's opinion on social service files at the GSC<sup>2</sup>. In that opinion, the unit responsible established the following policy: a period of five years after the death of the data subject, unless there had been a subsequent intervention following decease, in which case five years after the latter intervention. The EDPS found this policy reasonable having regard to the purpose laid down in Article 76 of the Staff Regulations.

The EDPS considers that storing the data for the same period that the supplementary aid is granted is proportionate having regard to the purpose of the processing operation. If the AA rejects an application, the EDPS is happy for the file to be destroyed. Moreover, the EDPS is satisfied that AA decisions and other documentary evidence of financial data should be kept in the data subject's personal file.

As regards social workers' notes, the EDPS considers that a data storage period of five years after the data subject's death, as stated above, is reasonable having regard to the purpose of the processing operation.

Bills and calculations of the amount of the personal contribution are kept (on paper) for five years. Every time a new bill is encoded in the computer and processed, the data on the last bill are automatically deleted. For budget management purposes, an IT programme keeps total annual amounts grouped under a figure, not by officials' names. There are no plans to destroy these data.

The EDPS considers that a data storage period of 5 years for bills is proportionate in the light of Article 49 of the Financial Regulation<sup>3</sup>.

It is stated that there are no plans to erase the total annual amounts kept in the IT system without the name of the data subject. The EDPS considers that given that these data are rendered anonymous, this operation is equivalent to an operation for statistical purposes. It is therefore recommended that these data should not be used for other than statistical purposes.

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

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation. The processing covered by Article 7(1) is the transfer of personal data between or

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<sup>2</sup> EDPS opinion of 6 February 2006, case 2004/255.

<sup>3</sup> Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357 of 31 December 2002.

within Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

To comply with Article 7(1), the GSC must ensure that all the recipients have the appropriate competence and that the transfer is necessary. Here a transfer takes place within the GSC itself, as various units are involved in granting aid for a disability, in particular the Welfare Unit, the GSC's medical officer, the AA, the ad hoc Committee, the accounts office and the salaries department. All recipients have a specific competence and the data transferred to each are necessary for the legitimate performance of the tasks falling within their respective competences. The EDPS therefore considers the transfer acceptable under Article 7(1) of the Regulation.

Furthermore, in accordance with Article 7(3) of the Regulation, which provides that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*, it is essential that anyone at the GSC receiving and processing data in connection with this particular processing operation be informed that the data are to be used solely for the purposes of the processing operation.

According to the procedure, the ad hoc Committee may include two experts appointed by the medical officer to provide additional advice on the disability. In such a case, the GSC's medical officer would forward the medical file to the experts, who would be established in Belgium. This being the case, the experts would be covered by the Belgian legislation adopted for the implementation of Directive 95/46/EC and the processing operation would therefore be scrutinised under Article 8 of Regulation (EC) No 45/2001. This particular transfer is covered by Article 8(b), which states that transfer is possible *"if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced"*. In the present case, given that it is the data subject who applies for the aid and that in some cases the experts' advice could be essential to secure the aid, it is clear that this transfer is necessary and would not prejudice the data subject's legitimate interests.

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

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

Since the personnel number is collected and processed by the GSC's Welfare Unit as part of the processing operation, Article 10(6) applies. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller, its effects may nevertheless be significant. That is, incidentally, 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.

Here, it is not a case of establishing the conditions under which the GSC's Welfare Unit may process an identifying number, but rather of drawing attention to this point in the Regulation. In this instance the GSC's use of identifying numbers is reasonable in that it is intended for the purpose of identifying the data subject and keeping track of the file and is thus a means of facilitating the processing task. The EDPS considers that this number can be used in the management of files relating to the recognition and grant of an aid for disability by the GSC.

### 3.8. Right of access and rectification

Under Article 13 of Regulation (EC) No 45/2001 on right of access, a data subject has the right to obtain confirmation as to whether or not data related to him or her are being processed; information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed, and communication in an intelligible form of the data undergoing processing and any available information as to their source.

For the record, the rules applicable here are set out in Section 5 of the Council Decision of 13 September 2004, which lays down the procedures for the exercise of rights by data subjects. Data subjects can contact the Welfare Unit in writing in order to exercise their rights. Where the social worker takes personal notes, it is stated that they are kept on file at the Welfare Unit in the same way as data referred to in the EDPS's opinion on the GSC's social service<sup>4</sup>. According to the controller, the principle of access to these notes is clear: Article 20(c) of Regulation No 45/2001 will apply whenever access is requested.

In addition, as pointed out in the EDPS's opinion on the GSC's social service, in some cases access to social workers' personal notes may be restricted, under Article 20(1)(c), in order to protect the data subject or the rights and freedoms of others. However, the EDPS does not consider that this restriction warrants a general, absolute refusal to grant access to social workers' personal notes. It is therefore recommended that access should be examined case by case, in the light of the principle of proportionality.

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. This right is somewhat limited as regards medical data, in that it is difficult to guarantee the accuracy or completeness of such data. It may, however, apply to other types of data (administrative or financial data, for example). As regards notes taken by the social worker during discussions, it is obvious that personal notes are subjective assessments. It follows that in the same way that access to the notes must be allowed in the light of the principle of proportionality, data subjects must also always be able to give their point of view and update the information concerning them, particularly in cases where certain subjective assessments could have consequences for the exercise of their rights.

It is therefore recommended that as a general rule, the data subject should be granted a right of access and rectification in respect of social workers' personal notes, in the light of the principle of proportionality, except in the case of legitimate exceptions<sup>5</sup>.

### 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 required to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subject and some from other persons.

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<sup>4</sup> EDPS opinion of 6 February 2006, case 2004/255.

<sup>5</sup> Recommendation adopted by the EDPS in his opinion of 7 March 2008 on the "*form for assessing a handicap*" at the GSC, case 2008/0017 and in his opinion of 6 December 2007 on "*welfare files*" at the EESC and CEO, case 2007/355.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on the information to be given to the data subject applies in this case, insofar as the data subjects apply to the GSC's Welfare Unit and supply the data and supporting documents themselves.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, because the data are collected from the various parties involved in the process (doctor's opinion, opinion of the GSC's medical officer, social worker's opinion, ad hoc Committee, decision of the AA, the accounts department and the financial unit).

For the record, as soon as a data subject comes to talk to the social worker, he or she is able to read an information note for all aid applicants which is posted on the door to the office. The social worker also informs the data subject that social workers are subject to a duty of professional secrecy and that their conversation will be kept confidential. This information note gives Regulation No 45/2001 in the subject line. It indicates the identity of the controller, the purpose of the processing, the existence of a right of access and rectification, the legal basis for the processing operation and the data storage period. The information note also states that there is a right of recourse to the EDPS.

The EDPS welcomes the fact that the information note is displayed visibly and brought to data subjects' attention before they begin to provide the social worker with information. However, the EDPS considers that the information note should also be made available on the DOMUS site, which features the most recent Staff Note of 28 October 2005 and the "*Guidelines*".

The EDPS considers that the content of the note should be improved and expanded. In particular, it is important to stress that the subject of the note is not Regulation No 45/2001, as stated, but the information listed in Articles 11 and 12 of Regulation No 45/2001 which the controller must supply to data subjects when data are collected in the course of a processing operation. The EDPS therefore recommends that the paragraph entitled "subject" should be deleted and replaced by a more detailed explanation of the purpose of the processing operation. The reference to Regulation No 45/2001 should be given in the title of the note. It is also recommended that information be added on recipients, and whether replies to questions are obligatory or voluntary and the possible consequences of failure to reply. In addition, the sentence on the right of recourse to the EDPS should be reformulated in more precise terms, viz. "There is a right of recourse to the EDPS at any time" under Article 11(1)(f)(iii) of the Regulation. The fact that discussions are confidential and that social workers are under a duty of professional secrecy must be mentioned not only orally by the social worker but also in writing in the information note.

In cases where an applicant for aid provides information about another person referred to (a spouse or child, etc.) in the course of the processing operation, it is evident that it would be impossible or involve disproportionate effort for the controller of the processing operation to inform such persons of their data protection rights. In this case, Article 12(2) of the Regulation is applicable. The EDPS therefore recommends that the information note should point out that it is for staff applying for aid to inform persons whom they refer to in their application of their rights under Articles 11 and 12 of the Regulation.

It is also essential that the information note should refer to the fact that, in certain cases, data subjects' rights to access some of the data on their file may be restricted under Article 20(1)(c)

of the Regulation, but that they will be informed of the principal reasons for the restriction in accordance with Article 20(3) of the Regulation.

### **3.10. Processing by a processor**

Where a processing operation is carried out on behalf of the controller, Article 23 of Regulation (EC) No 45/2001 stipulates that the controller must choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by the Regulation. Performance of a processing operation by a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that the processor must act only on instructions from the controller and that the obligations with regard to confidentiality and security of personal data processing are also incumbent on the processor.

For the record, the ad hoc Committee may also include two experts appointed by the GSC in the light of the disability. The two experts are chosen in Belgium by the GSC's medical officer. Where necessary, it is the GSC's medical officer who receives the medical file and forwards it (in whole or in part) to the experts.

The EDPS therefore considers that an order equivalent to a contract or legal act should be concluded between the controller and the experts. In order to comply with Article 23(2)(a) of the Regulation, this order should stipulate that the processor must act only on instructions from the controller. In addition, a data protection provision must be added, referring to data transferred and processed under the processing operation, as data protection principles apply. It is also essential that the contract should be supplemented by a reference to the level of security adopted within the meaning of Article 23(2)(b) of the Regulation. In particular, given that the experts are to be governed by Belgian law, the processor must be subject to the security obligations laid down in national law by virtue of the second indent of Article 17(3) of Directive 95/46/EC. It may be that this obligation, laid down in Article 23(2)(b) of the Regulation, is already covered by the code of medical ethics, but this is an explicit legal requirement in the data protection context.

### **3.11. Security measures**

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 EDPS considers that the set of security measures taken (medical report under sealed cover, electronic lock, password) are such that they can be regarded as adequate within the meaning of Article 22 of the Regulation.

#### **Conclusion:**

The proposed processing operation must take into account the above comments in order to comply with the provisions of Regulation No 45/2001. This means, in particular, that the GSC should:

- inform the EDPS as soon as the provisional Guidelines are approved by the Board of Heads of Administration and adopted as a GSC Decision;

- remind the whole Welfare Unit team and all those in the departments in charge of this processing operation that data relating to health must be processed according to the principles of medical confidentiality and that they are subject to a duty of professional secrecy equivalent to that of a health professional;
- convey to the social worker taking notes during discussions and to the Welfare Unit team responsible for the files that they have a duty to comply with the principle set out in Article 4(1)(c) of the Regulation;
- use the total annual amounts stored without the data subjects' names for statistical purposes only;
- inform anyone at the GSC receiving and processing data as part of the processing operation that the data are to be used solely for the purposes of the processing operation;
- lay down that as a general rule, the data subject should be granted a right of access and rectification in respect of social workers' personal notes, in the light of the principle of proportionality, except in the case of legitimate exceptions;
- ensure that the information note:
  - is available on the DOMUS site, which features the most recent Staff Note, of 28 October 2005, and the "Guidelines";
  - be improved and expanded as set out in section 3.10 of this opinion;
- draft an order with the medical experts stipulating that the processor must act only on instructions from the controller. In addition, a data protection provision must be added, referring to data transferred and processed as part of the processing operation, and a reference to the level of security adopted in the light of Article 23 of the Regulation.

Done at Brussels, 25 November 2008

(signed)

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor