

## Opinion on the notification for prior checking received from the European Commission's Data Protection Officer regarding the "Selection of staff for teleworking"

Brussels, 6 February 2008 (Case 2007-720)

### 1. Procedure

In an e-mail dated 4 December 2007, the European Commission's Data Protection Officer (DPO) submitted a notification under Article 27(3) of Regulation (EC) No 45/2001, concerning the "Selection of staff for teleworking" case. The submission consisted of five documents, including the notification.

On 23 January 2008, the draft opinion was sent to the DPO for comments. The DPO forwarded his comments on 31 January 2008.

### 2. The facts

Teleworking is not a statutory right; it is by nature voluntary and is only one of a number of possible working arrangements available to services and staff who request it, subject to the interests of the service, the availability of staff and statutory provisions. Subject to these considerations, Directorates-General are invited to make teleworking available to staff across all their services, taking into account the particular interests of those services. Teleworking uses new communication and information technologies to allow greater flexibility in the organisation of work and better reconciliation of private and professional life. Many tasks are suitable for teleworking, including management tasks.

The procedure governing the introduction of teleworking at the Commission is **based** on the "Memorandum to the Commission of 21 December 2006 concerning the use of teleworking in the Commission's services. Adoption of the 'Guidelines for the implementation of teleworking in the Commission'"<sup>1</sup>.

The **purpose** of the processing in question is to identify the persons authorised to telework with regard to different criteria such as the possibilities of teleworking, the interests of the service or the individual's motivation.

The procedure for implementing teleworking in the DGs confers great importance on their human resources services.

The procedure consists of:

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<sup>1</sup> C(2006) 6831

- Carrying out a survey of those persons already teleworking in the DG, if there are any. As far as the teleworking application is concerned, it is important that the decision-making process applied by DGs and services to applications is open and transparent, particularly where teleworking opportunities are limited in relation to demand from staff;
- Defining the criteria for arbitration and the priority criteria to be used by the DG on the basis of the guidelines, and making them public. When a choice has to be made between several applications, various criteria such as disability, family obligations, etc. may be taken into account;
- Issuing a call for expressions of interest to which an application form would be annexed;
- Informing direct hierarchical superiors (through HR units) that they will have the opportunity to check and confirm that the applications fulfil the minimum conditions of eligibility;
- Centralising the applications and making a selection, in cooperation with the services, in relation to the number of teleworking opportunities;
- Establishing priority groups on the basis of the different criteria accepted;
- Forwarding the names of the teleworkers selected;
- Arranging for the agreements to be signed and sending copies to the teleworkers' hierarchical superiors;
- Forwarding to the Information Resource Manager (IRM) the list of persons authorised to telework for the purpose of applying to the Directorate-General for Informatics (DIGIT) for the allocation of "tokens" (rights of remote access);
- Forwarding to the inventory property manager (GBI) the list of persons authorised to telework with their telephone number in order for him to send an application to DG DIGIT for the telephone network for authorisation to divert the office telephone to a private (fixed or mobile) telephone;
- For the purpose of evaluating the project, sending DG ADMIN an anonymous summary table indicating the number of applications received and granted and a breakdown by type and category;
- Keeping a copy of the agreements and of the application forms.

It is also planned that the policy of the DGs should be to have initial decisions taken at unit level by middle management, then approved or refused by the Director, after the agreement of the Human Resources unit has been obtained and the IRM and LISO (Local Information Systems Officer) consulted. Teleworking by management staff should be dealt with in a similar manner, at the appropriate hierarchical level. It is important that the Human Resources unit is able to fully coordinate the exercise within each service.

Teleworking **data subjects** are the candidates who fill in an application form and the candidates selected in each DG.

The **data** concerned are those contained in the teleworking applications (personnel number, surname, first name, department, date of entry into service, administrative address, teleworking tasks to be performed, teleworking schedule, motivation) and in the agreements (surname, first name, teleworking address, teleworking percentage and schedule, specific conditions).

NB: In principle, sensitive data within the meaning of Article 10 of Regulation No 45/2001 are not processed. However, the possibility of applicants voluntarily including some sensitive information in their application cannot be ruled out. As regards the grounds for applying for teleworking, the persons concerned may wish to give reasons relating to priority criteria such as family obligations and disability. The information provided in this box will be considered by the hierarchy and HR only for selection purposes and will not be transmitted to the other recipients of the data (DG DIGIT, DG ADMIN).

The **recipients** of the data are the hierarchy of the data subject (teleworking application and agreement); Human Resources (HR); the IRM and the DIGIT Department for the allocation of tokens (surname, teleworker's personnel number and login); the GBI of each DG and the DIGIT Coordination Cell for the telephone network (surname and telephone number to which the teleworker's calls are diverted).

The procedure is based on **manual** operations contained within a structured set and using electronic means of communication. The procedure for implementing teleworking may vary slightly according to the Directorate-General implementing it.

The data **storage medium** is electronic and/or paper according to the DGs and requesters.

With regard to **information** for data subjects, a declaration on data protection in the selection procedure for teleworkers ("*declaration*") is available on the intranet<sup>2</sup>, in which the following are indicated: the identity of the controller; the purposes of the processing operation for which the data are intended; the recipients of the data; the existence of a right for data subjects to have access to and to rectify their data; the legal basis for the processing operation, the data retention periods; and the right to have recourse at any time to the European Data Protection Supervisor. Data subjects will, moreover, be informed of the availability of tokens and of the selection criteria defined by the DGs.

Data subjects may contact the Human Resources unit of their DG to request **access** to their personal data and to the documents concerning them: teleworking application and agreement. In the case of any error in the personal data concerning them, they may ask for it to be rectified, as defined in the declaration. On a legitimate and justified request to the HROs by data subjects, data is blocked/erased in the week following the request.

Finally, with regard to the data **retention** policy, the documents are retained in files separate from the personal file. Applications received and agreements signed are retained by the Human Resources service of each DG.

Applications not granted will be retained for three years. Agreements will also be retained by the HR units of the DGs for three years after teleworking ceases, for the following reasons:

- to help establish an order of priority for persons who have applied on several occasions but were not selected because of the large number of applications within the DG;
- mid-term review of this working arrangement.

### 3. Legal aspects

#### 3.1. Prior checking

The notification received on 4 December 2007 relates to processing of personal data ("*any information relating to an identified or identifiable (...) person*" – Article 2(a) of Regulation (EC) No 45/2001). The processing of personal data includes the operations of collection, storage, consultation and erasure performed upon personal data. The data processing in question is carried out by a Community institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The processing of the recruitment procedure is a processing operation which is in principle manual and forms part of a structured whole. Article 3(2) therefore applies. Consequently, such processing comes under Regulation (EC) No 45/2001.

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<sup>2</sup> [http://intracomm.cec.eu-admin.net/pers\\_admin/equal\\_opp/teleworking\\_fr.html](http://intracomm.cec.eu-admin.net/pers_admin/equal_opp/teleworking_fr.html)

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 by virtue of their nature, their scope or their purposes*" subject to prior checking by the European Data Protection Supervisor.

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

The processing was notified under Article 27(2)(a) (processing of data relating to health) of Regulation (EC) No 45/2001.

The Commission considers, in its notification, that Article 27(2)(a) applies insofar as the application form could refer, with regard to the motivation of individuals, to family circumstances or to particular health conditions such as disability. Furthermore, the notification stresses that the selection made is not linked to aspects of ability, efficiency or conduct of the applicants for teleworking. Finally, teleworking is not considered a right, so the purpose of the selection is not to exclude individuals from a right.

After analysing the procedure, the EDPS does not entirely agree with this conclusion. The fact of referring, with regard to the motivation of individuals, to family circumstances or to particular health conditions such as disability suffered by data subjects or by their family is, according to the notification, a possibility which is not available in all cases. As an exception, the processing of such possible medical data alone is not sufficient basis for submitting the processing operation as a whole for prior checking by the EDPS.

On the other hand, according to the notification the procedure provides for the teleworking application and agreement to be submitted to the data subject's hierarchical superior. The result is that a selection decision is taken on whether or not to authorise a person to submit his application for teleworking. The EDPS considers that the procedure is subject to prior checking on the basis of Article 27(2)(b) insofar as, structurally, the letter containing the motivation is taken into consideration and will contain the personal aspects highlighted. If these aspects are of a sensitive nature, such as data relating to health, the processing risk will be greater.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed *ex post*. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The DPO's notification was received on 4 December 2007. On 25 January 2008, the EDPS's draft opinion was sent to the DPO so that he could make comments. The DPO forwarded his reply on 31 January 2008.

Under Article 27(4) of the Regulation, this opinion must be delivered within two months of that date. The Supervisor will therefore deliver his opinion no later than 13 February 2008.

### **3.2. Lawfulness of the processing**

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

Provision is, furthermore, made in the preamble (recital 27 of the Regulation) that this processing "*includes the processing of personal data necessary for the management and functioning of those institutions and bodies*".

The procedure for the selection by human resources services of staff applying for teleworking, which involves the collection and processing of personal data concerning officials and employees, 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. The processing operation proposed is therefore lawful.

The legal basis for data processing under the procedure consists of Communication C(2006) 6831 "Memorandum to the Commission of 21 December 2006 concerning the use of teleworking in the Commission services. Adoption of the ""Guidelines for the implementation of teleworking in the Commission"". Although there is no other legal basis for the implementation of teleworking, the EDPS considers this sufficient with regard to Regulation No 45/2001.

The legal basis supports the lawfulness of the processing.

### **3.3. Processing of special categories of data**

Pursuant to Article 10 of the Regulation, "*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*" except where grounds are identified in particular in Article 10(2).

During the selection of teleworking candidates, data such as information supplied by the candidate are collected, in particular any possibility of a special family situation or disability (of the data subject or of the individuals around him). The latter data must be regarded as data concerning health for the purposes of Article 10. However, the processing of such data would comply with Article 10(2) because it would be carried out with the consent of the person concerned acting with the consent of or representing members of his family and it would be necessary within the framework of employment law.

It is important to note that the Human Resources staff who collect information concerning disabilities and any medical certificates are not health practitioners. Consequently, the EDPS recommends that these persons be reminded that they are subject to professional secrecy in order to ensure compliance with Article 10(3) of the Regulation.

### **3.4. Data quality**

The data must be "*processed fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (See 3.2 above). Fair processing means having the information forwarded to the data subjects (see 3.10 below).

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 Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion must be regarded as fulfilling these conditions in relation to the processing operation. The factual data are submitted by the candidates themselves on the form. However, the motivation should be taken into account. As individuals could transmit excessive data in relation to what is necessary for the processing operation, the controller should avoid processing unnecessary data.

The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 is complied with in this respect.

Article 4(1)(d) of the Regulation stipulates that data must be "*accurate and, where necessary, kept up to date*". The Regulation further provides 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*".

The selection made by the hierarchy is by nature subjective and it is therefore difficult to determine its accuracy. Nevertheless, the fact that staff have the opportunity to contact the Human Resources unit of their DG to request access to their personal data and to the documents concerning them (teleworking application and agreement) and to ask for them to be rectified (as defined in the declaration) does guarantee data accuracy and allow data to be updated. These rights are a means of ensuring data quality. See point 3.9 below on the rights of access and rectification.

### **3.5. Data retention**

Pursuant to Article 4(1)(e) of the Regulation, 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*".

Provision is made for applications not granted to be retained for three years. Agreements will also be retained by the HR units of the DGs for three years after teleworking ceases, for the following reasons:

- to help establish an order of priority for persons who have applied on several occasions but were not selected because of the large number of applications within the DG;
- mid-term review of this working arrangement.

The EDPS agrees with the planned data retention policy.

At present, documents are retained in separate files from the personal file. Applications received and agreements signed are retained by the Human Resources service of each DG.

If, in future, a reference to teleworking were to be made in the personal file, via the SYSPER 2 system, the EDPS considers that provision should be made for any reference to be erased automatically from the system at the end of the 3-year retention periods mentioned above.

It is not planned to retain the data for historical, statistical or scientific purposes beyond the abovementioned period.

### **3.6. Change of purpose/Compatible use**

Article 4(1)(b) of the Regulation provides that "*personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

As mentioned above, the purpose of processing is to select teleworking applicants. Data are retrieved from or entered in the staff databases. The processing operation under review involves no general change to the stated purposes of the data collected and processed. Accordingly, Article 6(1) of the Regulation is not applicable to the case in point and the requirements of Article 4(1)(b) are complied with.

### **3.7. Transfer of data**

In accordance with Regulation (EC) No 45/2001, the transfer of personal data within or between Community institutions or bodies must meet the conditions set out in Article 7. Personal data may only be transferred if they are necessary for carrying out the tasks of the various recipients and for the legitimate performance of tasks covered by the competence of the recipient. The recipient may process the personal data only for the purposes for which they were transmitted.

The recipients are the hierarchy of the data subject, the HR units, the IRM and the GBI of each DG, together with the DIGIT Service for the allocation of tokens and the DIGIT Coordination Cell for the telephone network. In the present case, Article 7(1) is complied with. These transfers have a legitimate purpose since they are necessary for the management of human resources and for the technical installation of teleworking.

Lastly, Article 7(3) of the Regulation provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". For that reason, the EDPS recommends that all those receiving and processing data should be informed that they may not use them for other purposes.

### **3.8. Processing including the personnel or identifying number**

In the present case, 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, which makes provision for action by the European Data Protection Supervisor. The EDPS considers that the use of an identification number in the selection procedure as it appears on the teleworking form must be considered reasonable insofar as it facilitates the identification of the applicant during the procedure.

### **3.9. Right of access and rectification**

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 of any available information as to their source.

Article 14 of the Regulation provides that the data subject has the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

Data subjects have the right to contact the Human Resources unit of their DG to request access to their personal data and to the documents concerning them. The declaration also sets out this right of access, verification and rectification of factual data. The EDPS considers that this provides sufficient guarantee that the rights of the data subjects are respected.

### **3.10. 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.

Individuals are mainly informed via the declaration on data protection. In this respect, the EDPS considers that the declaration should be attached directly to the application form and not when the specimen teleworking agreement is signed.

For the rest, the EDPS considers that the declaration contains the obligations set out in Articles 11 and 12 of the Regulation.

### **3.11. Security**

In accordance with Article 22 of Regulation (EC) No 45/2001, the controller is required to 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. These security measures must in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and prevent all other forms of unlawful processing.

Some security measures have been taken.

Following a careful examination, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) No 45/2001.

### **Conclusion**

The proposed processing 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 the European Commission should:

- with a view to observing Article 10(3) of the Regulation, remind those human resources officers collecting information relating to disability and any medical certificates that they are subject to professional secrecy;
- provide that the controller should avoid processing data which are not necessary, with regard to the motivation expressed;
- ensure that if, in future, a reference to teleworking were to be made in the personal file, via the SYSPER 2 system, provision is made for the reference to be automatically erased from the system at the end of the planned retention periods;
- ensure that any person receiving and processing data is informed that he may not use them for other purposes;
- make sure that the declaration on data protection is attached to the teleworking application form.

Done at Brussels, 6 February 2008

(Signed)

Peter HUSTINX  
European Data Protection Supervisor