



Opinion on the notification of a prior check received from the Data Protection Officer of the Court of Justice of the European Union (*the Court*) regarding the ‘Invalidity Committee Procedure’

Brussels, 15 December 2011 (Case 2011-0655)

1. Procedure

On 14 April 2011 a consultation within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (‘the Regulation’) was conducted by the Court Data Protection Officer (the ‘DPO’), concerning the processing of personal data under the invalidity committee procedure.

On 30 June 2011, the EDPS replied that, by the very nature of health data processed under a procedure before an invalidity committee, this processing must be submitted for prior checking by the EDPS within the meaning of Article 27(2)(a) of the Regulation. In its letter, the EDPS indicated that it would consider the date of receipt by the Court of the notification regarding the invalidity committee procedure to be the date of the said letter, in the light of Article 27(4) of the Regulation.

In the context of this notification, questions were put to the Court’s DPO by e-mail on 29 July 2011 and replies were received on 26 August 2011. Supplementary questions were asked on 20 September and replies were furnished on 13 October 2011.

The draft opinion was sent to the Court DPO for comments on 20 October 2011. Comments were provided on 12 December 2011.

2. The facts

The purpose

The Unit for Rights under the Staff Regulations, Social and Medical Matters and Working Conditions of the Directorate General for Personnel and Finance (‘the DGPF’) is responsible for conducting procedures relating to invalidity in accordance with the Staff Regulations. Once the conditions laid down in the Staff Regulations have been satisfied, the purpose of these procedures is to obtain from the invalidity committee a decision as to whether the official, temporary member of staff or contract member of staff concerned should be granted invalidity or should resume professional activities.

Legal basis

The legal basis of the processing consists of:

- Articles 53, 59 and 78 of the Staff Regulations;
- Article 33 of the conditions of employment applicable to other servants, for temporary members of staff;

Postal address: rue Wiertz 60 - B-1047 Brussels

Offices: rue Montoyer 63

E-mail: edps@edps.europa.eu - Website: www.edps.europa.eu

Tel.: 32-2-283 19 00 - Fax: 32-2-283 19 50

- Article 102 of the conditions of employment applicable to other servants, for contract members of staff, and
- Articles 7, 8 and 9 of Annex II to the Staff Regulations regarding the invalidity procedure.

The data subjects may be informed of the procedure in question on the Staff Vademecum intranet site, on the subject of ‘invalidity’.

The invalidity committee meets:

- either at the request of the data subject;
- or at the request of the Appointing Authority where the duration of absences during the past three years amounts to 365 days, based on information originating from the medical service.

The DGPF informs the data subject of the referral to the invalidity committee and asks him to provide the name of a doctor to represent him on the Committee.

The invalidity committee consists of three doctors:

- one appointed by the institution;
- one appointed by the official concerned;
- one appointed by agreement between the first two doctors appointed.

This Committee delivers its conclusions as to whether the official or servant is fit to perform his duties. In addition to this finding, the invalidity committee rules as to the cause of unfitness for work and indicates the need for and frequency of follow-up medical examinations.

If the invalidity committee concludes that the official or other staff member satisfies the invalidity conditions within the meaning of the Staff Regulations, he is retired automatically on the last day of the month in which the Appointing Authority has taken the decision on the official or servant’s permanent unfitness to perform his duties.

It is not ruled out that the state of health of the official or other staff member concerned might improve. The Staff Regulations therefore allow the official to return to his institution if he no longer satisfies the requirements for payment of an invalidity allowance. The invalidity committee shall deliver an opinion on a possible return to work.

The Court publishes the Appointing Agency’s decision on the intranet pursuant to Article 25, third paragraph, and Article 35 of the Staff Regulations.

Data processed in the context of the processing

The DGPF processes administrative data, in particular the data subject’s surname, forename, insurance number and date of birth.

All medical data, namely medical reports and medical findings, are processed exclusively by the medical service of the Court and the members of the invalidity committee.

Nature of the processing

Processing is both manual and computerised. The documents relating to the processing are produced using either Word or Excel software.

Recipients:

The recipients of administrative data within the Court are the Appointing Authority, the Director General for Personnel and Finances, the Director for Human Resources and Personnel Administration, the managers of invalidity cases and the internal auditor.

Other potential recipients are the Court of Justice in the event of a dispute, OLAF (the European Anti-Fraud Office), the Court of Auditors, the EDPS and the Mediator.

Right of access and rectification

Data subjects may apply to the Unit for Rights under the Staff Regulations, Social and Medical Matters and Working Conditions to request access to the documents concerning them.

They may also request a rectification of their data.

Right to information

Data subjects may consult the Staff Vademecum on the intranet for an information note in relation to Articles 11 and 12 of the Regulation in the context of an invalidity procedure. The note gives the following information:

- the identity of the data processing controller,
- the purposes of the data processing,
- the categories of data processed,
- the data recipients,
- the existence of the right of access to and rectification of the data concerning them,
- the legal basis,
- the existence of storage periods for medical and administrative data, but without any precise information, and
- the right of referral to the EDPS at any time.

Retention of data

Further to questions addressed to the Court DPO, the Appointing Authority's decision is kept on the data subject's personal file for the duration of the retention period fixed for that file by the Court, namely for 120 years from the data subject's date of birth. The Court DPO has pointed out that the retention period is in line with the one currently adopted by the Commission. In this connection, reference is made to case 2004-0281 on performance reports, which has been closed for the time being pending the outcome of discussions between the EDPS and the Commission on the question of the time-limit for the retention of data on personal files¹.

As regards medical data, the Court DPO has stated that the retention period is the same as for medical files and has made reference to the processing of medical files that have been the subject of a prior check². The question of the conservation of medical data has been the subject of interinstitutional coordination for several years within the Preparatory Committee for Social Affairs. The Court DPO has said that the Court would align itself with the interinstitutional common position to be defined in agreement with the EDPS.

¹ EDPS letter of 31 May 2011 to the data controller.

² The EDPS delivered an opinion on 17 June 2005 (Case 2004-0278). In this case, the Court has indicated that it stores the data for an indefinite period. The EDPS has recommended that a specific period proportional to the purpose of the processing be fixed.

The administration has provided for the possibility of storing anonymous data for statistical reasons. The Court is considering in particular taking only metadata from the file, such as the cause of invalidity, the age and the gender, whereas the actual documents from which the metadata are extracted would be destroyed.

Storage and security measures

The files are stored in locked cupboards. The only people having access to the data are the specifically accredited file managers.

3. Legal aspects

3.1 Prior checking

The applicability of the Regulation: The data processing being analysed consists of the processing of personal data (*‘any information relating to an identified or identifiable natural person’*, according to Article 2(a) of the Regulation). The data are processed by an institution of the European Union (*‘the E.U.’*), the Court, in the exercise of activities within the field of application of E.U. law.³ The processing is computerised in part, and therefore the Regulation is applicable.

Reasons for prior check: Article 27(1) of the Regulation states that *‘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 shall be subject to prior checking by the European Data Protection Supervisor’*. Article 27(2) lists the processing operations likely to present risks, such as the *‘processing of data related to health ...’* (Article 27(2)(a)). Processing in this instance implies the collection of health-related data so as to determine the extent of the data subject’s invalidity. As a result, it falls within the application of the prior checking procedure, based on Article 27(2)(a) of the Regulation.

In principle, the check carried out by the EDPS is prior to the processing. The EDPS regrets not having been able to give its opinion before the start of the processing. By default, in this case, the check necessarily becomes *‘a posteriori’*. This does not in any way alter or deflect from implementing the recommendations presented by the EDPS.

Official notification is considered to have been received on 30 July 2011. In accordance with Article 27(4) of the Regulation, the period of two months in which the EDPS is required to deliver his opinion has been suspended. Because of the 51 days’ suspension, therefore, the EDPS will deliver his opinion by 19 December 2011 at the latest (51 days’ suspension + 31 days according to the suspension clause for the month of August + 53 days for comments).

3.2 Lawfulness of processing

According to Article 5 of the Regulation, data may be processed only on one of the grounds specified.

³ The concepts of *‘Community institutions and bodies’* and *‘Community law’* can no longer be used after the enforcement of the Lisbon Treaty on 1 December 2009. Article 3 of the Regulation must therefore be read in the light of that Treaty.

Of the five grounds listed in Article 5, the processing in this instance satisfies the conditions set out in Article 5(a) of the Regulation, to the effect that 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 in the legitimate exercise of official authority vested in the Community institution*.

In the present case, **the legal basis** for the processing is found in Articles 53, 59 and 78 of the Staff Regulations, Article 33 of the conditions of employment applicable to other servants, for temporary members of staff, Article 102 of the conditions of employment applicable to other servants, for contract members of staff, and Articles 7, 8 and 9 of Annex II to the Staff Regulations.

The necessity for processing is also mentioned in paragraph 27 of the preamble to the Regulation, which 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'*. In this instance, the processing of personal data is necessary in order to obtain the invalidity committee's conclusions as to whether the official, temporary member of staff or contract member of staff concerned should be granted invalidity or should resume professional activities. This processing is therefore necessary for the proper management and functioning of the Court.

The processing proposed is therefore lawful.

3.3 The processing of special categories of data

Article 10(1) of the Regulation states that the processing of personal data on health is prohibited, except where it is justified by reasons cited in Articles 10(2) and 10(3) of the Regulation.

Article 10(2)(b) applies in this case: *'Paragraph 1 (prohibition of the processing of data on 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 in this instance is necessary in order to comply with the specific obligations and rights of the Court, as an employer, under labour law. The Court therefore carries out this processing in accordance with the provisions of the Staff Regulations pursuant to Article 10(2)(b) of the Regulation.

In addition, in the present case, according to the notification all medical data are processed exclusively by the Court's medical service and the members of the invalidity committee. It follows that the medical data are communicated to health professionals, who themselves are bound by professional secrecy, for the purpose of arriving at a medical diagnosis. Article 10(3) of the Regulation has therefore been observed.

3.4 Data quality

Pursuant 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'*. It should therefore be verified that the data are relevant in relation to the purpose for which they are being processed.

The EDPS considers that the data as described in this opinion satisfy these conditions regarding the purposes of the processing explained above.

Furthermore, Article (4)(1)(d) of the Regulation provides that data must be *'accurate and, where necessary, kept up to date'*. According to this Article, *'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'*.

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

In the present case, the procedure in place enables one to conclude that the system itself gives a reasonable guarantee of data quality. Furthermore, the rights of access and rectification are available to the data subject, in order to make the file as comprehensive as possible. These rights constitute the second means of ensuring that data concerning the data subjects are accurate and updated (see section 3.7 on the right of access).

In addition, the data must be *'processed fairly and lawfully'* (Article (4)(1)(a)). The lawfulness of the processing has already been discussed in section 3.2 of this opinion. As for fairness, this is linked to the information that must be forwarded to the data subject (see section 3.8 on the right to information).

3.5 Retention of data

The general principle stated in the Regulation is that the 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'* (Article (4)(1)(e) of the Regulation).

As indicated in the section on the facts, the Court keeps the Appointing Authority's decision on the personal file for 120 years from the data subject's date of birth. As indicated in the facts, this issue is still pending and will be dealt with in the near future in the context of Case 2004-0281. The EDPS, however, regards the 120 years' retention period to be excessive considering the purpose of processing. The EDPS draws the attention of the Court to its Guidelines of 10 October 2008 concerning staff recruitment as well as its Guidelines concerning staff evaluation of 15 July 2011⁴. The EDPS has recommended that personal files be kept for a period of 10 years after the termination of employment or the last pension payment. The EDPS insists on this position. Nevertheless, in this instance, the EDPS considers that the question should be further discussed in the context of case 2004-0281.

As for medical data, the Court has indicated that the retention period is the same as that applicable for medical files and refers to the processing relating to medical matters on which a prior check has already been conducted. In the notification concerning medical matters, it had been indicated that the medical files are retained for an undetermined period. In its opinion of 17 June 2005, the EDPS recommended the adoption of a specific period proportional to the purpose of the processing.

In addition, the EDPS pointed out in its Guidelines concerning the processing of health data in the workplace⁵ and its opinion concerning the processing of health data by 18 EU agencies⁶

⁴ <http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/Guidelines>.

⁵ Published on 28 September 2009.

that as a general rule a period of 30 years, from the date the last medical document was put on the file, should be considered as the maximum period for storing medical data. The conservation period should be assessed and determined in the light of Article 4(1)(e) of the Regulation.

In this instance, the EDPS recommends that the Court make a distinction between the case of a favourable opinion by the invalidity committee and the case of an unfavourable opinion. In the former case, in the light of other recent EDPS opinions on the subject⁷, the EDPS recommends that medical data should be retained for a period of 30 years from the time that invalidity is recognised. If invalidity is not recognised, the EDPS recommends that the documents associated with the invalidity committee should be kept on the medical file for a period of 5 years in order to allow for a possible appeal. These periods should be clearly indicated in the information note in the staff Vademecum published on the intranet site (see section 3.8 '*right to information*').

The Court envisages storing data in anonymous form for statistical reasons, using only metadata in a file such as the cause of invalidity, age and gender. The EDPS considers that the data used and the method of anonymisation comply with Article (4)(1)(e) of the Regulation.

3.6 Transfer of data

Articles 7, 8 and 9 of the Regulation lay down certain obligations that apply where personal data are transferred to third parties. The rules differ depending on whether the transfer is (i) within or between EU institutions or bodies (Article 7), (ii) to recipients subject to Directive 95/46/EC (Article 8), or (iii) to other types of recipients (Article 9).

Internal transfers

In accordance with Article 7(1), the Court is required to verify both that all the recipients possess the appropriate competences and that the transfer of the personal data is necessary to the performance of these competences. In this instance, the case is one of a transfer both within the Court, in particular within the various departments responsible as indicated above and between the Court and other E.U. institutions. Each recipient has its own specific competence and the data transferred to each one appear to be necessary to the lawful performance of their assignments. The EDPS points out, however, that only the data they require for the performance of their missions must be transferred. It will be a matter of verifying the lawfulness of the transfer case by 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*'. The Court is required to ensure that any persons taking part in the invalidity procedure within the Court who receive and process data are informed that they may not use the data for other purposes (see also section 3.3 of this opinion).

External transfers

In the context of the invalidity procedure, health data are also communicated to the medical doctor treating the data subject, and to a medical doctor chosen by mutual agreement between the Court's medical doctor and the medical doctor treating the data subject. These recipients

⁶ Opinion of 11 February 2011 (Case 2010-0071).

⁷ EDPS opinion of 16 January 2009 on the procedure of the invalidity committee at the Council (Case 2008-626).

external to the Court are health professionals subject to the obligation of professional secrecy, which takes account of the particular nature of the data communicated and satisfies the conditions of Article 10(3) of the Regulation.

If either of these medical doctors is in a country that has passed legislation transposing Directive 95/46/EC, Article 8 of the Regulation is applicable. The data on health may be transferred only once the need for that transfer has been established in the light of Article 8 of the Regulation.

If either of these medical doctors is in a country that is not subject to Directive 95/46/EC, Article 9 of the Regulation is applicable. Pursuant to this provision, the data may be transferred only to a country offering an adequate level of protection. If this is not the case, the exceptions stated in Article 9(6) must be taken into account. In this instance, paragraph (a) of Article 9(6) is particularly 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 ...'*.

3.7 Right of access and rectification

Article 13 of the Regulation provides for the principle of the right of access to the data – and the procedures therefor – at the request of the data subject. Article 14 of the Regulation provides for the data subject's right of rectification.

According to the notification, the data subjects may apply to the Unit for Rights under the Staff Regulations, Social and Medical Matters and Working Conditions to request access to the documents concerning them. They may also request rectification. The information note refers to Article 13 and 14 of the Regulation.

Right of access

The existence of the right of access is in accordance with Article 13 of the Regulation. Nevertheless, the EDPS draws the attention of the Court to Article 20 of the Regulation, which lays down certain restrictions on this right, in particular where such restrictions constitute a necessary measure for the protection of the data subject or of the rights and freedoms of others.

In the case of the medical file, the right of access to the medical file is the subject of Staff Note No 31/2004 of 19 March 2004. This note states that data subjects have the right of direct access to their medical file, to be exercised on the premises of the medical service in the presence of a person designated by the medical service. Provision is also 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 restriction is necessary to guarantee the protection of the data subject or the rights and freedoms of others.

The EDPS therefore recommends that the Court make reference to this Staff Note in the information note on the intranet, as well as to the possibility of Article 20 of the Regulation applying in the event of an invalidity procedure. The EDPS invites the Court to ensure that a restriction on access to medical files is examined on a case-by-case basis in accordance with

the principle of proportionality. Article 20 of the Regulation must not be allowed to result in a general refusal of access to the personal notes of doctors in the medical file.

Right of rectification

With regard to the right of rectification, the Court should explain to data subjects, for example in the information note, that their right of rectification implies not only the rectification of administrative errors in their medical file but also their right to supplement it by adding second medical opinions according to the rules and within the procedural terms laid down by the Staff Regulations.

3.8 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.

In this instance, the information note on the intranet sets out most of the items included in Articles 11 and 12 of the Regulation. However, the EDPS draws the attention of the Court to the following information that should supplement the note:

- include external medical doctors among the possible recipients of processing, as mentioned in section 3.6 of this opinion;
- clarify whether replies to questions to data subjects are obligatory or voluntary, as well as the possible consequences as regards the opinion of the invalidity committee of failure to reply (Article 11(1(d)));
- provide clarification on the right of access and rectification, as discussed in section 3.7 of this opinion, and
- specify the periods for which data are stored in both the personal and the medical file, in accordance with the EDPS recommendations in section 3.5 of this opinion.

The EDPS recommends, therefore, that all this information be provided to data subjects by means of the information note.

3.9 Security measures

In accordance with Article 22 of Regulation No 45/2001/EC on 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’*.

Security measures for consultation and the conservation of files in hard copy have been adopted.

Nevertheless, no information has been provided on the security measures adopted in the context of consultation and the storage of electronic data. The EDPS therefore suggests that the Court adopts adequate measures and states this in the notification.

Conclusion:

The processing proposed does not appear to involve any infringement of the provisions of Regulation No 45/2001/EC provided that the comments made above are taken into account. This means in particular that the Court should:

- in the event of a favourable opinion, keep the medical data for a term of 30 years from the granting of the benefit;
- in the event of an unfavourable opinion, keep the documents associated with the invalidity committee on the medical file for a term of 5 years, to allow for a possible appeal;
- inform any persons taking part in the invalidity procedure within the Court who receive and process data that they may not use them for other purposes;
- make reference to Staff Note No 31/2004 of 19 March 2004 in the information note on the intranet and to the possibility of Article 20 of the Regulation applying to the right of access to the medical file. The Court should ensure that restrictions on access to medical files are examined on a case-by-case basis in accordance with the principle of proportionality;
- explain to data subjects that their right of rectification implies not only the rectification of administrative errors in their medical file but also their right to supplement the file by adding second medical opinions;
- include in the information note any supplementary information as explained in section 3.8 of this opinion;
- adopt security measures concerning the consultation and storage of electronic data, and indicate this in the notification.

Done in Brussels on 15 December 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor