



Opinion on a notification for prior checking received from the Data Protection Officer of the Community Plant Variety Office regarding requests for a part-time work.

Brussels, 28 July 2011 (Case 2011-0299)

1. Proceedings

On 25 March 2011, the European Data Protection Supervisor (EDPS) received a letter from the Data Protection Officer (DPO) of the Community Plant Variety Office (CPVO), containing a notification for prior checking regarding the processing operations "request for a part-time work".

The notification was accompanied by several background documents:

- request for part-time work form;
- privacy statement on part-time work;
- Commission Decision of 15 April 2004 on part-time work;
- Decision of the President of CPVO of 28 November 2005 on the adoption of implementing rules to the Staff Regulations;
- Decision of the President of CPVO of 1 September 2008 on the conservation of personal files.

On 29 April 2011, the EDPS sent a request for additional information to the DPO, who responded on 24 June 2011. On 7 July 2011 the EDPS's draft Opinion was sent to the DPO for her comments. Those comments were received on 25 July 2011.

The EDPS takes into account his joint Opinion 2010-0073/2010-0075¹ adopted on 28 March 2011, which presents some similar procedural aspects, and its follow-up -received by the EDPS on 24 June 2011-, including adaptations that have been introduced in comparison with the original notification.

2. Facts

The **purpose** of the processing is to manage the part-time applications of the CPVO staff members, allowing them to work part-time under the conditions laid down in Article

¹ Joint Opinion of 28 March 2011 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", (cases 2010-0073 and 2010-0075)), available on the EDPS website: www.edps.europa.eu.

55(a) and in Annex IVa of the Staff Regulations.

According to the notification, the processing of data is mainly performed through non automatic means.

The staff member wishing to work part-time shall fill in the request form for the part-time work, which can be found in the Intranet and then send it to his/her superior. The request shall be submitted to the immediate superior of the staff member concerned at least two months before the requested date, except in duly justified cases. The superior shall give an opinion on the application before transmitting it to the Appointing Authority. The authorization granted by the Appointing Authority shall determine the type of the part-time work, its beginning, its duration and the daily work schedule and in the case of the special part-time work, the dates of the days or half-days off. The Appointing Authority shall transmit its decision to the Human Resources Service, which informs immediately the staff member and his/her superior.

Notwithstanding the possibility of requesting a withdrawal of the authorization to work part-time as provided for in Article 2, first paragraph, of Annex IVa of the Staff Regulations, the staff member may request withdrawal of the authorization with retrospective effect for reasons of sick leave. Such a request may be granted by the Appointing Authority in exceptional cases, taking into account the probable duration of the sick leave, the duration of the part-time work and the fact that the sick leave effectively prevents the staff member from undertaking the commitments for which he had requested part-time work.

According to the notification, data subjects may be asked to present supporting documents to the request. In case of medical certificates (certificats médicaux) of absence for example, they are not seen by the hierarchy of the person concerned and are processed only by HR. If these documents are medical statements containing medical data, the staff member is asked by HR to provide these directly to the CPVO doctor who acknowledges receipt to HR (but do not transmit any medical data). They -together with the request and the final decision- are added to the personal file of the staff member concerned. The data controller also stated that the privacy statement for part-time has been amended accordingly with the privacy statements for unpaid leave and leave management².

According to the notification, the processing operations carried out in respect of part-time work are based on the following **legal grounds**:

- (i) Art. 55a of the Staff Regulations;
- (ii) Annex IVa to Staff Regulations;
- (iii) Article 5(a) of the Regulation 45/2001;
- (iv) Commission Decision on part-time work of 15 April 2004 (C(2004)1314);
- (v) Decision of the President of the CPVO on the adoption of implementing rules to the Staff Regulations, of 28 November 2005. This Decision states that "*the decision on Article 55a and Annex IV of the Staff regulations concerning part-time work (C(2004)1314 of 15-04-2004), as adopted by the Commission, shall apply "mutatis mutandis" to the staff of the CPVO.*

The **data subjects** are: the CPVO staff members, including officials, temporary and contract agents. Data concerning relatives of CPVO staff members may also be processed

² See footnote n. 1

in the context of the justification for a leave.

The request form for a part-time work contains the following **data**, which are processed:

- identification data (surname and forename, personnel number, function group/grade);
- administrative status, with the expiration date of the contract, if applicable;
- period of part-time (exact period and whether it is a new request or a renewal);
- type of part-time work (if standard or special part-time);
- reason(s) lying under the request;
- working hours (indicating the schedule of working days in case of standard part-time work and indication of exact dates of the days or half-days off in case of the special part-time work);
- pension contribution;
- opinion of hierarchical superiors;
- decision of the appointing authority, with possible modifications or if rejected with the reasons of rejection;
- signatures from the staff member concerned, the hierarchical superiors and the appointing authority.

Data may be transferred to the following **recipients** or categories of recipient:

- to the staff's immediate superior, the Appointing Authority and the Human Resources Service.
- to the Office for the administration and payment of individual entitlements.
- to IT administrators. Such access to documents can only take place under specific conditions and for specific situations (for instance, maintenance and other procedures). They are instructed that outside these specific conditions, access is strictly prohibited.

Regarding **information to the data subjects**, a privacy statement indicating the data controller is available on the CPVO's intranet under the DPO section. The privacy statement contains information on the controller, the purposes of the processing, the types of data processed, the legal basis for the processing, the recipients of the data, the lawfulness of the processing, the storage periods, the existence of the right of access and rectification, and the right to recourse to the EDPS.

The **storage** is made on paper in the personal files of each staff member concerned in the Human Resources Service under locked cupboards and in Docman (tool that manages documents by electronic means). Access to Docman is secured by password and only the Human Resources Service has access to these documents. As explained above, IT administrators can access these documents.

As to the **retention** period, in accordance with the "Decision of the President on the conservation of personal files" of 1 September 2008, all personal data 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.

Regarding the **rights of the data subjects**, the notification indicates that upon request to the data controller, data subjects have the possibility to access and modify their data, even after having submitted their request.

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 largely performed through non automatic means, but such processing operations form part of a filing system (application form and entry in Docman) Therefore, Regulation (EC) No 45/2001 is applicable (Article 3(2) of the Regulation).

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) lists processing operations that are likely to present such risks. Article 27(2)(b) refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". In effect, the processing involves an evaluation of the data subject, insofar as the decision to grant part-time work is based on the interest of the service and takes into account the grounds given in support of the application, but also insofar as it is possible for part-time work to be refused. It is also possible for applicants to justify their application to work part time by referring to their own state of health and/or the state of health of members of their families. Therefore, the processing of data relating to health is also potentially concerned (Article 27(2)(a)).

The processing is 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: Notification from the DPO was received on 25 March 2011. In accordance with Article 27(4), this Opinion must be delivered within two months of receipt of the notification. Because of the 57 days of suspension (+ 20 days for comments), the EDPS must give his Opinion by 11 September 2011 at the latest.

3.2. Lawfulness of the processing

Under Article 5(a) of Regulation (EC) No 45/2001, personal data may be processed "*if 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 procedure for granting part-time work may be regarded as being necessary for the performance of a task carried out in the public interest on the basis of legislative acts adopted on the basis of the Treaties insofar as it includes "*the processing of personal data necessary for the management and functioning of those institutions*" (recital 27 of Regulation (EC) No 45/2001). The management of part-time work at the CPVO is based on the Staff Regulations, the Commission Decision and, as well as on the formal internal implementing decisions of the CPVO. Thus, specific legal instruments "adopted on the basis of the Treaties" allow and provide the basic conditions for the notified processing operations.

In this respect, the processing could be considered necessary and proportionate, particularly for the management of the working hours of staff and the functioning of CPVO (recital 27). The processing operation proposed 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 part-time 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 considered necessary in order to comply with legal obligations imposed on the CPVO with respect to its staff as laid down in the Staff Regulation as described in Section 3.2 above. The processing of these data for purpose of part-time work could therefore be considered justified under Article 10(2)(b) of the Regulation. The EDPS notes that this legal ground could be 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 part-time 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* must only be processed by a health professional, i.e. the person in charge of medical aspects of the CPVO.

As already stated in his Opinion on notifications for prior checking received from the Data Protection Officers of certain EU agencies concerning the "*processing of health data in the workplace*"³ ("joint Opinion"), 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

³ Case 2010-0071

confidentiality obligation is not specific enough to cover their processing of health related data. The EDPS therefore insists, as he has established in the joint Opinion, 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 3.7 of this Opinion).

The EDPS also notes that other special categories of data may be collected on the form in the field relating to the reason for the application (the part-time form uses a free text space), such as for example data about trade-union membership or political opinions. In this case the collection of such data is covered by Article 10(2)(a) as the data subject would expressly consent to the processing of the data. Moreover, it would also be covered by Article 10(2)(b) of the Regulation, since it is necessary to comply with the specific rights and obligations of the controller in the field of employment law. In the event that such data are collected, the EDPS recommends that the recipients of the data should be reminded that they must only process them for the purposes of dealing with applications to work part time.

3.4. Data quality

Article 4(1)(c) of Regulation No 45/2001 states that personal data must be "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*". In this case, the data are collected and processed for the purposes of managing applications to work part time.

The EDPS considers that the personal data which have to be provided are necessary to establish the right to work part time, and that their processing cannot be regarded as excessive.

Moreover, 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 point 3.2 above). The issue of fairness of the processing is linked to the information given to the data subject (see point 3.9 below).

Under Article 4(1)(d) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date; 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 procedure in place gives sufficient reason to believe that the system itself ensures the quality of the data. 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. As the written observations by the immediate superior are subjective by their very nature, it is hard to assess their accuracy. In any case, the possibility to exercise the rights of access and rectification helps to ensure that the data are accurate and up to date (see point 3.8).

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*".

As stated above under point 2, in accordance with the "Decision of the President on the conservation of personal files" of 1 September 2008, all personal data 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.

With respect to the retention of data, the EDPS considers excessive the conservation of all data related to part-time work in the personal file for a period of 10 years from the date of the end of contract of the staff member. The EDPS already underlined this aspect in his joint Opinion. In its follow-up, the CPVO states that it has adopted a new Decision of the President of 8 June 2011. This decision foresees, in point 1, that "*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.*" Point 2 b) states that "*These provisions do not apply to absence certificates (for medical reasons, to support a special leave request, to support part-time request or any other request) and annual medical visits certificates which shall be destroyed after a period of 3 calendar years (for example any certificate dated 2009 shall be destroyed 1/1/2013)*". The EDPS was consulted on the draft of this Decision (Case 2011-0541).

The EDPS notes that data concerning absence certificates in the context of part-time work are only kept for the period necessary for purpose of managing the part-time work, in order to manage the career of the person concerned and to allow him all his rights under employment law in compliance with Article 4(1)(e) of Regulation (EC) No 45/2001.

The EDPS acknowledges that documents or certificates containing any reference to medical data or medical diagnosis are stored in the staff member's medical file, which is kept by a health professional (i.e. the person in charge of medical aspects of the CPVO).

3.6. Processing including the personal or identifying number

Article 10(6) of the Regulation provides that "*the European Data Protection Supervisor 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 personal numbers of the staff concerned may be collected in connection with the processing of applications to work part time. The EDPS considers that the personal number can be used in this context since it allows the identification of the staff member and facilitates the proper administration of the file. There is no reason to lay down other conditions in this case.

3.7. Transfers of data

Article 7(1) of Regulation (EC) No 45/2001 provides 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*".

Personal data are disclosed to the staff's immediate superior, the Appointing Authority and the Human Resources Service. The whole application form for part-time work is

transferred within the institution to the different parties involved in the procedure for granting part-time.

Supporting documents concerning health data are disclosed to the medical advisor of the CPVO. The data controller also stated that if these documents are medical statements containing medical data, the staff member is asked by HR to provide those directly to the CPVO doctor who acknowledges receipt to HR (but does not transmit any medical data). As the supporting documents concerning health data are provided directly by the data subjects to the person in charge of medical aspects of the CPVO (and the data do not transit through the CPVO), this processing complies with Article 10(3) and the transfer is considered as necessary for the performance of the tasks of the recipient.

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. In this regard, the CPVO states in the follow-up of case 2010-0073/2010-0075 that they have prepared an amendment to the contract with their doctor with the following article (unchecked translation): "*the contracting party shall only act on the request of the CPVO and shall only provide it with the administrative data which are strictly necessary, without any mention of medical data*".

The EDPS takes note of the modification foreseen by the CPVO.

The EDPS also notes that transfers of personal data within the CPVO comply with Article 7(1) of Regulation (EC) No 45/2001. Indeed, in each case, the transfer of data is considered necessary for the recipients to be able to carry out the tasks of a confidential nature entrusted to them.

Nevertheless, as expressed above, the EDPS recommends that in accordance with Article 7(3), each of the recipients should be reminded that he or she may only process personal data received in connection with the procedure for applying for part-time work for that specific purpose.

3.8. Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 gives data subjects a right of access to personal data held concerning them. Article 14 lays down the right to have such data rectified.

The specific privacy statement indicates that data subjects have the right to access and update or correct their data even after having submitted the request for part-time. The EDPS considers that the requirements of Articles 13 and 14 have been met.

3.9. Information given to the data subject

Article 11 of Regulation (EC) No 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of the Regulation provides for certain information to be supplied where the data have not been obtained from the data subject.

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.

In this case, staff members will be informed by means of the CPVO decision governing part-time work and the specific privacy statement. The privacy statement informs the data subjects of the identity of the data controller, the purposes of the processing, the categories of data, the recipients, the data-storage period, the rights of access and rectification and the option of appealing to the EDPS.

Regarding the communication of information to family members whose personal data are processed in the context of an application to work part time, the EDPS recognizes that to communicate such information directly would involve a disproportionate effort by the CPVO. However, amongst other appropriate steps, the CPVO could ask officials/staff members submitting such data to inform the family members concerned about the processing of their personal data and their rights in that respect.

The EDPS therefore recommends that the CPVO adds in the specific privacy statement that family members are allowed access to data concerning them (if any), and ask that officials/staff members providing such data inform the persons concerned of those rights.

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. The EDPS received an extract of the said contract with the health professional. However, the EDPS asks the CPVO to provide him with the full contract.

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.

Conclusion

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the

observations made above. In particular, the CPVO should:

-have all persons within HR who are responsible for handling part-time 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;

-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 statement 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 and also provide the contract to the EDPS.

Done at Brussels, 28 July 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor