



Joint opinion on two notifications for Prior Checking received from the Data Protection Officer of the Community Plant Variety Office (CPVO) concerning "Management of leave" and "Management of Leave on Personal Grounds and Unpaid Leave"

Brussels, 28 March 2011 (Cases 2010-0073 and 2010-0075)

1. Proceedings

On 2 February 2010, the European Data Protection Supervisor ("EDPS") received from the Data Protection Officer ("DPO") of the Community Plant Variety Office ("CPVO") two notifications for prior checking concerning "Management of leave" and "Management of Leave on Personal Grounds and Unpaid Leave".

Due to similarities in the two data processing operations, the EDPS has decided to analyse them jointly in a single opinion.

The notifications were accompanied by several background documents including:

- Instructions guidelines on how to use "Centurio Congé" application;
- Privacy statements specific to each processing;
- CPVO decision introducing implementing provisions on leave;
- A model of application form for leave on personal grounds;
- Commission decision on the measures concerning leave on personal grounds for officials and unpaid leave for temporary and contract staff of the EU;
- Decision of the President of the CPVO on the adoption of implementing rules to the staff regulations; and
- Decision of the President of the CPVO on the conservation of personal files.

On 8 March 2010, the EDPS sent a request for additional information to the DPO, who responded on 6 January 2011. The draft opinion was sent to the DPO for comments on 22 February 2011 and these were received on 25 March 2011.

2. Facts

The *purposes* of the processing operations are to manage annual and special leave entitlements of the CPVO staff and to manage requests for unpaid leave on personal grounds. Annual leave, special leave, and leave on personal grounds/unpaid leave all require obtaining prior authorisation from the Appointing Authority. Requests for annual and special leave are introduced by staff members through an automatic process (i.e. the "Centurio congé" application), while requests for leave on personal grounds/unpaid leave are processed manually through the filling of a paper form.

The processing operations carried out in respect of **annual leave and special leave** are based on the following **legal grounds**:

- (i) Articles 40-42a of the Staff Regulations, Annex V of the Staff Regulations, Articles 16, 58 and 91 of the Conditions of Employment of Other Servants (CEOS);

- (ii) CPVO decision on introducing implementing provisions on leave;
- (iii) Decision on the policy and the procedures governing the engagement and use of SNE at CPVO; and
- (iv) Decision of the President of the CPVO on the maximum days of annual leave which could be taken above the annual granted entitlements.

The processing operations carried out in respect of **leave on personal ground** are based on the following **legal grounds**:

- (i) Articles 15, 37 and 40 of the Staff Regulations, Articles 11, 17, 81 and 91 of the CEOS as concerns unpaid leave on personal grounds;
- (ii) Commission decision of 28 April 2004 on measures concerning leave on personal grounds for officials and unpaid leave for temporary and contract staff of the EU; and
- (iii) Decision of the President of the CPVO on the adoption of implementing rules to the staff regulations.

The *data subjects* are CPVO staff members, i.e. officials, temporary and contract agents, and seconded national experts (SNEs are however not concerned by leave on personal grounds/unpaid leave); data concerning relatives of CPVO staff members may also be processed in the context of the justification for a leave.

The *processing* of annual and special leave requests is usually performed through automated means; staff members apply for a leave through the "Centurio Congé" electronic application. However, supporting documents justifying leaves requests are processed manually. Concerning the processing of requests for leave on personal grounds or unpaid leave, this is done manually via a paper application form.

(i) Processing of annual and special leaves:

Staff members introduce directly their requests for leave in Centurio Congé. After the staff member validates his/her request, his/her Head of Unit is automatically notified for approval. The Head of Unit can approve or reject any or all applications. Once approved or rejected, the request for leave is stored in Centurio Congé.

The Centurio Congé application is designed to:

- enable every staff member to enter, amend or cancel data necessary for a leave application;
- make a summary in order to find out how many days of leave a staff member has left in the current year;
- enable managers (head of units, president) to monitor leave for their administrative entities;
- enable leave administrators (HR staff) to manage leave entitlements;
- enable administrators to register and monitor documentation submitted in connection with special leave;
- enable leave administrators (HR staff) to manage staff absences (other than absence on leave);
- send leave application forms for approval electronically, via the approval chain;
- print out leave application forms so that they can be filled in by hand if necessary;
- transfer excess leave at the end of the year, if appropriate.

In addition, manual processing operations may occur in case supporting documents are attached to the leave request.

(ii) Manual processing of requests for leave on personal grounds/unpaid leave:

When requesting for a leave on personal grounds and/or an unpaid leave, the staff member has to fill in an application form that can be found on the intranet. The leave on personal grounds/unpaid leave may be granted by the Appointing Authority at the request of the staff member concerned. The Appointing Authority takes a decision on granting the leave after consulting the applicant's hierarchical superiors, having examined the request in detail and taken into account all relevant factors, in particular the reason for the leave, its duration and the immediate needs of the service. The staff member is notified of his/her precise obligations when the decision is taken to grant or extend a leave on personal grounds.

The *categories of data processed*:

(i) The following data are processed in the context of **annual and special leaves**:

- **On Centurio congé:**

- Personnel number, surname and forename, the leave balance, the cumulative days pending applications, name of the person replacing the staff member while absent;
- Type of leave: annual, special or cancellation of a leave request. In case of a special leave the motif for requesting it must be indicated; a list of reasons can be retrieved from Centurio. These reasons may include a serious illness of a relative or a cure, which are considered to be data related to health. These reasons may also include trade union activities. In cases of requests for a special leave or cancellation of a leave for medical reasons, a justification must be transmitted to the HR service.
- On a voluntary basis: comments from staff member, address and telephone number during his/her absence.

- **Manually:**

- Data subjects may be asked to present supporting documents. Supporting documents are not included in the "Centurio Congé" application. These documents are not seen by the hierarchy of the person concerned and they are processed only by the HR service.
- When a staff member is on sick leave, he should provide his certificate to HR. The number of days of absence for sick leave are entered into Centurio without any mention of the reason. HR adds this certificate to the personal file of the staff member concerned.
- When a staff member has a medical appointment, he/she must request from the doctor consulted a certificate where the doctor indicating the time of arrival and departure. This certificate should not be provided to HR but may be shown to the superior if the superior so requests. This absence is not recorded into Centurio.
- If the medical data have to be checked, for instance in case of special leave for medical consultation abroad, the medical advisor of the CPVO gives authorization for the leave together with the Head of Unit. The Head of Unit is not informed

(ii) The following data are processed in the context of **requests for a leave on personal grounds/unpaid leave**:

- Identification data of the staff member concerned (name and surname, personnel number, date of birth, telephone, fax and e-mail);
- Date of entry into service at CPVO;
- Administrative data of the staff member concerned: administrative status, function group/grade and unit;
- Duration of the period of leave;
- Reason for leaving and justification where necessary;
- Type of application (if it is a first request or a renewal);
- Description of duties in the CPVO;
- Address during absence;
- Outside activity's data (in case the staff member undertakes an activity while his/her absence, the following data is collected: name of the organisation, address, telephone, fax, email, period of employment, description of work, position within the organisation, if the organisation has any link with CPVO, etc);
- Signature from the staff member concerned;
- Opinion and reason of the hierarchical superiors for accepting/accepting under conditions/rejecting the request;
- Signature from the hierarchical superiors;
- Opinion and reason of the Appointing Authority for accepting/accepting under conditions/rejecting the request;
- Signature from the Appointing Authority.

Data processed on Centurio are *stored* on the Centurio Congé application. Supporting documents justifying the leave are stored on paper in the personal file of each staff member. Data concerning leave on personal grounds/unpaid leave are stored in the personal file of each staff member and in Docman (tool to manage documents by electronic means).

Regarding the *retention periods*, in accordance with the Decision of the President on the conservation of personal files of 1 September 2008, all personal data contained in the personal file of a staff member will be destroyed after a period of 10 years from the date of the end of contract of the staff member. These provisions do not apply to administrative data stored in the “pension” part of the personal file containing a summary of the employment history of the staff member at the CPVO as well as all correspondence related to the staff member with the Pension Unit of the Commission. For these data, the conservation period is extended to 10 years after the date of retirement of the (former) staff member. As concerns the retention of data in Centurio, the CPVO is currently drafting a Decision on the leave retention of data in Centurio, which would require erasing such data after 24 months.

As to **data protection information**, the CPVO provides data subjects with specific privacy statements in respect of (i) annual and special leave and (ii) leave on personal grounds/unpaid leave. The privacy statements contain information on the identity of the controller, purposes of the processing, types of data processed, legal basis for the processing, recipients of the data, lawfulness of the processing, storage periods, the existence of the right of access and rectification. They also instruct staff to inform their

respective family members about the processing of their personal data. The privacy statements are readily available on the DPO intranet pages.

Regarding the *rights of the data subjects*, the notification indicates that data subjects have the right to access their data via the "Centurio Congé" application and to request correction of the data to the HR staff. With respect to requests for leave on personal grounds/unpaid leave, data subjects may exercise their right of access and rectification upon request to the data controller. Family members whose personal data are processed have the right to access and modify their data upon request to the data controller.

The data processed are *disclosed* within CPVO to the following recipients: the Heads of Unit, the Appointing Authority and the Human Resources service. Supporting documents concerning health data are only disclosed to the medical advisor of the CPVO. Members of the IT service also have access to Centurio Congé for purpose of maintenance of the application.

In addition, data concerning leave on personal grounds/unpaid leave are also disclosed to the Office for the administration and payment of individual entitlements - to inform it about the duration of the unpaid leave - and to the Joint Sickness Insurance Scheme - the staff member must decide if he/she wants to pay the sickness contributions during the leave.

As concerns *security measures*, (...)

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) No 45/2001 ("the Regulation"): The processing of data relating to staff by the CPVO constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of the Regulation). The data processing is performed by an EU body in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation, in the light of the Lisbon Treaty). The processing of the data is both automatic and manual; in the latter case, such processing forms part of a filing system (Article 3(2) of the Regulation). Therefore, Regulation (EC) No 45/2001 is applicable.

Grounds for prior checking: According to 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 purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks, which includes health-related data (Article 27(2)(a)). The processing operations under review involve the processing of data indicating the health status of a person; health-related data are mentioned in administrative documents or in the list of reasons for leave in Centurio (e.g. "serious illness of a relative", "maternity leave" or "a cure", etc.). They are therefore subject to prior checking by the EDPS.

Ex-post prior checking: The processing operations were already in place at the CPVO before the EDPS was notified. The opinion of the EDPS should, as a rule, be requested and given prior to the start of any processing of personal data. Any recommendations made by the EDPS in this opinion must be fully implemented accordingly.

Deadlines: The notification of the DPO was received on 2 February 2010. According to Article 27(4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 423 days. Consequently, the present opinion must be provided no later than 1st April 2011.

3.2. Lawfulness of the processing

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. In particular Article 5(a) provides that personal data may be processed 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 or in the legitimate exercise of official authority vested in the Community institution or body"*.

The management of leave at the CPVO is based on the Staff Regulations and the Conditions for Employment of other Servants, as well as on formal internal implementing decisions as described in section 2. Thus, specific legal instruments "adopted on the basis of the Treaties" allow and provide the basic conditions for the notified processing operations. The EDPS is also satisfied that the processing is necessary and proportionate for the management and functioning of CPVO (recital 27). The processing is therefore lawful.

3.3. Processing of special categories of data

The processing of special categories of data is prohibited under Article 10(1) of the Regulation unless grounds can be found in Article 10(2) and/or Article 10(3) of the Regulation.

In the course of handling a leave request, the CPVO may process data about its staff members or their relatives which relate to their health or which may reveal political opinions, trade union membership or sex life. All these data constitute special categories of data which fall under the prohibition of Article 10(1) of the Regulation.

The processing of these special categories of data is necessary in order to comply with legal obligations imposed on the CPVO with respect to its staff as laid down in the Staff Regulation and the Rules applicable to other servants of the EU, as described in Section 2. The processing of these data for purpose of leave management is therefore justified under Article 10(2)(b) of the Regulation. The EDPS notes that this legal ground is also relevant in order to justify the processing of special categories of data of relatives of CPVO staff members when their processing is necessary for the establishment of the leave of CPVO staff members.

The prohibition regarding the processing of data concerning health may also be lifted when the processing is *"necessary for the purpose 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). In light of this provision, medical data *as such* should only be processed by a health professional, i.e. the medical advisor of the CPVO.

Considering that data indicating the health status of a person are processed by HR during the leave request procedure (e.g. reason for the absence, forms concerning sick leave,

medical certificates, etc), the EDPS recommends that all persons within HR who are responsible for processing information related to the CPVO staff members' health status are reminded to process them in accordance with the principles of medical confidentiality. Although staff members are subject to a general confidentiality requirement under Article 17 of the Staff Regulation, the EDPS considers that this confidentiality obligation is not specific enough to cover their processing of health related data. The EDPS therefore insists that the CPVO should prepare specific declarations of confidentiality to be signed by the HR staff that they are subject to an obligation of professional secrecy equivalent to that of a health professional, in compliance with Article 10(3) of the Regulation. (This issue should be linked with Article 7(3) of the Regulation, see more in section 3.6 of this opinion).

3.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The EDPS underlines that it must be ensured that HR does not process medical data *as such*. To this end, the EDPS recommends that data subjects are instructed to provide supporting documents containing medical information directly to a health professional, i.e. the medical advisor of the CPVO. Furthermore, the CPVO must ensure that the health professional only communicates to HR relevant and non excessive data (e.g. condition for the leave met/not). As concerns the processing of medical certificates, in principle this should be done by a health professional and not by HR. However, having considered the small structure of the CPVO as well as the fact that it does not have its own in house medical advisor, the EDPS considers that HR may only process medical certificates provided that the persons handling those medical certificates are subject to an obligation of professional secrecy, as outlined in section 3.3 above.

Accuracy: Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". Most of the data processed are provided directly by staff members, through self-declaration, which contributes to keeping the data accurate and up-to-date. Furthermore, and in particular for those persons whose data are provided indirectly, the rights of access and rectification are important means of ensuring accuracy of the data (see section 3.8).

Fairness and lawfulness: Article 4(1)(a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see section 3.2) and fairness will be dealt with in relation to information provided to data subjects (see section 3.9).

3.5. Data retention

Article 4(1)(e) of the Regulation states that 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 EDPS considers that the envisaged retention of personal data in Centurio for 24 months would in principle not seem excessive.

With respect to the retention of data in paper files, the EDPS considers excessive the conservation of all data related to leave in the personal file for a period of 10 years from

the date of the end of contract of the staff member. The EDPS underlines that data concerning leave should only be kept for the period necessary for purpose of managing the leave, and he therefore recommends that the CPVO adopts shorter retention periods.

The EDPS emphasizes that the CPVO must adopt appropriate retention periods also concerning the personal data processed in paper. The retention periods for data processed on paper could be adjusted to the retention period in Centurio, thus for a period not exceeding two years. There might be a need for CPVO to differentiate the retention of certain leave data according to legal obligations. In particular, the retention of sick leave data for three years would usually be considered necessary for the establishment of an eventual invalidity on the basis of Article 59(4) of the Staff Regulations¹.

The EDPS further reminds the CPVO that documents or certificates containing any reference to medical data or medical diagnosis should be stored in the staff member's medical file, which should be kept by a health professional (i.e. the medical advisor of the CPVO).

Finally, as regards the retention of files for purpose of compliance with the Financial Regulation, the EDPS would like to bring the CPVO's attention to the last paragraph of Article 49 of the Implementing Rules to the Financial Regulation stating that "*personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes*". This implies that data with no financial implications should not be stored on the basis of the financial regulation.

3.6. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other institutions or bodies "*if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient*" (paragraph 1). The recipient can process the data "*only for the purposes for which they were transmitted*" (paragraph 3).

Personal data are disclosed to HR, to the Heads of Unit and to the Appointing Authority. These data transfers are necessary for granting the requests for leave. They are therefore in compliance with Article 7(1) of the Regulation.

Supporting documents concerning health data are disclosed to the medical advisor of the CPVO. While these transfers would be necessary for the performance of the tasks of the recipient, the EDPS however considers that, in view of the sensitive nature of the data and of Article 10(3) of the Regulation, supporting documents concerning health data should not transit through the CPVO but should be provided directly by the data subjects to the medical advisor of the CPVO. As concerns transfers of data from the medical advisor to HR, the CPVO must ensure that information it receives from its medical advisor is relevant and not excessive, as described in section 3.4 above.

Members of the IT service have access to Centurio Congé for purpose of maintenance of the application. Access by IT to the data processed in Centurio for this purpose is in compliance with Article 7(1) of the Regulation.

¹ See EDPS Guidelines of health data at work adopted on 28 September 2009, page 12, section 4 of the data related to sick leave: "Article 59(4) of the Staff Regulations could justify a conservation period of 3 years for data necessary to justify an absence due to sick leave."

In addition, data concerning leave on personal grounds/unpaid leave are also disclosed to the Office for the administration and payment of individual entitlements - to inform it about the duration of the unpaid leave - and to the Joint Sickness Insurance Scheme - the staff member must decide if he/she wants to pay the sickness contributions during the leave. Insofar that these transfers are necessary for the performance of the tasks of the recipients, these transfers are in compliance with Article 7(1) of the Regulation.

For all these transfers the EDPS however underlines that only the data strictly necessary for the fulfilment of the recipients' tasks must be disclosed.

Furthermore, the EDPS recommends that in accordance with Article 7(3) of the Regulation each of the recipients is made aware that they shall only process personal data for the legitimate purpose for which they have been disclosed to them.

3.7. Processing of personal number or other identifier

According to Article 10(6) of the Regulation, the EDPS "shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body".

The personnel number of a staff member can be collected in the frame of the processing of leave management. The EDPS considers that the personnel number can be used in this context as it identifies the staff member and facilitates the linking to the correct case file. There are no reasons to determine other conditions in the case at hand.

3.8. Rights of the data subjects

Articles 13 to 19 of the Regulation establish a number of rights for data subjects. These notably include the right to access data upon request by the data subject and the right to rectify, erase or block personal data.

The EDPS notes with satisfaction that the notification and privacy statements indicate that all data subjects are provided with all their data protection rights, including family members whose personal data are processed in the context of the leave request.

3.9. Information to the person concerned

Articles 11 and 12 of the Regulation provide 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 is obtained from the data subject, the information must be given at the time of collection. When the data has not been obtained from the data subject, the information must be given when the data is first recorded or disclosed, unless the data subject already has it (Article 12).

In the present case, data are collected directly from staff members, thus Article 11 applies. Data about relatives may also be collected, which further requires that Article 12 is also complied with.

The EDPS welcomes the clear reference in the application form for unpaid leave on personal ground to the CPVO relevant privacy statement. The EDPS notes that two privacy statements specific for each processing are readily available on the DPO intranet pages, which contain all the elements listed in Articles 11 and 12 of the Regulation. He

furthermore notes with satisfaction that information of family members about the processing of their data has been taken into account.

For both privacy statements, the EDPS however recommends adding information about the processing of medical data indicating that supporting documents containing medical data should be addressed directly to the medical advisor of the CPVO, whose contacts should be made clear. Furthermore, the section on data retention of both privacy statements should be updated in accordance with section 3.5 of this opinion.

Finally, in the privacy statement concerning annual and special leave, it should be specified which of the data are collected on a voluntary basis in Centurio (Article 11(1)(d) of the Regulation).

3.10. Processing on behalf/subcontracting

When entrusting the processing of medical data to an external medical advisor, the CPVO must ensure the respect of Article 23 of the Regulation and must choose a processor providing sufficient guarantees in respect the technical and organisational security measures required.

Furthermore, a contract or other legally binding act must be established according to which the processor must only act upon instruction of the agency. Should the processor be subject to national law implementing Directive 95/46/EC, he must ensure the respect of the provisions of national law as regards security and confidentiality.

3.11. Security measures

According to Article 22 of the Regulation, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected."* These measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

On the basis of the information available, the EDPS has no reason to believe that the measures implemented by the CPVO are not adequate in the light of Article 22 of the Regulation.

4. Conclusion:

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

- ensure that any processing of health data is only handled by a health-professional or by a person subject to an equivalent obligation of professional secrecy, as required under Article 10(3) of the Regulation;
- have all persons within HR who are responsible for handling leave requests sign a declaration of confidentiality that they are subject to an obligation of professional secrecy equivalent to that of a health professional, in compliance with Article 10(3) of the Regulation;

- instruct data subjects to provide any medical information directly to a health professional, i.e. the medical advisor of the CPVO;
- adopt appropriate retention periods concerning the personal data processed in paper;
- keep medical data and documents containing a medical diagnosis in the staff member's medical file, by a health professional;
- as concerns transfers of data from the medical advisor to HR, adopt appropriate rules to ensure that information it receives from its medical advisor is relevant and not excessive, as described in section 3.4 of this opinion;
- ensure that only the data strictly necessary for the fulfilment of the recipients' tasks are disclosed;
- remind each of the recipients to only process personal data for the legitimate purpose for which they have been disclosed to them;
- update the privacy statements in accordance with the recommendations made in section 3.9 of this opinion; and
- ensure that the subcontracting of the processing of medical data is done in compliance with Article 23 of the Regulation.

Done at Brussels, on 28 March 2011

(signed)

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Assistant Supervisor