

Opinion on the notification for prior checking from the DPO (Data Protection Officer) of the European Commission regarding the case "Verification of the declarations concerning special allowances at the Joint Research Centre"

Brussels, 4 October 2007 (Case 2007-328)

1. Procedure

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "Verification of declarations concerning special allowances at the Joint Research Centre" dossier was sent to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the European Commission by e-mail dated 21 May 2007. Various annexes were attached to the notification: (i) declaration of confidentiality for special allowances, (ii) a note from the four directors of the JRC on special allowances, compensatory leave and remuneration for overtime, (iii) a summary of the rules on the four types of special allowances.

Since the "verification of the declarations concerning special allowances at the Joint Research Centre" processing operation is already under way, checking cannot be considered as prior. The processing operation is therefore subject to ex-post checking.

Questions were put to the Data Protection Officer by e-mail on 11 June 2007. Replies were provided on 18 July 2007. The DPO was given 7 days in which to comment on the draft EDPS opinion. Comments were provided on 4 October 2007.

2. Examination of the case

2.1. The facts

The Joint Research Centre (JRC) uses the special allowances system laid down in Articles 56, 56a, 56b and 56c of the Staff Regulations of officials of the European Communities (Staff Regulations) (+ CEOS). In order to monitor the award of these allowances, the JRC has put in place a system for verifying the declarations made by persons concerned by special allowances.

Special allowances cover four areas: overtime, continuous work or shiftwork, standby duty and arduous work. The "attendance" data provided by the declarations must correspond to the attendance schedule in the Sysper 2 database's Time Management Module (TIM). Random checks are carried out by the human resources unit responsible for special allowances.

The data subjects of the processing operations are officials, temporary staff and contract staff who are entitled to receive special allowances.

The staff responsible log the applications for special allowances in the JRC'S web application (Web Application Browser - WAB), which is authenticated by the ECAS system. The declarations by the data subjects, divided into four areas - overtime, continuous work or shiftwork, standby duty and arduous work - are logged on a monthly basis. "Allowances" is the name of the joint IT application for the logging and management of special allowances in the JRC Directorate-General. It is an Oracle database. It records the personnel number, surname, first name, grade, presences and absences.

It is the management of the JRC (Head of Department, Head of Unit, Directors, Director-General, Appointing Authority) who approves the award of special allowances to staff under its responsibility. It therefore has access to the data on the data subjects. The departments responsible for the creation and management of declarations concerning special allowances also have access to the data. The Paymaster Office (PMO) also has access to the data for the purposes of making payments.

The purpose of the processing operation set out in the declaration of confidentiality is twofold: to account for expenditure on special allowances and to draw up statistics on special allowances granted within the JRC.

The purpose set out in the processing notification is as follows: to ensure that the data on presences contained in the declarations is consistent with the data in the TIM's attendance schedule.

The legal basis for the processing operation is Article 56 of the Staff Regulations and Annex VI thereto for overtime, Article 56a for continuous work or shiftwork, Article 56b for standby duty, Article 56c for arduous work, as well as Article 16 of the Conditions of Employment of Other Servants of the European Communities (CEOS) and Council Regulations (EC, Euratom) No 858/2004, 859/2004 and 860/2004 for the implementing rules for the aforementioned articles.

The processing is automated.

The data are stored for a minimum of five years, in accordance with the Financial Regulation.

The data may be checked, amended or erased at the explicit request of the data subject, by sending an electronic mail to the address jrc-indemnities@ec.europa.eu. All requests for the amendment of personal data will be met within 14 days.

There is a communication on the management of special allowances on the "working conditions webpage" of the Intranet of the JRC. This webpage also has a declaration of confidentiality regarding the processing operation, which contains the following information: the purpose of the processing operation, the identity of the controller, the data processed, the recipients of the data, the existence of rights for data subjects (access, rectification, erasure), the period of storage and a reference to the right to have recourse to the EDPS at any time.

Some security measures have been taken. The "allowances" programme is only accessible on the Commission's internal network. A firewall ensures compliance with this rule and blocks all unwelcome access. The technical security measures are the same measures that are used for the JRC's ICT infrastructure. Only authorised persons have access to the specific data (the data subject's direct hierarchical superiors, the Head of Human Resources at the JRC as the Appointing Authority and the Paymaster Office for payment purposes).

3. Legal aspects

3.1. Prior checking

The notification received on 21 May 2007 describes a processing operation of personal data (Articles 2(a) and 2(b)). Indeed, the verification procedure proposed by the JRC involves, inter alia, the collection, recording and storage of personal data on applicants for special allowances, who are identified by their name and personnel number. The data processing in question is carried out by the JRC and is in the exercise of activities which fall within the scope of Community law (Article 3(1)): in the case in point, verification of the award of special allowances. Processing is automated, insofar as the declarations by the data subjects are recorded in an Oracle database and the random checks are carried out via the TIM automated database. Article 3(2) is therefore applicable in this case. This processing operation thus falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes subject to prior checking by the EDPS processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations likely to present such risks. This notification is submitted pursuant to Articles 27(2)(a) and 27(2)(b).

Firstly, Article 27(2)(a) classifies *the processing of data relating to health* as processing operations that are likely to present such risks. As made clear in an exchange of information with the JRC, the processing operation under review contains no data relating to health and therefore does not have to be submitted for prior checking under this article.

Article 27(2)(b) then classifies as processing operations that are likely to present such risks "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.*" Prior checking is justified under Article 27(2)(b) if the processing operation is intended to evaluate personal aspects such as the data subject's conduct. This applies in the current case; the purpose of the processing operations is to check the consistency of the data on presences contained in the data subjects' declarations with those in the attendance schedules in the Sysper2 Time Management system (TIM). However, evaluating the data subject's conduct boils down to establishing whether he or she was cheating or was absent-minded when filling in the monthly declarations for obtaining special allowances. This verification is carried out by the TIM database, which has already been checked by the EDPS in his opinion of 29 March 2007 (2007-63). If the processing operation went beyond a verification which excluded a person from receiving payments, to suspecting that that person had committed fraud, an administrative enquiry would have to be carried out by the Investigatory and Disciplinary Office (IDOC) and disciplinary procedures adopted as a result. The EDPS also checked the "internal administrative inquiries and disciplinary procedures within the European Commission" in its opinion of 20 April 2005 (Case 2004-187). As a result, the EDPS considered that the processing operation should not be analysed in the light of Article 27(2)(b).

Article 27(2)(d), however, classifies as operations likely to present such risks "*processing operations for the purpose of excluding individuals from a right, benefit or contract.*" In the case in point, the special allowances are benefits established by Articles 56, 56a, 56b and 56c of the Staff Regulations. The purpose of verifying the declarations in relation to these allowances is to exclude the data subjects from benefits. Article 27(2)(d) is therefore applicable and as a result the processing operation under review must undergo prior checking.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this specific case, the processing was set up before consultation of the EDPS, so the check necessarily has to be performed ex-post. This does not alter the fact that the recommendations issued by the EDPS should be implemented.

The formal notification was received by e-mail on 21 May 2007. In accordance with Article 27(4) of the Regulation, the EDPS must issue his opinion by 22 July 2007. The case was suspended further to a request for information on 11 June 2007. In accordance with Article 27(4) of Regulation (EC) 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended. Replies were sent by e-mail on 18 July 2007, involving a suspension of 38 days. The DPO was given 7 days in which to comment on the draft EDPS opinion. Comments were received on 4 October 2007, involving a suspension of 9 days. As a result the EDPS will deliver his opinion on 8 October 2007 at the latest (22 July + 37 days of suspension - excluding the month of August - plus 9 days for comments), 7 October being a public holiday.

3.2. Lawfulness of the processing

In order to be legitimate, all processing must meet one of the criteria set out in Article 5 of Regulation No 45/2001. Under Article 5(a) of Regulation 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."*

A processing operation that is designed to verify declarations aimed at obtaining special allowances is necessary to perform a task carried out in the public interest on the basis of a legal instrument based on the Treaty establishing the European Community and is therefore legitimate pursuant to Article 5(a) of Regulation No 45/2001.

The legal basis for the personal data processing operation is to be found in the following articles of the Staff Regulations: 56 for the remuneration of overtime, 56a for continuous work or shiftwork, 56c for standby duty and 56d for arduous work. The implementing rules for these articles are: Annex VI to the Staff Regulations and , Council Regulations (EC, Euratom) Nos 860/2004, 859/2004 and 858/2004 respectively. Article 16 of the CEOS is the legal basis for other servants.

3.3. Data quality

Under Article 4(1)(c) of the Regulation, *"personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed"*. Following careful examination, the EDPS is of the opinion that the data set out in the notification and collected from the data subject in order to verify the declarations aimed at obtaining special allowances meet the criterion laid down in Article 4(1)(c).

Moreover, the data must be *"processed fairly and lawfully"* (Article 4(1)(a) of the Regulation). Lawfulness has already been considered in point 3.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see point 3.9 below).

Lastly, the 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" (Article 4(1)(d) of the Regulation).

The system described provides reasonable assurance as regards the accuracy of the data. The data subject is made aware of his or her rights to access and rectify data in order to ensure that the file remains as comprehensive as possible. These rights are the second means of ensuring data quality. See point 3.8 below on the dual rights of access and rectification.

3.4. Storage of data

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 (...)" (Article 4(1)(e) of the Regulation).

It is recalled that in order to comply with Article 49 of the Financial Regulation, data are stored for five years. The EDPS considers that the period for storing data set out in the declarations aimed at obtaining special allowances complies with Article 4(1)(e).

The data used for statistical purposes are therefore not stored for a longer period than those used to verify declarations regarding special allowances; Article 4(1)(e) is therefore duly complied with.

3.5. Change of purpose / compatible use

It is recalled that the declaration of confidentiality states that the data are also used to draw up statistics on special allowances at the JRC. This subsequent aim is entirely compatible with the initial aim since the production of statistics forms part of the budgetary management of special allowances. Data from the TIM database are used to carry out checks; this subsequent use of data is compatible with the initial purpose of the TIM (attendance schedule). Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation. The processing covered by Article 7(1) is the transfer of personal data 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 conditions in Article 7(1) are fulfilled, since the data are transferred within the institution. By way of reminder, the management of the JRC: the Head of Department, the Head of Unit, the Directors, the Director-General, the Appointing Authority and the departments responsible for the creation and management of declarations on special allowances may be recipients. The PMO, as an interinstitutional body, is also a recipient. The aim of the transfers is to verify the award of the special allowances and their payment.

3.7. Processing including the personnel or identifying number

The JRC uses the personnel number to verify the declarations on special allowances. This use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller. Such use may, however, have significant consequences. This was why the European legislator decided to regulate the use of identifying

numbers under Article 10(6) of the Regulation, which makes provision for action by the EDPS.

This is not the place in which to determine the conditions under which the JRC may process an identifying number, but it is appropriate here to emphasise the attention that must be paid to this aspect of the Regulation. In the case in point, the JRC's use of an identifying number is reasonable as it is used for the purposes of identifying the person and keeping track of the file and thus to facilitate processing. The EDPS considers that this number may be used in the context of the administrative management of the JRC's verification of the declarations on special allowances.

3.8. Right of access and rectification

Article 13 of the Regulation makes provision, and sets out the rules, for right of access at the request of the data subject. Article 14 of the Regulation allows the data subject a right of rectification.

In this case, data subjects may exercise the rights of access and rectification by submitting a request for access to/correction of their data to the following e-mail address: jrc-indemnities@ec.europa.ec. Articles 13 and 14 of the Regulation are therefore duly complied with.

The JRC also complies with the blocking (Article 15) and erasure (Article 16) rights and replies within 14 days to all e-mail requests concerning access to, rectification, blocking or erasure of data subjects' personal data. A stance which is welcomed by the EDPS.

3.9. Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and other data are collected from other persons.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply in this case. Inasmuch as the data subjects fill in the declarations on special allowances, they provide the data themselves.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also apply in this case since information is collected in the TIM database for the purposes of verifying presence.

It is recalled that the communication on special allowances on the JRC's Intranet contains a declaration of confidentiality which includes the following information:

the purpose of the processing operation, the identity of the controller, the data processed, the recipients of the data, the existence of rights for data subjects (access, rectification, erasure), the duration of storage and a reference to the right to have recourse to the EDPS at any time. The EDPS notes that the purpose of the processing operation stated in the declaration of confidentiality differs from the purpose stated in the notification. The EDPS asks that the purpose of verifying the declarations relating to allowances be clearly set out in the declaration of confidentiality. In fact, the purpose of the processing operation goes beyond the submission

of documentary evidence with a view to budgetary discharge; its aim is to detect any fraud and thus exclude data subjects from benefits. In order to comply with Articles 11 and 12 and in the interests of fair processing (see point 3.3), the JRC must incorporate the purpose of verifying the declarations concerning allowances so that all of the purposes of the processing operation are included in the information given to the data subject. In addition, the EDPS underlines that the legal basis for the processing operation must be added to the declaration of confidentiality.

3.10. Security

Following in-depth examination of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This means in particular that:

- the purpose of verifying the declarations concerning allowances must be clearly stated in the declaration of confidentiality.
- the legal basis of the processing operation must be included in the declaration of confidentiality.

Done at Brussels, 4 October 2007

(signed)

Peter HUSTINX
European Data Protection Supervisor