Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Justice of the European Communities on medical files

Brussels, 17 June 2005 (Case 2004-280)

1. Proceedings

1.1. On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by article 27 of Regulation (EC) 45/2001. The EDPS requested notification of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.

1.2. On 24 September 2004, the DPO of the Court of Justice of the European Communities (ECJ) inventoried the case of medical files as a case for ex-post prior checking notably since it included health data (article 27 §2 a).

1.3. The EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking to be addressed. The case of medical files is among these cases.

1.4. On 9 December 2004, the EDPS requested notification of the processing operation.

1.5. The DPO sent notification of the case for prior checking on 8 March 2005 by e-mail. The formal notification by letter was received on 14 March 2005.
Attached were:
- a template of a medical questionnaire;
- a decision of the Registrar of 12 July 2004, n° 221/04 on the conditions of access to the medical files;
- a request by the Medical College to the Collège des Chefs d'Administration on the time limits for storing the data.

1.6. A request from the EDPS for further information was made on 10 March 2005. The DPO answered to this request on 16 March 2005.

1.7. A request for information from the EDPS was made on 10 May 2005. This request was answered by Mr MOAYEDI on 12 May 2005.

1.8. A final request for information was made on 20 May 2005. This request was replied to on 23 May 2005.

1.9. On 24 May 2005 an extension of one month was made in accordance with Article 27(4).

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2. Examination of the matter

2.1. The facts

Medical files concerning its officials and agents are kept at ECJ by the Medical Service of the Personnel Division. Information contained in medical files serve different purposes.

Medical check up

According to the Staff Regulations (SR) potential or actual members of staff are subject to a medical examination by the institution's medical officers. Indeed, potential candidates may only be appointed as an official providing he "is physically fit to perform his duties" (article 28 (e) SR and article 13 of Conditions of employment of other agents). Article 33 therefore provides that, before appointment, a successful candidate shall be medically examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 28(e). The candidate is also required to complete a medical questionnaire and is subjected to various medical tests mentioned in the questionnaire. According to the information given by the DPO, candidates are also subject to blood tests.

Article 1 of Annex VIII of the Staff Regulations and article 32 of the Conditions of employment of other agents also provide that if the medical examination shows the servant to be suffering from sickness or invalidity, the appointing authority may decide that expenses arising from such sickness or invalidity are to be excluded from the reimbursement of expenditure provided for in Article 72 of the Staff Regulations. The medical questionnaire also contributes to the determination of the insurability of the data subject.

Where a negative medical opinion is given as a result of this medical examination, the candidate may, within 20 days of being notified of this opinion by the institution, request that his case be submitted for the opinion of a medical committee composed of three doctors chosen by the appointing authority from among the institution's medical officers. The medical officer responsible for the initial negative opinion shall be heard by the medical committee. The candidate may refer the opinion of a doctor of his choice to the medical committee.

During his/her career, officials shall undergo a medical check-up every year either by the institution's medical officer or by a medical practitioner chosen by them (article 59.6). According to the information received, if the official chooses to proceed to an examination by an independent medical practitioner, the medical service receives the medical report and any copies of complementary examinations carried out.

Medical examination in the event of illness or sick leave

An official who provides evidence of being unable to carry out his duties by reason of illness or accident shall be entitled to sick leave. He shall produce a medical certificate if he is absent for more than three days. This medical certificate will be kept in his medical file. The official may at any time be required to undergo a medical examination arranged by the institution (article 59.1 of SR). The results of these medical examinations will also be stored in the medical file.

The Appointing Authority may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years (Article 59.4 of SR). Information regarding the length of absence and relevant extracts from the medical file are sent directly by the Court's medical service to the doctors sitting on the Invalidity Committee.

Medical files may be sent to the legal counsel of the Court and to Court of First Instance itself in the context of a case taken by a member of staff against a decision in this field.

Accident or occupational disease

Article 73 of the SR provide that officials are insured, from the date of entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the institutions of the Communities. According to Article 16 of the Rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease, any official making a claim after an accident will need to submit a medical certificate specifying the nature of injuries and the probable consequences of the accident.

According to article 19 of these rules, decisions recognizing the accidental cause of an occurrence including a decision as to whether the occurrence is to be attributed to occupational or non-occupational risks, or decisions recognizing the occupational nature of a disease and assessing the degree of permanent invalidity shall be taken by the appointing authority on the basis of the findings of the doctor(s) appointed by the institutions; and where the official so requests, after consulting the Medical Committee. The decision defining the degree of invalidity shall be taken after the official's injuries have consolidated. To this end, the official concerned must submit a medical report stating that he has recovered or that his condition has stabilized and also setting out the nature of his injuries (article 20 of the rules).

All information contained in medical files is stored in the Personnel division according to strict security measures, which guarantee exclusive access by the Medical Service.

2.2. Legal aspects

2.2.1. Prior checking

The prior checking relates to the processing of personal data contained in medical files held by the ECJ. The prior checking of the processing of data related to health and concerning sick leave will be examined by the EDPS in a separate case (2004-0278).

The present processing operation concerns manual processing of the data. It falls within the scope of Regulation (EC) 45/2001 since it involves the processing of personal data which form part of a filing system or are intended to form part of a filing system (Article 3(2) of the Regulation). The processing involves data relating to health and qualified as a "special" category of data, subject to the provisions of Article 10 (see below 2.2.3).

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "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". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as processing of data relating to health. Medical files clearly contain health related data and to that extent qualify for prior check by the EDPS.

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 however the processing operation has already been established. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 14 March 2005. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 14 May 2005. A request for information suspends the delay for a period of 6 + 2 + 3 days extending the date to the 25 May 2005. On 24 May 2004 the period within which the EDPS should render his opinion was extended for one month by decision of the EDPS.

2.2.2. Legal basis for and lawfulness of the processing

The processing of data contained in medical files is based on various articles of the Staff Regulation (articles 33, 53 and 59) and the Conditions of employment of other servants of the European Communities (articles 13, 16, 32, 33 and 59). The Rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease also provide for the processing of medical data notably in order to establish the consequences of an accident or the nature of an occupational disease.

The lawfulness of the processing according to Regulation (EC) 45/2001 is therefore based on the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of an official authority vested in the Community institution (Article 5(a)). However the necessity of the collection and the processing of the data for the performance of a task provided for in the Staff Regulations must be demonstrated (see below as concerns special categories of data).

2.2.3. Processing of special categories of data

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

Clearly here we are in the presence of the processing of personal data concerning health.

As has been explained above concerning the legal basis, the justification for processing of such data is to be found in the Staff Regulations and 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".

Being an exception to the general prohibition, Article 10(2)b must be interpreted in a restrictive manner. On one hand, the rights and obligations of the controller are qualified as specific. For example, according to Article 33 of the Staff Regulations, before appointment, a successful candidate shall be medically examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 28(e) i.e. that he is physically fit to perform his duties. This provision therefore justifies the processing of sensitive data considered as relevant in order to determine whether a person is fit to perform his duties. One the other hand, the concept of necessity means unavoidable need to process the data. This adds up further constraints when applying Article 4(1)(d), as it will be discussed under "data quality".

The prohibition regarding the processing of data concerning health can also be lifted where 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)). By reason of their function, the medical officers and nurses are health professionals subject to the obligation of professional secrecy. This also implies that there must be functional separation of those professionals, which is the case, as the Medical Service appears to have functional separation within the Personnel Division of the Court. Therefore Article 10(3) is fully respected

In the event of the transfer of data relating to health to third parties other than the Medical Service, it must also be ensured that Article 10 is complied with. As will be examined below (2.2.6), the medical files may be transferred either to the Invalidity committee, the legal counsel of the Court and the Court of First Instance. Since this is done in the frame of obligations resulting from the Staff Regulations in the field of employment law, Article 10(2) is fully complied with.

2.2.4. 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.

Even though certain standard data will always be present in medical files such as the name, data of birth and personnel number, the precise content of a medical file will of course be variable according to the case. Guarantees must however be established in order to ensure the respect for the principle of data quality. This could take the form of a general recommendation to the persons handling the files reminding them of the rule and recommending them to ensure the respect of the rule.

Data quality must also be ensured in any medical questionnaire submitted to potential or actual agents. Any information requested must be pertinent as concerns the purpose for which the data is collected. The questionnaire on the "aptitude médicale" may only serve the purpose of determining whether or not the person is physically or mentally fit to perform his/her duties. This raises the issue as to what can be considered as medical data which is likely to have an impact on the performance of an agent's duties. In any event the type of data will vary according to the type of function (office work or other, for example). The EDPS would like to underscore the fact that the relevance of a series of data collected in the questionnaire must be demonstrated as concerns the medical fitness to carry out ones duties: on this point the EDPS questions the relevance of information such as that concerning the spouse or children's past or present medical condition. The EDPS recommends an evaluation of the data in the questionnaire on medical aptitude in the light of the data protection principles.

In case T-121/89 and T-13/90 the Court of First Instance has found that "the medical officer of the institution may base his finding of unfitness not only on the existence of present physical or psychological disorders but also on a medically justified prognosis of potential disorders capable of jeopardizing the normal performance of the duties in question in the foreseeable future". Even if the ruling was subsequently annulled by the Court (C-404/92), this interpretation of the notion of "unfitness" was not challenged. Even if terms such as "potential disorders" and "foreseeable future" are vague in terms of data protection, the relevance of the data in respect to the normal

performance of the duties must be proved. The link between a potential disorder and the ability to carry out ones duties will need to be demonstrated.

As mentioned in the facts, Article 1 of Annex VIII of the Staff Regulations and article 32 of the Conditions of employment of other agents also provide that if the medical examination shows the servant to be suffering from sickness or invalidity, the appointing authority may decide that expenses arising from such sickness or invalidity are to be excluded from the reimbursement of expenditure provided for in Article 72 of the Staff Regulations. The medical questionnaire submitted at the time of the medical examination for recruitment also contributes to the determination of the insurability of the data subject. However one must bear in mind that no more data than that strictly necessary for this precise purpose may be communicated to the Appointing authority and by the authority to the payment unit.

Should the information gathered in the questionnaire and medical examination serve other purposes than that of verifying the medical aptitude of the data subject to perform his/her duties, such as admitting the person concerned to guaranteed benefits in respect of invalidity or death, the EDPS would suggest to divide the questionnaire in two so that the relevance of the data may be assessed accordingly. It must be made clear that only data relevant for the medical aptitude to carry out ones duties may be requested in the part on medical fitness. Adequacy as concerns insurance should be subject to a specific examination. Here again it should be underlined that as concerns health related data which is not processed for medical reasons the adequacy of the data must be assessed according to strict criteria.

In the frame of annual medical check-ups carried out by a medical practitioner chosen by the official (article 59(6) of the Staff Regulation), it must be assessed to what extent the medical service needs to receive the medical report and any copies of complementary examinations carried out. It must be examined whether the precise purpose of the medical check-up cannot be reached by a statement by the medical practitioner attesting the medical condition of the official and determining whether or not certain exams have been carried out or not.

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.”

In this case, we are dealing with data such as results of medical examinations or notes taken down by a medical officer. The accuracy of this data cannot be easily ensured or assessed. However, the EDPS underlines the necessity for the institution to undertake every reasonable step to ensure up-dated and relevant data. For example, so as to ensure the completeness of the file, any other medical opinions submitted by the data subject must also be kept in the medical files.

2.2.5. Conservation of data

The general principle in the Regulation is that personal data may be kept in a form which permits identification of data of data subjects for not longer than is necessary for which the data are collected and/or further processed (Article 4(1) (e)).
According to Article 4(1) e, if the data are to be kept for statistical, historical, scientific purposes, the Community institution or body must ensure that it is either in an anonymous form or that it is encrypted.

According to the information received, medical files are stored for an indefinite period.

During the career of an official, it must therefore be evaluated to what extent and for what purposes the content of a medical file including data such as the results of medical examinations or health certificates need to be kept.

The EDPS acknowledges the importance of the conservation of the data even after the decease or the retirement of the person concerned since in some cases this data are relevant in the potential discovery of information linked to the cause of decease or illness (asbestos, for example). However in the light of the Regulation (EC) 45/2001 it seems that a certain time frame has to be established by the institution[1]. Indeed, in the light of the data protection principles, the data should only be kept for as long as the official or his successors are entitled to claim a right. Any data kept for statistical or scientific purposes must be made anonymous.

A further point must be made as concerns the conservation of medical exams concerning future candidates which, even after having been subjected to a medical examination have not been recruited whether or not this is linked to a medical reason. The conservation of their data relating to the medical examination as provided for in article 33 SR should not be kept indefinitely. The EDPS maintains that the data should only be kept within a certain time frame which could be that of the period during which the data or decision taken on the basis of such data, can be contested.

2.2.6. Transfer of data

According to the notification received from the DPO, information contained in the medical files can be disclosed to medical officers and nurses; the Medical committee; the Invalidity committee; the legal counsel of the Court and the Court of First Instance.

Article 7 of the Regulation, 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 the tasks covered by the competence of the recipient. When a request for transfer of information contained in the medical file is made, the medical service will be required to verify the competence of the recipient and to make a provisional evaluation of the necessity of the transfer of the data. The recipient shall only process the data for the purposes for which they were transmitted.

Transfers to the Medical committee and the Invalidity committee are provided for in the Staff Regulations and are therefore within the competence of the recipient. As for transfers to the legal counsel of the Court and the Court of First Instance, they may only be made in the context of a case taken by a member of staff against a decision in this field and also clearly fall within the competence of the recipient.

2.2.7. Information to the data subject

Articles 11 and 12 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 have not been obtained from the data subject, the information must be given when the

[1] According to the information received, this question has been raised by the College medical to the Collège des Chefs d'administration (CA-D 1975/00). However has been no outcome so far.

data are first recorded or disclosed, unless the data subject already has it. Since in this case information is at first obtained from the data subject on the occasion of the medical exam prior to the entry into service, this should be the occasion to provide the data subject with adequate information at least as concerns the processing of medical data in the framework of the medical examination.

As concerns information on the purpose of the processing, Article 1 of Annex VIII of the Staff Regulations and article 32 of the Staff rules applicable to other agents provide that where the medical examination made before an official takes up his duties show that he is suffering from sickness or invalidity, the appointing authority, in so far as risks arising from such sickness or invalidity are concerned, may decide to admit that official or agent to guaranteed benefits in respect of invalidity or death only after a period of five years. Seeing that at the time of the medical examination made before the entry into service, the official or agent does not have this information at hand, this information should be provided to him at the time of collection of such data.

Information should also be provided as concerns the possible recipients of the data.

The medical questionnaire should also provide information on whether replies to questions are obligatory or voluntary as well as the possible consequences of failure to reply. The data subject must also be informed of the time-limits for the storing of the data. In this case, seeing that there are no time-limits installed, this must be clearly explained to the data subject.

Candidates are also subject to blood tests. However, the questionnaire does not provide any information on the types of blood tests nor of the purposes of these tests.

Information on the existence of a right of access and right to rectify data concerning the data subject as laid down in the decision of the Registrar of 12 July 2004 should be provided to new staff.

As for further processing of the data beyond the medical examination prior to the entry into service, in principle no further information needs to be given as the information is either provided for in the Staff Regulations, or has been mentioned in the questionnaire on medical aptitude, or has been the object of a decision given to staff (see for example, Registrar decision of 12 July 2004 on right of access). The EDPS considers this information as sufficient.

2.2.8. Right of access and rectification

According to Article 13 of the Regulation, the data subject shall notably 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 20 of the Regulation provides for certain restrictions to this right notably where such a restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others.

By virtue of Article 26(a) of the Staff Regulations, Staff have the right to acquaint themselves with their medical files, in accordance with arrangements laid down by the institutions. According to a decision of the Registrar of the ECJ of 12 July 2004, officials and agents are entitled to have access to their medical file according to the following conditions:

1) the file may be consulted in the medical service and in the presence of a member of the medical staff;
2) officials or agents may have access to any psychiatric/psychological reports concerning him/her through the intermediary of a medical practitioner designated by him/her;
3) officials or agents may be denied access to the personal notes of medical officers when, in the light of article 20(1) c of Regulation (EC) 45/2001 and on the basis of a case by case approach, it may be necessary to protect the data subject or the rights and freedoms of others.

The EDPS would like to underline the fact that the rule as laid down in the Regulation is that data subjects have an access to their personal data. Any restrictions to this right must therefore be limited. The restriction must be based on the protection of the data subject. As for a restriction based on the "rights and freedoms of others", this refers to the fact that the rights and freedoms of an identified third party override the access of the data subject to the information. This should be examined on a case by case approach in the light of the principle of proportionality and precludes a blanket denial of access to personal notes of medical officers contained in the medical files.

As concerns point 2 of the Decision the fact that the access must be exercised "though the intermediary of a medical officer" gives the right for medical officer to withhold information. However the EDPS would like to underline that any restriction to this right must be based on Article 20(1) c of the Regulation. The restriction must be based on the protection of the data subject.

Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data. This right is somewhat limited as regards medical data to the extent that the accuracy or completeness of medical data is difficult to guarantee. It may however apply as concerns other types of data contained in medical files (administrative data, for example). Furthermore, as mentioned above (quality of data) the data subject may request the completeness of his medical file in the sense that he may request that information such as contra opinions by another medical officer or a Court decision on an element of the medical file be placed in his file so as to ensure up-dated information.

2.2.9. Security measures

According to Articles 22 and 23 of the Regulation 45/2001, the controller and the processor shall implement the 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. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

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, provided that confidentiality of communications are guaranteed when transferring information from and to the Medical Service.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account:

- Guarantees must be established in order to ensure the respect for the principle of data quality of all data placed in medical files:

  - The data in the questionnaire on medical aptitude must be evaluated in the light of the data protection principles, no more data than that necessary to determine the medical aptitude of the data subject may be requested;

  - No more data than that strictly necessary for the purpose of determining the insurability of an agent in accordance with article 72 of the Staff regulations may be communicated to the Appointing authority and by the authority to the payment unit;

  - In the frame of annual medical check-ups carried out by a medical practitioner chosen by the official (article 59(6) of the Staff Regulation), it must be assessed to what extent the medical service needs to receive the medical report and any copies of complementary examinations carried out;

  - Every reasonable step must be taken so as to ensure up-dated and relevant data.

- As concerns the conservation of the data:

  - A certain time frame must be established by the institution as concerns the conservation of the data even after the decease or the retirement of the person;

  - Data concerning medical exams of candidates which have not been recruited should only be kept within a certain time frame.

- Information on the purposes of the processing of the data collected in the questionnaire or as a result of any medical test carried out in the frame of the medical examination made before the entry into service, on the possible recipients of the data, on the right of access and rectification according to the decision of the Registrar of 12 July 2004, on whether replies to questions are obligatory or voluntary as well as the possible consequences of failure to reply and the time-limits for the storing of the data (or absence thereof) should be provided at the time of the medical examination.

- Confidentiality of communications must be guaranteed when transferring information from and to the Medical Service.

Done at Brussels, 17 June 2005

Peter HUSTINX
European Data Protection Supervisor

Follow-up Note 23 August 2006

All acting measures have been taken by the Court of Justice on 13 June 2006.

The European Data Protection Supervisor