



Prior Checking Opinion

"Office Indoor Climate Survey" at the Committee of Regions

Case 2017-0676

The CoR will invite its staff members to voluntarily participate in a survey in order to assess and detect any health problems of the employees due to their working conditions. Staff members are free to fill in a questionnaire and on the basis of their replies they may have a follow-up with the CoR's medical service for possible solutions. Their replies will also be encoded in an Excel table for statistical purposes. Staff members may ask to remove their questionnaire kept in their medical file at any time.

Brussels, 28 July 2017

1. Proceedings

On 21st June 2017, the European Data Protection Supervisor ("the EDPS") received a notification for prior checking under Article 27(2)(a) of Regulation 45/2001 ("the Regulation") from the Data Protection Officer ("the DPO") of the Committee of Regions. The notification concerns a new processing operation related to the use of an Office Indoor Climate survey (the questionnaire) by the medical service of the CoR in the context of specific preventive missions.

According to Article 27(4) of the Regulation, this Opinion must be issued within a period of two months, that is, no later than the 21st August 2017¹.

2. Facts

The notification states that the **purpose** of the questionnaire is for the medical service of the CoR to assess and detect possible air quality problems in the employee's offices and their prevalence. On the basis of this assessment, the medical service may propose to the staff member concerned a medical advice, recommendations, appropriate accommodations or further medical examinations. Staff members may also discuss the outcome of their replies to the questionnaire in the context of their preventive annual medical check-up. The questionnaire can provide background information for the medical officer about risk factors in the staff member's health.

The notification refers to Article 1(e)(2) of the Staff Regulations² and to the Council Directive 89/391/EEC of 12 June 1989³ as the **legal basis** of the processing at hand. The notification also states that the staff members of the CoR are free to participate to the survey.

The medical service of the CoR sends the questionnaire to all staff members of the CoR⁴ by internal mail together with a data protection notice entitled "Notice regarding data processing in respect of the Office Indoor Climate Questionnaire". Those who choose to reply to the questionnaire can send it in a sealed envelope (without indication of their name on the envelope) to the attention of the CoR's medical officer, or hand over the envelope in person to the medical service, or send it to the medical officer by internal mail. Upon receipt, the envelope will be stamped with the text "medical confidentiality".

Staff members should provide the following data in the questionnaire: date, name, date of birth, office number and floor, grade, occupation, type of work place (i.e. own room, shared, office landscape), type of work (i.e. mostly at the office), working hours, position, post, overtime work. They should also reply to specific questions related to

- work environment ("Have you been bothered during the last three months by draught, room temperature, dry air, unpleasant odour, passive smoking, dust and dirt ...");
- work conditions ("do you regard your work as interesting and stimulating, do you have too much work to do, do you have any opportunity to influence your working conditions, do your fellow-workers help you with problems you may have in your work ..");
- present symptoms ("fatigue, headache, nausea, nose-bleeding, suffering from stress, difficulties to sleep...");
- temperature conditions,
- noise,

¹ This case started as a consultation on the need for prior checking under Article 27(3) of the Regulation; that consultation was submitted on 10 February 2017. A series of questions were raised by the EDPS on 2nd May 2017. Based on the replies and on the additional information received from the CoR, on 21st June 2017, the EDPS considered that prior checking was indeed necessary, re-qualified the case as an Article 27(2) notification, and started preparing the Opinion. The draft Opinion was sent for comments to the DPO/controller on 20 July 2017 and he replied back on the same day.

² "Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties".

³ on the introduction of measures to improve the safety and health of workers at work.

⁴ On 20 July 2017, the controller pointed out that the CoR intends to launch the survey building per building and not send the questionnaire to all the staff of the CoR.

- cleaning and
- air quality conditions.

Staff members should indicate any health problems they may have due to any of the above conditions (asthmatic problems, irritated respiratory airways from tobacco smoke, eczema etc.)

The nurse of the CoR will encode the replies of the participants in an Excel table indicating the staff members' office number, but not their name. The EDPS asked the DPO to provide further information as to the purpose of encoding the replies of the questionnaire to an Excel table. The DPO replied that in addition to the individual assessment and follow-up, the purpose of encoding the staff members' replies is twofold:

- to obtain representative statistical data, for example how many of the staff members have respiratory problems or complain about noise and any other kind of nuisance and
- to detect any collective indoor climate complaints which are for instance concentrated on a given floor or in a given area of the building and if possible to identify possible reasons and solutions for such problems.

The notification states that *“results for statistical purposes in table form (electronic) do not include any personal data and individual respondents cannot be identified”*.

The privacy notice mentioned above will also be uploaded on intranet.

Each questionnaire will be kept in the medical file of each staff member concerned for 30 years beyond the end of the service. Only the staff of the medical service can have access to the questionnaires.

Staff members may exercise their right to have access to their questionnaire, correct any inaccurate and incomplete data and request to have their questionnaire removed from their medical file at any time by sending an e-mail to the CoR's medical service.

The notification states that medical files are securely archived on the premises of the CoR's medical service.

3.1. Prior checking

The processing of personal data under analysis is carried out by an EU institution, the CoR. Furthermore, the processing is both manual - which forms part or is intended to form part of a filing system (questionnaires in paper) - and automatic (replies are encoded by the nurse in an Excel table). The Regulation is therefore applicable.

The processing operation involves the processing of data relating to health, such as symptoms (i.e. fatigue, cough, irritated nose, stress etc.) to the health status of the staff members and health problems (i.e. asthma, eczema, hay fever, irritated respiratory airways etc.) due to noise, cleaning, air quality, temperature and other work conditions. The purpose of the processing is to assess and detect any health problems of the staff members due to their work conditions and propose solutions. Due to the sensitive nature of the data processed, the processing is likely to present specific risks to the rights and freedoms of the applicants and is therefore subject to prior checking by the EDPS⁵.

⁵ Article 27(2) of the Regulation contains a list of processing operations that are likely to present risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, including point (a) processing of data relating to health.

The EDPS will identify below the CoR's practices which do not seem to be in conformity with the principles of the Regulation and provide the CoR with relevant recommendations.

3.2 Consent

The notification states that “the legal basis can be found in Article 5(d) of Regulation 45/2001 - unambiguous consent of the data subject”.

The CoR's motivation for the processing under analysis is based on the Staff Regulations and on Council Directive 89/391/EEC of 12 June 1989 by analogy. Article 1e of the Staff Regulations as amended states that EU staff “shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties”. Council Directive 89/391/EEC, as amended, gives employers a general “duty to ensure the safety and health of workers in every aspect related to the work”.

However, the individual voluntary participation of the CoR's staff members is based on consent 5(d) of the Regulation. The EDPS reminds the CoR that in an employment situation, consent is a sensitive matter as it may be doubtful that such consent is freely given. It is therefore important that the CoR ensures that each participant will "freely" give his consent before his participation to the test, as Article 5(d) of the Regulation requires. This means that the participants' consent must be a freely given, specific and an informed indication that they agree that their data are collected through all different steps of the processing⁶. Staff members have to be able to decline participation without any negative consequences for them.

Recommendation: The CoR should clarify the above information in the notification (see further in point 3.5 on information to be provided to staff members (privacy notice)).

3.3 Data quality

The CoR keeps personal data in the questionnaire for the assessment and follow-up of each staff member and it also encodes these personal data from the questionnaires in an Excel table for the individual assessment and follow-up and for statistical purposes.

The CoR should make a clear distinction between the purpose of keeping a questionnaire of a staff member in his medical file (individual assessment and follow-up) and the further purpose of keeping personal data in an Excel table (statistical purposes) within the meaning of Article 4(1)(b) of the Regulation⁷.

Furthermore, the purpose indicated in the notification is limited only to the detection of “air quality problems in the employee's offices”. However, on the basis of the different questions asked in the questionnaire, the purpose of the processing at hand is wider and concerns the detection of any potential health problems that might occur in the workplace due to the working conditions. For the sake of clarity and in light of Article 4(1)(b) of the Regulation, the CoR should therefore explicitly indicate the wider purpose of the processing under analysis.

⁶ Article 2(h) of the Regulation states that the data subject's consent shall mean “any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed”.

⁷ “Personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes”.

Recommendation: The CoR should clarify the two different purposes in its internal documentation (Art. 25 notification) and fill in the section under “historical, statistical or scientific purposes”.

Although the name is not indicated in the Excel table, the office number is collected in both the questionnaire and in the Excel table. The notification states that “*results for statistical purposes in table form (electronic) do not include any personal data and individual respondents cannot be identified*”. The EDPS points out that the office number is a personal data relating to a specific staff member who can be identified or identifiable⁸; the staff member can be identified directly or indirectly by reference to his office number. As it is foreseen in Article 4(1)(c) of the Regulation, only adequate, relevant and not excessive personal data should be collected in relation to the purpose for which they are collected and/or further processed. The collection of the office number in the questionnaire is adequate and relevant for the assessment and the follow-up of the staff member concerned. Nevertheless, the office number is irrelevant and excessive personal data to be collected for statistical purposes and it is hence incompatible within the meaning of Article 4(1)(c) of the Regulation (see further in point 3.4 on the principle of retention periods under Article 4(1)(e) of the Regulation).

Recommendation: The CoR should not encode the office number of the staff members in the Excel table, as it is irrelevant and excessive in relation to the purpose for which these data are collected (statistical purposes) under Article 4(1)(c) of the Regulation. The CoR should include this information in the Article 25 notification.

When the draft Opinion was sent for comments to the controller, the latter disagreed with the EDPS position for a number of reasons⁹. Nevertheless, the EDPS reiterates that the assessment of the individual questionnaire with the office number should have as a clear purpose the protection of the staff member and his well-being. On the contrary, the purpose of the Excel table as indicated in the notification is for statistical purposes and it should therefore be compatible with the conditions required in Article 4(1)(e) of the Regulation (anonymisation or encryption) (see further point 3.4). In any case, **if the CoR wishes to collect the office number in the Excel table, it should document and justify its reasons before doing so.**

3.4 Data retention

⁸ Article 2 of the Regulation: “personal data shall mean any information relating to an identified or identifiable natural person ...”.

⁹ “We strongly contest however that the inclusion of the office number in the excel table is irrelevant and excessive in the light of the (collective dimension of the) project purpose. In fact, as indicated, in addition to the individual follow-up of staff members’ situation, the survey also allows to aggregate data in the context of a more structural analysis and cross-examination wherever appropriate. To put it simply: if the survey reveals that similar symptoms are reported recurrently on a given floor or in a given building, this allows us to detect any features of a “sick building” and to identify possible infrastructural remedies thereto, so as to improve the concerned staff members health situation on the work floor. The only way to detect and tackle structural weaknesses of a building or floor, the purely individual follow-up of the staff member would be reduced to treating symptoms without solving the underlying infrastructural causes. The name of the staff member is in this respect of a lesser relevance than the office number, because over the years a single office can be used by several staff members and therefore have an impact on the health situation of several persons. When balancing the absolute protection of personal data against due protection of staff members’ health (on the basis of data collected on a purely voluntary basis and in a fully confidential setting), from an employer point of view priority is to be given to the protection of staff health and well-being”.

As a general principle, Article 4 (1) (e) of the Regulation states that personal data must not be kept in a form which permits identification of individuals for longer than is necessary for the purposes for which the data were collected or for which they are further processed.

Personal data in the questionnaire:

The retention period indicated by the CoR in the notification is 30 years in the medical file beyond the end of the service of the staff member. The purpose of the questionnaire is to provide solutions to potential health problems of the particular staff member filling in the questionnaire. The CoR will assess each questionnaire and provide appropriate measures and/or treatment. This follow-up will vary depending on the specific problem of the staff member concerned. For instance as a result of the questionnaire, a staff member may be advised to change some habits, or his working conditions will need to be accommodated according to his health issue or he may need to undertake medical examinations with a systematic follow-up or not. The EDPS hence considers that this retention period is excessive to the purpose for which the questionnaire is collected.

On 20 July 2017, the controller provided some justifications for the necessity of 30 years. If for example, after 20 years of service (and exposure to an unhealthy office climate) a staff member is found to have a serious disease, it may be of immediate interest to the staff member if he can demonstrate through his medical file that a causal link exists between the disease and the work environment (recognition of and compensation for professional disease etc.). In addition, the CoR pointed out that for those staff members who choose to participate in the indoor climate survey (especially when they believe their health may be negatively impacted by their work environment), it may be in the interest of staff that the survey is kept in their medical file for a significantly long period. Moreover, the CoR pointed out that staff members may ask for the questionnaire to be removed from their file. Indeed, since the processing is based on their consent, should they revoke their consent, the CoR will be obliged to remove the questionnaire.

Recommendation: The EDPS considers that the retention period of 30 years of the medical questionnaires in the medical files may be justified in light of the CoR's additional information as long as the CoR ensures that the right of a staff member to remove his questionnaire at any time from his medical file is clearly indicated in the privacy notice (see further point 3.5).

Personal data encoded in the Excel table:

Article 4(1)(e) of the Regulation provides that “personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form or, if that is not possible, only with the identity of the data subjects encrypted”. As it was pointed out above, although their name is not encoded in the Excel table, staff members may be directly and indirectly identified from their office number, which is incompatible with the meaning of Article 4(1)(e) of the Regulation. That is why the CoR should keep the personal data of the questionnaires in the Excel table without the office number and only for statistical purposes and not for the individual follow-up of the staff member.

There is no information as to the retention period of the personal data kept in the Excel table. The CoR is, under Article 4(1)(e) of the Regulation, obliged to set out a maximum retention period for the data processed, which are necessary to the purpose for which they are further processed (statistical purposes). The CoR should hence make an assessment, in light of Article 4(1)(e) of the Regulation, as to how long it would be necessary to keep data for present and future statistical purposes and establish a maximum retention period

On the basis of the comments received by the controller, the CoR pointed out the necessity of keeping the Excel table as long as the building in question is occupied by the CoR. Once the CoR no longer occupies the building in question, the personal data related to that particular building will be erased.

Recommendation: The CoR, should therefore indicate this information in its internal documentation in line with Article 4(1)(e) of the Regulation.

3.5 Information to be provided to the staff members

The privacy notice includes relevant information regarding the processing operation at hand in light of Articles 11 and 12 of the Regulation.

It mentions that “participation in any further examination is voluntary”. This should be explained in more detail (see point 2).

In order to guarantee a fair processing in respect of the staff members, the CoR should add the following necessary information:

1. add the wider purpose of the processing (detection of health problems at the workplace) as well as the further purpose of the processing (statistical purposes) (Articles 11(1)(b) and 12(1)(b) of the Regulation);
2. indicate that staff members are free to participate to the survey and their data collected in the questionnaire are filled in by them voluntarily; in case they wish to withdraw from the survey or from any stage of the procedure including the follow-up, they can do so at any time without any prejudice to their rights and interests. (Article 11(1)(d) of the Regulation);
3. mention that if staff members withdraw their consent, they have the right to ask to remove at any time their questionnaire from their medical file (Article 5(d) in connection with Article 16 of the Regulation);
4. update the privacy notice in line with the recommendations related to the retention periods in this opinion (see point 3.4).

Recommendation: The CoR should update the privacy notice with all the information outlined above in accordance with Articles 11 and 12 of the Regulation.

4. Conclusion

Provided that the above recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

In light of the accountability principle, the EDPS expects the CoR to implement the above recommendations accordingly and has therefore decided to close the case.

Done at Brussels, 28 July 2017

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