



Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the Council of the European Union on the "Verification of Flexitime clocking operations with respect to data on physical access"

Brussels, 12 November 2009 (Case 2009-477)

1. Procedure

On 23 July 2009, the European Data Protection Officer (EDPS) received by mail a notification for prior checking under Article 27 of Regulation (EC) No 45/2001 (hereinafter referred to as "the Regulation") from the Data Protection Officer of the Council of the European Union (DPO). The notification concerned the "verification of Flexitime clocking operations with respect to data on physical access" dossier at the General Secretariat of the Council (GSC).

The notification followed a consultation of the EDPS by the DPO on the need for prior checking (2009-267).

The processing operation in question also has to be considered in relation to the system for controlling access to Council buildings, which was the subject of a consultation of the EDPS (2008-392).

The notification for prior checking was accompanied by a note from Mr Saller dated 1 April 2009 and notification 134N01 on the system for controlling access to Council buildings in Brussels, Geneva and New York.

On 18 September 2009, the EDPS's draft opinion was sent to the DPO for comment. The controller requested, via the DPO, a one-month extension for providing his comments. The comments were finally received by the EDPS on 7 November 2009.

2. The facts

The Flexitime application (notification 041N00) manages working time and attendance. It enables leave entitlement to be calculated, monitors leave taken and automatically calculates overtime. This application has already been subject to prior checking by the EDPS (2004-258).

The Council also has an access control system managed by the Security Office, which stores such data in a database (notification 134N00 and EDPS consultation 2008-392). These data are accessible to the departments of the Administration only within the framework of a formal administrative investigation.

In order to combat possible abuses of the Flexitime system (leaving the building and taking breaks without clocking in or out correctly), the GSC would like to take dissuasive action and have access to expanded monitoring possibilities. In order to dissuade members of staff from non-compliance with the Flexitime rules, the Administration would like to be able to carry out occasional spot checks by comparing the data gathered by the two systems.

Given that there are no plans to change the computerised parameters of the two applications, data will be transferred exclusively by means of Excel files on an external support (CD, DVD or USB stick). It will be possible to identify persons on the basis of their personnel number (information which is available in both systems). The decision to carry out such checks will be taken at the level of the Director of DG A1B - Personnel and Administration by sending a note to the Director of the Security Office.

The controller states that, in view of the quantity of data available for each member of staff per day of attendance (around 20,000 events per day), and given the administrative effort involved in manually filtering such data and the disproportionality of daily systematic checks on the Flexitime rules, the Council has no intention of carrying out regular mass checks.

With regard to the **information for data subjects**, the notification for prior checking provides for the publication in a Staff Note of the sole fact that this possibility exists and that the Appointing Authority will make use of it on a random and unannounced basis. The controller considers that such information should suffice to dissuade staff from non-compliance with the Flexitime rules and show them that the Appointing Authority is determined not to tolerate any infringements.

The Director of DG A1B - Personnel and Administration is designated as **the controller**, and the Security Office (Accreditation) and Personnel Department are **responsible for the data processing operation**.

The purpose of the processing operation is to dissuade members of staff from non-compliance with the Flexitime rules and from incorrectly recording their departures and breaks.

The data subjects are Council officials, seconded national experts, temporary staff and contract staff.

According to the notification, **the data processed** are the personnel number, the individual badge numbers and the date, time, direction and origin of the clocking operations.

According to the notification, Section 5 of the Council Decision of 13 September 2004 (2004/644/EC)¹ guarantees **the rights of the data subjects**.

Data storage medium: Temporary storage on USB/CD medium for the transfer of data from the Security Office (SO), followed by storage on the password-protected servers of Personnel and Administration. Once stored on those servers, the transfer media will be deleted/destroyed.

¹ Council Decision of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L No 296, 21.9.2004, p. 20).

Data storage policy: Depending on the notification, the data generated by the processing operation (file made available by the SO, together with the data resulting from the comparison) will be deleted one year after the date of the clocking operation. Once that deadline has expired, the only data stored will be those which are essential for the application of the provisions referred to in Staff Note No 115/06 of 30 June 2006 or other provisions which will be explicitly indicated by the Appointing Authority or, in the event of an appeal, until the expiry of the latest possible date of appeal.

Exceptionally, in the event of disputes or administrative investigations (disciplinary procedures), data may be stored for a longer period.

3. Legal analysis

3.1. Prior checking

Regulation (EC) No 45/2001 applies to the processing of personal data by all the Community institutions and bodies, in so far as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law. In the case in point, the data processing operation conducted by the General Secretariat of the Council, a Community institution, is part of activities carried out under the first pillar and therefore falls within the scope of Community law (Article 3(1) of the Regulation).

Regulation (EC) No 45/2001 applies to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system (Article 3(2)). In the case in point, personal data are processed since such data are extracted from the database on physical access by means of an Excel file and are forwarded to the GSC Administration with a view to comparing them with those encoded in the Flexitime system. As such processing involves the processing otherwise than by automatic means of data which form part of a filing system or are intended to form part of a filing system, Article 3(2) of the Regulation applies.

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. Furthermore, Article 27(2) contains a list of processing operations likely to present such risks. Article 27(2)(b) provides that processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct should be subject to prior checking. The purpose of the processing is to identify and dissuade members of staff from non-compliance with the Flexitime rules. The aim of the data comparison is to identify persons who are violating the Flexitime rules and to assess their conduct. The processing operation is therefore intended to evaluate the conduct of certain persons (infringements of the Flexitime rules). It could also lead to the adoption of disciplinary measures.

Moreover, the processing operation allows linkages between the data contained in the database on physical access checks and the Flexitime system, as such data are processed for different purposes. Such linkages are not provided for pursuant to Community legislation. Consequently, Article 27(2)(c) of the Regulation applies.

For these reasons, the processing operation must be subject to prior checking.

The DPO's notification was received on 23 July 2009. Pursuant to Article 27(4) of Regulation (EC) No 45/2001, this opinion must be delivered within two months of that date. The EDPS

will therefore submit his opinion by 24 September 2009. A time limit of 50 days was granted to enable the controller and the DPO to comment on the EDPS's draft opinion.

3.2. Lawfulness of the processing

Article 5(a) of Regulation (EC) No 45/2001 stipulates that personal data may be processed only if they are "*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*". Recital 27 of the preamble stipulates 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 order to determine whether the processing operation complies with Article 5(a) of Regulation (EC) No 45/2001, the following three questions should be answered. Firstly, do the Treaty or other legislative acts provide for processing operations carried out by the GSC? Secondly, is the processing operation carried out in the public interest? Thirdly, is the processing operation necessary? These three conditions are of course closely linked.

Legislative acts referred to in the notification: the notification for prior checking refers to Article 55 of the Staff Regulations (hours of work of officials), Staff Note No 2/82 of 4 January 1982 (Adjustment of working hours), Staff Note No 41/03 of 26 March 2003 (Working hours - Information on the position of the AA's representatives), Staff Note No 19/04 of 17 February 2004 (Flexitime - Information on the outcome of the consultation), Staff Note No 200/07 of 20 November 2007, Staff Note No 214/07 of 18 December 2007 and Staff Note No 201/08 of 5 December 2008 as the legal basis.

The EDPS considers that, due to the purpose of the system concerned, "*only in specific cases where specific individuals are involved*" (see below) in an administrative investigation, Article 55 of the Staff Regulations and even Article 86 of and Annex 9 to the Staff Regulations apply. The EDPS has already carried out prior checks on data processing at the GSC (Administrative investigations and disciplinary board, dossier 2004-250).

Public interest: All data processing operations, even if they contribute to the public interest, must comply with the principles of proportionality and necessity.

Need for processing: The EDPS considers that the need for and proportionality of the verification of Flexitime clocking operations with respect to data on physical access checks are debatable. Based on the facts available and the arguments put forward by the controller, the EDPS considers that there is insufficient proof that the implementation of a system for verifying Flexitime clocking operations with respect to data on physical access is necessary for the performance of the staff management task and the functioning of the GSC.

As explained to the EDPS, data relating to physical access may be accessed by the departments of the Administration only within the framework of a formal administrative investigation.² According to the EDPS notification, in order to dissuade members of staff from non-compliance with the Flexitime rules, the GSC Administration wishes to be allowed to carry out occasional spot checks by comparing the data gathered by the two systems, i.e. by physical access checks and by Flexitime. It is a question of striking the right balance between

² Note to the GSC's Data Protection Officer from Mr R. Saller dated 1 April 2009.

the detection of infringements of the Flexitime rules on the one hand and GSC staff members' right to respect for their private lives on the other.

In his comments concerning the draft opinion, the controller expressed serious concerns as regards compliance with the current Flexitime rules. The EDPS notes those concerns and acknowledges that the situation is problematic. The EDPS also recognises that the controller has an administrative obligation to tackle that problem.

However, the EDPS insists that the processing operation which would be introduced must be lawful and proportionate. With regard to the processing operation under examination and without prejudice to the introduction of other systems, the EDPS considers that the proposed processing of personal data is disproportionate in that it covers a massive volume of personal data.

The EDPS does not see the necessity for the processing of data concerning the establishment of such a monitoring system comparing entrances into and exits from GSC buildings with the Flexitime timetables on an *ad hoc* basis. The word "necessity" implies that the resulting interference with the data subject's private life meets a pressing need. Such interference must be proportionate to a lawful purpose. The EDPS considers that the facts provided fail to demonstrate the proportionateness of the system in question, which links data from the physical access checks to Flexitime data. The EDPS considers that the disproportionateness of the proposed data processing operation arises from the massive volume of personal data which is likely to be used in the context of a new purpose.

Processing the data collected in connection with the physical access checks (a system which was established in order to ensure the Council's overall security) in the interests of the GSC Administration with a view to ensuring compliance with Flexitime is a *new purpose*. The introduction of a new purpose in notification 134N00 to the DPO (System for controlling access to Council buildings) does not make the processing operation in the context of the new system either lawful or compatible with the rules and principles of data processing. Account should be taken of the change in the purpose of the processing operation in conjunction with the lawfulness of the processing operation and the quality of the data (see points 3.2 and 3.3).

In the absence of sufficient suspicions, the processing of personal data with a view to comparing Flexitime clocking operations with data obtained in the context of physical access checks on members of staff for the purpose of dissuading those members of the GSC's staff who fail to comply with the Flexitime rules is considered to be excessive. Such "*fishing expeditions*" (where data are randomly compared in order to identify those individuals who fail to comply with the Flexitime rules) must be avoided. There are other less intrusive methods which could be used to ensure compliance with those rules.

In certain cases concerning specific individuals, the GSC Administration always has the option of launching an administrative investigation where there is reason to suspect that a member of staff is infringing the Flexitime rules. Such a system does not require spot checks to be carried out by comparing physical access data with Flexitime data. The EDPS believes that the GSC Administration has other means at its disposal in order to identify members of staff who are failing to comply with the current rules. There are other indicators which could reveal suspected non-compliance with the Flexitime rules, including indicators which are available to the individual's immediate superior, for example.

In view of the above analysis, the EDPS concludes that the verification of Flexitime clocking operations with respect to data on physical access checks may be justified as necessary only

in those specific cases in which there are grounds to suspect that a member of staff is infringing the Flexitime rules. Such verification should then be carried out within the framework of an administrative investigation. Under the Staff Regulations, administrative investigations are authorised in so far as they serve a *determined* purpose, as they call into question specific individuals and their behaviour.

3.3. Data quality

According to Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". They must also be "*accurate and, where necessary, kept up to date*" (Article 4(1)(d) of the Regulation).

The spot checks carried out by means of comparing the data gathered by the two systems risk infringing Article 4(1)(c) of the Regulation. As the purpose of the data processing operation is to collect a massive volume of data in connection with the various clocking operations, the EDPS considers that the data processed in the context of the new purpose of carrying out checks to identify abuses of the Flexitime system by members of staff are, by their very nature, excessive.

3.4. Conclusion

The extension of the time limit within which the DPO and the controller had to submit comments provided the controller with an opportunity to inform the EDPS of his concerns regarding possible abuses of the current system and the need for the proposed solution.

The EDPS has given careful consideration to the arguments put forward by the controller and acknowledges the existence of the problem. However, the EDPS cannot support the implementation of the proposed solution.

From the point of view of the protection of personal data, and without prejudice to any other alternative solution, the EDPS confirms his doubts regarding the proportionality of the planned processing operation.

On the basis of the above, the EDPS considers that the planned processing operation would violate the Regulation on various levels (lawfulness of the processing operation, necessity and proportionality, change in purpose, data quality) if the verification of Flexitime clocking operations with respect to data on physical access checks, as described in the notification, were to be carried out outside the framework of an administrative investigation.

This conclusion in no way prejudices the implementation of other solutions which comply with Regulation (EC) No 45/2001, with due regard also for the appropriate use of administrative investigations.

Done at Brussels on 12 November 2009

(Signed)

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