



EDPS prior-checking Opinion on the European Parliament's notification on a processing operation related to "*disability establishment and reasonable accommodation*"

Brussels, 22 July 2015 (Case 2015-0366)

1. Proceedings

On 22 April 2015, the European Data Protection Supervisor (the EDPS) received a notification for prior checking under Article 27(3) of Regulation 45/2001 (the Regulation) from the Data Protection Officer (the DPO) of the European Parliament (the Parliament). The notification concerns a new processing operation related to the establishment of the existence of a disability and the provision of reasonable accommodation to the Parliament's staff members.

According to Article 27(4) of the Regulation, this Opinion must be issued within a period of two months, which is 28 July 2015, taking into account suspensions due to further information¹.

2. Facts

Purpose and Data subjects

The Directorate for Management of Support and Social Services of the Directorate-General for Personnel of the Parliament is responsible for establishing the disability of a staff member (official) or another agent (temporary, contract staff and parliamentary assistants) and approve reasonable accommodation.

Legal basis

The legal basis of the processing consists of:

- Article 1d(4) of the Staff Regulations and Articles 10, 80(4) and 128 of the Conditions of Employment of other Servants of the EU;
- UN Convention on the Rights of Persons with Disabilities;
- Parliament's Internal Rules of 1st April 2015 implementing Article 1d(4) of the Staff Regulations (Persons with a disability) ("*Internal rules*");
- Parliament's Guidelines implementing the above internal Rules.

Procedure and data processed

Establishment of the existence of a disability

According to the Internal Rules, if during the pre-recruitment medical exam, the medical officer considers that the successful candidate has a disability², he or she may directly assess

¹ The case was suspended for further information from 23 April 2015 to 12 May 2015, from 23 June 2015 to 10 July 2015 and for comments from the DPO and controller from 14 July 2015 to 20 July 2015.

the disability and issue an opinion to the appointing authority ("AA") and where necessary, make a written request to the AA for the reasonable accommodation.

A staff member may also request that his disability is established. The staff member must submit a written request to the AA accompanied by a medical report³ from his own doctor under sealed cover. The request and the medical report under sealed cover must be submitted to the Parliament's medical service. The medical officer will assess the disability and issue an opinion to the AA.

The medical officer may obtain any expert's medical opinion necessary for this assessment. The staff member will be informed beforehand of the recipients of his medical records.

Entitlement to a reasonable accommodation⁴

A staff member whose disability has been established should make a written request to the AA asking for a reasonable accommodation. The staff member should fill in the form "request for reasonable accommodation" which requires the following data: administrative data, type of work carried out, places where the work is carried out, limitations experienced when carrying out tasks in daily life, details of reasonable accommodation requested.

The AA should ask the opinion of the advisory committee (a medical officer from the Parliament's medical service, a social worker and a representative for the Unit for Risk Prevention and Well-being at Work) who should then make a recommendation to the AA.

The advisory committee may ask the staff member to submit to the medical service an updated medical report from his own doctor and may consult other internal or external specialists.

Recipients have access to the following data:

- medical service of the Parliament: medical certificate completed by the staff member's physician, request for reasonable accommodation form, expert's opinion if necessary;
- advisory committee: relevant conclusions from the medical officer and records which are strictly necessary to evaluate the request, request for reasonable accommodation form, AA's decision on reasonable accommodation (no information about the nature of disability, but reasonable accommodation measures are indicated);
- a representative of the Human Resource department of the relevant Directorate-General/Political Group may participate in the deliberations of the advisory committee and receive the same information mentioned above;
- a representative of the Equality and Diversity Unit participates as an observer and receives the same information mentioned above;

² According to the Guidelines, a disability could be physical (30%) or mental (20%).

³ A specific form needs to be filled in: "Medical certificate for use in disability assessment".

⁴ This may involve the provision of support measures, the re-arrangement of duties or responsibilities, adjustments of working-time and other adjustments to the working environment, as long as they do not impose a disproportionate burden on the resources of the institution.

- Individual Entitlements and Payroll Unit in charge of the personal file: AA's decision on the recognition of the disability and period of validity of the disability (whether the disability is permanent or temporary) and AA's decision on reasonable accommodation;
- Recruitment and Transfers Unit in charge of newly recruited applicants receive the two AA's decisions stated above;
- Services providing physical reasonable accommodation (i.e. DG ITEC for specific computer programmes or DG INLO for specific requirements): details for the reasonable accommodation to be provided for a specific person.

Rights of access and rectification

Staff members may exercise their rights of access and rectification by contacting the person designated to be in charge of the processing operation. A functional e-mail is also included: Pers-Dir-C@ep.europa.eu.

Right of information

A privacy statement will be published on the Parliament's intranet.

In case of pre-recruitment medical exam, the medical officer will provide the privacy statement directly to the successful candidate.

In case a staff member submits a request, a privacy statement is attached to the form "request for reasonable accommodation".

Retention policy

The AA's decisions on disability and reasonable accommodation will be kept in the personal file (10 years after all the rights of the person concerned and their dependents have expired), following the rules in force in the Parliament regulating the document management (Retention Schedule)⁵. Other personal data not included in the personal/medical file, will be kept for three years after the end of validity of the Decision on Disability or the end of the employment of the staff member.

All medical reports and conclusions are stored in the medical file.

For statistical purposes and in order to monitor the effectiveness of the disability establishment and reasonable accommodation procedure, the Parliament will store the following anonymised information:

- disability establishment requests;
- disability establishment decisions and their period of validity;
- reasonable accommodation requests;
- reasonable accommodation provided.

⁵ 30.09.2010, Management of current and intermediate records at the EP (Decision of the Secretary-General of 01.10.2008) DOCUMENT RETENTION SCHEDULE FOR THE DIRECTORATE-GENERAL FOR PERSONNEL.

Storage and security measures

Data are shared between the units involved in the procedure in their respective drives. Access to the drives is password protected. Recipients are reminded every time a transfer occurs that personal data must only be processed for the purposes for which they are transmitted.

3. Legal aspects

3.1 Prior checking

The processing of personal data under analysis is carried out by an EU institution, the Parliament. Furthermore, the processing is both manual - which forms part or is intended to form part of a filing system (medical reports, medical files) - and automatic (information shared and stored in drives). The Regulation is therefore applicable.

The processing operation involves the processing of data relating to health, as the purpose is to recognise a disability and provide reasonable accommodation. 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 it is therefore subject to prior checking by the EDPS⁶.

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

3.2 Data retention

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.

As to the anonymisation of data for statistical and effectiveness monitoring purposes, the notification mentions four forms containing personal data⁷ but does not specify which personal data are intended to be further processed.

The Parliament should only keep those data (not the whole forms/requests) which are necessary for statistical and effectiveness monitoring purposes. The Parliament should adopt adequate safeguards to ensure that these data are not processed for other purposes or used in support of measures or decisions regarding any particular individual. The notification should be updated accordingly.

3.3 Right of access

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

⁶ 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.

⁷ "disability establishment requests; disability establishment decisions and their period of validity; reasonable accommodation requests; reasonable accommodation provided".

The EDPS reminds the Parliament that staff members should have full access to their medical file, but that due to the sensitivity of the data certain conditions may apply⁸. 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 (such limitation may be necessary to guarantee the protection of the staff members or the rights and freedoms of the medical officer or other doctors) and documented. A general refusal of access to the doctors' personal notes in the medical file is disproportionate and hence unjustifiable.

3.4 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 an individual 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 Parliament should therefore ensure that all staff members fully understand the meaning of the right of rectification regarding the processing of their personal data relating to health.

3.5 Information to be provided to the applicants

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to guarantee a fair and transparent processing of their personal data. In the present case, some of the data are collected directly from the data subject and other data from other persons (i.e doctors, members of the advisory committee, external doctors etc.) and therefore both Articles apply.

As to the content of the privacy statement, the Parliament should ensure that all staff members are aware of the conditions of access to their medical file as well as of any possible access limitations (point 3.2). Staff members should also be aware of how they may exercise their right of rectification regarding their data relating to health (point 3.3).

The Parliament should publish the updated privacy statement on the institution's intranet before the processing is launched and attach it to the request for reasonable accommodation form.

3.6 Security

Article 22 of the Regulation urges the controller to *"implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"* and to perform risk management (risk assessment and treatment). These security measures should in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

⁸ Conclusions 221/04 of Heads of Administration of 19 February 2004.

Technical measures

The notification does not provide a description of i) the list of authorised categories of officers who have access to the drives shared between the units involved in the procedure, ii) what information is logged in the drives, iii) what use is made of the logged information and iv) the process in place to review the access rights.

The Parliament should therefore develop, document and implement both access rights review and logging and inform the EDPS accordingly. This policy is important in order to allow the Parliament to control that throughout the procedure, only authorised officers are attributed access rights and only on a "need-to-know" basis.

Organisational measures

Due to the sensitive nature of the data processed, the EDPS recommends that all officers involved sign confidentiality declarations stating that they are subject to an obligation of professional secrecy equivalent to that of a health professional. These declarations will contribute in maintaining the confidentiality of personal data and in preventing any unauthorised access within the meaning of Article 22 of the Regulation. This is an example of the measures that the Parliament should take to promote a data protection culture among officers involved in the procedure.

4. Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation, provided that the following considerations are taken into account. In particular the Parliament should:

- specify in the notification and privacy notice which personal data may be further processed in anonymised form for statistical and monitoring effectiveness purposes (point 3.2);
- apply, where necessary, the conditions of access to the medical file, as stated in the Conclusions 221/04 of Heads of Administration of 19 February 2004 (point 3.3);
- guarantee the right of rectification of staff members regarding their health data (point 3.4);
- include in the privacy statement the information, as explained in point 3.5, and ensure that it is published on the institution's intranet before the processing is launched as well as attached to the request for reasonable accommodation form;
- develop, document and implement a policy on both access rights review and logging on the basis of the "need-to-know" principle (point 3.6);
- ensure that all officers involved sign confidentiality declarations mentioning that they are subject to an obligation of professional secrecy equivalent to that of a health professional (point 3.6).

In the context of the follow-up procedure, please send to the EDPS a revised version of the notification and privacy statement as well as a copy of the security policy and confidentiality declaration before the processing is launched, within a period of 3 months, to demonstrate that the Parliament has implemented the above EDPS recommendations.

Done at Brussels, 22 July 2015

(signed)

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