



Opinion on the notification of a prior check received from the Data Protection Officer of the Council concerning the dossier ‘Administrative follow-up of unjustified absences owing to illness’

Brussels, 22 July 2010 (Dossier 2009-0687)

1. Procedure

On 23 October 2009 a notification pursuant to Article 27 of Regulation (EC) No 45/2001 (hereinafter ‘the Regulation’) was forwarded by the Council’s Data Protection Officer (DPO) to the European Data Protection Supervisor (EDPS) concerning the dossier ‘Administrative follow-up of unjustified absences owing to illness’.

The notification was accompanied by:

- Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident (Articles 59 and 60 of the Staff Regulations),
- three specimen letters (late submission of a medical certificate, note to the Processing Department, notification of failure to attend for a medical examination).

The draft opinion was sent to the DPO and the controller for consultation on 17 December 2009 and the reply was received on 20 July 2010.

2. Facts

Any absence owing to illness considered unjustified by the Medical Absences Management Department and/or the examining doctor on the basis of (i) the verification by the Processing Department of medical certificates and compliance with the submission time-limit; (ii) the opinion of the examining doctor following a medical examination; (iii) failure to attend for a medical examination; (iv) exceeding 12 days’ uncertificated absence owing to illness in a twelve-month period, entails administrative follow-up to regularise it.

In principle regularisation consists in offsetting the duration of such absences against the data subject’s annual leave. If that leave has been used up, the official / staff member forfeits his remuneration for an equivalent period.

These operations require the processing of personal data by the following services of the General Secretariat of the Council:

- in all cases: ‘Welfare Unit / Medical Absences Management Department’ and ‘Leave / Flexitime Department’
- if pay is affected, also the Processing Department.

This processing may potentially affect officials, temporary staff, contract staff and seconded national and military experts working at the Council.

The purpose of the processing operation is to ensure compliance with all statutory and other regulations concerning absence owing to illness or accident and to prevent unjustified medical absences.

Procedure in the event of unjustified absence

In cases of unjustified absence the data subject is informed as follows:

- if the data subject fails to attend for a medical examination, a note of notification of failure to attend for a medical examination is sent to him;
- if the data subject attends for a medical examination and the examining doctor finds that he is fit to return to work, an invitation requesting him to return to work on a given date is sent to the official. If the official does not return to work on that date, that absence will be regarded as unauthorised;
- if the data subject submits his medical certificate late, a note on late submission of a medical certificate is sent to him;
- if the data subject exceeds 12 days' uncertificated absence owing to illness in a twelve-month period, he does not receive a specific note but may record that excess in the Flexitime application (internal system for management of working hours and absences).

The regularisation of the days of absence is then carried out by the Leave / Flexitime Department in the Flexitime application. The data remain accessible to the staff concerned and are visible in the Flexitime application. In cases of disagreement they may at any time request revision and if appropriate modification of the data recorded by making a request to the department responsible for verification of medical certificates and absences owing to illness or to the Leave / Flexitime Department with regard to exceeding the 12 days laid down in Article 59 of the Staff Regulations with regard to on uncertificated absence owing to illness.

If the leave entitlement is used up, a note to the Processing Department with a copy to the data subject is drawn up by the Leave / Flexitime Department to recover the unjustified period from remuneration.

To carry out their duties, the departments concerned have access to the GPWIN personnel database and to the Flexitime application.

The data generated by that processing are held electronically in the Flexitime application and on paper (various notes) by the departments concerned.¹ Paper documents are retained for a maximum of three years.

The persons concerned are informed by Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident (Articles 59 and 60 of the Staff Regulations), which describes the procedure for submitting medical certificates and the arrangements for and consequences of a medical examination.

There is no specific confidentiality statement for this processing, nor is one sent to the data subject on transmission of various documents.

3. Legal aspects

¹ The Flexitime application is not the subject of this opinion. The EDPS issued an opinion on the issue on 19 January 2006 in case 2004-258.

3.1. Prior check

The procedure as described in the notification constitutes processing of personal data (*'any information relating to an identified or identifiable natural person'* – Article 2(a) of Regulation (EC) No 45/2001). The data processing is carried out by an institution and implemented in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing is partly automated (recording in Flexitime application). Some operations are still carried out manually (processing of various paper documents).

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

Under Article 27(1) of Regulation (EC) No 45/2001, *'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 by the European Data Protection Supervisor.

Article 27(2)(a) of the Regulation states that *'the following processing operations are likely to present such risks: processing of data relating to health ...'*, which is the case here since the data undoubtedly fall within the scope of *'data relating to health'*.

In addition, the processing is covered by Article 27(2)(d) of the Regulation because a reduction in leave entitlements and/or withholding of pay constitute *'processing operations for the purpose of excluding individuals from a right, benefit or contract'*.

This opinion supplements the opinion of the EDPS issued on 11 November 2008 concerning processing on the *'Procedure in the event of absence owing to illness or accident'* (EDPS dossiers 2008-0271 and 2008-0283).

In principle, checks by the European Data Protection Supervisor should be performed before the procedure is implemented. In this case, since the notification was submitted late the check is ex-post. This does not alter the fact that it would be desirable for the recommendations issued by the EDPS to be implemented.

The notification from the Data Protection Officer of the Council was received on 23 October 2009. Pursuant to Article 27(4) of the Regulation, the European Data Protection Supervisor should have delivered his opinion within two months. Taking into account the 215-day suspension, the EDPS will give his opinion no later than 27 July 2010.

3.2. Lawfulness of the processing

The lawfulness of the processing operation should be scrutinised in the light of Article 5(a) of Regulation (EC) No 45/2001. 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'*. Recital 27 of the Regulation also states that *'processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies'*.

Checks on absences owing to illness or accident and the ensuing consequences are carried out not only in the context of the management and functioning of the institution but also on the basis of the Staff Regulations, which were adopted under the Treaties.²

As stated in the Facts section, under Article 60 of the Staff Regulations,³ *‘any unauthorised absence which is duly established shall be deducted from the annual leave of the official concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period’*. Staff Note No 65/04 of 3 May 2004 on the procedure in the event of absence owing to illness or accident lays down the implementing rules for that provision.

The lawfulness of the processing is therefore complied with.

3.3. Processing of special categories of data

Under Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and 10(3). The present case very clearly relates to the processing of personal data on health.

Article 10(2)(b) applies to the present case: *‘Paragraph 1 (prohibiting the processing of data concerning health) 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 ...’*. The processing operation has been put in place by the controller in compliance with the provisions of the Staff Regulations concerning absences.

3.4. Data quality

Data must be *‘adequate, relevant and not excessive’* (Article 4(1)(c) of the Regulation).

As regards the standard forms attached to the notification, namely: note concerning late submission of a medical certificate, note to the Processing Department, notification of failure to attend for a medical examination, the EDPS considers that the data are adequate, relevant and not excessive for the purpose of checking, monitoring and managing absences. The EDPS is fully satisfied that those documents do not contain information on the nature of the illness/accident, such as diagnoses.

Under Article 4(1)(d) of the Regulation, personal data must be *‘accurate and, where necessary, kept up to date’* and *‘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 cause to believe that the data are accurate and kept up to date. The documents relating to the consequences of unjustified absences are sent to the data subject, who may check the accuracy of the data concerning him and ask for them to be rectified. The data subject may also consult his absences in the Flexitime application and check the accuracy of the data.

Finally, the data subject can also exercise the right to access and rectify the factual content of the files (see section 3.8 below).

² Articles 59 and 60 of the Staff Regulations.

³ Articles 16, 59, 60 and 91 of the Conditions of employment of other servants (CEOS) provide that the same arrangement applies to temporary agents, contractual agents and SNEs.

Lastly, the data must be *'processed fairly and lawfully'* (Article 4(1)(a)). The matter of lawfulness has already been analysed (see section 3.2 above). With regard to fairness, it is linked to the documents to be given to the data subject (see section 3.9 below).

3.5. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down 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'*.

As regards the documents processed by the departments responsible for the processing in question, their retention period, described in section 2 above, is necessary for the purposes of this processing operation.

At the end of the specified data retention period, manual files are destroyed and computerised files deleted.

3.6. Transfer of data

The processing should be examined in the light of Article 7(1) of Regulation (EC) No 45/2001, which concerns the transfer of personal data within or between Community institutions or bodies *'if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient'*.

The data are not communicated outside the departments responsible for processing. It is necessary for those departments to be informed of various irregularities identified in the course of managing absences owing to illness, so that they can assess whether the absence is justified or not, and determine any administrative or disciplinary consequences which fall within their sphere of competence. Article 7(1) is therefore duly complied with. As regards the transmission of data between the responsible departments, it should be borne in mind that only relevant data may be transferred and that medical data in the strict sense, relating to the nature of medical condition, may not be transferred in any case. Article 7(3) of the Regulation provides that *'the recipient shall process the personal data only for the purposes for which they were transmitted'*. There should be an explicit assurance that no individual receiving and processing data can use them for other purposes.

As regards transfers in exceptional cases to other actors such as the Institution's Legal Service, the Civil Service Tribunal, the European Ombudsman or the EDPS, the EDPS considers that these transfers comply with Article 7 of the Regulation since they are, in principle, necessary for the legitimate performance of tasks covered by the competence of the recipient. However, the European Data Protection Supervisor wishes particular attention to be paid to the fact that personal data must only be transferred if the transfer is strictly necessary for the legitimate performance of tasks covered by the competence of the recipient. This is particularly important in the case of the transfer of medical reports.

3.7. Processing including the personnel or identifying number

The data subject's staff number is given on some forms produced by the department responsible for the processing operation, for instance on the note to the Processing Department. In this case the use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the personal data controller. That said, such use may have important repercussions, which is why the European legislator decided to regulate the use of such identifiers or personal numbers under Article 10(6) of the Regulation. In this instance, the Council's use of the staff number is reasonable because it provides a better means of monitoring the management of absences.

3.8. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by 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 any available information as to their source.

The right of access and rectification is governed by Section 5 of the Council Decision of 13 September 2004 adopting implementing rules concerning Regulation (EC) No 45/2001 (2004/644/EC).⁴ No specific rules have been laid down concerning that processing.

In this case, it should be noted that the data subject is informed of the consequences of unjustified absence either by a specific note, or through the Flexitime application.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In addition to being given access to their personal data, data subjects may also have the data amended if necessary. Where justified and legitimate, data subjects are entitled to have the data updated by making a request to the competent department.

In this case the data subject may ask the department concerned to review and if appropriate modify the recorded data by making a request to the department charged with checking medical certificates and absences for medical reasons or the Leave/Flexitime Department as regards exceeding the 12 days laid down in Article 59 of the Staff Regulations for uncertificated absence owing to illness.

The EDPS considers that Articles 13 and 14 of the Regulation are thus complied with.

3.9. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 provide that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided.

These provisions apply in this case, since information is collected from the data subject and from the various actors involved in the process (consulting doctor, database, etc.).

The EDPS notes that the provision of information to data subjects is not sufficient to comply with the provisions of the Regulation as no specific information is communicated to data subjects.

The EDPS recommends that a privacy statement be drawn up and communicated, in every case, to the data subject. This statement must indicate the legal basis of the processing operation; the identity of the controller; the purpose and stages of the procedure; the categories of data concerned; the potential recipients of the data; the existence of a right of access and rectification; the data retention period and the possibility of recourse to the EDPS. The EDPS is of the opinion that this statement should also be displayed on the Council's intranet site, on the page concerning absences owing to illness. It should also be incorporated into a future staff note describing the procedure to be followed in the event of absence. This would help to ensure the greatest possible transparency in relation to data subjects.

⁴ OJ L 296, 21.9.2004, p. 20.

3.10. Security measures

Under Article 22 of Regulation (EC) No 45/2001 concerning the security of processing, *‘the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected’*.

The EDPS considers that, on the basis of the information supplied in the notification, Article 22 is 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,

- data subjects should be provided with appropriate information in accordance with section 3.9 of this opinion.

Done at Brussels, 22 July 2010

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor