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ASSISTANT SUPERVISOR

[...]

Brussels, 10 March 2008  
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Dear Mr [...]

Thank you very much for the consultation sent to the EDPS on [...] 2008, under article 27.3 of Regulation (EC) No. 45/2001, in the context of the processing operations related to *the controller's* medical files already prior checked ([...]). In fact, it is a consultation under Articles 24.1(b) and 46(d), as it concerns a specific transfer of data and not an analysis on the need for prior checking.

In your letter you described that *the controller's* medical service has recently received a request from a [...] Tribunal asking for a copy of the full medical file of a staff member (official) for the purpose of a divorce litigation. Furthermore, you asked the following questions:

1. Lawfulness: Would the EDPS advise to seek the free and unambiguous consent of the data subject?
2. Special categories of data: according to Article 10, processing of data concerning health is prohibited. Under which exception foreseen in Articles 10 or 20 could the transmission of a medical file to a national jurisdiction be authorised (considering that a divorce is not a criminal offence)? In particular, should *the controller* request an express agreement or decision from the EDPS to proceed (Articles 10.2.b, 10.4, 10.5)?
3. Fairness: as far as the data subject is informed about the request, could you please confirm *the controller's* obligation to inform the data subject when undertaking the transmission of the medical file in accordance with articles 11 and 12?
4. Adequacy, relevance, non excessiveness: according to the information provided, access is requested to the whole medical file of the person concerned. Should *the controller* question the adequacy and relevance of such a request with regard to the purposes pursued (divorce litigation)? Should *the controller* question the excessiveness of an eventual transfer of health data related to the period before the wedding? Would it be entitled to do so?

5. Accuracy and data subject's rights: in accordance with Regulation (EC) No. 45/2001 and further opinion of the EDPS in this matter, it is the controller's obligation to guarantee the accuracy of the data processed. Would the EDPS advise *the controller* to let the data subject exercise expressly his/her right of access, rectification, erasure and blocking of the data contained in the medical file before proceeding with the transfer?
6. Transfer of data: as far as the transfer of data is compliant with article 8(a), would the EDPS advise *the controller* to attach a legal notice to the transfer of the file, in accordance with the practice pursued in other transfer of staff data to the Member States (E.g. Permanent Representation, ...)?
7. Could the EDPS confirm that the notification to the DPO and the prior check to the EDPS corresponding to *the controller* medical files ([...]) must be updated in accordance with this new category of recipient of data?

Taking into account the facts mentioned in your letter and Regulation (EC) No. 45/2001, the EDPS gives the following answers:

Ad 1.

Article 5(b) stipulates that personal data may be processed only if "*processing is necessary for compliance with a legal obligation to which the controller is subject*". In the case under analysis, the controller is subject to the obligation to cooperate with national jurisdictions, and therefore, the processing activity would be justified under this perspective. Nevertheless, it has to be noted that the medical service is subject to the obligations derived from the medical secrecy regulations. As a consequence, the cooperation with national jurisdictions has to take place in accordance with the requisites and mechanisms imposed by the national regulations on medical secrecy in the cases of information requested by Courts in the frame of legal proceedings.

Given the sensitivity of the category of data concerned, consent of the data subject would be recommended as a complementary basis for lawfulness (Article 5(d)). Notwithstanding, a refusal of the data subject to provide her consent will not invalidate the basis under Article 5(b), as explained above. In any case, a refusal to give consent has to be taken into account from the perspective of proportionality and data quality in general (see *infra*).

Ad 2.

Article 10.2 foresees that "[p]aragraph 1 shall not apply where: (...) (d) processing (...) is necessary for the establishment, exercise or defence of legal claims, (...)".

In the present case, a decision adopted by the EDPS would not be necessary because Article 10.2 is applicable.

Article 20 does not establish exceptions to Article 10.

Ad 3.

Considering that the data subject has not been informed about this purpose or this category of recipients in the information provided to her, it is appropriate to do so before any transmission.

Ad 4.

Indeed, Article 4 (data quality) is of application to a processing activity as the one mentioned by the consultation. Therefore, before transferring the medical file, *the controller* has to ensure that only adequate, relevant and not excessive data are transferred. Considering that the request from the Tribunal does not specify the purpose of the processing asked, it is legitimate, in the light of Article 4.1.b, to require further specification in this regard. The answer to the second question depends on the purpose of the processing, in particular to the scope of the divorce litigation.

It has to be borne in mind that Article 20.1(c) foresees an exception to the application of Article 4.1 where such a restriction constitutes a “necessary” measure to safeguard “(...) (c) *the protection of the data subject or of the rights and freedoms of others; (...)*”. A “necessity test” can only be conducted appropriately taking into account the purpose of processing, which, for the time being, is not clearly determined. In any case, exceptions are of restrictive application. Hence, such exception is not necessarily applicable to the whole Article 4.1. Indeed, this has to be analysed on a case-by-case basis.

Ad 5.

The rights of the data subject can be exercised at any moment (within the limits of Article 20). Therefore, if the data subject so requests, she can exercise them before the transfer.

Ad 6.

*The controller* may inform the Tribunal about Article 8(a) of the Regulation.

Ad 7.

It is not necessary to update the notification to the DPO and the prior check because of an unforeseen transfer that is based on Article 5(b).

Please do not hesitate to contact us should you have any other question.

Yours sincerely,

Joaquín BAYO DELGADO