

## Opinion on the notification for prior-checking received from the Data Protection Officer of the Committee of the Regions concerning the ‘teleworking’ case

Brussels, 13 February 2012 (Case 2011-1133)

### 1. The procedure

By e-mail dated 7 December 2011, the Data Protection Officer of the Committee of the Regions (CoR) submitted a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (‘the Regulation’) concerning the ‘teleworking’ case. The correspondence sent consisted of four documents, including the notification.

A request for additional information was sent on 17 January 2012. A response was received on 27 January 2012. The draft opinion was sent to the DPO for comments on 2 February 2012. The DPO submitted his comments on 10 February 2012.

### 2. The facts

As the EDPS emphasised in a previous opinion<sup>1</sup>, 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. These points are also raised in the CoR Decision concerning the organisation of a teleworking scheme (Article 2), which forms the legal basis for data processing.

The **purpose** of the operation at issue is to process applications received in response to a call for expressions of interest in teleworking and the drafting of teleworking agreements.

The processing is intended to enable:

- the collection and assessment of applications from staff members interested in teleworking arrangements;
- the drafting of teleworking agreements for the persons selected;
- the management of a reserve list from which teleworkers whose teleworking agreement may have been terminated can be replaced.

As regards the applications, they are submitted in paper format and are then input into an Excel spreadsheet for processing and, where appropriate, the applications are ranked in order of priority. Teleworking agreements are drafted in electronic format and are then printed out

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<sup>1</sup> Opinion on the notification for prior-checking received from the Data Protection Officer of the European Commission concerning the case ‘Selection of staff for teleworking’ (2007-0720), available on the EDPS website.

and signed in duplicate by the parties concerned. One paper copy is retained by the Administration Department.

The **persons affected** are officials, temporary staff and contract staff and national experts on secondment.

The following personal **data** concerning a staff member may be processed as a part of the selection procedure:

- a) forename and surname;
- b) office address;
- c) home department;
- d) post;
- e) seniority within the CoR (and, where appropriate, within the EESC) and within the unit;
- f) the working arrangement (full time or part time);
- g) the opinion of his/her line manager (Head of Unit) concerning
  - whether the tasks performed are compatible with teleworking;
  - the applicant's ability to organise his/her work independently and to meet deadlines;
  - his/her motivation and professionalism;
  - his/her ability to use information technology;
- h) whether one or more potential priority grounds apply to him/her
  - reduced mobility;
  - children or family members requiring special care living with him/her;
  - children under 12 living with him/her;
  - specific personal or family circumstances;
- i) a health or reduced mobility problem affecting the applicant or a dependent within the meaning of Article 2 of Annex VII to the Staff Regulations, which might entitle him/her to a specially adapted teleworking arrangement differing from the teleworking arrangements generally offered.

Where the priority grounds cited are based on the state of health of a third party (relatives, children etc.) or specific family circumstances and personal data relating to third parties are submitted, the official undertakes to inform the data subject that personal data relating to him/her are being processed and to inform him/her of his/her rights.

The following personal data relating to a staff member may be processed in connection with the drafting of a teleworking agreement:

- a) forename and surname;
- b) home department;
- c) the staff member's contact details
  - home address;
  - telephone number (mobile, landline, fax);
  - office address;
  - office telephone number.

As regards the **recipients**, the data referred to above (application and agreement) can be accessed in a form enabling the data subjects to be identified only by the persons responsible for 'Working Conditions' within the Directorate of Administration/Finance.

In the case of applications, the application form is forwarded via line management to the Working Conditions Section. Apart from staff working in the Working Conditions Section, the recipients of the data listed above are the data subject's Head of Unit and manager.

The medical data listed in points h) and i) above are collected only if the person gives his/her consent. The priority declaration form which lists any priority ground/grounds which may be cited is sent in a sealed envelope to the Working Conditions Section – either directly or via the Medical/Social Welfare Department (depending on the priority ground cited). Evidence supporting priority claims is sent directly by the applicant, in a sealed envelope, to the institution's Medical/Social Welfare Department. Only the positive or negative opinion concerning the priority claim will be communicated to the Working Conditions Section, as this is necessary in order to draft and rank the list of applicants for teleworking.

The same will apply to data relating to social circumstances, where the applicant requests a teleworking arrangement because of specific circumstances. Documents containing supporting evidence of social circumstances will be sent directly to the Welfare Officer. Only the positive or negative opinion concerning the social circumstances on which the request is based will be communicated to the Working Conditions Section, as this is necessary to enable the specific teleworking arrangement to be granted.

The various documents are **stored** in paper format in the offices of the Working Conditions Section (Directorate of Administration/Finance). The Excel spreadsheet is accessible only to members of the Working Conditions Section who have access to the shared drive on which the file is stored.

As regards the **information** to be given to data subjects, a specific privacy policy statement concerning the processing of personal data will be published on the Intranet pages relating to this procedure. A draft of this statement has been sent to the EDPS.

In addition, data subjects may exercise their **rights** pursuant to Regulation (EC) No 45/2001 at any time, on request. The rights and procedures concerning access to and rectification, blocking, erasure etc. of personal data are explained in the specific privacy policy statement referred to above. Data will be blocked five days after receipt of a request and data will be amended and erased two weeks after receipt of a request.

Lastly, as regards **storage**, personal data relating to eligible applications are stored for a period of three years from the time they are received by the Working Conditions Section. The reason for the length of this period is that applicants who fulfilled the eligibility requirements but were not selected will be placed on a reserve list which can be used to replace staff members whose agreement may have been terminated and also so that these files can be used during subsequent calls for applications if previous applicants reapply.

Data relating to applicants who were not considered eligible will be stored only for 12 months after the closure of the call for applications (this is so that a response can be given to any person who may submit a complaint against the authority's decision pursuant to Article 90 of the Staff Regulations).

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### **3. Legal analysis**

#### **3.1. Prior checking**

The notification received on 7 December 2011 concerns the processing of personal data (*'any information relating to an identified or identifiable natural person'* – Article 2(a) of the

Regulation), which includes operations such as collection, storage, consultation and erasure performed on personal data. The data processing described is carried out by a Community institution – the Committee of the Regions – and is carried out in the exercise of activities falling within the scope of Community law (Article 3(1)).

For the purposes of the teleworking procedure, data is processed both manually and automatically. In fact, the storage medium is the paper document filed in the individual file, in the case of the application forms, and an Excel spreadsheet in the case of the electronic data. Article 3(2) is therefore applicable in this case. Consequently, the processing falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of the Regulation requires prior checking by the EDPS for any *'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'*.

The processing was notified pursuant to Article 27(2)(a) (processing of data relating to health), Article 27(2)(b) (processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct) and Article 27(2)(c) (processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes) of the Regulation.

In fact, in its notification, the CoR considers that Article 27(2)(a) is applicable in so far as the authority may introduce priority criteria for selecting applicants in cases where the number of applicants exceeds the permitted number of teleworkers. In that case, data relating to the health of staff members or their dependents could be processed by the institution's Medical/Social Welfare Department. Where personal data relating to a third party (relatives, children etc.) is submitted by the applicant for teleworking, the latter undertakes to inform the data subject that his/her personal data is being processed and also to inform him/her of his/her rights. The same will apply where the applicant requests a specific teleworking arrangement adapted to the health condition of his/her dependent.

With regard to Article 27(2)(b), the argument put forward is based on the fact that the application form has to include the Head of Unit's opinion on the applicant's professionalism, motivation and ability to work independently, enabling him/her to perform the tasks demanded of him/her within the required deadlines.

The justification for stating that Article 27(2)(c) is applicable is based on the fact that the Human Resources and Medical Departments already process data relating to health and data relating to staff conduct as part of other processing operations (data relating to health, allowances, staff appraisal etc.). Consequently, the data processed in connection with the teleworking procedure could be considered as an extension of those other operations.

The EDPS considers that the teleworking procedure as described in the CoR's notification requires prior checking. In fact, it is apparent from the notification that the procedure requires the application and the teleworking agreement to be approved by the data subject's line management<sup>2</sup>. This means that a selective decision is taken as to whether or not to authorise a particular person to apply for teleworking and that decision is based on the ability of the staff

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<sup>2</sup> Article 4 of the Decision concerning teleworking: 'Applications must be accompanied by a reasoned opinion from the Head of Unit concerning the first three eligibility criteria set out in Article 3(2) and also concerning the compatibility of the proposed teleworking arrangement with the needs of the department within the meaning of Article 8(4). Applications shall then be approved by the applicant's manager. Reasons must be given for the rejection of any application.'

member to perform his/her tasks on a teleworking basis. This assessment is therefore specific to teleworking. The EDPS consequently considers that the procedure is subject to prior checking on the basis of Article 27(2)(b).

Furthermore, if the reasons taken into consideration occasionally include special categories of data, such as data relating to health, the risk inherent in the processing operation will be greater. In such cases, prior checking would also be justified on the basis of Article 27(2)(a), which would then apply in addition to Article 27(2)(b)<sup>3</sup>.

Lastly, the EDPS does not consider that Article 27(2)(c) constitutes a legal basis for examining the processing operation, because each application requires the staff member to submit information concerning his/her personal situation.

In principle, the checking carried out by the EDPS should take place before the processing is carried out. In this case, the CoR should have submitted the procedure in question for prior checking before it introduced the proposed teleworking system. However, this does not make it any less desirable that recommendations made by the EDPS should be implemented.

The DPO's notification was received on 7 December 2011. A request for further information was sent on 12 December 2011 and the CoR replied on the same day. A further request was sent on 17 January 2012. The reply was received by the EDPS on 27 January 2012. The EDPS's draft opinion was sent to the DPO for comments on 2 February 2012. The DPO sent his response on 10 February 2012.

In accordance with Article 27(4), this opinion must be delivered within the next two months. The EDPS will therefore give his opinion by 25 February 2012 at the latest.

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

The lawfulness of the processing must be examined in the light of Article 5 of the Regulation, which provides that *'processing is necessary for the performance of a task 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'*.

Furthermore, Recital 27 of the Regulation states that this processing *'includes the processing of personal data necessary for the management and functioning of those institutions and bodies'*.

The procedure used by the Human Resources Department to select staff members applying for teleworking, which involves collecting and processing personal data relating to officials and other 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 proposed processing is therefore lawful.

The legal basis for the data processing carried out as part of the procedure consists of the Decision of the Committee of the Regions concerning the organisation of a teleworking scheme. The EDPS considers that this constitutes a sufficient basis having regard to the Regulation.

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<sup>3</sup> As emphasised in Case 2007-0720, the fact that reference could be made, with regard to the motivation of individuals, to family circumstances or to particular health conditions such as disability on the part of the data subjects or their family members is, according to the application, a possibility ('in so far as .... could'), which does not occur in all cases. As it would be an exception, the processing of medical data would not therefore in itself constitute sufficient grounds for submitting the processing operation as a whole to prior checking by the EDPS.

This legal basis supports the finding that the processing is lawful.

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

During the process of selecting applicants for teleworking, data such as information supplied by the applicant is collected, which might *inter alia* relate to specific family circumstances or disability (affecting the data subject or his/her relatives). The latter type of data should be considered as data relating to health within the meaning of Article 10. However, processing of such data would comply with Article 10(2), since it would be carried out with the consent of the data subject acting with the consent of or representing members of his/her family and would be necessary under the provisions of employment law.

The EDPS notes that the CoR has made provision that, for the processing of data relating to health and data relating to social circumstances for the purpose of obtaining a teleworking arrangement or an adapted teleworking arrangement, documentary evidence is to be sent to the Health and Social Welfare Department or the Welfare Officer. Only the positive or negative opinion on the priority grounds or the social circumstances forming the basis for the request will be communicated to the Working Conditions Section, since this is necessary for drafting or ranking the list of applicants for teleworking.

It is important to note that the human resources staff who collect data relating to the health of staff members are not health professionals. Consequently, the EDPS recommends that they should be reminded that they are bound by a professional secrecy obligation, to ensure compliance with Article 10(3) of the Regulation.

### **3.4. Data quality**

Data must be processed '*fairly and lawfully*' (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been examined (see above, point 3.2.). Accuracy and fairness need to be examined from the point of view of the data subjects' rights and also the information provided to them (see points 3.7. and 3.8. respectively).

The data must also 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 the Regulation. The data processed as described at the beginning of this opinion may be considered to satisfy these conditions, together with the processing carried out. In fact, factual data is supplied by the applicants themselves in the form.

However, the applicants' reasons for applying for teleworking need to be taken into account. If an applicant feels that the priority criteria do not apply to him/her, the form provides the option for him/her to give 'other reasons' in support of his/her request for a teleworking arrangement. Since applicants might provide information which could be excessive compared with what is necessary for the purposes of processing, the controller should be reminded to avoid using such data which is not necessary as evidence supporting requests for teleworking and applicants should be informed that they should only supply information which is relevant to their request for teleworking.

Article 4(1)(d) of the Regulation provides that '*data must be accurate and, where necessary, kept up to date*'. The Regulation also provides that '*every reasonable step must be taken to ensure that data which is inaccurate or incomplete, having regard to the purposes for which it was collected or for which it is further processed, is erased or rectified*'.

The selection carried out by line management is by nature subjective and it is therefore difficult to speak of accuracy here. However, the fact that it is possible for officials to contact the unit responsible for teleworking (the Administration Department) to request access to their personal data and documents relating to them and to request rectification (as defined in the Decision) ensures that data is accurate and that it is kept up to date. This makes it possible to ensure data quality. For rights of access and rectification, see point 3.7. below.

### **3.5. Data storage**

The EDPS considers the storage period for eligible applications, which the CoR has set at three years, to be proportionate. This period can be explained by the fact that applicants who were not selected but fulfilled the eligibility criteria will be placed on a reserve list for the purpose of replacing staff members whose agreement may have been terminated. It can also be explained by the fact that these files might be reused during subsequent calls for applications if previous applicants reapply.

He also accepts the CoR's decision that data relating to non-eligible applicants will be stored only for 12 months after the closure of the call for applications (so that a response can be given to any person who may submit a complaint against the authority's decision pursuant to Article 90 of the Staff Regulations).

### **3.6. Data transfer**

The processing operation must also be examined in the light of Article 7(1) of the Regulation, since data is transferred to various departments within the CoR. Processing in respect of Article 7(1) concerns the transfer of personal data within or between Community institutions or bodies *'if the data is necessary for the legitimate performance of tasks covered by the competence of the recipient'*.

In the case at issue here, Article 7(1) is complied with, as these transfers are made for a legitimate purpose, since they are necessary for the management of human resources and the technical measures required for setting up teleworking arrangements. The persons involved are those responsible for 'working conditions' within the Directorate of Administration/Finance, staff within the Medical and Social Welfare Department in the case of medical data and the Welfare Officer in the case of data relating to social circumstances, who are all bound by rules on confidentiality.

### **3.7. Right of access and right to obtain rectification**

Data subjects have the right to contact the unit responsible for teleworking (the managers of the Working Conditions Section) to request access to their personal data and documents relating to them. The privacy policy statement also makes provision for this right of access and the right to check and rectify factual data. The EDPS considers that this constitutes a sufficient guarantee that data subjects' rights under Articles 13 and 14 of the Regulation will be respected.

### **3.8. Information to be given to data subjects**

Information is supplied to data subjects principally in the specific privacy policy statement concerning the processing of personal data published on the Intranet web pages relating to the teleworking procedure.

Having examined the draft statement, the EDPS considers that it satisfies the requirements laid down in Articles 11 and 12 of the Regulation

### **3.9. Security**

Pursuant to Article 22 of Regulation (EC) No 45/2001 on security of processing *‘the controller shall 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’*.

The EDPS considers that the security measures adopted by the CoR may be considered satisfactory within the meaning of Article 22 of Regulation (EC) No 45/2001.

### **Conclusion**

The proposed processing does not appear to entail any infringements of the provisions of Regulation No 45/2001, provided that the Committee of the Regions takes account of the following recommendations. In particular, this requires the Committee:

- to remind human resources staff who collect information that they are bound by a professional secrecy obligation, so as to ensure compliance with Article 10(3) of the Regulation;
- to ensure that the controller avoids processing any data which is not necessary in the light of the reasons given and that applicants for teleworking are reminded that they should only supply information which is relevant to their application for teleworking.

Done at Brussels, 13 February 2012

**(signed)**

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