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Subject: EDPS prior-check Opinion on "*Reasonable Accommodation for persons with disabilities*" at the Council of the European Union (case 2018-0592)

Dear (...),

On 27 June 2018¹, the General Secretariat of the Council of the European Union (the Council) sent a notification to the EDPS for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation)² on the processing operations for providing reasonable accommodation for persons with disabilities at the Council. The Council sent also a draft Decision implementing Article 1d (4) of the Staff Regulations regarding reasonable accommodation for persons with disabilities and on establishing the procedures for the handling of requests and draft Guidelines which include a privacy statement.

The EDPS adopted a prior-check Opinion³ on the same procedure in another EU institution as well as Guidelines on the processing of personal data related to health in the workplace⁴. On the basis of the above, the EDPS will identify and examine the Council's practices which do not seem to be in conformity with the principles of the Regulation, as further outlined by the EDPS Guidelines, providing the Council with specific recommendations in order to comply with the Regulation.

¹ As this is a new processing (ex-ante case), the deadline of two months applies under Article 27(4) of the Regulation. The case was suspended for DPO comments on the draft opinion from 9 August 2018 to 11 September 2018. The EDPS should thus issue the present Opinion no later than 1 October 2018.

² OJ L 8/1, 12/01/2001.

³ EDPS Opinion of 22 July 2015 on the Parliament's notification regarding "disability establishment and reasonable accommodation", case 2015-0366.

⁴ https://edps.europa.eu/sites/edp/files/publication/09-09-28_guidelines_healthdata_atwork_en.pdf

Legal analysis

1) Retention periods and data protection notice

In accordance with Article 4(1)(e) of the Regulation, personal data must not be kept longer than necessary for the purpose for which they are collected or further processed.

The notification states that the “data will be kept until the staff member's retirement or until the staff member leaves the Institution. In case of legal challenge, data may be kept as long as necessary”.

The notification also lists clearly three categories of recipients who will have access to the personal data collected for the processing under analysis. In particular:

- “The Medical Officer receives, adds to and archives the medical data
- The Equal Opportunities Office staff when providing the secretariat to the Advisory Committee, preparing the decisions to be taken by the Advisory Committee, coordinating the provision of the reasonable accommodation and monitoring its effectiveness
- The Healthcare and Social Services Unit and line manager (permanent members) and ad-hoc members (legal councillors, IT department, Buildings department, Huissiers department, Mobility unit, Individual Rights unit, Budget Unit) of the Advisory Committee”

The retention period mentioned in the notification concerns the retention period of the Advisory Committee’s decisions to provide reasonable accommodation to the applicant. It is a necessary and reasonable retention period under Article 4(1)(e) of the Regulation. The Council could specify in the notification/data protection notice that those decisions will be kept in a specific file kept by the Equal Opportunities Office.

Moreover, the EDPS recommends that the Council make a distinction between the different categories of personal data collected and their respective retention periods in light of the above recipients involved in a specific case. For example, the Council should specify in the notification a maximum retention period that all medical data collected will be stored in the medical file of the applicant. As to the other personal data processed by the third category of recipients listed in the notification and not included in the personal/medical file, the Council should set up a maximum retention period to be kept after the end of validity of the decision providing reasonable accommodation or the end of the employment of the staff member.

Recommendation:

1. The Council should specify the different retention periods of the different categories of personal data collected under Article 4(1)(e) of the Regulation.

2. This information should also be included in the data protection notice under Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation.

The EDPS understands that the medical file is kept by the Council's medical service and would like to recall some data protection principles applicable regarding the medical file and the rights of the staff members.

2) Right of access

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application.

Staff members should have full access to their medical file, but certain conditions may apply⁵. In case of mental disability, staff members may have an indirect access to their psychological or psychiatric medical reports through their private doctor.

Furthermore, staff members might not have access to the medical officer's personal notes. Any limitation of access should be assessed on a case by case basis in accordance with Article 20(1)(c) of the Regulation and documented (such limitation may in very limited cases be necessary to protect the rights and freedoms of the medical officer or other doctors). A general refusal of access to the doctors' personal notes in the medical file would not meet the requirements of Article 20 of the Regulation and would therefore be unjustifiable.

3) Right of rectification

Article 14 of the Regulation provides for the data subject's right of rectification. In the context of the processing of health related data, the right of rectification means *in concreto* that a person concerned has the right not only to correct any administrative errors in their medical file, but also to add any second opinions of other doctors.

The Council should therefore ensure that all applicants fully understand the meaning of the right of rectification regarding the processing of their personal data relating to health.

Conclusion

The EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the recommendations made in this Opinion are fully taken into account.

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

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: (...), Data Protection Officer.

⁵ Conclusions 221/04 of Heads of Administration of 19 February 2004.