

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on management of leave

Brussels, 25 March 2010 (Case 2009-595)

1. Proceedings

On 17 September 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) at the European Parliament (EP) a notification for prior checking relating to the processing of personal data in the recording of the leave of staff of the General Secretary which follows a consultation on the same subject (case 2009-190).

On 17 September 2009 the EDPS requested information from the EP. The responses were received on 15 October 2009. Additional questions were put on 9 December 2009 and the answers were given on 12 March 2010. The EDPS sent the draft opinion to the DPO for comments on 17 March 2010 which were received on 25 March 2010.

2. Facts

The EP records all leave taken by all staff of the General Secretary. All leave taken is recorded on the in-house database "Streamline" and in the personal files of the individual staff. When one applies for leave in Streamline, one has to choose a reason for the leave from a menu. According to the type of leave, further circumstances are covered. In case of annual and special leave, the menu options are as follows:

- Adoption of a Child
- Adoption of a Disabled Child
- Annual
- Birth of Child
- Change of Residence
- Consultation Outside of Work (more than 65 km)
- Court Summons
- Death of Parents in-Law
- Death of Relative
- Death of Spouse
- Death of Spouse during Maternity Leave
- Death of a Brother/Sister
- Death of a Child
- Elections
- Exams/Competitions
- Health Cures
- Irregular Absences (Leave Office use only)
- Length of Service
- Marriage

- Marriage of a Child
- Maternity
- Military Obligations
- Other Reason
- Outside Activities (art. 12b)
- Serious Illness Parents in-Law
- Serious Illness of Relative in Ascending Line
- Serious Illness of Spouse
- Serious Illness of a Child
- Training
- Very Serious Illness of a Child

For annual leave the data processed includes leave entitlement and leave balance for individual staff members as identified uniquely by the staff number. A comment may be provided by the staff member concerned to help the approver understand the request (e.g. "this leave will constitute my two consecutive weeks for this year").

The file manager of the Leave Office may add a comment (e.g. "this is the third day of special leave request for illness of the father"). The type of leave is also processed, so that there is a check on, for instance, the number of days of uncertified sick leave. Each month a program is launched in order to check the number of uncertified sick leave over a period of 12 months for every member of the staff.

As concerns family leave, the application is submitted through Streamline and has to state the name and relationship to the family member concerned, with documentary proof of the relationship.

As concerns parental leave, the Streamline form asks the following:

- Period from/Period to (specifying AM or PM)
- Full-time/Half-time leave
- Wished timetable
- Single Parent: Yes/No
- Single Parent declaration
- Child's last and first name
- Reason for a supplemented parental leave allowance: Maternity/Adoption leave
- Maternity/Adoption leave period from/to

As concerns unpaid leave on personal grounds, the Streamline form asks the following:

- Period from/to (specifying AM or PM)
- Reason
- Other reason comments
- Child's last and first name
- Engaged in a gainful activity: Yes/No
- Activity Post
- Name of the organisation
- Activity of organisation
- Direct or indirect links between the activity and your duties at EP
- Coverage by EP insurance against sickness and accident: Yes/No
- Pension Contribution: Yes/No
- Address during the unpaid leave (if different of the current) - Country
- Address - Town or City

- Address - Postal Code
- Address - Line 1
- Address - Line 2
- E-mail address
- Telephone Number during the unpaid leave (if different of the current)
- GSM Number

Data subjects therefore will include all staff of the General Secretary, that is, officials and other staff. "Other staff" means temporary and contractual staff as well as accredited parliamentary assistants. It will also include their families, where information on relatives or a spouse is provided.

Staff members apply for leave using the in-house database "Streamline." In relation to annual leave, this paper-free procedure is used exclusively.

As regards applications for family and parental leave and unpaid leave on personal grounds, there are paper forms which are used in particular cases (no access to "Streamline" from outside, or cancellation or modification of such applications). In these cases, the paper-based application form is archived in the personal file of the applicant. Moreover, the leave decision for such applications is printed and signed by the Appointing Authority in paper version. This decision is sent to the personal file of the applicant. An electronic version of the decision is stored in the electronic personal file of the applicant.

In case of special leave for serious illness of a family member, additionally, a medical certificate accompanied by a diagnosis or medical report needs to be submitted to the Medical Service. In case of serious illness of the staff member himself, submission needs to be made to the Medical Absences Service. Medical certificates are not sent to the Leave Office, Staff Management, or Careers Unit.

Leave applications are handled by the Leave Office in the Individual Entitlements Unit. However, Staff Management and Careers Unit deal with leaves foreseen in Chapter 2 (Administrative status) of the Staff Regulations (Article 35 et seqq.), that is, leave on personal grounds, leave for military service, parental or family leave. The Leave Office does not deal with leave requests from the staff of the political groups but the Staff Management which has been the subject to a previous consultation (case 2008-770). Medical certificates are only handled by the Medical (Absences) Service, as mentioned above.

The menu of the options that are available when an application for leave is made in Streamline clearly includes some options that are related to health (e.g. "adoption of a disabled child", "health cures", "serious illness of spouse", etc.). Even if medical information is kept strictly separate from administrative information, the use of one of the options mentioned above can be considered as health related personal data.

Staff members are informed about the leave arrangements and the recording of leave through the page "Annual/Special Leave: Review" and "Data Consultation" (subpage "Balance") of the graphical user interface of "Streamline," and the "Privacy Statement" which is accessible through a hyper-text link of that interface. None of the other data subjects (as mentioned above) are provided with any information.

The Privacy Statement provides information about:

- the identity of the data controller;

- general purposes for which personal data are processed ("*administrative purposes and/or purposes of the tasks pursued by the Agency within Article 57 of Regulation 726/2004*¹");
- categories of recipients of staff member's personal data;
- the rights of data subjects and how they assert those rights; and
- the right to recourse to the EDPS.

However, there would appear to be no information provided about the specific purpose of the leave related processing operations or the respective storage periods.

The paper-based application form for parental leave, for family leave and the one for part time work leave include a privacy note which reads as follows: "*For your application to be processed, all applicable spaces must be completed. Your personal data will be communicated only to the responsible services. You have a right of access to your personal data as well as a right of rectification.*" There is no privacy statement on the paper-based application form for unpaid leave on personal grounds except the above rights of access and rectification mentioned. Nevertheless, the paper-based application forms are used in exceptional circumstances (less than 10% of the applications).

The EP's general website contains the following notice: Protection of personal data and there is also a leave guide and other information published on the Intranet.

Staff members are able to access their personal data held by the EP in "Streamline" in relation to the amount of leave that is taken, approved, and available, and the fact that the type of leave is annual or special leave. In addition, staff members can complain about processing of their personal data to EP's Data Protection Officer. Personal data can be rectified by cancelling a leave application. The cancellation of a leave a posteriori is a special procedure which requests approval from the line manager and the final approval of the Leave Office. They are procedures in place for accessing and rectifying paper-based leave data used for family and parental leave and unpaid leave on personal grounds as follow: the paper-based application forms are scanned and added to the virtual personal file of the official concerned who may consult them in Streamline. The originals are archived in the physical personal file of the official concerned to which he/she has also has a right of access.

As far as medical data is concerned, the procedures of access and rectification with the Medical Service were subject to prior checking in previous cases of 14 June 2007 (Case 2004-205 and 2004-203).

Personal data are held on paper files for five years, except for documents which relate to financial transactions (payment in respect of leave not taken on termination of service) which are retained for seven years. Records in "Streamline" go back to 2008 when leave processing in "Streamline" started. The application "Congé" contains earlier records. Records have been stored in "Congés" from 1988 to 2007 and in "Streamline" since 2008 to present. There are no arrangements for automatic erasure of records.

In Streamline, security is based [...].

¹ Regulation 726/2002 of the European Parliament and the Council of 31 March 2004 laying down procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing the European Medicines Agency

3. Legal aspects

3.1. Prior checking

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies. Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The data processed in connection with recording of the leave of EP staff members therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The data processing is performed on behalf of a Union body, in this case, the EP in the exercise of activities which fall within the scope of Union law (Article 3.1 of the Regulation). Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In this case, the personal data are held electronically as well as in a paper filing system. Regulation 45/2001 therefore applies.

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. This list includes Article 27(2)(a) *"processing of data relating to health..."*.

In the case of recording leave, processing of personal data concerning health occurs. Even if medical information is kept strictly separate from administrative information, the use of one of the options mentioned above can be considered as health related personal data (as mentioned under section 2 above). Thus the respective processing operations have to be prior checked by 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 operations. In this case however the processing operations have 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 notification of the DPO was received on 17 September 2009. According to Article 27(4) the present opinion must be delivered within a period of two months, that is, no later than 18 November 2009. The procedure was suspended for a total of 129 (121 + 8) days to acquire additional information (121 days) and to allow for comments from the data controller (8 days). Consequently, the present opinion must be delivered no later than on 27 March 2010.

3.2. Lawfulness of the processing

Article 5(a) of Regulation EC 45/2001 stipulates that personal data may be processed if *"the 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."

Articles 59 and 60 and Annex V of the Staff Regulations provide rights to leave for officials, and Articles 16, 58 and 91 of the Rules applicable to other servants of the European Communities provide rights to leave for those individuals who are not covered by the Staff Regulations, but are still employed as temporary, auxiliary and contract agents and parliamentary assistants by the EP. Family leave and parental leave are governed by specific decisions of the Secretary General of 18 May 2004. It is necessary for effective records to be kept to ensure that staff members are provided with the leave to which they are entitled.

The EDPS notes that the processing of personal data in relation to leave is considered necessary for the performance of the EP's obligations towards staff as provided by the above-mentioned rules and is therefore lawful in accordance with Article 5(a) of Regulation EC 45/2001.

3.3. Processing of special categories of data

Article 10(1) of Regulation 45/2001 states that *"the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health, or sex life are prohibited."*

Article 10(2) of Regulation 45/2001 provides a list of circumstances in which Article 10(1) shall not apply. In particular, Article 10(2)(b) states that *"processing is necessary for the purposes of complying with the specific rights and obligations of the data 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, or, if necessary, insofar as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards."*

In this instance, in case of annual and special leave, health-related data are processed, for example, in connection with the adoption of a disabled child, health cures, serious illness of spouse, and other types of special leave. Additionally, in case of parental and family, further processing of health related data is taking place. Data are also processed which could reveal the sexual orientation of that staff member and his/her partner where he/she applies for leave to care for them. The processing of these special categories of data is necessary in order to comply with legal obligations imposed on EP with respect to its staff as laid down in Articles 59 and 60 and Annex V of the Staff Regulations and Articles 16, 58 and 91 of the Rules applicable to other servants of the European Communities.

In the view of the above, the EDPS notes that the processing of personal data concerning sensitive personal data is considered performed in accordance with Article 10 of the Regulation.

3.4. Data Quality

Article 4(1)(c) of Regulation 45/2001 states that personal data must be *"adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed."* The information presented to the EDPS on the data processed appears to meet those requirements.

Article 4(1)(d) of Regulation 45/2001 states that personal data must be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."*

The EDPS is satisfied that the procedure used by the EP for recording of the leave helps to ensure accuracy of the personal data processed. In addition, Articles 13 and 14 of Regulation 45/2001 provide that the data subject has the right to access and the right to rectify data, so that the file can be as complete as possible. This also makes it possible to ensure the quality of data.

Article 4(1)(a) provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has been dealt with in 3.2 and fairness will be dealt with in 3.10.

3.5. Conservation of data/ Data retention

Article 4(e) of Regulation 45/2001 states that personal data must be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed"*.

Personal data are held on paper files for five years, except for documents which relate to financial transactions (payment in respect of leave not taken on termination of service) which are retained for seven years. The seven years period has been set out in accordance with the Community rules applicable to the disposal of records with financial link. In fact, Article 49 of the Implementing Rules to the Financial Regulation states that the original supporting documents are to be kept for up to seven years after the budgetary discharge.

Regarding the records stored electronically, the EDPS recommends that the application "Congé" which contains earlier records beyond the foreseen data retention period is kept up to date in order to make it consistent with the legal statement.

In addition, as regards sick leave related data, the initial three years storage period was established in line with Article 59(4) of the Staff Regulation². (As regards other data, the initial three years storage period was set out in accordance with the EP archiving policy to allow the data to be held for administrative purposes and for business continuity purposes.)

The EDPS considers that the sick leave related data can indeed be kept for the initial three years since they are necessary for the establishment of an eventual invalidity on a basis of Article 59(4) of the Staff Regulations.

As to the total storage period of seven years, the EDPS recognises the need to keep files for the purposes of a budgetary control. Nevertheless, he would like to bring the EP's attention to the recently added last paragraph of Article 49 of the Implementing Rules to the Financial Regulation stating that *"personal data contained in supporting documents shall be deleted where possible when those data are not necessary for budgetary discharge, control and audit purposes"*.

² Read together with Articles 16, 58 and 91 of the Rules applicable to other servants of the European Communities; cf. EDPS Opinion on conservation periods for medical documents of 26 February 2007

3.6. Compatible use / Change of purpose

Article 4(1)(b) of Regulation 45/2001 states that personal data must be *"collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes"*. The data processed in connection with leave is processed for the purposes of leave. Further processing in the respect of the data subject's personal file is compatible with this purpose.

3.7. Transfer of data

Article 7(1) of Regulation 45/2001 states that *"personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

In this case, personal data are in principle passed to the Leave Office in the Individual Entitlements and to the Staff Management and Careers Unit in case of parental and family leave and unpaid leave on personal grounds. In each of these cases the transfer is necessary for granting requests for leave and recording those requests.

As such, the EDPS notes that, in each case, the transfer of personal data within the EP is considered made in accordance with Article 7(1) of Regulation 45/2001. However, the EDPS recommends that, in accordance with Article 7(3), each of the recipients is made aware that they shall process the personal data they receive only for the purposes of recording leave.

3.8. Processing of personal number or unique identifier

The personnel number of each staff member is processed when making an application for leave. The EDPS considers that the personal number can be used in this context since it allows for the identification of the staff member and facilitates the follow-up in an appropriate way. There is no reason to determine any further conditions in this case.

3.9. Right of access and rectification

Article 13 of Regulation 45/2001 grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

In general, implementing rules relating to the Regulation contained in the Bureau decision of 22 June 2005 provide for the rights of data subjects in Articles 8 to 13 of the Regulation. Specifically for the leave application in electronic form, data subjects have direct access and can rectify to leave data. In addition, staff members can complain about processing of their personal data to the EP's Data Protection Officer. The cancellation of a leave *a posteriori* requires approval from the line manager and final approval of the Leave Office.

In addition, the EDPS notes that family members whose personal data are processed in the present case are not provided with right of access and rectification. None of the exemptions and restrictions provided for in Article 20(1) of the Regulation 45/2001 applies. The EDPS therefore recommends that the EP provide these rights where a family member makes an access request or asks for rectification of inaccurate data.

3.10. Information to the data subject

In the present case, both Articles 11 and 12 are applicable since certain personal data processed are provided by the respective data subjects (as regards staff member's own data) and certain personal data are obtained from other sources (as regards personal data of family members).

Article 11 of Regulation 45/2001 requires certain information to be provided when the personal data have been received directly from the data subject. In this instance, EP staff members will be informed through the Privacy Statement when applying electronically and the privacy note on the paper-based application form for parental leave.

The EDPS recommends that the paper-based application forms contain a hyper-text link to the privacy statement of the EP and are accompanied by a paper-based version of a privacy statement.

The EDPS recommends that the information provided in the Privacy statement is amended as follows:

- An annex should be added to the document with links to the Leave Consolidated Rules and/or to the Application for Annual Leave and Special Leave Form.
- The email address provided in the Data Protection Declaration should correspond with that provided on the Personal Data Access Request Form.

In addition, the EDPS recommends that information about the specific purpose of processing of leave related data, as well as information about the specific time period applicable are added.

Article 12 of Regulation 45/2001 requires certain information to be provided to the data subjects when the personal data have been obtained from other source (paragraph 1), unless the provision of such information proves impossible or would involve a disproportionate effort. In such a case, the Community institution or body shall provide for appropriate safeguards (paragraph 2).

The EDPS accepts that providing this information directly to each family member whose personal data are processed in connection with a particular leave would constitute a disproportionate effort on a part of the EP. Nevertheless, there are other steps the EP could take which would be appropriate, such as instructing its staff members applying for a leave to inform their respective family members about the processing of their personal data using all appropriate modalities in respect of the age and the state of health.

3.11. Security measures

According to Article 22 of Regulation (EC) No 45/2001, "the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected". These security measures must "in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing".

As indicated above, the relevant data are kept in the secured environment. The EDPS has no reason to believe that the measures mentioned are not adequate in light of Article 22 of the Regulation.

Conclusion

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

- Keep up to date the application "Congé" which contains earlier records beyond the foreseen data retention period in order to make it consistent with the legal statement.
- Ensure that, in accordance with Article 7(3), each of the recipients of personal data relating to leave is made aware that they shall process the personal data they receive only for the purposes of recording leave;
- Provide family members whose personal data are processed with a right of access and rectification upon their request;
- Amend the information provided to data subjects as mentioned in point 3.10.
- Ensure that appropriate measures are put into place in order to inform the family members involved in the processing, such as instructing the staff members applying for a leave to inform their respective family members about the processing using all appropriate modalities in respect of the age and the state of health.

Done at Brussels, 25 March 2010

(signed)

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