

Opinion on a notification for Prior Checking received from the Acting Data Protection Officer of the European Commission on the procedure and system of "Sickness insurance claims" related to Auxiliary Conference Interpreters (ACIs)

Brussels, 28 July 2006 (Case 2006-160)

1. Proceedings

On 30 March 2006 the European Data Protection Supervisor (EDPS) received a notification from the Acting Data Protection Officer (DPO) of the European Commission for an ex-post prior checking relating to the procedure and system of "Sickness Insurance Claims" related to Auxiliary Conference Interpreters (ACIs) at DG Interpretation (DG SCIC).

The dossier contained the formal notification to the EDPS; a note to the Auxiliary Conference Interpreters on "Sickness and accident cover for ACIs" and an annex to it on "impact on ACIs net salaries"(dated: 28.02.2005); the Agreement on Working Conditions and Financial Terms for Session Auxiliary Conference Interpreters (SAI) and Freelance Interpreters (FLI) (Contract Conference Interpreters) Recruited by the Institutions of the European Union¹ (hereinafter: "Agreement"); a form on "Sickness or accident report and a compensation claim" (Sickness and Accident Insurance for Auxiliary Conference Interpreters); a form on "Rétributions"; and a sample print out from GRIF (local payment system for ACI contract): AIC-Malades.

On 8 May 2006, the EDPS requested further information from the controller via the Deputy DPO of the European Commission, which he received on 30 May 2006. On 8 June 2006, another request for information was made, to which the EDPS received the response on 14 July 2006.

2. Examination of the matter

2.1. The facts

Auxiliary Conference Interpreters (ACIs) are recruited by the interpretation services of the European Parliament (EP), Court of Justice (CoJ) and the European Commission. ACIs can be engaged for those three institutions and for the other institutions and bodies of the European Union and for the agencies governed by Community law established by the Treaties or secondary legislation (hereinafter: "institutions").²

¹ Annotated on 13 October 2004 following the adoption of Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, amending the Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities (CEOS), which entered into force on 1 May 2004. The French version is the original: *"Convention Fixant les Conditions de Travail et le Regime Pecuniaire des Interpretes de Conference Auxiliaires des Session (I.A.S.) et Free-lance (I.F.L.) (Agent Interpreters de Conference) Recrutes par les Institutions de l'Union Europeenne"*.

² See Article 1 of the Agreement.

The International Association of Conference Interpreters (AIIC)³ and the European Parliament, the Commission and the Court of Justice (acting on behalf of the institutions and bodies of the European Communities) concluded an "Agreement" on the working conditions and financial terms for ACIs recruited by the Institutions of the European Union.

Article 16 of the Agreement requires that *"the Commission shall conclude an insurance contract for ACI against the risk of sickness and accident and consequent loss of income during the days worked for the European Union, days spent travelling to and from such assignments, and days not worked as in Article 11"*. Article 11 concerns the period between two assignments which is too short to allow the ACI to return to his/her professional domicile (it may be up to three days) and may also be applied if the allowances linked to Article 11 do not exceed the total cost of travel and allowances.

Further, the Agreement stipulates that *"the institutions shall pay a contribution towards the cost of insurance for each day that an ACI is engaged by them"* (Article 16 of the Agreement).

Besides the compulsory insurance provided to ACIs, there is a possibility for the ACI to insure him/herself for days when he/she is not working for the Union, if they wish so. This scheme does not involve a financial contribution from the institutions (Article 16 of the Agreement). In such cases the ACI pays the Insurer the appropriate premium⁴ (hereinafter: optional annual insurance).

Following an open call for tender, the Commission concluded an insurance contract and policy with a Belgium based insurance company (the Insurer) to provide collective cover against the risk of accident and illness to ACIs⁵ (hereinafter: "Insurance contract").

The Policy Specification (Annex 1 to the Insurance contract) defines in detail the duties of the Commission, the insured ACIs and the Insurer in relation to the contract. The Commission supplies the Insurer with a list of persons insured and with the certificates of services rendered which are necessary in order to verify claims (Paragraph 12). At regular intervals (at least once a year) the Commission notifies *"the Insurer of the number of days for which each insured person was entitled to insurance cover, and the amount of the remuneration, flat-rate travel allowances and remuneration for days not worked (...) during the preceding period"* (paragraph 13 of the Policy Specification). The premium is paid on a yearly basis.

The insured ACI sends all medical documents and all claims under the compulsory insurance to the Commission within a specified time limit. The Commission attests the facts of which it has knowledge (days remunerated by the Commission, days on which the interpreter is obliged to remain away from his domicile because of the requirements of his contract, etc). The Commission sends all claims and supporting documents to the Insurer (Paragraph 25 of Policy Specification).

The Insurer may request directly the insured ACI to supply any other certificates and proof which he may reasonably require. He may also require any additional medical examination or can call for an expert's report in certain cases in addition to the medical certificates supplied (Paragraph 26 of Policy Specification).

³ Representing the associations recognised as representative of the conference interpreting profession within the meaning of the call for expressions of interest (CEI).

⁴ Paragraph 14 of the Policy Specification (Annex 1 to the Insurance contract).

⁵ European Commission Contract Number SCIC/B2/01. Insurance against the risk of accident and illness to Auxiliary Conference Interpreters (ACI).

The Insurer pays directly the compensation to the insured ACI (Paragraph 28 of the Policy Specification).

Article II.13 of the Insurance contract allows subcontracting by the Contractor insurance company with the prior written approval of the Commission. In cases where the Commission authorises subcontracting, the Contractor insurance company *"shall none the less remain bound by his obligations to the Commission under the Contract and shall bear exclusive liability for proper performance of the Contract"* (Article II.13.2 of the Insurance contract).

The purposes of data processing is to transfer the sickness insurance claims of ACIs by unit B4 in DG SCIC on behalf of all institutions, and to provide the necessary information to the insurance company to allow them to pay the compensation referred to in Article 16 of the Agreement.

The role of DG SCIC- unit B4 in the procedure for reimbursement of medical expenses⁶:

ACIs who are entitled to the payment of compensation and the reimbursement of medical expenses in the event of sickness or accident send their completed claim form, and medical certificates and invoices/bills to the designated person in the ACI payments office of SCIC-B4. Collecting the claims (information) and forwarding them to the insurance company is done solely by the European Commission (DG SCIC B4). If the EP or CoJ receive a claim by mistake, they forward it to DG SCIC for processing.

Claimants are advised to keep copies of all compensation claims they make.

The other institutions (European Parliament and the Court of Justice) send the dates of sickness related to a contract to DG SCIC. Copying the dates and hours of absence for reason of sickness which are available in GRIF (local payment system for ACI contract) via the function "Malade- Liste" into the "Remarks" area linked to the contract of an ACI in GRIF constitutes automated processing of data.

The person in charge at DG SCIC verifies the information on sickness days and hours in GRIF, and verifies if any payment has been made to the ACI concerning the assignments during which the ACI became ill or had the accident. The dates of the incapacity to work concerning DG SCIC contracts are imported into GRIF from a programme used by DG SCIC unit C2.

After verification of dates of assignment and of absence, the person in the ACI payment offices of SCIC-B4 mentions this information in the claim form.

The head of unit signs the claim form. A photocopy of the claim is taken and the original documents are sent by registered mail in a sealed envelope to the insurance company.

Only the person who deals with the claim forms keeps a copy in his archives. There are no other recipients in DG SCIC.

A letter is sent to the ACI who introduced a claim either to inform him/her that the claim has been forwarded to the insurance company or that the claim has been refused (providing, in that case, the reason for the refusal). The unit does not send the claim of ACIs to the insurance company if the claim concerning an illness/accident is not covered by the policy (i.e. the ACI

⁶ From the " Important Remarks" section of the "Sickness and accident report and compensation claim" form.

was not under contract with the institutions). Claims and supporting documents that are not forwarded to the insurance company are filed and may be returned to the ACI.

Data concerned:

The personal data involved are identification data and health related data:

- The *Sickness or accident report and compensation claim* requires the following information: personal data of the insured ACI (name, date of birth, full address, telephone, bank or post office account); the nature of illness (must be submitted in a sealed envelop and to be opened by a medical doctor only); in case of accident (date of accident, circumstances of accident, place of accident, whether a third party is involved, name and address of third party presumed liable, what official action has been taken).
- Further, information on the *Temporary inability to work confirmed by medical certificate* (number of days, start and end date given); *Compensation for inability to work* (daily remuneration at 100 or 35%; entitlement from any other public or private insurance); *Medical expenses* (listing: name of doctor, dentist, hospital, chemist, etc; date of services; nature of expenses: consultation, house call, medicines, etc; amount of expenses; reimbursement received from other public or private insurance).
- The form for the use of the European Commission contains information on: category of claimant; covered by insurance (start and end date); daily remuneration paid by the EC for the days (start and end date); flat rate travel allowance paid by the EC for the particular days, and a "Remarks" section.
- In the event of *surgical operation*, the surgeon must provide a certificate specifying the nature of the operation.
- Medical expenses must be supported by bills paid bearing the claimant's name and first name. The claimant must declare any reimbursement he/she has received from other public or private insurance. Such reimbursements must be detailed, certified, and accompanied by supporting documents.

Only a medical doctor can access the medical information in the sealed envelope. In practice, the medical doctor is employed by the insurance company. The insurance company needs to know the nature of the illness or accident (certain illnesses or accidents are not covered by the insurance policy). Another appointed medical doctor may have access to this information if an independent medical verification is necessary. Paragraph 25 of the Policy Specification states that the "*Commission reserves the right for its Medical Service to have access to any medical certificates and other relevant medical documents and if necessary to seek and independent medical verification*".

Under the clause of "Confidentiality" (Article II.9) of the Insurance contract it is stated that: "*the Contractor [meaning the insurance company] undertakes to treat in the strictest confidence and not to make use of or divulge to third parties any information or documents which are linked to performance of the Contract. The Contractor will continue to be bound by this undertaking after completion of the tasks*". (Article II.9.1.) "*The Contractor shall obtain from each member of his staff, board and directors an undertaking that they will respect the confidentiality of any information which is linked directly or indirectly, to execution of the tasks and that they will not divulge to third parties or use for their own benefit or that of any*

third party any document or information not available publicly, even after completion of the tasks"(Article II.9.2. of the Insurance contract).

The staff members of DG SCIC unit B4 are informed that, as to the health related data they process, they are subject to an equivalent obligation of secrecy to medical professionals, and that they must treat the health related data as confidential.

Information provided to ACIs:

- The blank "*Sickness or accident report and compensation claim*" form is published on SCICNet, on the website of DG SCIC and it is accessible to all ACIs. The "*Important remarks*" section of the form contains information on personal data protection: identity of data controller, purposes of processing operation, data subject's right of access to data kept by DG Interpretation, data storage period (5 years), and deadlines to submit the claims and supporting documents in order to receive the compensation. It also states that "*By submitting an application, the applicant will be considered as having given his or her consent to the processing of these data in the context of the insurance claim*". The claim form mentions that all documents relating to the claim will be forwarded to the insurance company (and names the company).
- The "Note to the Auxiliary Conference Interpreters" (hereinafter: "Note to the ACIs") mentions the legal basis (Agreement and Insurance contract).
- A letter informs the ACI that his claim was forwarded to the insurance company or that it was refused.

Access by the ACI to his own personal data:

In order to consult his/her file the ACI should contact the person who deals with the claims in DG SCIC, unit B4. The right to rectify one's personal data is granted and information on that possibility is provided to the data subjects. Upon request corrections are possible in case the information imported on the dates of incapacity to work is inaccurate.

Storage of data and rectification

DG SCIC-B4 unit keeps a photocopy of the claims in the archive for 5 years in order to:

- calculate the premium to be paid to the insurance company,
- verify invoices received from the insurance company,
- reply to questions from the insurance company concerning the dates of cover of the ACI,
- justify payment of the premium.

The person who deals with the payments of the ACI contracts in DG SCIC B4 selects the contract of the ACI concerned and modifies/updates the information in the "Remarks" area in GRIF.

The note in the remarks area of GRIF may be deleted or modified by DG SCIC unit B4. The information (dates of incapacity of work) which is imported into GRIF from the programme used by DG SCIC unit C2 may not be deleted or modified by DG SCIC unit B4.

Security measures:

Security measures have been adopted. [...]

2.2. Legal aspects

2.2.1. Prior checking

The prior checking relates to the processing of personal data (Article 2(a) of Regulation (EC) No 45/2001, hereinafter: "Regulation") by the European Commission in the exercise of its activity which falls within the scope of Community law (Article 3.1 of the Regulation).

The present operation concerns both automated and manual processing. Copying the dates and hours of absence for reason of sickness which are available in GRIF into the "Remarks" area linked to the contract of an ACI in GRIF means automated processing. The various manual processing (handling claim forms, photocopying them, storing them, forwarding them to the insurance company) are intended to form part of a filing system, therefore Article 3.2 of the Regulation is applicable.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all processing operations which are *"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, among them "processing of data relating to health" (Article 27(2)(a) of the Regulation), which is the case here.

The optional annual insurance scheme does not fall within the scope of the present prior checking because the optional insurance contract is signed between the ACI and the insurance company and the Institutions are not involved in the processing of information concerning claims covered by this optional insurance.

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. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The prior checking notification was received on 30 March 2006. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 31 May 2006. The information requests suspended the procedure for a period of 22 + 36 days, thus the opinion should be rendered no later than 28 July 2006.

2.2.2. Lawfulness of the processing

In the present case, personal data are processed on several grounds of Article 5 of the Regulation. Recording and processing data on inability to work due to sickness or accident is a legitimate exercise of official authority vested in the Community institutions and bodies (Article 5(a) of the Regulation). Further the processing is necessary for compliance with a legal obligation to which the controller is subject (Article 5 (b) of the Regulation) because Article 16 of the *Agreement on Working Conditions and Financial Terms for Session Auxiliary Conference Interpreters (SAI) and Freelance Interpreters (FLI) (Contract Conference Interpreters) Recruited by the Institutions of the European Union* requires that the Commission concludes an insurance contract for ACIs against the risk of sickness and accident and consequent loss of income in the specified cases. Also, since the consent of the ACIs is given to the processing of their health related data by their action when they submit

their claims for the payment of medical expenses and compensation, Article 5 (d) of the Regulation constitutes ground for the processing.

The requirements as to the legal basis will depend on the processing. The need for legal guarantees provided differs and has to be assessed by taking into account the risks presented by the processing operation. The prior checking notification mentions two legal bases: 1) Article 16 of the Agreement, and 2) the insurance contract and policy which have been concluded with an insurance company. It is to be considered sufficient especially as the Agreement is referred to explicitly in Article 90 of the Conditions of employment of other servants of the European Communities (see 2.2.3. below).

2.2.3. Processing of special categories of data

According to Article 10 of the Regulation, processing personal data concerning health is prohibited. Articles 10(2) and 10(3) of the Regulation however provides for certain exemptions. Article 10(2)(b) permits the processing of health related data 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. This is the case here. Article 90 of the Conditions of employment of other servants of the European Communities specifies that: *"By way of derogation from the provision of this title, conference interpreters engaged by the European Parliament or engaged by the Commission on behalf of the Community institutions and bodies shall be subject to the conditions laid down in the Agreement of 28 July 1999 between the European Parliament, the Commission and the Court of Justice, on behalf of the institutions, on the one hand, and the associations representing the profession, on the other."* The European Commission complies with its obligation in the field of employment law required by the Agreement when concluded insurance contract against the risk of accident and sickness of ACIs, and processes health related data within that framework.

Also, Article 10(3) allows an exception where the processing of data is required *"for the purposes of....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 any other person also subject to an equivalent obligation of secrecy"*. In the present case, Articles II.9.1 and II.9.2. of the Insurance contract require confidentiality from the processor insurance company (staff, board, directors) as to the information which is linked to the performance of the contract. In addition, on account of their professions, medical doctors are subject to the obligation of professional secrecy. Only a medical doctor can open the envelop containing medical certificates or can perform additional medical examination. In this respect Article 10(3) of the Regulation is duly complied with.

In certain cases, the ACI does not send his/her medical certificate or the certificate specifying the nature of his/her operation in a sealed envelop, but indicates his/her illness or accident on the form itself. The EDPS was informed that the staff of the DG SCIC unit B4 is informed that they are subject to an equivalent obligation of secrecy to medical professionals, and that they should treat the health related data as confidential.

The EDPS finds it an appropriate measure to mark the term "confidential" on the sealed envelop whenever it contains medical information (e.g. when it is sent to the insurance company or when it is refused to be forwarded and it is returned to the ACI).

2.2.4. Data Quality

Data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed (Article 4(1)(c) of the Regulation). The required information in the sickness or accident report and compensation claim form respect that rule.

Data must be processed fairly and lawfully (Article 4(1)(a) of the Regulation). The lawfulness has already been examined. Given the sensitivity of the subject, fairness warrants considerable attention. It is linked to the information that must be provided to data subjects (see part 2.2.8.)

Data should be accurate and where necessary kept up to date (Article 4(1)(d) of the Regulation). The system and procedure guarantees in a reasonable manner the accuracy and up-dating of the data. The data subject has the right to access their health related data stored by DG SCIC unit B4. This also makes it possible to ensure the quality of data. (See part 2.2.7.)

2.2.5. Conservation of data

As a general principle personal data should 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 and/or further processed (Article 4 (1) (e) of the Regulation).

The storage period for the photocopied claim forms at DG SCIC unit B4 is 5 years. This period is necessary for a variety of purposes regarding the relation towards the insurance company (calculating and justifying payment of premium, verifying invoices received from the company, replying to questions as to dates of cover of ACIs). Thus it seems to be appropriate.

Upon request from the ACI, the claim and supporting documents are returned to the ACI. Nevertheless, taking into account that original medical documents are concerned, the EDPS would find it better practice to return them automatically to the ACI concerned instead of filing those documents for an indefinite period. Besides, a specific time limit should be established for returning them, and data subjects should be clearly informed of that time limit.

Keeping data for statistical, historical and scientific purposes is ruled out by the prior checking notification. (Article 4(1)(e) of the Regulation).

2.2.6. Transfer of data

According to Article 7 of the Regulation *"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"*.

The present case concerns data transfer within DG Interpretation (between the person dealing with the claim form and his hierarchy), and inter-institutional data transfer as the other institutions (European Parliament and the Court of Justice) send the dates of sickness related to a contract to DG SCIC. In this respect Article 7 is duly complied with.

Health related and other personal data are forwarded by DG SCIC unit B4 to an insurance company based in Belgium. This transfer is covered by Article 8 of the Regulation, because the recipient is subject to the Belgian national law which implemented Directive 95/46/EC,

and also because the data transfer is necessary to reimburse medical expenses and pay the compensation, and there is no reason to assume that the data subject's legitimate interests might be prejudiced (Article 8 (b) of the Regulation).

Since the Insurance contract makes sub-contracting possible, Article 9 of the Regulation should be duly complied with if transfer of personal data to recipients who are not subject to Directive 95/46/EC takes place. Thus, personal data shall only be transferred, *"if an adequate level of protection is ensured in the country of the recipient (...) and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out"*. If the country of destination does not ensure an adequate level of protection, the exceptions of Article 9.6 and 9.7 must be considered. Article 9.6(c) would be of particular relevance: *"By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if: (...) (c) the transfer is necessary for the (...) performance of a contract entered into in the interest of the data subject between the controller and a third party"*.

2.2.7. Right of access and rectification

Article 13 provides for a right of access to personal data by the data subject, and Article 14 grants a right to rectification of inaccurate or incomplete personal data without delay.

ACIs can contact the person who deals with the claims in DG SCIC unit B4 in order to consult their file. Thus, Article 13 is complied with.

The dates of incapacity to work imported into GRIF from the program used by DG SCIC unit C2 may not be deleted or modified by DG SCIC unit B4. Since verification of incapacity to work is a prior condition for forwarding the claims to the insurance company, it is important that the system itself has a correction mechanism in case the information on the dates of incapacity to work is inaccurate. Such a correction mechanism is granted upon request.

The right to rectify inaccurate or incomplete data is somewhat limited because the accuracy and completeness of health related data is difficult to assess. It may however apply when it concerns other types of data contained in the file (e.g. address, bank account). Furthermore, the data subject may request the completeness of his/her file in the sense that he/she may request that information such as contra opinions by another medical doctor be placed in his/her file so as to ensure up-dated information. As the information from the controller confirmed; the right to rectification in this manner is provided. Thus Article 14 is complied with.

2.2.8. Information to the data subject

Article 11 of the Regulation provides for a list of information to be supplied to the data subject where the data have been obtained from the data subject, and Article 12 of the Regulation specifies the information to be supplied where the data have not been obtained from the data subject.

The present case concerns personal data obtained from the data subject (such as data required in the claim form) and also obtained from other sources (importing dates of incapacity to work into GRIF from another program).

The "Important remarks" section of the claim form and the Note to the ACIs contains most of the information required by Regulation (EC) 45/2001. In order to guarantee fair processing

with respect to the data subject, the EDPS recommends that information regarding the right to have recourse at any time to the European Data Protection Supervisor be supplied.

2.2.9. Processing data on behalf of the controller

The insurance company should be considered as "processor" within the meaning of Article 2(e) of the Regulation, namely "*a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller.*" This means that the Commission should comply with Article 23 of the Regulation. Thus in principle, the Commission should not only choose a processor who can give sufficient guarantees in respect of security measures, but a contract or legal act should also be drawn up between the controller and the processor, stipulating in particular that the processor shall act only on instruction from the controller. For the purposes of keeping proof, the parts of the contract relating to data protection and the requirements relating to the security measures should be in writing or in another equivalent form.

The Insurance contract and policy between the European Commission and the insurance company is appropriate under the Regulation, provided that the security measures referred to in Article 23 of the Regulation are put in writing or in another equivalent form.

2.2.10. Security measures

The EDPS considers that the security measures adopted, are adequate in the light of Article 22 of Regulation (EC) 45/2001.

Conclusion:

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

- return the claim and supporting medical documents automatically to the ACI concerned when those are not forwarded to the insurance company within a specified time limit of which the ACIs are informed,
- provide information on the right to have recourse at any time to the European Data Protection Supervisor,
- put the security measures referred to in Article 23 of the Regulation in writing or in another equivalent form.

Done at Brussels, 28 July 2006

Peter HUSTINX
European Data Protection Supervisor