



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Bert DE COLVENAER
Executive Director
Fuels Cells Hydrogen Joint
Undertaking (FCH-JU)
WA TO-56
1049 Brussels

Brussels, 27 May 2013
GB/MV/kd D(2013) 1094 C 2011-0836
Please use edps@edps.europa.eu for all
correspondence

Subject: Opinion on the notification for prior checking from the Data Protection Officer of the Fuel Cells and Hydrogen Joint Undertaking concerning Sick and Family leave management

Dear Mr de Colvenaer,

On 13 September 2011, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the Fuel Cells Hydrogen Joint Undertaking (**FCH JU**) a notification for prior checking concerning "Sick and Family leave management".

This Opinion deals with already existing Sick and Family leave processing operations. The guidelines on leave and flexitime ("The Guidelines") were adopted on 20 December 2012, which allows the EDPS to focus on the practices that do not seem to be fully compliant with Regulation 45/2001.

The DPO sent this notification while the Guidelines in the area of Leave and Flexitime (the "Guidelines") were being drafted. Therefore, the procedure was suspended between 13 September 2011 and 31 March 2013 for adoption and implementation of the Leave and Flexitime Guidelines¹.

1. Legal aspects

The EDPS notes that the processing in question is considered by the controller as lawful in terms of Article 5(a) of the Regulation².

¹ Guidelines concerning the processing of personal data in the area of leave and flexitime adopted on 20 December 2012 (EDPS 2012-0158).

² Based on Articles from the Staff Regulations, the Conditions of Employment of other servants of the European Communities, Commission decision on Article 42b of the Staff Regulations concerning family leave, Commission decision introducing implementing provisions on absences as a result of sickness or accident, Commission decision on introducing implementing provisions on leave and Commission decision measures concerning leave on personal grounds for officials and unpaid leave for temporary and contract staff of the European Union (Communities), as implemented by the FCH JU.

Regarding information, even though the notification states that information is provided to the data subjects upon recruitment and at the beginning of the calendar year, no specific privacy statement on sick and family leave complying with Articles 11 and 12 is provided. It was clarified that information is also provided by a general privacy statement on personal files or by oral discussions between the HR officer and the concerned colleagues. Although not specifically required by the Regulation, a written privacy statement would ensure that the controller meets its obligations in terms of information and would ensure that the provision of the information can be documented in case of a complaint.

The rights of access and retention are granted to the data subjects in accordance with Articles 13 and 14 and the security policy appears to be in line with Article 22. Transfers appear to be limited to information necessary for the competent entities to carry out their tasks and recipients are reminded of the purpose limitation obligation in terms of the Article 7(3) of the Regulation.

Besides, the right of access is granted to the data subjects in accordance with Articles 13 and 14. Specifically, reference to Articles 9 to 18 of the FCH JU Implementing rules concerning data protection is made. These include access to the DPO's register of data processing operations; requests from data subjects to the data controller to exercise their rights, as well as detailed procedures to exercise the rights to access, rectify, erase, block, and object.

As to the retention period, the EDPS notes that the retention of the leave management files for four years and the retention of the data are considered as necessary to justify an absence due to sick leave for three years are in line with the Guidelines.

As to subcontracting, the EDPS made a specific recommendation in the Guidelines on subcontracting in the context of processing of health related data. This recommendation stresses that if an agency does not set up its own medical service, but outsources the processing of all medical data to the Commission medical service or to an external service provider (i.e. external doctor), in such case the agency must ensure the respect of Article 23 of the Regulation and must choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required. The processor must be legally bound to the controller. In particular, the latter must act only on instructions from the controller and be bound to respect the security obligations in Articles 2 and 22 of the Data Protection Regulation 45/2001. The EDPS received confirmation from the FCH JU that Article 23 has been complied with. Indeed, the EDPS received copy of the service level agreement with the medical service of the European Commission that foresees the obligations stated above.

2. Conclusion

In view of the above analysis, the EDPS considers that the FCH JU sick and family leave processing operations are in line with the Regulation.

Therefore, he has decided to close the case.

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

Cc: Mr Nicholas BRAHY, Data Protection Officer, FCH-JU