



## **Opinion on the notification for prior checking received from the Data Protection Officer of the Council of the European Union regarding the "Invalidity Committee procedure"**

Brussels, 16 January 2009 (Case 2008-626)

### **1. Procedure**

By letter of 21 October 2008, the Data Protection Officer (DPO) of the Council of the European Union (Council) submitted to the European Data Protection Supervisor (EDPS) a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "Invalidity Committee procedure".

The EDPS has prior checked the processing of "Medical files" by the Council (see EDPS Opinion of 29 May 2006 on the notification for prior checking from the Council regarding the "Medical files" and "Clinic daybook" dossiers, Case files 2004/254 and 2005/363).

Insofar as the personal data collected as part of the Invalidity Committee procedure form an integral part of medical files, their processing must be carried out in conformity with the EDPS Opinion of 29 May 2006, which remains applicable. The present Opinion is supplementary to the EDPS Opinion of 29 May 2006 on Cases 2004/254 and 2005/363 in that it sets out additional recommendations to be followed in the procedure which is the object of the present notification.

On 21 November 2008, the EDPS's draft opinion was sent to the DPO for his comments. Those comments were received on 16 January 2009.

### **2. The facts**

Article 59(4) of the Staff Regulations of Officials of the European Communities (Staff Regulations) provides that "*the Appointing Authority may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years*".

Based on that Article, the Council has established a procedure to obtain a decision from the Invalidity Committee as to whether the official, temporary member of staff or contract member of staff concerned should be granted invalidity or should resume professional activities.

#### **2.1 Process to launch an invalidity procedure**

The invalidity procedure may be launched either at the request of the person concerned or at the request of the staff administration. Where the invalidity procedure is launched by the staff

administration, a referral note is sent by the staff administration to the medical officer controlling the processing based on the situation with regard to absences.

A note from the medical service is sent to the person concerned inviting them to see the medical officer. After having drawn up a report on the consultation, which is kept in the medical file, the medical officer sends a note to the staff administration to suggest launching an invalidity procedure. The decision on whether to launch an invalidity procedure is taken by the Appointing Authority.

The medical grounds are never forwarded. Anything which relates to medical information remains protected by medical confidentiality. Only the doctors involved may have access to that information.

## **2.2 Decision to launch an invalidity procedure**

On the basis of the information forwarded, the Appointing Authority is responsible for the decision to refer the case to an Invalidity Committee (under Article 59(4) of the Staff Regulations).

## **2.3 Appointment of a doctor to represent the person within the Invalidity Committee**

The staff administration sends the person concerned an official letter of referral to the Invalidity Committee asking him to appoint a doctor to represent him on the Invalidity Committee.

If a doctor has not been appointed within fifteen working days from the date of receipt of the letter making the request, a reminder is sent. If there is no response to the reminder, then a doctor will automatically be appointed by the President of the Court of Justice of the European Union.

## **2.4 Invalidity Committee**

The Invalidity Committee consists of three doctors:

- the first is appointed by the institution (the institution's medical officer);
- the second is appointed by the person concerned;
- the third is appointed by agreement between the first two doctors. In the event of failure to agree on the appointment of a third doctor within two months of the appointment of the second doctor, the third shall be appointed automatically by the President of the Court of Justice of the European Union (Article 7 of Annex II to the Staff Regulations).

When a date has been set for the meeting of the Invalidity Committee, the medical service sends requests to appear to the doctors and to the person concerned.

The proceedings of the Invalidity Committee are secret and are covered by medical confidentiality.

The Invalidity Committee has a threefold task:

- to determine whether or not the person is fit to work;
- to determine the causes of unfitness to work;
- to indicate whether follow-up examinations are required and how frequently they should be carried out.

## **2.5 Decision of the Invalidity Committee**

On conclusion of its proceedings, the Invalidity Committee delivers an opinion to the Appointing Authority, but does not mention the medical grounds for its decision. The third doctor draws up the document setting out the medical grounds of which the Appointing Authority has not been notified; this document is then placed in the medical file. The conclusions, drafted and signed by all three doctors, are placed in the medical file.

At the end of its proceedings, the Invalidity Committee may decide either:

- (i) that the person concerned fulfils the conditions for recognition of "invalidity" under the Staff Regulations, in which case the medical service sends the staff administration a copy of the conclusions of the Invalidity Committee, which sends the invalidity decision, signed by the Appointing Authority, by mail to the person concerned.
  
- (ii) that the person concerned does not fulfil the conditions for recognition of "invalidity" under the Staff Regulations, in which case the staff administration, in agreement with the institution's medical officer, determines the date on which work must be resumed, and any necessary arrangements. The decision on the resumption of work and the necessary arrangements, signed by the Appointing Authority, is sent by mail to the person concerned.

## **2.6 Periodic examination - return to work**

It is not, in principle, impossible that the state of health of a person who has been recognised as unfit to work might improve. The Staff Regulations therefore allows the official the right to return to work if he no longer satisfies the requirements for payment of an invalidity allowance. For this reason, the institution's medical officer carries out periodic medical examinations. Under Article 15 in Chapter 3 of Annex VIII to the Staff Regulations, the institution may also have him medically examined periodically without the Invalidity Committee so requesting.

The Invalidity Committee is invited to indicate whether, in its opinion, such medical examinations are necessary, and if so how often they should take place. The examinations are carried out by the institution's medical officer. If he feels that it would be appropriate, the Medical Officer may also accept a report from a doctor where the person concerned lives.

Persons who have to be examined receive a letter in which they are asked to present themselves for examination to the institution's medical officer. On the basis of that medical examination, the medical officer may decide to extend the invalidity, in which case he indicates when any further examination should take place. If the medical officer finds that the person concerned is now fit to work, the administration is informed and the person concerned is sent a letter to setting a date for his return to work.

### **Other information arising from the notification**

Data controller: Processing is carried out by DGA 1B - Council Personnel and Administration, Medical Service, under the responsibility of the medical officer, who is the Head of Unit of the Medical Service.

Categories of data processed: Information from personal medical file: surname, first names, address, staff number, date of birth; medical reports; procedural letters sent to the doctors; administrative correspondence, report; medical and administrative conclusions.

Recipients: Medical information is disclosed to the institution's medical officer and members of the Invalidity Committee. Information contained in the administrative file is disclosed to the medical service, staff administration, the Appointing Authority, the pensions department and, if it appoints a second and/or third doctor, to the Court of Justice.

Data storage medium: Paper, filed in the data subject's personal medical file; computerised media, filing of documents issued by the medical service in a special computerised register.

Retention period for data storage: Documents relating to the Invalidity Committee are kept in the medical file for 30 years if invalidity is recognised, and for 5 years if invalidity is not recognised in order to allow for a possible appeal. Administrative files are stored in computerised form by the medical service as long as the data subject remains in active service.

Use of the data for statistical purposes: annual statistics are compiled by the institution's medical officer for the Director of Administration. They include figures relating to invalidity procedures (such as the number of invalidity committees, percentages of invalidity, distribution according to age, sex, category, illness). They are stored in computerised form by the medical service for one year.

Information for data subjects: A standard information note has been drawn up by the Council to be sent to persons for whom an invalidity committee procedure has been launched. It provides information on the purposes of the processing, the categories of data and recipients, arrangements for exercising the right to access, rectification or erasure and the retention period for data storage. The information note is sent to the recipients at the same time as the official letter of referral to the administration together with the form for appointing the person's own doctor.

Procedures for respecting the rights of data subjects: The data subject may consult the institution's medical service at any stage in the procedure if he needs information. He has access to his medical file in accordance with the procedure set forth in conclusions 221/04 of the Heads of Administration and Staff Note 31/2004 defining access to medical documents, by sending a written request to the institution's medical officer.

Security measures: Medical files are kept in locked cupboards. Only the medical officers, the medical assistant and the staff of the medical secretariat can access the computerised register.

Appeals: The data subject has the right to have recourse at any time to the European Data Protection Supervisor.

### **3. Legal aspects**

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

The prior checking relates to the processing of personal data within the meaning of Article 2(a) of Regulation (EC) No 45/2001 (hereinafter "the Regulation") by the Council's medical service in the context of invalidity committee procedures. The processing includes operations for the collection, consultation, storage, etc. of data.

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) of the Regulation).

The processing for the invalidity procedure is both manual (the launching of the procedure, medical reports) and automatic (special computerised register in which the administrative documents issued by the medical service are kept). Article 3(2) is therefore applicable in this case.

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

Article 27(1) of the Regulation requires prior checking by the EDPS of all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*". Article 27(2) of the Regulation contains a list of processing operations likely to present such risks.

Article 27(2)(a) of the Regulation states that the processing of data relating to health is subject to prior checking by the EDPS, which is the case here as the data fall within the scope of "data relating to health".

In principle, checks by the EDPS should be performed before the processing operation is implemented. Otherwise the checking necessarily becomes *ex post*. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The notification of the DPO was received on 27 October 2008. According to Article 27(4) the present Opinion must be delivered within a period of two months following receipt of the notification. Taking into account the 56-day suspension for comments, the EDPS will have to deliver his opinion by 23 February 2009 at the latest.

### **3.2. Legal basis and lawfulness of the processing operation**

The lawfulness of the processing operation should be scrutinised in the light of Article 5(a) of the Regulation. 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 ...*".

The procedure to obtain the conclusions of the invalidity committee, which involves the collection and processing of personal data concerning officials and other staff so as to grant them the invalidity allowance or a return to professional activity, is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legislative acts adopted on the basis of those Treaties. The processing operation is therefore lawful.

The legal basis for the data processing is Article 59(4) and Articles 78 and 79 of the Staff Regulations of Officials of the European Communities (supplemented by Articles 7 and 9 of Annex II to the Staff Regulations with regard to the arrangements governing the Invalidation Committee). For contract staff and temporary staff, the legal bases are Article 102 and Article 33 of the Conditions of Employment respectively. The invalidity procedure organised by the Council is therefore lawful. The legal basis is therefore in compliance and supports the lawfulness of the processing operation.

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

The processing carried out by the Council's medical service concerns personal data relating to health and medical information which are classified as "special categories of data" under

Article 10 of the Regulation. Under Article 10(1) of the Regulation, the processing of personal data relating to health is prohibited unless grounds can be found in Article 10(2) or (3) of the Regulation.

In this case, Article 10(2)(b) applies: "*Paragraph 1* (prohibiting the processing of health-related data) *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 ...*". In this case, the Council as employer is complying with Article 10(2)(b) by performing these data processing operations so as to comply with the provisions of the Staff Regulations.

Moreover, in this case, certain health-related data are disclosed to the doctors on the invalidity committee. Owing to the very nature of the health-related data, Article 10(3) of the Regulation, which relates to special categories of data, applies in this instance. It provides that: "*Paragraph 1* (prohibiting the processing of data relating to health) *shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy*". During the processing in question, the medical data are effectively disclosed to health professionals, who themselves are subject to professional secrecy, in order to establish a medical diagnosis. In this instance, Article 10(3) of the Regulation is duly complied with. However, the EDPS would draw attention to the fact that all administrative departments responsible, within the framework of social medicine, for processing files containing certificates issued by medical staff are themselves bound by professional secrecy. The EDPS recommends that they be reminded of that obligation.

### **3.4. Data quality**

Article 4 of the Regulation lays down certain obligations as regards the quality of personal data. Personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4(1)(c)). It should therefore be checked whether the data correspond to the purposes of the processing operation.

The EDPS considers that the processed data described at the beginning of this opinion must be regarded as satisfying these conditions in the light of the purposes of the processing operation explained above.

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). Fairness should be the subject of special attention in the context of such a sensitive subject. It relates to the information given to the data subjects (see point 3.10 above).

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).

Invalidity is an inability to work for a fixed or indeterminate period. Depending on the case, the invalidity committee may decide to set a special timetable for the re-evaluation of the

person's situation (unfit/fit to work), bearing in mind that he must be re-examined periodically (Article 15 of Annex VIII to the Staff Regulations).

The procedure in place gives sufficient cause to believe that the system itself ensures the quality of the data. The data subject has the right to access and rectify data in order to make the file as complete as possible. This is a second way of ensuring the quality of data. (See point 3.9 above regarding the right of access and rectification.)

### **3.5. Data retention**

Article 4(1)(e) of the Regulation sets forth 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*".

The medical considerations which led to the conclusions of the invalidity committee are recorded in a medical report which is filed in the medical file of the person concerned; it is not forwarded to the administration. They are stored for 30 years starting from the date on which an allowance is granted in the event of a favourable opinion. If the invalidity committee reaches an unfavourable opinion, documents relating to the invalidity committee are stored for 5 years in order to allow for a possible appeal.

The EDPS considers that the period of storage of health-related and medical data is adequate, but points out that their storage in the medical file must comply with the EDPS Opinion of 29 May 2006 on the abovementioned cases 2004/254 and 2005/363.

Administrative files are stored on computer media in a special register in the Unit of the medical service, access to which is restricted to the medical officers, the Unit's medical assistant and the staff of the medical secretariat until the final conclusions of the Invalidity Committee.

The EDPS welcomes the introduction of precise storage measures but nevertheless recommends that storage measures be specified for the archiving of administrative files.

Article 4(1)(e) of the Regulation also stipulates: "*the Community institution or body shall lay down that personal data which are to be stored for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes*".

The EDPS welcomes the fact that the length of storage of data for statistical use adopted by the Council is determined by and in proportion to that use. The EDPS nevertheless recommends that the Council make sure that data for statistical use are kept in anonymous or encrypted form.

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

The processing operation under review here involves no change of the specified purpose of the staff databases and is not incompatible with that purpose. Accordingly, Article 6(1) of the Regulation does not apply in this instance and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

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

Personal data and in particular health-related data collected during the processing operation under review are transferred (i) between or within Community institutions or bodies if "*necessary for the legitimate performance of tasks covered by the competence of the recipient*" (Article 7 of the Regulation) and (ii) to recipients other than Community institutions or bodies (Articles 8 and 9 of the Regulation).

#### (i) Transfers within or between Community institutions or bodies

The notification explains that personal data relating to health and medical data are disclosed to the Council's medical officer and members of the invalidity committee.

In addition, personal data collected for the administrative file are forwarded to the following recipients: (i) the staff administration for the official referral and the communication of the conclusions, (ii) the Appointing Authority for the official decision, (iii) the pensions department with a view to implementing rights further to the recognition of invalidity, (iv) the data subject, and (v) the Court of Justice if a 2nd doctor and/or 3rd doctor is appointed in the event of a dispute.

The case thus concerns not only transfers of data within the institution, but also transfers of data between institutions. Care should therefore be taken to ensure that the conditions of Article 7(1) of the Regulation 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*". The task here is covered by the competence of the Council departments, the invalidity committee and the Court of Justice when it is involved in a procedure in order to appoint a medical officer. The transfer in this case is therefore 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 the Regulation provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". It must be ensured that any person involved in the Council's invalidity procedure who receives and processes data is informed that they may not use them for other purposes.

Furthermore, as far as the transfer of medical data is concerned, the EDPS recommends that only persons authorised to have access to data relating to health, and who are subject to professional secrecy, receive such data.

#### (ii) Transfers to recipients other than Community institutions

During the invalidity procedure personal data, and in particular health-related data, are also disclosed to the official's own doctor as well as to the doctor chosen by mutual agreement between the Council's medical officer and the official's own doctor. The only recipients outside the Community institutions are health professionals subject to professional secrecy, thus taking due account of the special nature of the data disclosed and satisfying the conditions of Article 10(3) of the Regulation.

If either of these doctors is in a country which has adopted legislation transposing Directive 95/46/EC, Article 8 of the Regulation applies, which does not give rise to any problems as regards the transfer.



If either of these doctors is in a country which is not subject to Directive 95/46/EC, Article 9 of the Regulation applies. Under Article 9, transfer may only take place to a country offering an adequate level of protection. Otherwise the exceptions provided for under Article 9(6) must be considered. Given the nature of the case under review, subparagraph (a) of Article 9(6) is especially relevant: *"By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if: (a) the data subject has given his or her consent unambiguously to the proposed transfer;..."*

Finally, the EDPS would point out that the Court of Justice, the European Ombudsman and he himself may also be considered data recipients under Regulation (EC) No 45/2001. This should be reflected in the information given to data subjects (see point 3.9 below).

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

Article 13 of the Regulation makes provision, and sets out the rules, for right of access at the request of the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and of any available information as to their source.

Article 20 of the Regulation provides for certain restrictions on this right, notably where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others.

Arrangements for exercising the right of access, rectification and erasure set out in the information note from the Council concerning the invalidity committee procedure refer to Council Decision 2004/644/EC of 13 September 2004, to Article 26bis of the Staff Regulations and to Staff Note No 31/2004 of 19 March 2004.

The right of access to medical files is dealt with in Staff Note No 31/2004 of 19 March 2004. This note provides for data subjects to have direct access to their medical files to be exercised on the premises of the medical service in the presence of a person designated by the medical service. Provision is made for indirect access in order to consult psychiatric/psychological reports through the intermediary of a doctor appointed by the data subject. It is also laid down that officials or servants may not have access to personal notes by doctors if, under the terms of Article 20(1)(c) and on the basis of a case-by-case examination, this is necessary to guarantee the protection of the data subject or the rights and freedoms of others. The EDPS would like this access to be subject to examination on a case-by-case basis in accordance with the principle of proportionality. This limitation must not be allowed to result in a general refusal of access to the personal notes of doctors in the medical file.

With regard to the right of rectification provided for in Article 14 of Regulation 45/2001, Council Decision 2004/644/EC provides that such requests be dealt with "without delay" by the controller. Exercise of this right is in conformity with Article 14 of the Regulation. However, in order to make the file more complete, the EDPS nevertheless suggests that provision could also be made for a second medical opinion to be obtained.

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

Articles 11 and 12 of the Regulation 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 others from other persons.

The notification refers to the information note on the invalidity committee procedure provided to the data subject when the letter informing them about the decision to launch the procedure is sent.

The EDPS considers that the procedure should be published on the Council's intranet.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply in this case. In fact, insofar as the data subjects are heard by the three invalidity committee doctors, they provide the data themselves.

The EDPS would draw particular attention to the absence from the information note concerning the procedure of explicit references to the following:

- the recipients or categories of recipients of the data (Article 11(1)(c)), adding to the list recipients indicated in point 3.7 above;
- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply (Article 11(1)(d));

It must be ensured that the data subject is fully informed on those two points. The exhaustive list of all recipients should be found in the information note on the procedure. Regarding Article 11(1)(d), the obligation could be reflected by informing the data subject of the consequences of refusal to provide the medical certificates needed for the procedure before the invalidity committee. The EDPS welcomes the fact that the information note on the invalidity committee procedure covers the points referred to in Article 11(1)(f): *the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*, which show that the fairness of the processing operation is fully respected. With regard to the last of these points, the exact e-mail address of the EDPS could usefully be provided (edps@edps.europa.eu).

The provisions of 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 apply in this case because information may be obtained from external doctors. The clarification about the recipients of the data (Article 12(1)(d) of Regulation (EC) No 45/2001) also applies in this case.

The EDPS recommends that all this information be supplied to data subjects, by whatever means necessary. This could be achieved by adding the information indicated above to the information note on the invalidity committee procedure.

### **3.11. Security**

Under Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements "*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*".

Appropriate security measures are taken with respect to consultation of the file by the data subject and retention of such files. Article 22 of the Regulation is therefore 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:

- all the administrative departments responsible, within the framework of social medicine, for processing files containing certificates issued by medical staff are subject to professional secrecy, and that they should be reminded of that secrecy.
- storage measures for archiving administrative files should be specified.
- storage of data for statistical use must be on the basis of anonymous or encrypted data.
- only persons authorised to have access to health-related data and subject to professional secrecy may receive medical data.
- any person involved in the Council's invalidity procedure who receives and processes data must be informed that they may not use them for other purposes.
- in the event of a transfer of data to a doctor in a country not subject to Directive 95/46/EC, and where that country does not provide an adequate level of protection, the data subject's consent to the transfer must be obtained by virtue of Article 9(6)(a).
- the Court of Justice, the Ombudsman and the EDPS must also be considered data recipients under Regulation (EC) No 45/2001.
- in the context of the right to rectification, provision should be made for the possibility of obtaining a second medical opinion in order to make the file more complete. This could be indicated in the information note.
- the information note on invalidity committee procedures should be published on the Council's intranet.
- all the information described in point 3.10 above must be supplied to data subjects, by whatever means necessary.

Done at Brussels, 16 January 2009

(Signed)

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor