Opinion on the notification for prior checking received from the European Commission's DPO (Data Protection Officer) regarding the "Invalidity procedure – Medical Services in Brussels and Luxembourg" case

Brussels, 29 November 2007 (Case 2007-125)

1. Procedure

In an email dated 21 February 2007, the European Commission's Data Protection Officer (DPO) submitted a notification under Article 27(3) of Regulation (EC) No 45/2001, concerning the "Invalidity procedure – Medical Services in Brussels and Luxembourg" case. The submission consisted of nine documents, including the notification.

Some questions on the case were e-mailed to the DPO on 6 March 2007, and replies were provided on 26 June 2007. On 7 September 2007 the EDPS' draft opinion was sent to the DPO for comments. The DPO replied with his comments on 26 November 2007.

2. The facts

Article 59(4) of the Staff Regulations of Officials of the European Communities provides that:

"The Appointing Authority may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years."

Based on that Article, the European Commission has established a procedure to obtain a decision from the Invalidity Committee as to whether the official concerned should be granted invalidity or should resume professional activities. In fact the procedure concerns not only officials, but also temporary and contract staff on all the European Commission's sites (including offices), as well as European agencies via a Service Level Agreement type of arrangement.

Under this procedure, an application to launch an invalidity procedure may be made at the request of the person concerned, or of the department in which the person is working, or by the Medical Service. In the latter two cases, the person's sick leave must have totalled at least 365 days over the last three years.

Section 3 of Annex II to the Staff Regulations (Articles 7, 8 and 9) stipulates who is to appoint doctors to the Invalidity Committee, and lays down the Committee's working arrangements. Those arrangements are also set out in the invalidity procedure manual and in the privacy statement relating to the invalidity procedure.
When an application to launch an invalidity procedure is made, it is registered by the Medical Service and a standard form (roadmap) called the IP form ("Fiche OPI") is created. A letter (confirming receipt) is sent to the person concerned and to his human resources manager, with a privacy statement which explains in detail how the application to launch the procedure will be processed, and how the person concerned may have access to the information contained in his file.

Under the responsibility of the Health Committee (which consists of at least three medical officers from the Medical Service), the IP form is circulated to the relevant parts of the Medical Service. One of the three doctors is appointed as the reporting doctor, who gathers all the relevant documents from the medical file, including not only medical reports but also the list of periods of sick leave (from the SERMED application\(^1\)) as well as the results of any checks carried out by the examining doctor (acceptance or refusal of the period covered by the medical certificate\(^2\)) and any requests by the human resources manager or the Medical Service for a meeting with the person concerned, for example to change his working conditions. The person concerned by the invalidity procedure may add further documents to the reporting doctor's file, such as attestations/certificates from his own doctor. In the letter confirming receipt of the application to launch an invalidity procedure, the name of the reporting doctor is given as the contact point.

The reporting doctor (who has reading access to the "reporting (lists)" function of the "control of absences" module) may obtain a list of absences covered by a medical certificate (over the last three years) from SERMED. The official record of days of sick leave is the responsibility of the human resources managers of each DG who have access via the Time Management module of Sysper2 not only to absences covered by medical certificates, but also to sick leave without a certificate.

The IP form contains the following factual information:

- surname, first name, personnel number, sex, age, nationality, grade, DG, and date of taking up employment;
- the date of the application to launch an invalidity procedure, who launched the application (the person concerned, the human resources manager or the Medical Service) and the total number of days of sick leave over the three-year period preceding the date of the application for an invalidity procedure.

The IP form is used as a base in a procedure which – by seeking the opinion of various parts of the Medical Service – has the purpose of verifying whether the person's situation has been examined as a whole, from every angle, and thus of judging correctly whether it would be appropriate:

- to send the application to launch an invalidity procedure directly to the Appointing Authority, or
- not to send the application to the Appointing Authority with the file in its present state, and to allow other alternatives to be evaluated.

The application to launch an invalidity procedure is forwarded to the Appointing Authority with the name of the medical officer proposed to represent the Institution on the forthcoming Invalidity Committee (IC). The Appointing Authority is then responsible for the decision to refer the matter to an IC, which is an ad hoc Committee which only meets at the request of the institutions, on a case-by-case basis. The Committee consists of three doctors: one chosen by

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\(^1\) SERMED is a computer application used to manage the activities of the Medical Service, which has been the subject of prior checking by the EDPS (2004-232).

\(^2\) Also the subject of a prior check by the EDPS (2004-226).
the Commission (Appointing Authority), a second by the person concerned and the third by mutual agreement between the first two doctors. If agreement cannot be reached on the appointment of the third doctor, there is a procedure which applies.

The IC has a threefold task, namely to establish fitness or unfitness to work, to determine the reason for unfitness to work, and to decide whether follow-up examinations are required and if so, how frequently they should be carried out.

If the person concerned is present at the doctors' meeting (which is the case in the very great majority of situations), he is directly informed of the Invalidity Committee's decision by the doctors who are members of that Committee, at the end of the meeting.

The IC's conclusion recognising that the person is unfit to work on a permanent basis is sent to the person concerned as soon as possible (by recorded delivery with acknowledgement of receipt). It is forwarded to the Appointing Authority, which endorses the decision to grant invalidity. Once the decision has been signed, the Paymaster Office is also notified by the Medical Service. A copy of the Appointing Authority's decision is sent to the human resources manager of the department to which the person is assigned, and a second copy is sent to the Departure Desk of the Paymaster Office.

When the Invalidity Committee concludes that the person is fit to work, he is notified immediately and invited to return to work in a letter from the Appointing Authority.

If the health of a person who has been recognised as unfit for work improves, under the Staff Regulations he is entitled to return to work if he no longer satisfies the conditions for receipt of an invalidity allowance. The medical officer therefore carries out periodic medical examinations.

The proceedings of the Invalidity Committee are secret (Article 9, Section 3 of Annex II to the Staff Regulations) and are covered by medical confidentiality. The IC's record or medical report is filed in the medical file of the person concerned, who has access to it under the rules laid down in the Staff Regulations (Article 26a); only those doctors who have signed the medical report receive a copy of it, if they so wish. The record is not sent to the Appointing Authority, but only a document entitled "outcome of the meeting of the Invalidity Committee", which contains no purely medical information other than the information needed for the procedure to continue from the administrative and financial points of views. The person concerned also receives a copy.

According to the invalidity procedure manual, a form (called Annex 13 – medical reason for invalidity) which sets out the medical grounds for the invalidity and which is signed by the members of the IC, is used to produce anonymous statistics at the end of each year. The data comes from the "invalidity" record in SERMED, and the form contains two pieces of information: the number of persons granted invalidity and the type (code) of the medical condition. The form (Annex 13) used to produce the annual statistics contains the name, grade, nationality, age and DG of the person concerned, and is processed by the Invalidity Committee secretariat to provide the two pieces of information mentioned above. The Annex itself is added to the file of the person concerned.
The "invalidity" files are kept in the medical file of the person concerned in secure premises for as long as the person is in active service, and are then archived with the medical file\(^3\). The files are kept for 30 years (under the rules laid down in SEC(2005) 1419\(^4\)).

3. Legal aspects

3.1. Prior checking

The notification received on 21 February 2007 relates to the processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a) of Regulation (EC) No 45/2001, hereinafter referred to as "the Regulation").

The prior check relates to the processing of personal data contained inter alia but not exclusively in the medical files kept by the European Commission (Articles 2(a) and (b) of the Regulation). The processing activity is being carried out by a European institution within the first pillar framework of Community law (Article 3(1) of the Regulation). The personal data processing is partly by automatic means. For example, automated processing is used for referral to the Invalidity Committee, and the conclusions of the Invalidity Committee are entered into an automated system (Article 3(2) of the Regulation). Moreover, in the non-automated processing operations, the data are intended to form part of a filing system. The Regulation therefore applies in this case.

Article 27(1) of the Regulation subjects all "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" to prior checking by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks.

Article 27(2)(a) of the Regulation states that the processing of data relating to health are subject to prior checking by the EDPS, which is the case here as the data fall within the scope of "data relating to health"\(^5\) and medical data.

In principle, checking by the European Data Protection Supervisor should take place prior to processing. 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 DPO's notification was received on 21 February 2007. On 6 March 2007 an email was sent to the DPO with questions on the case. The replies were received on 26 June 2007. Under Article 27(4) of the Regulation, the EDPS had to deliver his opinion within two months. Taking into account the 122-day suspension + 81 days for comments, the EDPS had to deliver his opinion by 3 December 2007 at the latest (21 February 2007 + 122 days suspension + August + 81 days for comments).

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\(^3\) See the EDPS' opinion on the processing of the Commission's medical files (2004-225).


3.2. Legal basis and lawfulness of the processing operation

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 personal data may be processed only 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".

The procedure to obtain the conclusions of the IC, which involves the collection and processing of personal data concerning officials and other staff so as to grant them the invalidity allowance or a return to professional activity, is necessary for the performance of a tasks carried out in the public interest on the basis of the Treaties establishing the European Communities or other legislative acts adopted on the basis of those Treaties. The proposed processing is therefore lawful.

The legal basis for the data processing is Article 59(4) and Article 78 of the Staff Regulations, and Articles 7, 8 and 9 of Annex II to the Staff Regulations. For contract staff and temporary staff, the legal bases are Article 102 and Article 33 of the Conditions of Employment respectively. The system of referral to the Invalidity Committee organised by the Commission is therefore lawful. The legal basis is therefore valid.

3.3. Processing of special categories of data

Data relating to health are among the data which Article 10 of Regulation (EC) No 45/2001 classes as "special categories of data". Article 10(1) of Regulation (EC) No 45/2001 prohibits the processing of personal data concerning health, unless grounds can be found in Articles 10(2) and (3).

In this case, Article 10(2)(b) applies: "Paragraph 1 [prohibiting the processing of data relating to 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 ...". Here, the Commission as employer is complying with Article 10(2)(b) by performing these data processing operations so as to comply with the provisions of the Staff Regulations.

Moreover, in this case, certain health-related data are forwarded to the doctors on the Invalidity Committee. Owing to the very nature of the health-related data, Article 10(3) of Regulation (EC) No 45/2001, which relates to special categories of data, applies in this instance. It states: "Paragraph 1 [prohibiting the processing of data relating to health] shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy". Because of their duties, the doctors are acting to establish a medical diagnosis. Moreover, the doctors are subject to the obligation of professional secrecy and are the sole recipients of this data. In this instance, Article 10(3) of the Regulation is duly complied with.

3.4. Data quality
Article 4 of Regulation (EC) No 45/2001 lays down certain obligations as regards the quality of personal data. 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)). It should therefore be checked whether the data correspond to the purposes of the processing operation.

In the context of the invalidity procedure, the aim of the data processing operation is to decide:
- whether the person concerned has a condition rendering him unfit to carry out his duties (or duties corresponding to employment in his function group); or
- whether he is fit to return to work, perhaps subject to certain recommendations, such as a return to work part-time for a limited period.

The EDPS considers that the processed data described at the beginning of this opinion must be regarded as satisfying these conditions in the light of the purposes of the processing operation explained above.

Moreover, the data must be "processed fairly and lawfully" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2.2.2. above). Given the sensitivity of the subject, fairness is an issue which requires considerable attention. It relates to the information given to the data subjects. See point 3.9 below on this point.

Lastly, 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).

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 the re-evaluation of the person's situation (unfit/fit to work), given that it must be re-examined periodically in any case (Article 15 of Annex VIII to the Staff Regulations).

The procedure in place gives sufficient reason to believe that the system itself ensures the quality of the data. The data subject has the rights of access and rectification, to make the file as complete as possible. This also makes it possible to ensure the quality of data. These rights are discussed in section 3.10 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".

A copy of the Appointing Authority's decision is sent to the human resources manager of the department to which the person is assigned for inclusion in the personnel file and a second copy is sent to the Departure Desk of the Paymaster Office.

The invalidity procedure manual lays down that the medical considerations leading to the conclusions of the Invalidity Committee shall be recorded in a medical report kept in the medical file of the person concerned. The "invalidity" files are kept in the medical file for as long as the person is in active service, and are then archived with the medical file. The data is kept for 30 years (under the rules set out in SEC(2005) 1419), under the same procedure as for medical files (see the "medical files" notification, Case 2004-0225).
Because of the sensitive nature of the data being kept, the fact that they are archived for long-term storage does not make them any less sensitive. Accordingly, even where long-term retention is concerned, appropriate transmission and storage measures must be applied when handling this data, as is the case for all sensitive information.

The EDPS finds that the current storage period for medical data at the Commission complies with the principle of limited storage, since it is planned to destroy these files at the end of 30 years. However, this information on the destruction of the data after 30 years should be brought to the attention of data subjects in the privacy statement.

The conclusions of the Invalidity Committee and the related decision by the Appointing Authority are sent to the data subject and to his human resources manager, and are filed in that person's medical file.

Article 4 of Regulation (EC) No 45/2001 also specifies that the institution or body shall lay down that personal data which are to be stored for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data must not be used for any purpose other than for historical, statistical or scientific purposes.

The principle is, therefore, that data should be kept only for the period necessary for the purposes for which they were collected. If they are kept for historical, statistical or scientific purposes they must be kept in anonymous form or encrypted.

As explained in paragraph 2 above, for each case of invalidity the members of the Invalidity Committee fill in a form (known as Annex 13 - showing the type of medical condition and a code indicating the condition(s) providing grounds for the invalidity). The code indicating the type of medical condition (three-digit figure) is entered in the "cause of invalidity" field in SERMED. The codes are used to produce an annual statistical table which is anonymous, showing only (1) the code and (2) the number of times that condition has been the grounds for invalidity.

3.6. Change of purpose/Compatible use

The processing operation under review here involves no change of the specified purpose of the staff databases and is not incompatible with that purpose. Accordingly, Article 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

In the case of the planned procedure, the processing should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. Article 7(1) relates to 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".

According to the notification, no medical data are transferred to anyone. The medical data are only accessible to the doctors and to the person concerned in accordance with Article 26a of the Staff Regulations. The administrative data are accessible to recipients within the limits described in the manual, as regards the procedure for periodic examinations with a view to a return to work. What is involved here is transfer within one institution (namely to the
Appointing Authority, the Departure Desk of the Paymaster Office, and the human resources manager of the department to which the person is assigned). There is also a transfer of personal data between institutions, since the data are also transferred to the Invalidity Committee, which is an ad hoc committee established by the Staff Regulations.

Furthermore, some administrative data from the file may temporarily be brought to the attention of: (a) the Legal Service, to allow it to prepare a defence in the event of an appeal before the Civil Service Tribunal, or (b) the judges of the Civil Service Tribunal at their request, or (c) the Ombudsman, at his request, always in full compliance with the legislation in force and the settled case-law of the Court of Justice on this subject.

Care should therefore be taken to ensure that the conditions of Article 7(1) are fulfilled; this is indeed the case, since the data collected are needed to carry out the processing and, furthermore, are "necessary for the legitimate performance of tasks covered by the competence of the recipient". In this case, the task is the responsibility of the various departments of the European Commission, the Invalidity Committee, and the Sickness Fund. As regards the transfers, only relevant data must be transferred. Therefore this transfer is indeed lawful, insofar as the purpose is covered by the competences of the recipients. Article 7(1) is therefore duly complied with.

Article 7(3) of Regulation (EC) No 45/2001 provides that "the recipient shall process the personal data only for the purposes for which they were transmitted". There should be explicit guarantee that no person involved in the Commission's invalidity procedure who receives and processes data may use them for other purposes.

As regards transfers in exceptional cases to other parties such as the Legal Service in the event of an appeal before the Civil Service Tribunal, to judges of the Civil Service Tribunal or to the European Ombudsman at his request, the EDPS is of the opinion that Article 7 has been fully complied with.

In the context of the invalidity procedure, data are communicated to the doctor representing the official and to the doctor chosen by mutual agreement between the examining doctor and the official's doctor.

If either of these doctors is in a country which has adopted legislation transposing Directive 95/46/EC, Article 8 of the Regulation applies. Under Article 8(b), it is for the recipient to establish the necessity of having the data transferred and there must be no reason to assume that the data subject's legitimate interests might be prejudiced. In this case, the recipient has no difficulty in establishing the necessity of the transfer since he needs the data in order to reach a decision on the contested case. Furthermore, the transfer does not in any way prejudice the legitimate interests of the data subject because it assists the invalidity procedure for the official concerned.

If the official's doctor or the doctor chosen by mutual agreement between the examining doctor and the official's doctor is in a country not covered by Directive 45/96/EC, Article 9 of the Regulation applies. Under Article 9, transfer may only take place to a country offering an adequate level of protection. If the level of protection is not adequate, the data subject must give his consent to the transfer in accordance with Article 9(6)(a).

Finally, the EDPS would point out that he himself may be considered a data recipient under Regulation (EC) No 45/2001. For instance, pursuant to Article 33 (Complaints by Community staff) or Article 47(2)(a), he is entitled to obtain access, from the controller or Community
institution or body, to any personal data and any information he needs for his enquiries. This should be reflected in the information given to data subjects (see below, 3.9 Information to be given to the data subject).

3.8. Processing including the staff or identifying number

The Commission uses the personnel number. While the 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, such use may have significant consequences. This is why the European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation, and allows action by the European Data Protection Supervisor. In the case in point, use of the personnel number may allow the linkage of data processed in different contexts. Here, it is not a case of establishing the conditions under which the Commission may process the personnel number, but rather of drawing attention to this point in the Regulation. In this instance, the Commission's use of the personnel number is reasonable because it is a means of facilitating the processing task, in particular archiving.

3.9. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 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. 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.

The notification refers to the privacy statement provided to the person concerned with the letter confirming receipt of any application for an invalidity procedure to be launched (whether requested by the person concerned, by the administration or by the Medical Service), which is said to explain in detail the different stages of the invalidity procedure, and to cover the information required by Articles 11 and 12, including the rights of access and rectification.

The manual and the privacy statement provide that the person concerned is informed of the referral to the Invalidity Committee and of its conclusions, and also of the Appointing Authority's decision (sent by recorded delivery with acknowledgement of receipt).

The EDPS is satisfied that a privacy statement has been published on the Commission's intranet since 1 July 2007.

The provisions of Article 11 (Information to be supplied where the data have been obtained from the data subject) on information to be supplied to the data subject apply in this case. Insofar as the data subject is interviewed by the three doctors on the Invalidity Committee (except in exceptional cases: hospitalisation, general state of health very (too) fragile, etc), the data subject himself provides the data.

The EDPS wishes to draw particular attention to the lack, both in the privacy statement and in the invalidity procedure manual, of a specific reference to the matters covered by Article 11(c) (the recipients or categories of recipients of the data) and (d) (whether replies to questions are obligatory or voluntary, as well as the possible consequences of failure to reply). It must be ensured that the data subject is fully informed on those two points. Regarding Article 11(c), the notification to the EDPS states that the recipients of the administrative data
are the Appointing Authority (Director-General of ADMIN, or the ADMIN Director of the departments concerned), the Director, the medical officers, the Medical Service, the human resources unit and DG of origin of the person concerned, the Paymaster Office, the person concerned by the invalidity procedure, and the doctor representing the person concerned on the Invalidity Committee. The administrative data are accessible to recipients within the limits described in the manual. Moreover, the medical data are only accessible to the doctors and to the person concerned in accordance with Article 26a of the Staff Regulations. This list should appear in the privacy statement. Regarding Article 11(d), this obligation could be reflected by informing the data subject of the consequences of refusal to provide the medical certificates needed for the procedure. The EDPS welcomes the fact that the privacy statement on the invalidity procedure covers the points referred to in Article 11(f): 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, which show that the fairness of the processing operation is fully respected.

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 may be obtained from doctors outside the institutions. The clarification about the recipients of the data (Article 12(d) of Regulation (EC) No 45/2001) also applies in this case.

The European Data Protection Supervisor recommends that all this information be supplied to data subjects, by whatever means necessary. This might be achieved by adding the points highlighted above to the privacy statement on the invalidity procedure.

Finally, to ensure the proper administration of the invalidity procedure, the Commission should explicitly inform data subjects, under the heading "adoption of conclusions" in section 4 of the invalidity procedure manual, that if one doctor on the Invalidity Committee disagrees with his two colleagues, that doctor shall without delay submit a separate report which will be attached to the Invalidity Committee's record (Annex 15).

3.10. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for a right of access at the request of 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 its source.

The notification states that the privacy statement covers the information required by Articles 11 and 12, including the rights of access and rectification.

That statement contains the following information regarding access to the medical file: The person concerned may ask the doctor in charge of the file for information at any stage of the procedure. The procedure under which officials and other staff may gain access to their medical file is referred to in Conclusion 221/04 of the Board of Heads of Administration of 19 February 2004. By virtue of that decision, the file must be consulted on the premises of the Medical Service of the institution, in the presence of a person designated by the Medical Service. The indirect access provided for in the decision covers psychiatric and psychological reports, where direct access might prove harmful to the data subject. Therefore, to that end indirect access by a doctor appointed by the data subject is provided for. The designated doctor does not necessarily have to be a doctor who took part in the Invalidity Committee's deliberations.
However, it is laid down that officials or servants may not have access to personal notes by doctors if, under the terms of Article 20(1)(c) of Regulation 45/2001 and on the basis of a case-by-case examination, this is necessary to guarantee the protection of the data subject or the rights and freedoms of others. The EDPS welcomes the fact that this is subject to examination on a case-by-case basis in accordance with the principle of proportionality. The above limitation must not be allowed to result in a general refusal of access to the personal notes of doctors in the medical file.

Regarding the right of rectification provided for in Article 14 of Regulation (EC) No 45/2001, the privacy statement also provides for a procedure for updating information, phrased as follows: "Any justified and legitimate changes (correction of mistakes, additional information, etc) to the factual content of your file must be made within 15 working days following the date on which the Medical Service head of unit receives your written request". The EDPS welcomes the fact that this procedure is referred to in the privacy statement. The addition of information, insofar as it is covered by the right of rectification, means the possibility of adding any document to the file.

These provisions, taken overall, fulfil the conditions of Articles 13 and 14 of Regulation (EC) No 45/2001.

### 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".

[...]

Appropriate security measures are provided for with respect to consultation of the file by the data subject and retention of such files. Article 22 of the Regulation is therefore complied with.

### Conclusion

The proposed processing operation 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:

- Because of the sensitive nature of the data being kept, the fact that they are archived for long-term storage does not make them any less sensitive. Accordingly, even where long-term retention is concerned, appropriate transmission and storage measures must be applied when handling this data, as is the case for all sensitive information.
- The Commission should include in the privacy statement a reference to the destruction of medical files after the 30-year storage period.
- If the official's doctor or the doctor chosen by mutual agreement between the examining doctor and the official's doctor is in a country not covered by Directive 45/96/EC, Article 9 of the Regulation should be applied. Under Article 9, the transfer may only take place to a country offering an adequate level of protection, unless the consent of the data subject is obtained.
• The Commission should remedy the lack – in both the privacy statement and in the invalidity procedure manual – of references to the matters covered by Article 11(c) and (d) of Regulation (EC) No 45/2001.

• To ensure the proper administration of the invalidity procedure, the Commission should explicitly inform data subjects, under the heading "adoption of conclusions" in section 4 of the invalidity procedure manual, that if one doctor on the Invalidity Committee disagrees with his two colleagues, that doctor is without delay to submit a separate report which will be attached to the Invalidity Committee's record (Annex 15).

Done at Brussels, 29 November 2007

(signed)

Peter HUSTINX
European Data Protection Supervisor