



Opinion on the notification for prior checking from the Data Protection Officer of the European Commission concerning "the processing of requests for waiver of immunity from legal proceedings and of the inviolability of Commission premises and archives"

Brussels, 25 March 2009 (Case 2008-645)

1. Procedure

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (hereinafter "the Regulation") concerning "the processing of requests for waiver of immunity from legal proceedings and of the inviolability of Commission premises and archives" was sent to the European Data Protection Supervisor by the Data Protection Officer (DPO) of the European Commission by e-mail on 31 October 2008.

Additional information was requested from the DPO on 3 December 2008 and was received on 9 February 2009. On 6 March 2009 the EDPS's opinion was sent to the DPO for his comments, which were received on 23 March 2009.

2. Facts of the case

Under the Protocol on the Privileges and Immunities of the European Communities (PPI)¹ officials and other servants of the Communities enjoy a number of immunities, and in particular (i) immunity from legal proceedings, (ii) inviolability of Community premises, and (iii) inviolability of Community archives, as follows:

- i. Under Article 12 of the PPI, officials and other servants of the Communities are immune from legal proceedings *"in respect of acts performed by them in their official capacity (...). They shall continue to enjoy this immunity after they have ceased to hold office."*
- ii. Under Article 1 of the PPI: *"The premises and buildings of the Communities shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation."*
- iii. Under Article 2 of the PPI: *"The archives of the Communities shall be inviolable."*

Under Article 18(2) of the PPI, *"Each institution of the Communities shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that waiver of such immunity is not contrary to the interests of the Communities."* Article 19 of the PPI poses the principle of loyal cooperation between the competent authorities of the Member States concerned and the institutions, whereby a European institution is required to waive immunity unless it can show that to do so would interfere with the interests of the Communities or, in the case of a request

¹ Protocol (No 36) on the Privileges and Immunities of the European Communities (1965), *Official Journal No C 321 E*, 29/12/2006 p. 0318 - 0324.

for waiver of the inviolability of the archives, that it would adversely affect the legitimate rights of third parties (see CJCE, C-275/00, *First and Franex*).

Accordingly, the Commission has put in place data processing for the purpose of deciding, in response to a request from a national court or any other national body entitled to carry out an investigation, whether to authorise or refuse to authorise the appearance in court of an official or other servant and/or access to the premises and/or archives of the European Commission.

The *data subjects* are officials and former officials and staff currently or formerly subject to the Conditions of Employment of Other Servants (RAA) named in the context of a judicial investigation (i) requiring them to disclose in legal proceedings information of which they have knowledge by reason of their duties, and/or (ii) requiring search by a competent authority of the premises currently or formerly occupied by them, and/or (iii) requiring access by a competent authority to archives relating to them.

The procedure for examining the request entails the following *data processing*:

- i. In the context of a judicial investigation, the national judicial authority sends its request for waiver of immunity from legal proceedings or inviolability of Commission premises and/or archives to a contact department at the Commission (Director-General for Personnel and Administration, Secretary-General, Director-General of OLAF, and/or a Commission department, in the case of a request for waiver of inviolability of premises).
- ii. In most cases, the national authorities specifically ask the Commission not to inform the person or persons concerned of the national authority's request or the Commission's decision in response to it, in order to avoid interfering with the progress of the investigation.
- iii. Upon receipt, requests are given a registration number in the Case Management System (CMS) of the Investigation and Disciplinary Office of the Commission (IDOC). Requests for waiver of inviolability of premises and/or archives which are made in conjunction with a request for waiver of immunity from legal proceedings are registered under the same number.
- iv. IDOC examines requests in collaboration with OLAF and the Commission's General Secretariat and Legal Service. IDOC prepares the draft Commission decision which is sent for comment and approval to OLAF, the General Secretariat and the Legal Service.
- v. Where the national authority has requested investigative secrecy, a version of the draft decision naming names is kept in a secure place, to which access is strictly controlled, at the General Secretariat and only a version with names removed is circulated by the General Secretariat.
- vi. The decision to waive immunity is adopted by different processes depending on the type of immunity involved, as follows:
 - Under the procedure for requests for waiver of immunity from legal proceedings, the written procedure file is sent to the Director-General, to the President's Private Office and to the member in charge of personnel for signature. The decision is adopted by the Secretary-General and sent to the requesting authority either by the General Secretariat or via OLAF.

- In the case of requests for waiver of the inviolability of Commission premises, the decision is sent to the personnel DG for signature. The decision is adopted by the Director for personnel and administration in agreement with the Secretary-General and sent to the requesting authority by IDOC or OLAF. The Security Directorate of DG ADMIN is informed of the decision for the purposes of access to the premises for the search.
- In the case of requests for waiver of the inviolability of Commission archives, the decision is sent to the personnel DG for signature. The decision is adopted by the Director for personnel and administration in agreement with the Secretary-General and sent to the requesting authority by IDOC or OLAF. The department(s) with which the documents are lodged is/are informed of the decision to waive inviolability of the archives for the purpose of providing the documents concerned. The Security Directorate of DG ADMIN is also informed, so that the decision can be implemented.

vii. Where the national authorities do not expressly request secrecy, IDOC informs the data subject of the decision of the Commission or the competent Appointing Authority within days of the decision's adoption. The data subject receives a copy of the decision. Where secrecy of the proceedings has been requested, the data subject is informed of the decision taken by the Commission (waiver of immunity from legal proceedings) or by the competent Appointing Authority (waiver of the inviolability of premises or archives) only when the Commission has been advised that secrecy is no longer necessary.

The data are processed both *manually and automatically*. The material necessary for management of the file (request from the national authority, information of other departments, Commission decision, archiving of the file) is placed in paper files. IDOC documents are kept in electronic form.

The *personal data* processed concern (i) data regarding the identity of the data subject, such as name, address, family situation, career, duties at the Commission; (ii) data relating to the data subject's alleged behaviour, action or failure to act; and (iii) data relating to the judicial proceedings against the data subject or in which the data subject is involved.

The files are managed by officials of the IDOC unit. The data are *forwarded* to the Commission departments involved in the taking of the decision (General Secretariat, Legal Service, OLAF, Appointing Authority). The Security Directorate of DG ADMIN, and/or the department(s) holding the documents in the case of access to archives, are informed of the Commission's decision to ensure that it is properly implemented in due course. The information is given only to persons who need it to carry out their duties.

Confidentiality of requests for waiver of immunity from legal proceedings or inviolability of Commission premises and/or archives is ensured by the measures applicable to IDOC investigations and disciplinary procedures. [...]

The data required to manage a file (request from the national authorities, correspondence with the departments consulted and Commission decision) are *kept* in the IDOC archives until the close of the national proceedings or, in the absence of information as to that, for a maximum of twenty years. If a disciplinary procedure is started against the data subject, the documents relating to immunity from legal proceedings are placed in his disciplinary file and kept for a period of twenty years from the close of the disciplinary procedure.

The data subject is guaranteed *right of access and right of rectification*. The clause on

confidentiality of the processing operation reveals restrictions on those rights. Right of access may be restricted and deferred at the express request of the national authority, where it invokes investigative secrecy. In that event, the data subject cannot exercise the right of access to the CMS file containing all the data concerning him until the secrecy requirement has been lifted. The data subject is also informed of his right to appeal to the EDPS under the conditions provided for in Article 20(4) of Regulation (EC) No 45/2001. If investigative secrecy is not invoked, the data subject is informed without delay of the request made to the Commission and the action which the latter intends to take on it, and he may at any time obtain access to the CMS file containing all the data concerning him, simply by applying in writing to the Director of IDOC.

The data subject is **informed** of the waiver of immunity procedure by means of the *confidentiality clause*, which is annexed to the letter telling him of the national judicial authorities' request; this letter is sent as soon as possible where secrecy is not required or when it has been lifted. The clause will also shortly be available on IDOC's intranet site.

The confidentiality clause contains the following information: identity of the controller; purpose of the processing; legal basis; categories of data processed; intended recipients of the data; security measures; data retention period; right of access, rectification and deletion of data and the relevant procedures; right of appeal to the EDPS.

3. Legal aspects

3.1. Prior checking

The prior checking concerns the processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2, point a, of Regulation (EC) No 45/2001) in the context of the processing of requests for 1) waiver of immunity from legal proceedings for officials and other servants of the Commission, and/or 2) waiver of inviolability of Commission premises, and/or 3) waiver of inviolability of Commission archives.

The data processing 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 is both manual and automatic. Article 3(2) of the Regulation therefore applies. Accordingly, the processing falls within the scope of Regulation (EC) No 45/2001.

Under Article 27(1) of the Regulation 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*" are subject to prior checking. Article 27(2) contains a list of processing operations likely to present such risks.

Article 27(2)(a) of the Regulation refers to "processing of data relating to health and to suspected offences, offences, criminal convictions or security measures" as processing operations likely to present such risks. The processing of "requests for waiver of immunity from legal proceedings and of the inviolability of Commission premises and archives" deals more particularly with data concerning suspected offences, offences and criminal convictions, and therefore falls within the scope of Article 27(2)(a).

In principle, checking by the EDPS takes place before processing begins. Otherwise, checking inevitably becomes "a posteriori". This is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The DPO's notification was received on 31 October 2008. In accordance with Article 27(4), the

present opinion must be delivered within two months following receipt of the notification. Given the 68-day suspension for further information, the EDPS will deliver his opinion by 27 March 2009 at the latest.

3.2. Legal basis and lawfulness of the processing operation

The lawfulness of the processing operation must be examined in the light of Article 5, point a, of the Regulation, which states that processing can be carried out only if it 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*".

The Commission cannot impede the course of justice and, where the interests of the Communities do not preclude it, must therefore waive the immunities provided for in the Protocol on the Privileges and Immunities of the European Communities. That does constitute a task carried out in the public interest on the basis of the Treaties. It is also a legal obligation, as provided for in Article 5, point b, of the Regulation. The processing operation is therefore lawful.

The legal basis is particularly important in this case, as the data processed may be very sensitive. The legal basis is Article 18(2) of the PPI, which states that "*each institution of the Communities shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that waiver of such immunity is not contrary to the interests of the Communities.*" The legal basis is therefore valid and supports the lawfulness of the processing operations.

From the description of the processing operation, the EDPS notes that the processing operation may also cover sensitive data within the meaning of Article 10 of the Regulation.

3.3. Processing of special categories of data

Article 10(5) of the Regulation stipulates that "*processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof (...)*". In this case waiver of immunity is specifically provided for in Article 18 of the Protocol on the Privileges and Immunities of the European Communities, annexed to the Treaty establishing the European Community. Article 19 of the PPI also poses the principle of cooperation between national authorities and institutions with regard to the processing of requests for waiver of immunity, which implies in particular communication by the national authorities, and processing by the Commission, of information warranting waiver of immunity, such as suspected offences and allegations made against the data subject. The processing operation concerned falls within the PPI framework and therefore complies with Article 10(5) of the Regulation.

3.4. Data quality

Article 4 of the Regulation imposes certain obligations regarding the quality of personal data, which 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 must therefore be established that the data are relevant to the purpose of the processing for which they were used.

The EDPS considers that the data processed, as described at the beginning of this opinion, must be regarded as satisfying these conditions, in the light of the purposes of the processing as explained above. The data collected appear necessary for the management of requests for waiver of immunity

from national authorities in the framework of an investigation or judicial proceedings. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 is complied with.

In addition, data must be processed "*fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing operation has already been discussed (see point 3.2 above). In such a sensitive area, specific attention must be paid to the fairness of the processing operation, which relates to the information given to data subjects (see point 3.8 above).

Finally, 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). Within the limits of Article 20 of the Regulation, the data subject is able to use the rights of access and rectification to ensure that the file is as complete as possible. These rights represent the possibility of ensuring the quality of the data. On the rights of access and rectification, see point 3.7 below.

3.5. Data retention

Article 4(1)(e) of the Regulation poses a 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 data required to manage a file, and the decision of the Commission or the Appointing Authority, are kept in the IDOC archives until the close of national proceedings or, in the absence of information as to that, for a maximum of twenty years. If the Commission starts a disciplinary procedure against the data subject, the documents relating to immunity from legal proceedings are placed in his disciplinary file and kept for a period of twenty years from the close of the disciplinary procedure.

The EDPS considers that retention of data over the long-term must be accompanied by appropriate guarantees. The fact that the data are archived for long-term retention does not alter the fact that they are personal data.

In addition, the retention period must be reassessed in the light of developments, in particular discontinuation of disciplinary and/or dispute procedures or the data subject's acquittal in court.

The Commission must also define the exact categories of person entitled to access these data/archives and the purposes for which they are allowed such access.

3.6. Transfers of data

Personal data collected in the context of the processing operation under consideration are transferred (i) within or between Community institutions and bodies (Article 7 of the Regulation), and (ii) to recipients other than Community institutions and bodies (Articles 8 and 9 of the Regulation).

(i) Transfers within or between Community institutions and bodies

Under Article 7(1) of the Regulation, data may be transferred within or between Community institutions only if they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

In this case, transfers take place within an institution. The recipients include the General Secretariat, the Legal Service, IDOC, the Appointing Authority managing the files, and the Commission department in contact with the national authority (ADMIN, OLAF, GS, etc.) for the purpose of informing it of the Commission's decision. Certain specific departments receive the decision of the Appointing Authority: the Security Directorate of DG ADMIN and/or the department holding the documents in the case of access to the archives, so that the competent authorities are able to have access to the premises and/or archives concerned in due course.

The information provided in the notification would indicate that such transfers comply with Article 7(1), since the data collected are necessary for the purpose of the processing and are also "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

Article 7(3) of the Regulation also stipulates that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". Given the sensitivity of the data processed, recipients must be reminded that it must be processed solely for the purpose of requests for waiver of immunity in order to authorise the appearance of a data subject in court and/or search of premises or archives connected with the data subject.

(ii) Transfers to recipients other than Community institutions

In this case, the decision of the Commission or Appointing Authority is sent to the national authority which requested waiver of immunity. There are two possible scenarios, depending on whether the Member State concerned is: (a) one in which the data protection legislation adopted pursuant to Directive 95/46/EC covers all sectors of the national legal system, including the judicial sector; (b) one in which the data protection legislation adopted pursuant to Directive 95/46/EC does not cover all sectors, and in particular not the judicial sector.

As regards the first scenario, Article 8 of the Regulation specifies as follows: "*Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC, (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, (...)*". Here it is the judicial authorities which have requested waiver of immunity and in so doing have established that transfer of the transfer is necessary because they are required to deliver justice.

For countries which have not extended the application of Directive 95/46/EC to the judicial authorities, Article 9 of the Regulation comes into play. In the case of these countries, Council of Europe Convention 108 applies to the judicial authorities, and can be regarded as offering an adequate level of protection for the matter in hand.

Article 9 also applies in the case of national authorities of countries not covered by Directive 95/46/EC. That article states that data may be transferred only to a country which offers an adequate level of protection. If that is not the case, the processing operation must be based on the exceptions provided for in Article 9(6), for example Article 9(6)(d): "*the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; (...)*".

In any event, given the nature of the data exchanged, the EDPS recommends that any transfer of data to recipients other than Community institutions be registered by the Commission, together with the legal justification for making the transfer.

3.7. Right of access and of rectification

Article 13 of the Regulation establishes and defines the data subject's right to request access. It stipulates *inter alia* that 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 14 of the Regulation gives the data subject the right to rectification of his data. Just as he may have right of access, he may also amend his personal data if necessary.

As already stated, the rights of access and rectification are guaranteed to the data subject. These rights and the conditions for exercising them are set out in the confidentiality clause (cf. section 3.8 below). Both rights may be restricted and deferred at the request of the national authority, if it has invoked the need for secrecy, in accordance with Article 20(1) of the Regulation.

Article 20(5) also stipulates that "*provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect*". It may be necessary to defer such information under that provision in order to protect the investigation. However, the EDPS would point out that any such derogation must be a temporary measure and that the data subject must be able to exercise his right of access as soon as secrecy is no longer justified.

Where the provision of information to the data subject and the exercise of his rights are deferred, the data subject is informed by the confidentiality clause, upon its receipt, that he may apply to the EDPS to verify whether the data have been processed. This complies with Article 20(4) of the Regulation.

Article 14 of the Regulation gives the data subject the right to rectification of inaccurate or incomplete data. Any restriction under Article 20 must be applied in the light of the preceding paragraphs regarding right of access. The EDPS would point out that where no restriction arising from Article 20(1) is applicable – in particular if the national authority has not requested secrecy of the proceedings – the data subject must have the opportunity of expressing his views before the Commission or Appointing Authority takes its decision. The data subject's comments must be placed in his personal file. That recommendation apart, the EDPS considers that Articles 13 and 14 of the Regulation are complied with.

3.8. Information to be given to the data subject

Articles 11 and 12 of the Regulation concern the information which the data subject must be given in order to guarantee transparent processing of his personal data. These articles list a series of compulsory and optional provisions. The optional provisions apply insofar as, given the particular circumstances of any processing operation, they are necessary to ensure fair processing of the data.

In this case, the data relating to the request for waiver of immunity are not obtained directly from the data subject but forwarded by the national authority to the Commission department with which it is in contact. Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) therefore applies.

General information for data subjects is provided via the specific confidentiality clause, available on the intranet, relating to requests for waiver of immunity from legal proceedings and inviolability of Commission premises and archives. The confidentiality clause contains all the compulsory and optional items provided for in Article 12 of the Regulation.

As regards specific information, i.e. where a data subject is the subject of a request for a waiver of immunity, he must be informed of the processing no later than the time when the data are first disclosed, if the request was made via a Commission department. That is the case whenever a national authority does not invoke the need for secrecy of the proceedings.

It is possible for such information to be deferred, under Article 20(1) of the Regulation, at the request of the national authority. The Commission will then notify the data subject as soon as the national authority has advised it that secrecy is no longer necessary. This restriction of the data subject's right to information complies with Article 20(1) of the Regulation.

3.9. Security

Technical and organisational measures have been taken to ensure an appropriate level of security in the light of the risks of the processing operation and the nature of the personal data to be protected.

On the basis of the information available, the EDPS has no reason to believe that the Commission has not complied with the security measures required in Article 22 of the Regulation.

Conclusion

The proposed processing operation does not appear to involve any infringement of Regulation (EC) No 45/2001, provided that the following comments are taken into account. In particular, the Commission must ensure that:

- long-term retention of files is accompanied by appropriate guarantees;
- the period of retention is reassessed in the light of developments, in particular discontinuation of disciplinary and/or dispute procedures or the data subject's acquittal in court;
- the exact categories of person entitled to access the data/archives and the purposes for which they are allowed access are clearly defined;
- any transfer of data to recipients other than Community institutions is registered by the Commission, together with the legal justification for making the transfer;
- officials in charge of files at the Commission are reminded that the data must be processed solely for the purpose of requests for waiver of immunity to authorise the appearance of a data subject in court and/or search of premises or archives connected with the data subject;
- the data subject has the opportunity of expressing his views before the Appointing Authority takes its decision, where no restriction under Article 20(1) applies, and the data subject's comments are placed in his personal file.

Done at Brussels, 25 March 2009

(Signed)

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