

Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the European Commission regarding the general administrative management of participation in a strike.

Brussels, 25 September 2006 (Case 2004-222)

1. Procedure

On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to the Data Protection Officers (DPOs) asking them to prepare an inventory of data processing operations that 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 that commenced before the Supervisor was appointed and for which checking could never be regarded as prior, but which would be subject to "ex post" checking.

On 20 July 2006 (the communication sent on 14 December never reached the EDPS), the EDPS received notification regarding prior checking of the general administrative management of participation in a strike. In order to enable the DPO to provide the additional information and relevant comments, the deadline was suspended for a further ten days.

2. The facts

The provisions governing the right to strike at the European Commission are set out in the Commission Decision of 16 December 1970 and in the framework agreement of 27 January 2003 between the Commission and the Trade Union or Professional Organisations (OSP). The principle adopted is that days on strike cannot be remunerated.

For the purposes of non-payment, attendance or absence on strike days must be monitored. Since the strike on 10 November 2005, such monitoring is possible by means of SYSPER 2.

The data subjects for the processing of data relating to strike participation are officials and other servants. The purpose of the data processing operation is to establish a reliable list of strike participants in order to apply to them a salary deduction of one-thirtieth of basic salary per day on strike.

The data regarding the data subjects are as follows:

- full name
- personnel number
- status
- post
- fraction of working time

The procedure, described using for the purposes of illustration the strike on 10 November 2005, is as follows:

- Staff working on day 1 of the strike are urged to sign the attendance lists made available in the DGs and departments once in the morning and once in the afternoon.
- The DGs and departments will draw up a list of staff presumed to be on strike by checking which colleagues have signed the attendance lists (once in the morning and once in the afternoon) and which colleagues are absent on day 1 of the strike for reasons other than the strike (leave, illness, mission, training, part-time work, etc.).
- The DGs and the departments will transfer this list to DG ADMIN ten days later, via a specific menu of the SYSPER 2 application which will be accessible to Directors-General, Directors/Heads of Private Offices and Heads of Unit, and HR management, in accordance with a pre-established procedure.
- In the following month, DG ADMIN will send a letter to staff thought to have participated in the strike on the basis of those lists, and will give them the opportunity, in the event of disagreement, to correct the information and/or submit documentary justification for their absence. In view of the necessary time-limits, the salary deduction will generally be made in month $n+2$.
- Under the Framework Agreement concluded between the Commission and the Trade Union or Professional Organisations (OSP), the list of posts whose holders may be requisitioned in the event of a strike is submitted to the OSP during consultations. The list is then brought to the attention of staff through publication on the Social Dialogue site.

The information for the data subjects consists of "everybody" e-mails from the Director-General of DG ADMIN, the publication of messages on the Commission Intranet site (Social Dialogue) and the information for the data subjects required under Articles 11 and 12 of the Regulation, published on the Social Dialogue site at http://intracomm.cec.eu-admin.net/home/dial_soc/index.htm.

As regards rights of access and rectification, the right of access to data may be exercised through HR management (see information required under the Regulation mentioned in the previous paragraph). Moreover, DG ADMIN sends a letter to persons thought to have participated in the strike on the basis of the lists, and gives them the opportunity, in the event of disagreement, to correct the information and/or submit documentary justification for their absence.

In addition to the drawing-up and publication on the intranet of requisition lists, information relating to strike participation is collected by units via a specific menu item of SYSPER 2. The data processing is therefore partially automated.

The data are stored in a database at the Commission's Data Centre in Luxembourg.

The recipients of the data are the PMO, HR management and, possibly, the leave department (where strike days are recovered in the form of leave).

The data are stored in accordance with the following arrangements: access (reading/writing) by Heads of Unit/hierarchical superiors is for 1 month maximum after the date of the strike. Access by HR management and, possibly, by the leave department: for reading/writing, up to

the date of transfer of the data to the PMO; and for reading only, 2 months after the salary deductions and, in any event, no more than 2 years after the date of the strike.

The data collected will be erased from SYSPER 2 after they have been processed; however, records will remain in the pay files for the entire period for which pay application data are retained. Those records are likely to be kept for a period of 7 years pursuant to Article 49(d) of the detailed rules for the implementation of the Financial Regulation ¹.

The time-limit for blocking the data does not apply (the records can be obtained via the pay application) and the time-limit for erasing (correcting) the data is the date of transfer of the data to the PMO (subsequently, cases will have to be taken up individually with the PMO).

The security measures are those of the SYSPER 2 environment, which guarantees security, completeness and consistency, in particular through the use of a secure https:// protocol, connection to the system via individual login and password, and the monitoring of access to SYSPER 2 through technical audit trails.

3. Legal aspects

3.1. Prior checking

The management of data on strike participation 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 in question is carried out by an institution in the exercise of activities which fall within the scope of Community law.

The data on strike participation are processed both by automatic means (SYSPER 2) and manually (establishment of requisition lists). They are therefore involved in processing partly by automatic means (Article 3(2) of the Regulation).

The processing therefore falls within the scope of Regulation (EC) No 45/2001.

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 subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations likely to present such risks. Article 27(2)(d) classifies as operations likely to present such risks "processing operations for the purpose of excluding individuals from a right, benefit or contract".

Participation in a strike is an operation for the processing of personal data covered by Article 27(2)(d), and as such is subject to prior checking by the European Data Protection Supervisor. Article 27(2)(d) applies insofar as participation in a strike automatically implies a salary deduction in accordance with the principle established by the Commission Decision of 16 December 1970.

¹ Rules for the implementation of the Financial Regulation, Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002. Article 49 (keeping of supporting documents by authorising officers (Article (60(4) of the Financial Regulation)) paragraph (d): The management systems and procedures concerning the keeping of original supporting documents shall provide for [...] such documents to be kept for at least five years from the date on which the European Parliament grants discharge for the budgetary year to which the documents relate.

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, as the European Data Protection Supervisor was appointed after the system was set up, the check necessarily has to be performed *ex-post*. This does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The formal notification was received by e-mail on 20 July 2006. The communication sent by e-mail on 14 December 2005 never reached the EDPS. Under Article 27(4), the European Data Protection Supervisor has to deliver his or her opinion within the following two months. However, by an e-mail dated 14 September the procedure was suspended for ten days in order to enable the DPO to provide the additional information and relevant comments. Accordingly, the EDPS will deliver his opinion on 25 September 2006.

3.2. Lawfulness of processing

The lawfulness of processing must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which 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"*.

In the present case, the general administrative management of participation in a strike is carried out in the public interest insofar as good management of the strike (and, in particular, of requisitions) allows efficient functioning of the institution and protects the Community's financial interests. The data processing is carried out on the basis of legislative acts (Commission Decision and Framework Agreement between the Commission and the OSP). The processing operation is therefore lawful.

The data processing operation is carried on the basis of the Commission Decision of 16 December 1970 and the Framework Agreement of 27 January 2003 between the Commission and the OSP and, in particular, Annex 1 containing the provisions on work stoppages. The legal basis is valid and supports the lawfulness of the processing.

Moreover, data relating to trade union membership are among the data which Article 10 of Regulation (EC) No 45/2001 refers to as "special categories of data".

3.3. The processing of special categories of data

If the strike were to be called by a single trade union, the persons likely to follow the strike could be regarded as being members of that trade union. The processing proposed could indirectly imply trade union membership.

The processing of personal data revealing trade union membership is prohibited (Article 10(1) of Regulation (EC) No 45/2001). However, in the case under examination the general management of participation in a strike is covered by Article 10(2)(b), which authorises processing necessary *"[to comply] with the specific rights and obligations of the controller in the field of employment law"*.

Article 10 of Regulation (EC) No 45/2001 on the processing of special categories of data is duly complied with.

3.4. 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).

The data processed in the context of strike participation, set out in the first page of this Opinion, may be deemed to be "adequate, relevant and not excessive" and to comply with Article 4(1)(c) of the Regulation.

Moreover, the data must be "processed fairly and lawfully" (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in section 3.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see section 3.10 below).

Finally, the 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).

The system described provides reasonable assurance as regards the accuracy of the data. The data subject is made aware of his or her right of access to and right to rectify data, in order to ensure that the file remains as comprehensive as possible. These rights are the second means of ensuring data quality. See point 3.9 below on the dual rights of access and rectification.

3.5. 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).

The data collected will be erased from SYSPER 2 once they have been processed. The data are stored in the SYSPER 2 system by DG DIGIT for between 2 months after the salary deductions and a maximum of 2 years after the date of the strike. These two years include the duration of the procedure and the various time limits resulting from appeals (Article 90 of the Staff Regulations/ Court of Justice).

It should be noted that records will remain in the pay files for the entire period for which pay application data are retained. Those records are therefore likely to be kept for a period of 7 years pursuant to Article 49(d) of the detailed rules for the implementation of the Financial Regulation ².

The EDPS considers that the various time limits are reasonable in the light of the purpose of the administrative management of participation in a strike. The production of statistics is not involved; Article 4(1)(e) does not apply in this case.

3.6. Change of purpose / compatible use

Data are retrieved from or entered into the staff databases. The processing being reviewed involves no general change to the specified purpose of staff data bases, management of participation in a strike being only a very small part of that purpose. Accordingly, Article

² See previous footnote.

6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

3.7. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies "if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

Article 7(1) of the Regulation is complied with because the transfers of data are carried out only within the institution (HR department and, possibly, the leave department if strike days are recovered in the form of leave) or with an interinstitutional body (PMO). The purpose of such transfers is to implement the financial consequences of participation in a strike.

3.8. Processing including the personnel or identifying number

The Commission uses the personnel number SYSPER 2. This use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller. However, such use may have significant consequences. That was why the European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation, which makes provision for action by the European Data Protection Supervisor.

Here, it is not a case of establishing the conditions under which the Commission may process the identifying number, but rather of drawing attention to this point in the Regulation. In the present case, the Commission's use of an identifying number is reasonable as it is used for the purposes of identifying the person and keeping track of the file, thereby facilitating processing. The EDPS considers that this number may be used in the context of the administrative management by the Commission of strike participation.

3.9. 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. The data subject may exercise his or her right of access through the Head of Human Resources.

Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification. DG ADMIN sends a letter to staff deemed to have participated in a strike in order to give them the opportunity, in the event of disagreement, to exercise their right of rectification, on the basis of documentary justification.

Articles 13 and 14 of the Regulation are duly complied with.

3.10. Information to be given to the data subject

Regulation (EC) No 45/2001 provides 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. In the present case, some of the data are collected directly from the data subject and other data from other persons.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply in this case. In signing the attendance lists in the morning and the afternoon, the data subjects themselves provide the data.

The provisions of 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 also apply in this case because information are obtained from the various parties involved in the process (HR management, heads of unit).

As already mentioned, the information for the data subjects in the present case consists of "everybody" e-mails from the Director-General of DG ADMIN, the publication of messages on the Commission Intranet site (Social Dialogue) and the information for the data subjects required under the Regulation, published on the Commission's Social Dialogue site.

In the paper version of the information note placed on the Social Dialogue site, the information given is almost complete. However, there is no mention of whether replies to the questions are obligatory or voluntary, the possible consequences of failure to reply (Article 11(d)), and the categories of data concerned (Article 12(c)).

The EDPS recommends incorporating into the information note on the Social Dialogue site information on whether replies to the questions are obligatory or voluntary, the possible consequences of failure to reply (Article 11(d)), and the categories of data concerned (Article 12(c)), in order to fully comply with Articles 11 and 12 of the Regulation.

3.11. Security

In accordance with Article 22 of Regulation (EC) No 45/2001 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".

The security measures are those of the SYSPER 2 environment and appear to be appropriate and to comply with Article 22 of the Regulation.

Conclusion

The proposed processing operation does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This means in particular that:

- the information note on the Commission's Social Dialogue site should incorporate information on whether replies to the questions are obligatory or voluntary, the possible consequences of failure to reply (Article 11(d)), and the categories of data concerned (Article 12(c)), in order to fully comply with Articles 11 and 12 of the Regulation.

Done at Brussels, 25 September 2006

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