

Opinion on a Notification for Prior Checking received from the Data Protection Officer of the European Commission on Assignment of ALER flats to statutory staff of JRC Ispra and the European School in Varese

Brussels, 26 May 2008 (Case 2008-144)

1. Proceedings

On 5 March 2008, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Commission a notification for prior checking relating to the Assignment of ALER flats to statutory staff of JRC Ispra and the European School in Varese.

Complementary questions have been asked on 19 March and 8 April 2008. The answers have been received on 25 March and 14 April 2008 respectively. The draft Opinion was sent for comments to the controller and the DPO on 14 May 2008 and the comments have been received on 21 May 2008.

2. Examination of the matter

2.1. The facts

Purpose of the processing activity

The purpose of processing is to attribute free ALER flats¹ to statutory staff of JRC Ispra site and the dependants of the European School in Varese taking into consideration new arrivals, family size and social aspects (such as a family with a handicap person in charge).

Description of the procedure

The attribution procedure is the following:

- publication of free ALER (Azienda Lombarda per l'edilizia residenziale provincia di Varese) flats,
- collection of applications,
- preparation of evaluation sheets,
- convocation of the Joint Housing Committee (CPA),

¹ ALER: Azienda Lombarda per l'edilizia residenziale provincia di Varese

- decision on basis of neutralised (without name) tables of evaluation. The evaluation is based on the attribution criteria listed in the file "Scheda individuale per assegnazioni alloggi".
- after the selection (decision of the Joint Housing Committee) the candidates are informed by post sealed in a closed envelope either by internal post to JRC staff in Ispra or by registered letter to European school staff.
- ALER is informed about attribution of apartments to the respective candidates, the name, the work-address (JRC or European school) and the work-place phone number are indicated in order to protect the information about their private address.

Categories of data subjects

Data subjects are statutory staff of JRC Ispra site and the dependants of the European School in Varese.

Categories of data

The categories of data processed are the following:

- Personal data: name, surname, date of birth, home address, telephone, starting date at EC / European School at Varese, type of contract, net salary, other income, marital status.
- Family data: relationship, date of birth, profession, income, possible handicap yes/no.
- Information about the current accommodation.
- Open field: motivation for the request

Information to be given to data subjects

The Privacy Statement provides information about:

- The identity of the data controller;
- The purposes for which personal data are processed
- Categories of recipients of personal data;
- The rights of data subjects and how they assert those rights; and
- The right to recourse to the EDPS.

The privacy statement will be attached to the application form.

Procedures to grant rights of data subjects

Data subjects will be informed that they can send any requests or complaints (access, rectification, etc.) to the following email address: jrc-adv-social-activities@ec.europa.eu

Automated / Manual processing operation

Partly automated

Recipients to whom the data might be disclosed

Data can be transferred to the JRC Ispra Medical service. (information about a possible handicap, medical certificate), the ALER (letter of attribution with name and address of the

working place of the candidate), the Joint Housing Committee (Joint Committee according to the Staff regulations, Article 9, they receive data as requested in the application form), the Legal Service, the European Civil Service Tribunal, the Ombudsman and the EDPS.

Retention policy

The application form and evaluation files will be kept for 6 years. This period follows the maximum duration of the contractual agents' contracts, who must give the flat back after the end of the contract. In case of eventual discussions and/or audit the original dossier shall be available.

Security measures

Security measures have been adopted.

3. Legal aspects

3.1. Prior checking

Presence of elements that trigger the application of Regulation (EC) No. 45/2001

The prior checking relates to the processing of personal data by the DG JRC of the European Commission (Articles 2(a) and (b) of Regulation (EC) No. 45/2001 (hereinafter "the Regulation"). The processing activity is carried out by an European institution, in the framework of Community law (Article 3.1 of the Regulation). The data are processed partly by automatic means (Article 3.2 of the Regulation). As a consequence, the Regulation is applicable.

Assessment of whether the data processing operations fall under Article 27 of the Regulation

Article 27.1 of the Regulation subjects to prior checking by the EDPS all "*processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes*". Article 27.2 of the Regulation contains a list of processing operations that are likely to present such risks.

Under Article 27.2(b) of the Regulation, "*processing operations intended to evaluate personal aspects relating to the data subject*" shall be subject to prior checking by the EDPS. In the present case, the selection criterion includes the evaluation of certain personal aspects such as family characteristics (monoparental).

Furthermore, Article 27.2(a) of the Regulation, foresees that "*processing of data relating to health*" shall also be subject to prior checking by the EDPS. In the case in point, the system described includes health related data (handicap).

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should be given prior to the start of the processing operation. In this case, the processing activities have already started. However, in the present case, this is not a serious problem as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 5 March 2008. According to Article 27.4 the present Opinion must be delivered within a period of two months. The Opinion will be issued no later than on 26 May 2008 (6 May + 19 days of suspension).

3.2. Lawfulness of the processing and legal basis

The processing in question has to be examined in light of Article 5 (a) of the Regulation.

Article 5(a) of the Regulation stipulates that personal data may be processed only if the *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof"*. Recital 27 of the Regulation further specifies that *"processing of data for the performance of tasks carried out in the public interest of the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*.

In order to determine whether the processing operations comply with Article 5(a) of the Regulation three elements must be taken into account: first, whether either the Treaty or other legal instruments foresee the data processing operations carried out by the JRC; second, whether the processing operations are performed in the public interest, and third, whether the processing operations are necessary. Obviously, the three requirements are closely related.

As far as the first element is concerned, the legal basis for the data processing being analysed can be found in Article 6 of the Italian Law Nb. 906, from 01-08-1960, implementing the Agreement between the Italian Government and EURATOM¹: *"Il Governo italiano si impegna, inoltre, a fornire, a seconda delle necessità, gli alloggi occorrenti al personale del Centro ed alle loro famiglie. (...)"*. The "Convenzione tra la Commissione delle Comunità europee e l'ALER di Varese", further develops the legal basis.

Furthermore, attribution of ALER flats is part of the Social policy of the European Commission for her staff. The Joint Housing Committee establishes a scheme of points to be given, taking into consideration new arrival, income, size of family, etc. Giving priority to families with disabled members is part of the Social policy (following the Staff Regulations, Articles 1e(1), 76 and the Regulation for other agents of the European Commission Articles 30, 71 and 98) and will be decided by the Social assistant being competent for those questions.

As far as the second element is concerned, the processing of personal data in the present context can be considered as an activity conducted in the public interest of the Commission, as stipulated by the Staff Regulations.

As far as the third element is concerned, the necessity of the processing has to be evaluated in the light of the purpose. In the present case, the processing is, in principle, necessary for the purposes described.

3.3. Processing of special categories of data

According to Article 10 of the Regulation, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and 10(3). In the present case, data

¹ Accordo fra il Governo della Repubblica Italiana e la Commissione della Comunità europea dell'energia atomica per l'istituzione di un Centro comune di ricerche nucleari di competenza generale (Roma, 22 luglio 1959).

related to a handicapped member of the family may be processed because it is an element to be considered for priority in the attribution of an ALER flat.

As it has been explained above, the justification for processing of health related data is to be found in the EC Staff Regulations, as well as in Agreement between the Italian Government and EURATOM. The processing in question is therefore compliant with Article 10(2)(b) according to which the prohibition shall not apply where the 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"*.

It has to be noted that, in the present case, medical data will be present not only in the medical certificate (it will be received directly by the Medical Service) but also in the application form (handicap yes/no, and potentially in the Open field "Motivation for the request"). These data will be processed by the controller, the Adviser for the social activities attached to the Ispra site Director. Therefore, it is important to remind the controller that he/she has to respect an obligation of secrecy in this regard.

3.4. Data Quality

According to Article 4(1)(d) personal data must be *"adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed"*.

In the present case, the data processed respect this principle. Furthermore, the medical certificate is only processed by the medical service.

According to Article 4(1)(d) of the Regulation, personal data must be *"accurate and where necessary kept up to date"*, and *"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 system, based mainly in data collection from the data subject, ensures accuracy and up-date. Besides, this principle is connected to the rights of access and rectification, which in the present case are respected (see point 3.7 below).

Lastly, data must also be *"processed fairly and lawfully"* (Article 4(1)(a) of the Regulation). The question of lawfulness has already been considered. As for fairness, it is related to the information to be given to the data subject (see below point 3.8.).

3.5. Conservation of data/ Data retention

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

As indicated above, data are kept for 6 years. This period is reasonable in the light of the purpose described in point 2.1.

3.6. Transfer of data

Article 7 of the Regulation stipulates: "*(1) 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*".

As explained above, the medical certificates are transmitted directly to the Medical Service by the applicant. Strictly speaking, this is not an intra-institutional "transfer", because it is the data subject who conducts such processing activity and not the JRC. The other transfers mentioned by the controller are necessary for the legitimate performance of the tasks of the recipients, therefore Article 7.1 is respected.

Article 7.3 of the Regulation specifies the obligation to process data only for the purpose for which they have been transmitted. This rule has to be reminded to the recipient when the transfer is made.

3.7. Right of access and rectification

According to Article 13 of the Regulation, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data.

As described in point 2.1 of the present Opinion, Articles 13 and 14 of the Regulation are respected.

3.8. Information to the data subject

Article 11 of the Regulation provides for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data are obtained from the data subject, the information must be given at the time of collection.

It is noted that the data subject is not informed about whether replies to the questions are obligatory or mandatory, as well as the possible consequence of failure to reply. This information has to be provided. Furthermore, the controller has to inform also about the legal basis of the processing and the time limits for storing the data.

3.9. Security measures

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the above considerations are fully taken into account. In particular, the JRC should:

- be aware of the obligation of secrecy that has to be respected regarding medical data.
- inform the data subject about whether replies to the questions are obligatory or mandatory, as well as the possible consequence of failure to reply; furthermore, the controller has to inform also about the legal basis of the processing and the time limits for storing the data.

Done at Brussels, 26 May 2008

(signed)

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