

Opinion on a notification for prior checking received from the Data Protection Officer of the Committee of the Regions regarding applications to work part time

Brussels, 27 July 2009 (Case 2009-0396)

1. Procedure

On 15 June 2009, the European Data Protection Supervisor (EDPS) received a letter from the Data Protection Officer (DPO) of the Committee of the Regions, containing a notification for prior checking regarding applications to work part time.

On 22 July 2009 the EDPS's draft opinion was sent to the DPO for his comments. Those comments were received on 24 July 2009.

2. The facts

The Working Conditions/Rights/Training Unit ("the controller") handles applications by Committee of the Regions staff to work part time. Data are mainly processed manually, with staff filling in a form on paper. The data are kept on computer in Centurio, the Committee's IT application, in the part-time module. The data are processed in accordance with Articles 55a and 55b and Annex IVa of the Staff Regulations of Officials of the European Communities, and with Articles 16, 57 and 91 of the Conditions of Employment of other servants of the European Communities.

The Appointing Authority at the Committee wishes to adopt a new decision on part-time work, amending the current Decision No 289/04; in future, such processing will be carried out on the basis of that new decision, which is therefore the version taken into account in this opinion (a copy of the draft decision was forwarded to the EDPS).

The subjects of data processing in relation to applications to work part time are officials, temporary staff and contract staff at the Committee of the Regions. In exceptional circumstances, to justify an application to work part time, the family members of those staff may also be data subjects (e.g. spouse, relative in the ascending line, relative in the descending line, brother, sister or child).

The staff member must make the application by filling in the standard form and sending it through official channels at least two months before the desired starting date, to the Working Conditions/Rights/Training Unit, which forwards it, together with the opinion of the immediate superior, to the Appointing Authority for a decision. That opinion must give reasons if it is negative or if it changes the start or end date of the part-time work. If, on the basis of the views of the person's hierarchical superiors, the Appointing

Authority decides not to grant its authorisation or to postpone the date of effect, that decision is notified to the person concerned. However, authorisation to work part time may not be refused or delayed in the following cases: (i) to care for a child under 9 years of age, (ii) to care for a child aged between 9 and 12, if the reduction in working time is no more than 20 % of normal working time, and (iii) to care for a seriously ill or disabled spouse, relative in the ascending line, relative in the descending line, brother or sister. The official may also be authorised to work part time if the application is made for reasons other than those mentioned above.

Authorisation to work part time cannot be refused or delayed, except in exceptional circumstances and for overriding service-related reasons, after receiving the opinion of the Joint Committee, if such authorisation is sought in the following cases: (i) to take part in further training, or (ii) as of the age of 55 during the last five years before retirement.

Authorisation to work part time is granted in the form of a decision laying down the period for which the authorisation is granted. Except where the authorisation is granted in one of the cases listed in Article 2(3) of the draft decision, in exceptional circumstances in the interest of the service, the Appointing Authority may withdraw the authorisation before the expiry of the period for which it was granted, subject to two months' advance notice.

The form requesting authorisation to work part time contains the following data: surname, forename, function group, grade, staff number, directorate/unit/department to which the person is assigned, reason for the part-time application, duration and period requested, part-time percentage requested and the working arrangements, administrative status, date of end of contract (for temporary and contract staff), chosen percentage for the contribution to the pension scheme (100% or pro rata), date of application, signature, signed opinion of the immediate superior giving reasons, signed opinion of the Director or Secretary-General giving reasons, signed and dated proposal from the Director of Administration giving reasons.

For applications made under Article 4 of Annex IVa to the Staff Regulations, a calculation of the basic salary received by an official aged over 55 authorised to work part time, performed by the pensions section of the Administration/Finance Directorate, is also collected for data processing purposes.

Data may be transferred to the following recipients or categories of recipient:

- the data subject's immediate superiors for their reasoned opinion;
- administrators responsible for handling the application in the working conditions department;
- the medical service where medical reasons are advanced for part-time work;
- administrators in the pensions department where it is necessary to calculate the basic salary of an official/staff member aged over 55 authorised to work part time;
- members of the Joint Committee whose opinion is sought where consideration is being given to refusing or postponing the date of effect of a part-time application;
- the Appointing Authority which signs the decision to grant or extend part-time work;
- the recruitment department, to enable it to recruit a replacement if need be;

- the pay department, to enable it to make a proportional adjustment to the pay of a person authorised to work part time;
- the personal files department, for the filing of the original documents in the personal file of the official/staff member.
- If the decision is contested, the Legal Service, the Civil Service Tribunal or the Court of Justice of the European Communities.

The original of the Appointing Authority's decision to authorise or refuse part-time work, and the original application, are forwarded to the personal files department for filing in the personal file of the person concerned. The data are kept in the individual's personal file and on computer in the part-time module of Centurio, the Committee's IT application, for ten years from the date on which the official/staff member may claim pension rights. A copy of the application, supporting documents and decision are kept in the working conditions department for five years.

The data encoded in Centurio's part-time module mainly relate to the fact that the person has been authorised to work part time for a given period and according to certain arrangements (between 50% and 90% of working time), and to the pension contribution arrangements during the period of part-time work (100% or pro rata).

As regards the provision of information to data subjects, in conjunction with the adoption of the draft decision, a specific statement on personal data protection for applications to work part time will be available on the intranet on the pages dealing with this procedure.

The specific statement indicates that, during the processing, data subjects may contact the working conditions department to exercise their rights of access to and rectification of their data.

[...].

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 ("The Regulation") by the Working Conditions/Rights/Training Unit of the Administration/Finance Directorate of the Committee of the Regions in the context of the examination of applications to work part time. The processing includes the collection, consultation and storage of data.

The data are processed by a Community body and the operation is carried out in the exercise of activities within the scope of Community law (Article 3(1) of the Regulation).

The processing of applications to work part time is both manual (application form, supporting evidence) and automatic (entry of data in Centurio). Article 3(2) of the Regulation is therefore 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 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) lists processing operations that are likely to present such risks. 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 effect, the processing involves an evaluation of the data subject, insofar as the decision to grant part-time work is based on the interest of the service and takes into account the grounds given in support of the application, but also insofar as it is possible for part-time work to be refused. It is also possible for applicants to justify their application to work part time by referring to their own state of health and/or the state of health of members of their families. The processing of data relating to health is therefore also potentially concerned (Article 27(2)(a)).

The processing is therefore subject to prior checking by the EDPS.

This is in fact a genuine prior check relating to the new procedure for the examination of applications to work part time, which will be finalised once the EDPS's recommendations have been made.

Notification from the DPO was received on 15 June 2009. In accordance with Article 27(4), this opinion must be delivered within two months of receipt of the notification. Because of the two days of suspension for comments, the EDPS will give his opinion on 18 August at the latest.

3.2. Lawfulness of the processing

Under Article 5(a) of Regulation (EC) No 45/2001, 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 other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body*".

The procedure for granting part-time work may be regarded as being necessary for the performance of a task carried out in the public interest on the basis of legislative acts adopted on the basis of the Treaties insofar as it includes "the processing of personal data necessary for the management and functioning of those institutions" (recital 27 of Regulation (EC) No 45/2001). In this respect, the processing is necessary, particularly for the management of the working hours of staff and the allocation of those staff in the interest of the service. The processing operation proposed is therefore lawful.

In this case the processing of personal data is necessary for the Committee to grant the right to work part time, as provided for in Articles 55a and 55b and Annex IVa of the Staff Regulations of Officials of the European Communities, and in Articles 16, 57 and 91 of the Conditions of Employment of other servants of the European Communities, and in the Committee of the Regions' implementing rules. The legal basis thus supports the lawfulness of the processing.

3.3. Processing of special categories of data

Article 10(1) of the Regulation prohibits the processing of personal data revealing political opinions, trade-union membership or data concerning health, unless one of the reasons listed in Articles 10(2) or 10(3) can be invoked.

In connection with some applications, supporting documents concerning the state of health of data subjects or members of their families have to be provided.

In this case, the draft decision indicates that supporting documents relating to the state of health must be given by the person concerned to the medical officer (see Article 2(5)). The processing of medical data by a health professional subject to the obligation of professional secrecy for the purposes of medical diagnosis or the management of health-care services comes within the scope of Article 10(3). The passing of supporting documents of a medical nature directly by the person concerned to the medical officer therefore complies with Article 10(3) of the Regulation.

The EDPS also notes that other special categories of data may be collected on the form in the field relating to the reason for the application, such as for example data about trade-union membership or political opinions. In this case the collection of such data is covered by Article 10(2)(b) of the Regulation, since it is necessary to comply with the specific rights and obligations of the controller in the field of employment law. In the event that such data are collected, the EDPS recommends that the recipients of the data should be reminded that they must only process them for the purposes of dealing with applications to work part time.

3.4. Data quality

Article 4(1)(c) of Regulation No 45/2001 states that personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.*" In this case, the data are collected and processed for the purposes of managing applications to work part time.

The EDPS finds that the personal data which have to be provided are necessary to establish the right to work part time, and that their processing cannot be regarded as excessive.

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). The issue of fairness of the processing is linked to the information given to the data subject (see point 3.9 below).

Under Article 4(1)(d) of the Regulation, personal 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*".

The procedure in place gives sufficient reason to believe that the system itself ensures the quality of the data. As the written observations by the immediate superior are subjective by their very nature, it is hard to assess their accuracy. In any case, the invitation to exercise the rights of access, rectification and appeal helps to ensure that the data are accurate and up to date (see point 3.8).

3.5. Data storage

Article 4(1)(e) of the Regulation establishes the principle 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"*.

Copies of the application and the decision, together with the supporting documents, are kept by the working conditions department for five years. The original of the Appointing Authority's decision to authorise or refuse part-time work, and the original application, are kept in the individual file and are subject to the same archiving policy applied to the individual files. Moreover, only those data which are strictly necessary are kept throughout the career of the official/staff member on computer in the part-time module of Centurio. According to the data controller, it is necessary to keep these data in Centurio throughout the career of the official/staff member in view of the subsequent implications of a period of part-time work for calculation of the pension, and in order to enable the administration to check that the total of periods of part-time requested over the official's career to take part in further training, to care for a seriously ill or disabled spouse, relative in the ascending line, relative in the descending line, brother or sister, does not exceed five years, as laid down by Article 55a of the Staff Regulations.

The EDPS considers that it is necessary for the controller to keep the copy of the application to work part time, the Appointing Authority's decision and the supporting documents for five years, in order to manage the career of the person concerned and to allow him all his rights under employment law, and that this therefore complies with Article 4(1)(e) of Regulation (EC) No 45/2001.

3.6. Processing including the personal or identifying number

Article 10(6) of the Regulation provides 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"*.

The personal numbers of the staff concerned may be collected in connection with the processing of applications to work part time. The EDPS considers that the personal number can be used in this context since it allows the identification of the staff member and facilitates the proper administration of the file. There is no reason to lay down other conditions in this case.

3.7. Transfers of data

Article 7(1) of Regulation (EC) No 45/2001 provides that *"personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The whole application form for part-time work is transferred within the institution to the different parties involved in the procedure for granting part-time. Medical supporting documents are also sent directly by the person concerned to the medical officer/medical service. In each case, the transfer of data is necessary for the recipients to be able to carry out the tasks of a confidential nature entrusted to them.

The EDPS notes that as such these transfers of personal data within the Committee of the Regions comply with Article 7(1) of Regulation (EC) No 45/2001. Nevertheless, he recommends that in accordance with Article 7(3), each of the recipients should be reminded that he may only process personal data received in connection with the procedure for applying for part-time work for that specific purpose.

3.8. Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 gives data subjects a right of access to personal data held concerning them. Article 14 lays down the right to have such data rectified.

The specific statement on personal data protection indicates that data subjects are able to have access to the data concerning them, and to rectify any inaccurate or incomplete data. The EDPS is satisfied that the requirements of Articles 13 and 14 have been met.

The EDPS notes that the opinion of the Joint Committee must be sought in certain exceptional cases, where a refusal to grant authorisation to work part time is based on the overriding interests of the service, for some of the types of application listed in Article 2.3 of the draft decision. The EDPS recommends that the person concerned should be able to have access to the Joint Committee's opinion, for data concerning him.

As regards access to original documents kept in personal files, the EDPS would point out that members of staff must be informed, in accordance with Article 11 of the Regulation, of the rules relating to access to those documents.

3.9. Information given to the data subject

Article 11 of Regulation (EC) No 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of the Regulation provides for certain information to be supplied where the data have not been obtained from the data subject.

In this case, staff members will be informed by means of the decision governing part-time work and the specific statement on personal data protection. The statement informs the data subjects of the identity of the data controller, the purposes of the processing, the categories of data, the recipients, the data-storage period, rights of access and rectification and the option of appealing to the EDPS. The EDPS recommends that the Director or Secretary-General, who receive the application for an opinion, be added to the category of recipients, and that there be a reference to the legal basis for the processing operation, i.e. the new decision on part-time work amending the current Decision No 289/04.

Regarding the communication of information to family members whose personal data are processed in the context of an application to work part time, the EDPS admits that to communicate such information directly would involve a disproportionate effort by the Committee. However, amongst other appropriate steps, the Committee could ask officials/staff members submitting such data to inform the family members concerned about the processing of their personal data and their rights in that respect.

The EDPS therefore recommends that the Committee of the Regions make the following changes to the specific statement on data protection:

- allow family members access to data concerning them, and ask that officials/staff members providing such data inform the persons concerned of those rights;
- add the Director or Secretary-General, who receive the application for an opinion, to the category of recipients, as well as a reference to the legal basis for the processing operation, i.e. the new decision on part-time work amending the current Decision No 289/04.

Furthermore, the EDPS recommends that the draft decision and the specific statement on data protection should be aligned with regard to the forwarding of medical supporting documents, which according to the draft decision must be sent to the "medical officer" and according to the specific statement on data protection are to be sent to the "medical service".

3.10. Security measures

Article 22 of Regulation (EC) No 45/2001 on the security of processing states that "*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*".

On the basis of the information provided, the EDPS has no reason to believe that the Committee of the Regions has not implemented the security measures required under Article 22 of the Regulation.

Conclusion:

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. In particular, that means that:

- each recipient should be reminded that he may only process personal data received in connection with the procedure for applying for part-time work for that specific purpose;
- if authorisation to work part time is refused and the opinion of the Joint Committee has to be obtained, the person concerned should be allowed access to the Joint Committee's opinion as regards the data concerning him;
- the specific statement on data protection should be amended in accordance with the recommendations made in point 3.9 of this opinion.

Done at Brussels, 27 July 2009

(Signed)

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