

Opinion on the notification for prior checking from the Data Protection Officer of the European Commission regarding the "checks on absences from work due to illness or accident – Directorate-General Joint Research Centre Ispra and Seville" dossier

Brussels, 6 February 2008 (Case 2007-508)

1. Procedure

On 3 September 2007 the European Data Protection Supervisor (**EDPS**) received a notification from the Commission's Data Protection Officer (**DPO**) concerning the dossier "checks on absences from work due to illness or accident – Directorate-General Joint Research Centre (**DG JRC**) Ispra and Seville".

The notification was accompanied by a series of documents including:

- an excerpt from the Staff Regulations of officials of the EC regarding checks on absences due to illness;
- Commission Decision No 92-2004 of 6 July 2004 introducing implementing provisions on absences as a result of sickness or accident;
- a description of the process of medical checks;
- copies of documents produced by the examining doctor: *Referto di controllo medico* (report on medical checks) and *Rapporto medico* (medical report).

In connection with this case, questions were put to the controller via the DPO on 9 October 2007. Some replies were given at a meeting with the controller, the DPO and the Data Protection Coordinator (**DPC**) of DG JRC on 13 November 2007, as well as in an e-mail from the DPC dated 14 November 2007, which was accompanied by the draft Commission Communication "Towards a strategy for wellbeing at work at the European Commission: Multi-annual action programme 2006-2009" (SEC(2006) 500/3 of 21 April 2004).

The draft opinion was sent to the DPO and the DPC for their comments on 6 December 2007. On 11 January 2008 the comments and the outstanding replies were provided directly by the controller.

2. Facts

2.1. Context

As part of the new wellbeing-at-work strategy and the fight against absenteeism, DG JRC Ispra and Seville aims to introduce a new policy for managing absences covered by medical certificate. Its objective is to **verify the reasons for absences due to illness or accidents, in particular those exceeding 21 days¹**, in order to help people to become reintegrated into the work process after such an absence.

¹ The registration and retention of medical certificates are the subject of specific prior checks (EDPS

Verification takes the form of a **medical examination** carried out by an examining doctor in one of the consulting rooms of DG JRC Ispra's² medical service or at the home of the data subject. This examination may be conducted at the request of the service to which the data subject is assigned via the Appointing Authority, or on the initiative of the Medical Service.

Furthermore, actual medical data obtained at the time of the examination is kept in the individual medical record and may be communicated to the occupational physician (medical officer) by the examining doctor for the purpose of monitoring the health of staff (preventive medicine).

2.2. Data subject

The medical examination concerns officials, contract staff, temporary staff, seconded national experts and trainees.

2.3. Medical examination – description of the process

The medical examination carried out for the purpose of verifying long-term sick leave is a three-stage process:

Lists: The Medical Service regularly prints lists of persons absent for more than 21 days due to illness or accident. These lists are generated by the MeDeL database.

Notifications: The examining doctor receives this list and decides to notify (by mail, telephone, fax or e-mail) or visit certain persons.

If the person notified is unable to travel, he or she informs the examining doctor and sends a medical certificate as proof.

If the person notified does not come to the Medical Service, his or her absence is considered to be unjustified as from the day of the examination except where it can be reasonably explained or justified.

If the patient is absent when a check is carried out at his or her home, he or she is notified to attend the Medical Service in order to be examined there.

Results of the check: the examining doctor sees persons in a consultation and draws up two reports, namely

- **a medical report** containing actual medical data (see point 2.4),
- **a medical examination report** containing the doctor's conclusions regarding the justification of sick leave (validation or otherwise of the leave in question) and (in)capacity to resume work. The medical examination report must be signed by the data subject.

Arbitration: if the examining doctor does not validate the sick leave and the official or other servant considers that the examining doctor's conclusions (concerning his capacity for work) are medically unfounded, the official or other servant or a doctor acting on his behalf has 2 days to submit a request for arbitration to the Institution (procedure described in

2007-329 "Individual medical records DG JRC Ispra and Seville" and EDPS **2007-504** "[Database] MeDel – DG JRC").

² Located in Unit C2 "Occupational Health, Safety and Hygiene" of DG JRC's Ispra site Directorate.

Article 59(1) of the Staff Regulations of officials of the EC). The request for arbitration is mentioned in the medical examination report ("*paziente ha contestato questo giudizio e pertanto il Servizio Medico designerà un 3° medico per un consulto specialistico*").

The request for arbitration is passed to another doctor appointed by mutual agreement between the Institution's medical officer and the attending physician. If no such agreement is reached within five days, the Institution chooses one of the persons on the list of independent doctors compiled each year for that purpose by mutual agreement between the Appointing Authority and the Staff Committee. The data subject has two days within which to contest this choice, in which case the Institution chooses another person on the list. This new choice is final.

The opinion of the independent doctor given after consultation of the attending physician and the medical officer is binding. If that opinion confirms the examining doctor's conclusions, the absence is treated as unjustified as from the day on which the check was carried out. If the independent doctor's opinion does not confirm these conclusions, the absence is treated as justified in every respect.

2.4 Categories of data

The medical report drawn up by the examining doctor in connection with a medical examination contains the following data: name, date of birth, sex, case history (pathology/professional), general examinations, specialised examinations (date carried out/date to be carried out), contact with the doctor of the data subject/specialist – with the permission of the data subject (signature), treatment, diagnosis and observations.

The medical examination report contains the following data: name, date of birth, personnel number, and post to which the person is assigned, date and place of the examination (medical service or the person's home) and the results of this examination (absence justified/justified until further examination/unjustified and date of resumption of work).

In addition, the reasons for failing to make a home visit may be specified (absent/unknown at the home address).

In the observations the examining doctor can also make it clear that the person's absence is also connected with his work (exposure to occupational risks/interpersonal relations/request contact with the Appointing Authority with a view to a possible transfer³) and that the nature of the absence justifies recourse to the Invalidity Committee.

As mentioned above, the data subject may, before signing, record his agreement or submit a request for arbitration to the medical service.

2.5 Recipients

The two reports drawn up by the examining doctor are forwarded to the medical service to be filed in the individual medical record of the person concerned.

³ "*L'assenza del paziente è motivata anche da problemi legati all'attività lavorativa (esposizione a rischi), all'ambiente di lavoro (relazioni interpersonali), l'interessato è stato invitato a contattare l'Amministrazione in vista di un possibile trasferimento*".

The medical examination report may be sent to Human Resources if the examination was requested by the Appointing Authority.

2.6. Data retention

Data are filed in the medical record and retained for a period of 30 years (standard or exposure to radiation) and 40 years (carcinogenic substances).

Anonymous annual statistics are also drawn up.

2.7. Rights of the data subjects

Requests for verification, rectification, erasure or blocking may be sent to the medical service or e-mailed to the following address: jrc-medical-service@ec.europa.eu.

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) No 45/2001: The procedure for "checks on absences from work due to illness or accident" as described in the notification received by the EDPS on 3 September 2007 constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a)). The data processing in question is carried out by an institution in the exercise of activities falling within the scope of Community law (Article 3(1)).

Data processed as part of a medical examination are for inclusion in the individual medical record of the data subject. Article 3(2) of the Regulation is therefore applicable in this case.

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

Grounds for prior checking: Under Article 27(1) of the Regulation "*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)(a) of the Regulation states that "*processing of data relating to health*" is likely to present such risks. There is no doubt that the procedure for checking absences due to illness or accident is a processing operation concerning personal data relating to health. That is why it is subject to prior checking by the EDPS.

Ex-post prior checking: In principle, checks by the EDPS should be carried out before the introduction of the processing operation. In this case, as processing took place before the EDPS was consulted, checking of necessity has to be ex-post. This does not alter the fact that it would be desirable for the recommendations made by the EDPS to be introduced.

Deadlines: Notification from the Commission's DPO was received on 3 September 2007. In accordance with Article 27(4) of the Regulation, the EDPS should have delivered his opinion within two months. Given the 94 days suspension period, the EDPS will deliver his opinion no later than 6 February 2008.

3.2. Legal basis and lawfulness of the processing operation

The lawfulness of the processing operation must be examined in the light of Article 5 of Regulation (EC) No 45/2001.

Verification of absences: Article 5(a) of the Regulation applies in this case, stipulating that processing must be *"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"*. Paragraph 27 of the preamble to the Regulation provides, moreover, 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"*.

The legal bases for the processing operation are:

- Article 59(3) and (4) of the Staff Regulations of Officials of the European Communities;
- Article 16 of the Conditions of Employment of other servants of the European Communities;
- Article 13(1) of the rules on the secondment of national experts to the Commission⁴;
- Point 5.2.2 of the Rules governing the official traineeships scheme of the European Commission⁵.

The implementing rules for medical examinations carried out on officials, other servants and seconded national experts are set out in detail in Article II.e of Commission Decision No 92-2004 of 6 July 2004 introducing implementing provisions on absences as a result of sickness or accident.

Under the above-mentioned provisions, officials, other servants, seconded national experts and trainees who are *"on sick leave may ... be required to undergo a medical examination ... to ensure that the absence is justified and that the duration of the absence is in proportion to the nature of the illness."*

Hence the collection and processing of the personal data necessary for drawing up the medical examination report on the justification of absence due to illness is clearly a task carried out in the public interest on the basis of secondary legislation concerning sick leave. The legal basis therefore supports the lawfulness of the processing.

Preventive medicine (monitoring the health of staff): Apart from the objective stated above, the data collected during an examination visit, including actual medical data, are also filed in the data subject's individual medical record (see point 3.5 below). This processing is not covered by the aforementioned legal basis, and its lawfulness must be examined in accordance with Article 5(d) of the Regulation. Such a processing operation must be based on *"the unambiguous consent of the data subject"*. Under Article 2(h) of the Regulation, consent is *"any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed"*. In any case, consent must be explicit and cannot be presumed.

⁴ Commission Decision laying down rules on the secondment of national experts to the Commission of 1 June 2006 – C (2006) 2003.

⁵ Commission Decision of 2 March 2005 – C (2005) 458.

In this case, the EDPS is of the opinion that the processing of the actual medical data carried out during the medical examination may be considered lawful to the extent that it rests on the informed consent of the data subject (see point 3.10 below).

3.3. Processing of special categories of data

Article 10 of the Regulation provides that the processing of personal data relating to health is prohibited unless it is justified on grounds mentioned in Article 10(2) and (3) of Regulation (EC) No 45/2001.

Verification of absences: Article 10(2)(b) of the Regulation applies in this case, stipulating that the processing of special categories of data may be authorised if it 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"*. In fact, this processing is an operation introduced by the controller for the purpose of complying with the provisions taken from the Staff Regulations of Officials of the European Communities, the Conditions of Employment of other servants of the European Communities, the rules on the secondment of national experts to the Commission, as well as the Rules governing the official traineeships scheme of the European Commission.

Preventive medicine (monitoring the health of staff): The ban on processing data relating to health can also be lifted where the processing *"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"* (Article 10(3) of the Regulation). The examining doctors are health professionals subject to professional secrecy by virtue of their duties. Article 10(3) of the Regulation may therefore be used to justify the processing of medical data collected during an examination visit for the purposes of preventive medicine. In any case, this processing operation must be based on *"the express consent of the data subject"* pursuant to Article 10(2) of the Regulation.

3.4. Data quality

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

For the record, this prior checking relates, on the one hand, to medical data in the strict sense collected and processed by the examining doctor during an examination visit and, on the other, to "administrative" data relating to the management of long-term absences due to illness. In this context it is perfectly acceptable that no medical data in the strict sense is contained in the medical examination report that may be sent to Human Resources.

Accuracy: Article 4(1)(d) of the Regulation provides that data must be *"accurate and, where necessary, kept up to date"*. Moreover, this Article also states that *"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"*.

It is not easy to guarantee or evaluate the accuracy of the medical data. Nevertheless, the EDPS is of the opinion that the system as such also helps to guarantee that data are accurate

and kept up to date. The signing of the medical examination report allows the data subject to verify the accuracy of the administrative data. The consent (and signature) of the data subject as regards information concerning contacts with his attending physician or specialist make it possible to ensure that medical data contained in the medical report are complete.

Furthermore, the arbitration procedure likewise makes it possible to guarantee the completeness of the medical data processed to the extent that the opinion of the independent doctor is filed in the individual medical record of the data subject and that purely administrative data are recorded in the MeDeL database.

Lastly, the data subject has right of access and right of rectification so as to ensure that the record is as complete as possible (see point 3.9 below).

Fairness and lawfulness: the data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawful character of the processing has already been examined (see point 3.2 above). Processed fairly means that the information is forwarded to the data subjects (see point 3.10 below).

Hence the EDPS considers that the principles of data quality set out in Article 4(1)(a), (c) and (d) of the Regulation are complied with in this regard.

3.5. Change of purpose/compatible use

Article 4(1)(b) of Regulation (EC) No 45/2001 stipulates that the data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

For the record, when a medical examination is carried out, two reports are drawn up and filed in the individual medical record. The medical examination report deals with the justification for sick leave, while the medical report contains actual medical data processed for the purpose of monitoring the health of staff (see EDPS opinion 2007-329 – Individual Medical Records at DG JRC Ispra and Seville).

The EDPS therefore considers that the processing operation examined does not entail a change of initial purpose to the extent that the data subject undergoing medical examination is clearly informed that the data relating to him collected on that occasion may be processed for the purposes of occupational medicine and that the processing of those data is based on his consent (see point 3.10 below).

3.6. Data storage

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001, 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. The Community institution or body shall lay down that personal data which are to be stored for longer periods 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 shall not be used for any purpose other than for historical, statistical or scientific purposes.*"

For the record, the data are filed with the medical record and stored for a period of 30 years (standard or exposure to radiation) or 40 years (carcinogenic substances). Anonymous annual statistics are also drawn up.

The storage of data in the individual medical record of the data subject (and in the MeDeL database) is analysed separately in the relevant prior checks (EDPS opinions 2004-329 and 2007-504).

3.7. Transfer of data

By way of reminder, the data may be forwarded to the following recipients:

- Human Resources (only the medical examination report, upon request);
- the attending physician and the independent doctor appointed by mutual agreement between the attending physician and the examining doctor (in the case of arbitration).

The processing operation must therefore be examined in the light of Articles 7, 8 and 9 of Regulation (EC) No 45/2001.

Article 7 of the Regulation: As regards transfer to the medical service and Human Resources of the Commission's DG JRC, Article 7 of the Regulation applies, stating that *"personal data shall only be transferred 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"*. Furthermore, the recipient may process the data only *"for the purposes for which they were transmitted"*.

The medical service receives the two reports drawn up by the examining doctor in order to update the data subject's medical record. Human Resources may receive the medical examination report in order to update the administrative record concerning sick leave. Clearly, these tasks come within the scope of the legitimate performance of tasks covered by the competence of the different services of the Commission's DG JRC.

Nevertheless, the EDPS would like to remind the above-mentioned recipients that data transmitted may be processed only for the purposes of verifying sick leave (Article 7(3) of the Regulation).

Article 8 of the Regulation: In cases where the attending physician and/or the independent doctor are established in a country that has transposed Directive 95/46/EC, Article 8 of the Regulation applies. Under Article 8(b) of the Regulation, personal data may only be *"transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC (...) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced."*

In this case the transfer may take place at the request of the data subject, not if the attending physicians prove that the transfer is necessary. This request by the data subject demonstrates the necessity for transfer precisely for the purpose of an arbitration procedure initiated by the data subject himself. Moreover, it goes without saying that that does not prejudice the data subject's legitimate interests.

Article 9 of the Regulation: If the attending physician and/or the independent doctor are established in a country not covered by Directive 95/46/EC, Article 9 of the Regulation applies. In principle, transfer may take place *"only if an adequate level of protection is*

ensured in the country of the recipient" unless the consent of the data subject has been obtained (Article 9(1) and 9(6)(a) of the Regulation).

3.8. Processing including the personal number or identifying number

The personal number is contained in the medical examination report. The use of an identifier is, in itself, no more than a legitimate means of facilitating the task of the data controller. Nevertheless, the fact that such use may have important consequences prompted the European legislator to regulate the use of such identifiers or personal numbers in Article 10(6) of the Regulation. The point here is not to establish the conditions under which the Commission's DG JRC may use the personal number but to draw attention to that provision of the Regulation. In this instance, use of the personal number is reasonable because it improves monitoring of the management of absences due to illness.

3.9. Rights 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. Article 14 of Regulation (EC) No 45/2001 establishes the right to rectify inaccurate or incomplete data. Under Article 20 of the Regulation, the exercise of these rights may be limited, *inter alia* "where such restriction constitutes a necessary measure to safeguard (...) the protection of the data subject or of the rights and freedoms of others".

Moreover, Article 26(a) of the Staff Regulations states that *"officials shall have the right to acquaint themselves with their medical files, in accordance with arrangements to be laid down by the institutions"*.

According to the information provided in this instance, data subjects have rights of access to and rectification of personal data processed at a medical examination. As previously mentioned (see point 3.4 above), the arbitration procedure available to the data subject for disputing the examining doctor's conclusions makes it possible to guarantee that his medical record is complete.

In addition, the EDPS would like to reiterate that restrictions on the rights of access and rectification based on Article 20 of the Regulation must be subject to scrutiny in each case in accordance with the principle of proportionality.

3.10. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 concern the information to be supplied to the data subject in order to ensure that the processing of personal data relating to him is transparent. These Articles list certain specific items of information that must or may be provided. The latter apply where, taking account of the particular circumstances of the processing operation in question, they are required for the purpose of ensuring that data relating to the data subject are processed fairly.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) apply in this instance since the information is collected from different doctors participating in the process. Under this provision, the following information must be supplied to the data subject when the data are recorded or, at the latest, when the data are first disclosed to a third party:

- the identity of the controller;

- the purposes of the processing, including the possible processing of data collected at the medical examination for the purposes of preventive medicine (monitoring the health of staff);
- the categories of data concerned;
- the data recipients;
- the existence of the rights of access and rectification;
- the legal basis of the processing operation;
- the time-limits for storing the data;
- the right of recourse to the EDPS;
- the origin of the data.

In the case in question, no information is provided concerning the way in which data subjects are informed or regarding the content of the privacy statement.

The EDPS therefore recommends that a privacy statement containing all the above information be drawn up, put on the Intranet and added to all notifications sent by the examining doctor.

Conformity with Article 12 of the Regulation will make it possible for informed consent to be given pursuant to Articles 5(d) and 10(2)(a) of the Regulation, and guarantee proper compliance with Article 4(1)(b).

3.11. Security measures

(...)

4. Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means, in particular, that the Commission's DG JRC should:

- draw the attention of DG JRC's medical service and of its Human Resources to the provisions of Article 7(3) of the Regulation (the possibility of processing the data transferred solely for the purpose of verifying sick leave);
- ensure that the restrictions on the rights of access and rectification based on Article 20 of the Regulation are subject to case-by-case scrutiny in accordance with the principle of proportionality;
- draw up a privacy statement containing all the information mentioned in Article 12 of the Regulation which is to be communicated to the data subjects.

Done at Brussels, 6 February 2008

(signed)

Peter HUSTINX
European Data Protection Supervisor