



Opinion on the notification of a prior check received from the Data Protection Officer of the Council of the European Union relating to the social service files

Brussels, 6 February 2006 (Case 2004-255)

1. Procedure

- 1.1. On 20 July 2004 the European Data Protection Supervisor (EDPS) wrote to the Data Protection Officers (DPOs) asking them to prepare an inventory of data processing operations which might be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) No 45/2001 (hereinafter referred to as "the Regulation"). The EDPS requested notification of all processing operations subject to prior checking, including those begun before the Supervisor was appointed, for which checking could never be regarded as prior, but which would be subject to "*ex post facto*" checking.
- 1.2. On the basis of the inventories received from the Data Protection Officers, the EDPS identified priority topics, namely data processing operations in disciplinary, staff evaluation and medical files. On 10 November 2004 the EDPS wrote to all DPOs requesting an update of their inventories and referring in the request to two new priorities: social services and e-monitoring. The Council's social service files fall within the scope of this fourth new priority.
- 1.3. On 30 November 2005 the EDPS received notification by post for prior checking of data processing operations falling within the scope of the social service files.
- 1.4. Additional questions were forwarded on 5 and 7 December 2005 and 17 and 18 January 2006. The replies were received on 5 and 8 December 2005 and 18 and 19 January 2006 respectively.

2. Examination of the case

2.1. The facts

The purpose of the social service files is to carry out a procedure providing aid to an official and/or a member of his/her family. The body of data provided by the applicant (the person concerned) forms one of the fundamental tools for the professional relationship between the applicant and the welfare officer. Some of the data is used in making an application for assistance to the Appointing Authority, for example an application for a loan, gift or financial contribution to the cost of household help under Article 76 of the Staff Regulations or financial assistance with the non-medical expenses of a disabled person (budget heading 164).

The persons concerned are all officials requesting aid, whether working or retired, or they may be family members of the official concerned requesting aid.

The data categories include details of private and/or professional life provided by the person requesting aid; personal opinions expressed by the applicant; comments and opinions of the welfare officer on the situation reported, on the person, on the problem and on the aid process; the factual details, invoices or other supporting documents which are necessary to make a valid request for financial aid or financial intervention by the institution and have been presented by the applicant. The welfare officer makes no report giving his professional view of the case.

"Details of private and/or professional life provided by the person requesting aid" is to be understood as comprising all possible personal data referred to in Article 10 of the Regulation. Accordingly, an official who is sick will give data on his health, possibly adding other sensitive data. Another official will request information on the procedure to be followed in Belgium after being sentenced by a court and will ask for a translation of the judgment. "Factual details" in the context of an administrative procedure, means the data given on an invoice (name, address, name of product, etc.) from a hospital, institution for disabled persons, family assistance organisation, etc.

The controller responsible for the processing operation does not consider it necessary to give the information referred to in Article 11 of the Regulation, since the applicant will personally supply the information to the welfare officer. No data is ever collected by the welfare officer from other persons and/or bodies. The applicant is free to supply whatever information he/she wishes. The welfare officer will inform the applicant that he is bound by professional secrecy and that all conversations will be confidential.

Each welfare officer holds the details of each of his aid applicants. However, should he be absent, another welfare officer may if necessary consult the file and the personal notes in order to ensure that the case is followed up.

Rights of access, rights to correct, block, erase and challenge apply to files but not to the welfare officer's personal notes.

The documentation in the file (correspondence, invoices, copies, reports, etc.) supplied by the applicant remain the property of the applicant. On request these documents may be returned to the person concerned.

Processing procedures are partially automated. When a file is submitted to the Appointing Authority for the purpose of requesting financial aid or any other intervention by the institution, a paper file is always included, containing the request from the welfare officer and/or the supporting documents. The supporting documents, copies, correspondence, etc. supplied by the applicant are stored in paper form. The welfare officer's personal notes may also be stored in paper form, but other welfare officers keep computerised notes.

With regard to transfers of data within the institution, files prepared for the use of the Appointing Authority and containing only the data necessary for taking a decision based on the Staff Regulations are sent to the head of DGA 1-B. The supporting documents remain in the welfare officer's file.

If a document has not already been returned to the applicant (at his request), all data continues to be held by the social service (either on the central server or in the departmental archives) for up to five years after the death of the person applying for aid, unless there has been a subsequent intervention following decease, in which case data storage will be for five years after the latter intervention. A check is made every year for purposes of data destruction.

Security measures have been adopted.

2.2. Legal aspects

2.2.1. Prior checking

Data management relating to the social service files and the welfare officer's personal notes constitute processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data processing in this case is performed by an institution, carried out in the exercise of activities falling within the scope of Community law (Article 3(1)), and is performed wholly or partly by automatic means or must be recorded in a file (Article 3(2)). It accordingly falls within the scope of Regulation (EC) 45/2001. Furthermore, it should be noted that there are no exceptions to the application of the Regulation for processing of the welfare officer's personal notes.

Article 27(1) of Regulation (EC) 45/2001 makes "processing operations likely to present specific risks to the rights and freedom of data subjects by virtue of their nature, their scope or their purposes" subject to prior checking by the EDPS.

Article 27(2) of the Regulation contains a list of processing operations which might present such risks.

The present matter merits prior checking in view of the fact that it concerns "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct" (Article 27(2)(b)). Processing operations effected by the social service may indeed be intended to evaluate personal aspects of the data subject. Ability, efficiency or conduct are in fact only examples of some of the personal aspects which may be evaluated. Furthermore, Article 27(2)(a) also applies, as the social service may carry out "data processing operations relating to health and to suspected offences, offences, criminal convictions or security measures" as described in paragraph 2.1 of this Opinion.

In principle the check made by the European Data Protection Supervisor takes place before the processing operation is carried out. In this case, because of the fact that the European Data Protection Supervisor was appointed after the establishment of the system, the check perforce becomes *ex-post facto*. This in no way alters the desirability of applying the recommendations made by the European Data Protection Supervisor.

The DPO's notification was received on 30 November 2005. In conformity with Article 27(4), this opinion must be delivered within the next two months. The procedure has been suspended for four days. The Supervisor will therefore deliver his opinion on 6 February 2006.

2.2.2. Legal basis and lawfulness of processing

The processing operation is carried out on the legal basis of Articles 76 and 76a of the Staff Regulations of Officials of the European Communities, which state that "gifts, loans or advances may be made to officials, former officials or where an official has died, to those entitled under him who are in a particularly difficult position as a result inter alia of serious or protracted illness or by reason of a disability or family circumstances."

Article 76a goes on to state that: "a surviving spouse who has a serious or protracted illness or who is disabled may receive financial aid increasing the pension from the institution for the duration of the illness or disability on the basis of an examination of the social and medical

circumstances of the person concerned. Rules implementing this Article shall be fixed by common accord between the institutions, after consulting the Staff Regulations Committee."

The analysis of the legal basis for the Regulation is accompanied by an analysis of the lawfulness of the processing operation. Article 5(a) stipulates that "Personal data may be processed only if:

(a) 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 or in a third party to whom the data are disclosed (...)."

In the file under consideration, the social service is acting in the context of an exercise undertaken in the public interest on the basis of Articles 76 and 76a of the Staff Regulations.

This being so, the proposed processing operation complies with the lawfulness requirement.

In addition, data relating to health are described in Article 10 of the Regulation as "special categories of data."

2.2.3. Processing of special categories of data

Among other data, social service files may include data relating to the health of the official as indicated in paragraph 2.1.

Article 10(1) states that "the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited."

However, in the case under consideration the exception provided for in Article 10(2)(b) applies:

"... 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 Staff Regulations fulfil those conditions.

2.2.4. Data quality

"Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed" (Article 4(1)(c) of the Regulation).

Data processed in the context of the social service's files, as described in paragraph 2.1 of this Opinion, may be quite extensive in character, with the result that it is difficult to establish *a priori* and without knowledge of the specific case whether they are "adequate, relevant and not excessive". Consequently, it is important that the staff involved in processing data for the various files are properly informed of the requirement to comply with the principle laid down in Article 4(1)(c), and that they take account of this in processing the data. It should be noted that the foregoing applies not only in relation to all the data supplied by the applicant but also to the welfare officer's personal notes.

Data must also be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has already been discussed in paragraph 2.2.2 above. Concerning fairness, this

relates to the information which is to be communicated to the data subject (see above, paragraph 2.2.7).

Finally, 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 " (Article 4(1)(d) of the Regulation).

This provision, in the case of social files, relates primarily to factual data. However, the EDPS considers that, as far as the subjective content of the welfare officer's personal notes is concerned, the data subject must always have the opportunity to give his or her point of view and to corroborate the accuracy of the data, particularly if the request is refused – either because of a lack of proposal on the part of the welfare officer or because of a proposed rejection.

The data subject has access and rectification rights, in order to ensure that the file is as complete as possible; on these two rights see paragraph 2.2.6 below.

2.2.5. Data storage

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 (...)" (Article 4(1)(e) of the Regulation).

In the case in question, the period of five years was set by agreement between the welfare officers, in view of the fact that notes and documents may be important where a member of the family or entitled person requests aid after the death of an official. The EDPS considers this time-limit reasonable in the light of the stated aim in Articles 76 and 76a of the Staff Regulations. The time-limit accordingly applies to the files and to the welfare officer's personal notes.

In any case, data is not kept for historical, statistical or scientific purposes (Article 4(1)(b)).

2.2.6. Access and rectification rights

Article 13 of the Regulation establishes a right of access, and arrangements for exercising this upon request by the data subject. Article 14 of the Regulation provides the data subject with a right of rectification. In the case in point, the right of access is granted for the items in the file which have been supplied by the applicant. However, neither the right of access nor the right of rectification are applied with regard to the welfare officer's personal notes.

Although the exception provided for in Article 20(1)(c) may be relevant in certain cases dealt with by the social service, the EDPS considers that it cannot be applied in absolute terms. Since it is an exception to a general rule laid down in Articles 13 and 14, this exception must be interpreted restrictively and the application must be analysed on a case-by-case basis, where necessary after consulting the DPO. Consequently the general rule for the files and the welfare officer's personal notes must be to apply the principles of right of access and rectification.

2.2.7. Information to be given to the data subject

The Regulation states that the data subject must be informed where there is processing of his or her personal data and lists a number of obligatory points to be included in the information. In the case at hand, the data is collected directly from the data subject and indirectly by processing the welfare officer's personal notes.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) and Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject apply in this case.

As stated in paragraph 2.1, the controller does not consider it necessary to give the information provided for in Article 11 of the Regulation. However, even though the data subject himself provides the data to the welfare officer and even though no data is ever collected by the welfare officer from other persons and/or bodies, the controller must comply with Article 11, as the circumstances communicated do not constitute legally recognised exceptions to the requirement imposed in Article 11 as set out in Article 20(1) of the Regulation. Nor does the fact that the welfare officer is bound by professional secrecy and all conversations take place in confidentiality mean that this requirement is not to be followed.

The information specified in all the provisions of Article 11, namely: (a) (the identity of the controller); (b) (the purposes of the processing operation); (c) the recipients or categories of recipients of the data); (d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply); (e) (the existence of the right of access to, and the right to rectify, the data concerning him or her) must be supplied to data subjects. This also applies to paragraph (f), which lists the following: *the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor* – ensuring that processing fully complies with the lawfulness requirement.

The same reasoning applies to Article 12 of the Regulation with regard to the data processed from the welfare officer's personal notes.

The EDPS therefore recommends that all the information referred to in Articles 11 and 12 be provided to the data subjects.

2.2.8. Transfer of data

The processing operation must also be considered in the light of Article 7(1) of the Regulation. Processing as contemplated by that Article concerns personal data transfers between Community institutions or bodies, or within them "if necessary for the legitimate performance of tasks covered by the competence of the recipient".

Article 7(1) of the Regulation is complied with, as only transfers within the Council (namely to DGA 1-B) for the purpose of taking a decision on the aid requested and on the basis of the Staff Regulations are made in the case in question, provided that the content of the file is not excessive.

2.2.9. Security

In conformity with Article 22 of the Regulation on 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".

From the description of the security measures taken in the notification, the EDPS considers the measures adequate in terms of Article 22 of the Regulation.

Conclusion

The proposed processing operation does not appear to involve any infringements of Regulation (EC) 45/2001, if account is taken of the above comments. This means in particular that:

- The welfare officers who process the personal data must be properly informed of the requirement to comply with the principle laid down in Article 4(1)(c) of the Regulation, namely that the data processed must be "adequate, relevant and not excessive in relation to the purposes for which they are further processed". This principle must be complied with in relation to the data supplied by the applicant and the welfare officer's personal notes.
- The data subject must be informed where his personal data is processed, in accordance with Articles 11 and 12 of the Regulation.
- The right of access and right of rectification must be exercised in relation to all the data processed. These rights are to be rigorously applied to the factual data. Concerning the subjective opinions contained in the welfare officer's personal notes, the data subject must always have the opportunity to give his or her point of view, especially where the subjective opinion might have repercussions in the exercise of the data subject's rights.

Done at Brussels on 6 February 2006.

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