BOUTTEFROY Evelyne 0723/2006/WP

From: guido.strack@web.de on behalf of Guido Strack [guido.strack@web.de]
Sent: 10 December 2006 03:21
To: Euro-Ombudsman
Subject: Beschwerde 723/2006/WP
Attachments: 723_2006_WP_20061210.pdf; 06-11-30 Letter Strack 2006-0120 D-1303.pdf; EDPS_20061210.pdf

Sehr geehrter Herr Ombudsmann,

anbei sende ich Ihnen meine Anmerkungen zu den Anlagen Ihres Schreibens vom 30/11/2006.

Für eine kurze Eingangsbestätigung danke ich Ihnen schon jetzt.

Mit freundlichem Gruß

Guido Strack
Taunusstr. 29a
D-51105 Köln
Tel.: +49 221 169 2194

Guido Strack
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An den Europäischen Ombudsmann

Herrn P. Nikiforos Diamandouros

Via E-mail: euro-ombudsman@europarl.eu.int

Köln, 10.12.2006

Beschwerde: 723/2006/WP
Ihr Schreiben vom 30.11.2006

Sehr geehrter Herr Prof. Dr. Diamandouros,

Am 2.12.2006 habe ich Ihr Schreiben in o.g. Beschwerdesache vom 30.11.2006 erhalten, mit welchem Sie mir die Bemerkungen der Kommission vom 3.11.2006 bzw. 16.11.2006 mit zwei Anhängen zugeleitet haben. Hierfür darf ich mich zunächst herzlich bedanken. Die Gelegenheit Anmerkungen zu machen, nehme ich gerne wahr.

Verfahrenstechnisch möchte ich zunächst darauf hinweisen, dass die Kommission selbst die von Ihnen verlängerte Frist missachtet hat. Ich hoffe, dass Sie die Kommission auffordern werden, angesichts dieser versäumten Zeit das weitere Verfahren – möglichst im Gesamtzusammenhang auch mit der Beschwerde 3591/2006/WP – beschleunigt zu betreiben. Außerdem ist die Übersetzung ins Deutsche mangelhaft und hinsichtlich der Anlagen unvollständig.

Inhaltlich nehme ich zu den Bemerkungen der Kommission wie folgt Stellung:

Zu 2.1.:
Diese Aussage der Kommission ist zutreffend. Anzumerken ist, dass meine Personalakte nicht den Anforderungen von Artikel 26 des Beamtenstatuts entspricht, da insbesondere Informationen und Entscheidungen zur Beurteilung nur in Sysper II aber nicht in der Personalakte zu finden sind. Ich darf Sie bitten, auf eine entsprechende Ergänzung hinzuwirken, diese ist umso mehr geboten, als ich nach dem Ausscheiden aus dem aktiven Dienst keinen Zugang zu Sysper II mehr habe.

Zu 2.2.:
Diese Aussage ist m.E. bereits unvollständig, mein Antrag bezog sich nämlich auf alle Kranken- und Personalakten und ich habe explizit auch auf die Krankenversicherung (die sich ja nicht in der Berufsunfähigkeitsanerkennungsakte erschöpft) hingewiesen. Es ist davon auszugehen, dass beim PMO neben dem Dossier zu meinem Antrag auf Anerkennung einer Berufskrankheit vom 7.3.2005 noch weitere Akten bestehen. Diese sind mir aber trotz meines Antrages nie zugänglich gemacht worden.

Zu 2.3., 2.6. und 2.7.:
Hier ist zunächst anzumerken, dass die deutsche Übersetzung von Punkt 2.3. fehlerhaft und sinnentstellend ist. Ich gehe daher im Folgenden von der englischen Fassung aus, bitte aber in Zukunft Maßnahmen zur Qualitätssicherung zu ergreifen, um mir evtl. darauf zurückführbare Verkürzungen meiner Rechte bzw. Argumentationsmöglichkeiten zu ersparen.

Zu den Aussagen der Kommission unter 2.3. ist festzustellen, dass man mir am 2.3.2006 in der Tat eine Akte gezeigt hat. Mir wurde aber nicht nur wie die Kommission selbst vorträgt verboten Kopien von Aktenbestandteilen anzufertigen, sondern es wurde mir auch verboten Fotos von Aktenbestandteilen zu machen. Außerdem wurde mir verboten mir Notizen zu machen und mir wurde die Akte weggenommen als ich dies versuchte. Da die Kommission bisher niemals meinen diesbezüglichen Aussagen in Punkt 2 meiner Email an Herrn Pires vom 8.3.2006 widersprochen hat, gehe ich davon aus, dass auch Sie dies insoweit als die vollständigere Sachverhaltsdarstellung akzeptieren werden.

Gleiches muss auch für die Aussagen in Punkt 1 meiner o.g. Email gelten. Auch diese ignoriert die Kommission lediglich, widerspricht aber auch hier nicht. Ich meinerseits stimme der Kommission darin zu, dass *„the file was still under examination and no final decision had been taken"*. Dies widerspricht aber keineswegs meiner Aussage in jener Email: *"Insbesondere fehlte bei den mir vorgelegten Schriftstücken der Ihnen [PMO] bereits vorliegende Bericht von Dr. Helmer in der jetzigen Form"*.

Auch in Punkt 2.6. widerspricht die Kommission dieser meiner Aussage nicht, da sich die dortigen Aussagen nur auf den *„final report"* beziehen der unstreitig zu jenem Zeitpunkt noch nicht vorlag. Wohl aber der erste Bericht von Dr. Helmer. Und dieser hätte sich daher auch in meiner Akte finden müssen. Dabei kann es dahinstehen, ob die Kommission meine Rechte dadurch verletzt hat, dass sie den ihr zu jenem Zeitpunkt bereits vorliegenden Bericht erst gar nicht in meine Akte eingeordnet hat, oder aber dadurch, dass sie ihn vor meiner Akteneinsicht aus jener Akte wieder entfernt hat. Die Kommission hat jedenfalls – auf die eine oder die andere Art und Weise - mein Akten- (Art. 26/26a Statut), Dokumenten- (VO 1049/2001) und datenschutzrechtliches (VO 45/2001) Zugangsrecht verletzt.

Ihr besonderes Augenmerk möchte ich jedoch zunächst auf die Anlage zu Punkt 2.3. richten welche angeblich eine *„Zusammenfassung des Inhalts der Akte"* darstellt. Schon aus dieser Aufstellung ergibt sich nämlich, dass die Kommission mir nicht einmal die Einsicht in die volle Akte gewährt hat. Dazu reicht ein einfacher Vergleich dieser Liste mit jener Liste die der EDPS mir im parallelen Beschwerdeverfahren C2006-0120 und -0390 überlassen hat. Die entsprechenden Dokumente des EDPS füge ich in der Anlage bei.

Blatt 9 der mir dort vom EDPS überlassenen Dokumente nennt nämlich u.a. *„9bis Letter of PMO to AXA of 12 Oktober 2005 – Communication of the report from IDOC of 16 September 2005"* und die diesbezügliche Fußnote macht hierzu genauere Angaben: *„[2] This document was not listed/numbered by PMO. There are two Communications from IDOC to PMO: one of 16 September 2005, with the conclusions annexed and signed, and a second one, of 6 February 2006 (numbered by PMO as document 11), which makes reference to the previous communication and has an annex also called conclusions; those "conclusions" are not signed and are shorter, although with the same three conclusive paragraphs. The first communication and annex are the annexed documents to the letter of 12 October 2005 from PMO to AXA Belgium"*. Für mich kann ich sagen, dass, als ich die Akte eingesehen habe sich darin kein Brief vom 12.10.2005 an AXA und auch keine zwei IDOC Mitteilungen befanden.

Es gab mit Sicherheit in der mir vorgelegten Akte keinen *„full IDOC report"* wie er am Ende von Blatt 12 der PDF-Datei des EDPS beschrieben wird. Schließlich stellt der EDPS ja auch klar und unzweifelhaft fest: *„The complainant had access to all these documents, according to PMO, except document 9bis."*

Nunmehr geht die Kommission sogar noch einen Schritt weiter und verschweigt auch **Ihnen** gegenüber bewusst wahrheitswidrig die Existenz von Dokument 9bis, was aus meiner Sicht die Frage aufwirft inwieweit ich und vor allem auch Sie den sonstigen Angaben der Kommission noch vertrauen können.

Hinsichtlich der vorläufigen Stellungnahme von Dr. Helmer, deren Existenz mir ja vor meiner Akteneinsicht bereits telefonisch bestätigt worden war und die neben dem IDOC-Dossier den eigentlichen Grund für mich bildete nach Brüssel zu fahren, finden sich im EDPS Dokument, Blatt 3 der PDF-Datei im Schreiben von L. Promelle (PMO), folgende Aussage: *„Dr Helmer, one of the Commission's medical officers, has examined Mr Strack. Confidentially, I can add that Dr Helmer has drawn up a preliminary report but now wishes to seek the opinion of a medical expert (psychiatrist). This report was not shown to Mr Strack."* Dies bestätigt meine Darstellung des Sachverhalts in jedem Punkt. Auch hier hat die Kommission Ihnen gegenüber die Wahrheit zumindest umgangen.

Demnach steht auf der tatsächlichen Seite fest, dass sowohl der volle IDOC Bericht als auch die vorläufige Stellungnahme von Dr. Helmer beim PMO vor dem 2.3.2006 vorhanden waren, sich aber beide Dokumente nicht in der mir nur zum oberflächlichen Lesen zugänglich gemachten Akte befanden. Mit der rechtlichen Bewertung dieses Verhaltens werde ich mich noch gesondert beschäftigen.

Zu 2.4.:
Die Darstellung der Kommission entspricht den Tatsachen. Es ist anzumerken, dass mir trotz meines entsprechenden Wunsches bis auf ein kleineres Teildokument keine Kopien ausgehändigt wurden, weshalb ich mich bezüglich einiger anderer Dokumente mit Fotos zu behelfen versuchte. Diese, ohne Stativ gemachten, Fotos erwiesen sich in der Folge jedoch leider als Qualitativ nicht hinreichend um handschriftliche Notizen in einer fremden Sprache auswerten zu können, auch insoweit halte ich daher meinen Antrag auf Übersendung von Kopien aufrecht.

Zu 2.5.:
Es mag sein, dass die Kommission die in der Anlage beigefügte *„Conclusion 221/04"* anwendet, dies wirft aber mehr Fragen als Antworten auf, insbesondere welches die rechtliche Grundlage für einen derartigen Beschluss durch ein derartiges Gremium ist und ob er verfahrensmäßig ordnungsgemäß (z.B. unter Mitwirkung der Gewerkschaften) ergangen ist. Fraglich ist außerdem, ob dieser Beschluss mit höherrangigem Recht, insbesondere Artikel 255 EG-Vertrag, dem Grundrecht auf Informationelle Selbstbestimmung, dem Grundsatz der Menschenwürde, dem Grundsatz der guten Verwaltung, dem Beamtenstatut, der VO 45/2001 und der Verordnung 1049/2001 in Einklang steht. Im Ergebnis ist dies nicht der Fall so dass *„Conclusion 221/04"* nichtig bzw. zumindest unbeachtlich ist. Dies will ich abschließend, mit Blick vor allem auf Verordnung 1049/2001 kurz darstellen.

Ergänzend möchte ich Sie zuvor aber auch auf die Argumente in meiner beigefügten Beschwerde im EDPS Verfahren (dort mit Schwerpunkt auf Verordnung 45/2001) und die bereits früher gemachten rechtlichen Ausführungen hinweisen. Schließlich sind auch noch primärrechtliche Vorschriften, insbesondere die Artikel 1, 8, 20, 26, 41, 42 und 47 der EU-

Grundrechtscharta und die dahinter stehenden allgemeinen Rechtsgrundsätze der Rechtsordnungen der Mitgliedstaaten sowie Artikel 1, 6, 8 und 13 der EMRK zu beachten und bei der Auslegung des Sekundärrechts zu meinen Gunsten heranzuziehen.

Verordnung 1049/2001 besteht aus einem einfachen Regel-Ausnahme Prinzip. Die Regel ist der volle und uneingeschränkte Dokumentenzugang der gemäß Artikel 10 Absatz 1 erfolgt: *„je nach Wunsch des Antragstellers entweder durch Einsichtnahme vor Ort oder durch Bereitstellung einer Kopie, gegebenenfalls in elektronischer Form."* Ausnahmen sind nur dort zulässig wo sie vom Verordnungsgeber explizit normiert sind. Dass Artikel 4 Absatz 1 b) VO 1049/2001 nicht dazu verwendet werden kann dem Datendispositionsbefugten vor seinen eigenen Daten zu schützen ist offensichtlich und wurde an anderer Stelle bereits dargelegt. Ansonsten hat sich die Kommission und auch *„Conclusion 221/04"* aber nie auf irgendeinen anderen Ausnahmetatbestand der VO 1049/2001 berufen. Demnach ist der Zugang zu gewähren. Da ich Kopien verlangt habe, ist dies auch genau in dieser Form zu tun, da VO 1049/2001 insoweit keinerlei Raum für Abweichungen vom Wunsch des Antragsstellers lässt.

Demnach wäre eine andere Handhabung nur möglich wenn VO 1049/2001 nicht anwendbar wäre. Die Datenschutzregelungen der VO 45/2001 stehen hier aus den genannten Gründen meinem Zugang zu meinen Daten nicht entgegen, können also hier VO 1049/2001 weder einschränken noch verdrängen. Dies gilt auch für die Datenzugangsregelungen der VO 45/2001 die ja nur Mindeststandards festschreiben, weitergehende Datenzugangsregelungen aber keinesfalls beschneiden wollen.

Demnach könnten allenfalls noch Artikel 26a des Beamtenstatuts als speziellere Regelungen in Betracht kommen, dies hatte die Kommission schon zuvor zu Unrecht vorgetragen und ich hatte hierauf auch bereits erwidert. Ergänzend ist hierzu noch anzuführen, dass:

- der IDOC Bericht materiell kein medizinischer Bericht ist, also auch nicht unter Artikel 26a sondern schon unter Artikel 26 des Beamtenstatuts fällt.
- Artikel 26a selbst keine Einschränkungen enthält und auch keine Anhaltspunkte dafür bietet, dass EU-Beamte quasi als Bürger zweiter Klasse von den normalen Gemeinschaftsrechtsgewährleistungen der VO 45/2001 und der VO 1049/2001 ausgeschlossen werden können.
- Artikel 26a als sekundärrechtliche Norm die primärrechtliche Norm des Artikels 255 EG-Vertrag schon aus Normenhierarchischen gründen nicht verdrängen kann.

Was die Regelungen unter Nr. 1 – 3 der „Conclusion 221/04" angeht bleibt abschließend noch anzumerken, dass:

- Hinsichtliche Nr. 1, es dahinstehen kann ob es einen sachlichen Grund dafür geben mag, dass die medizinische Akte nur innerhalb der Institutionen und im Beisein eines Beauftragten eingesehen werden können soll, dass dies aber keineswegs dass Recht des Betroffenen auf die Herausgabe einer Kopie beschränkt, diese Recht vielmehr von dem Einleitungssatz *„bénéficiant d'un accés aussi large que possible"* nachgerade bestätigt wird.

- Hinsichtlich Nr. 3 keine Bedenken bestehen, dieser aber nur so weit reichen kann wie sich der Arzt als eigene Person einbringt und insoweit Datenschutz genießt, dies ist hier aber keineswegs Gegenstand des Verfahrens.

- Hinsichtlich Nr. 2 bestehen demgegenüber erhebliche rechtliche Bedenken. Geht man vom Grundsatz der Menschenwürde aus, so darf nämlich der Mensch und hier der Beamte nicht bloßes Objekt institutionellen Handelns werden. Solange er nicht entmündigt und geistig in der Lage ist seine Angelegenheiten selbst zu regeln ist ihm daher dieses Recht auch zuzuerkennen. Genau dieses Recht wird mir hier aber beschnitten. Es mag ganz besonders gelagerte Ausnahmefälle geben, in denen Beamten die Ergebnisse ihrer psychologischen Untersuchungen nicht mitgeteilt werden sollten weil damit eine unmittelbare Gefahr für deren Gesundheit einhergehen könnte, diese Ausnahmen dürfen aber nicht als Rechtfertigung einer entsprechenden Standardprozedur missbraucht werden. Da es hier um medizinische Dossiers geht die ohnehin nur in Gegenwart eines Mediziners offenbart werden sollen, kann diesem auch die Prüfung der Gefährdung im Einzelfall übertragen werden. In meinem Fall bestand eine solche Gefahr offensichtlich nicht, schon deshalb weil ich ja selbst zuvor etliche psychologische Gutachten offen bei PMO eingereicht hatte.

- Außerdem hat sich PMO hier ja selbst nicht einmal an die Regelung der *„Conclusion 221/04"* gehalten. Dort ist nämlich an keiner Stelle von einer möglichen Sonderbehandlung für Zwischenberichte die Rede (die an Dritte, nämlich an AXA ja auch weitergegeben wurden) und außerdem hätte PMO dann zumindest die Offenlegung der vollständigen Akte gegenüber meinem behandelnden Arzt am 2.3.2006 anbieten müssen – auch dies ist aber nicht geschehen. Ja selbst die für meinen Arzt bestimmte Anlage zur abschließenden Entscheidung vom 8.11.2006 enthielt diese Unterlagen nicht.

Im Ergebnis ist mir daher zu Unrecht der beantragte Dokumentenzugang verweigert worden, weshalb ich Sie bitten darf auf dessen umgehende Gewährung, durch Übersendung von Kopien, hinzuwirken.

Mit freundlichem Gruß

Guido Strack

Anlagen:
2 PDF Dateien mit Unterlagen zum EDPS-Verfahren (Entscheidung EDPS und Beschwerde)

EUROPEAN DATA
PROTECTION SUPERVISOR

JOAQUIN BAYO DELGADO
ASSISTANT SUPERVISOR

Mr Guido STRACK
Taunusstrasse 29a
D-51105 Köln

CONFIDENTIAL

Brussels, 30 November 2006
JBD/ktl/ D(2006) 1303 **C 2006-0120**

Dear Mr Strack,

Please find attached a copy of the decision of the EDPS on the second part of your complaint relating to the transfer of health related data to AXA Belgium.

The decision concludes that the disclosure of data concerning you by PMO to AXA Belgium was lawful and not excessive. However, PMO may have acted in breach of Articles 11 and 12 of Regulation 45/2001. It is also recommended to reconsider the granting of full access to a document containing the IDOC conclusions.

Furthermore, let me draw your attention to the fact that your request for access to documents in the case file has been granted in part to a larger extent (see annex A to the decision).

This letter and the attached decision have been marked confidential for your own protection. However, as explained before, this only aims at third parties and is not intended to limit you in any way.

A copy of the decision has been sent to PMO and the Data Protection Officer of the European Commission for their information.

Sincerely yours,

Joaquín BAYO DELGADO

Annexes :

- Decision
- Annex A - case file 2006-0120

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Offices: rue Montoyer 63
E-mail : edps@edps.europa.eu - Website: www.edps.europa.eu
Tel.: 02-283 19 00 - Fax : 02-283 19 50

Annex A – case file 2006-0120

Documents exchanged between EDPS and PMO (if made available)

02 June 2006 Letter PMO to Mr Bayo Delgado *(attached)*
27 July 2006 Letter Mr Bayo Delgado to PMO *(attached)*
18 Oct 2006 Letter PMO to Mr Hustinx with file *(only letter attached)*

→ Encl

JBD 22/6/06

EUROPEAN COMMISSION
OFFICE FOR THE ADMINISTRATION AND SETTLEMENT OF INDIVIDUAL ENTITLEMENTS

PMO.3 - Sickness and accident insurance

Brussels, 2nd June 2006
PMO.3/LP/ls D(2006) 13484

M. J. Bayo Delgado
European Data Protection
Supervisor
rue Montoyer 63
1047 Bruxelles

Subject: **Complaint of pens. n°134756 regarding to a denial of access to and the transfer of personnal data**

Dear Sir,

With reference to your letter of 15 May 2006 regarding the complaint lodged by Mr Guido Strack, please find below the responses to the questions which you posed to PMO.

Mr Strack visited our offices on 2 March 2006 and was shown the complete file held by PMO. He was not permitted to make photocopies (see below).

The file Mr Strack asked (and was given) access to, concerns his request under Article 73 of the Staff Regulations (recognition of occupational disease).

Dr Helmer, one of the Commission's medical officers, has examined Mr Strack. Confidentially, I can add that Dr Helmer has drawn up a preliminary report but now wishes to seek the opinion of a medical expert (psychiatrist). This report was not shown to Mr Strack as it has not yet been finalised. On 23 February 2006 Dr Helmer announced the name of the medical expert who will also examine Mr Strack. As soon as the expert's report has been received, Dr Helmer will finalise his report which will then be transmitted to Mr Strack via his doctor. It should be noted that transmission to a medical doctor, of the staff member's choice, is standard procedure when the report is of a sensitive nature. This is a general rule which is applicable to all staff members in such cases.

In view of the special nature of the files such as the one concerning Mr Strack, some limitation of the right of access (such as the restriction on making of photocopies) is necessary as long as the file is still under examination and no final decision has been taken. The medical experts must be able to come to a conclusion in all objectivity and neutrality. While we can be open concerning all procedural steps that are taken (e.g. forwarding of the application to the insurer, nomination of a medical expert), we cannot give out any substantial information concerning the expert's opinion before it is final. The

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
Office: Sc-27 03/56. Telephone: direct line (32-2) 2954451. Fax: (32-2) 2956639.

E-mail: ludovic.promelle@cec.eu.int

necessary checks and balances are in place to protect the official's interest, a.o. the possibility to have a second opinion from a medical doctor appointed by the official.

With regard to the transfer of personal data to the insurance company AXA, it should be remembered that the transfer of data to AXA is made within the framework of the contractual obligations of the agreement signed between the Commission in the name of the Institutions and the insurer AXA. This Contract comprises insurance to cover the risks of accident, occupational disease and death from natural causes of officials, temporary officials and contract staff of the institutions of the European Union and of the European University Institute in Florence.

AXA does the follow up of accidents and occupational diseases declared to the Administration. The transmission of data to AXA is necessary in order to respect our contractual obligations and this is done in accordance with the conditions and guarantees of professional secrecy established in the agreement.

In view of Mr Strack's request, AXA has received a copy of the request for recognition of occupational disease which we received from Mr Strack. This is the initial information which AXA needs as insurer. All subsequent documents will be dealt with in the usual way. AXA will therefore be in possession of the standard medical information which it requires in order to fulfil its contractual obligations.

Please note that the above-mentioned agreement was signed before Regulation (EC) No 45/2001 came into force. The new agreement which is in the process of being drawn up foresees that: "Any personal data included in the Contract shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. It shall be processed solely for the purposes of the performance, management and follow-up of the Contract by [entity acting as data controller] without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in conformity with Community law. The Contractor shall have the right of access to its personal data and the right to rectify any such data that is inaccurate or incomplete. Should the Contractor have any queries concerning the processing of its personal data, it shall address them to [entity acting as data controller]. The Contractor shall have right of recourse at any time to the European Data Protection Supervisor.]"

Please do not hesitate to contact me should you require further information.

Yours faithfully,

Ludovic PROMELLE
Head of Unit

Copy : Mrs. D. Deshayes – Director PMO

EUROPEAN DATA
PROTECTION SUPERVISOR

JOAQUIN BAYO DELGADO
ASSISTANT SUPERVISOR

Mr Ludovic PROMELLE
Head of Unit
The European Commission
(PMO)
BRU-SC27 03/056
B-1049 Brussels

STAFF MATTER

Brussels, 27 July 2006
JBD/ES/ktl/ D(2006)808 **C 2006-0120**

Dear Mr PROMELLE,

Thank you for your letter of 2 June 2006 in which you provided useful information about Mr Strack's complaint.

As I already explained in my letter, Mr Strack lodged a complaint with the EDPS on two grounds. First he complained that his request for access to his personal file and other documents containing his personal data had been denied with respect to some of the documents on file. Second, he also complained that his personal data have been unlawfully transferred to the private insurance company AXA, in violation of Article 10 of the Regulation No 45/2001.

"An official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them" - as provided in Article 26 of the Staff Regulations. Right of access is also foreseen in Article 13 of the Regulation (EC) No 45/2001. This right, however, can be limited if one of the conditions listed in Article 20 so requires.

The report about Mr Strack's state was still being prepared at the time when the PMO responded to EDPS' request for further information. Considering the sensitive nature of the case, the EDPS does not find the restriction of the complainant's right of access unlawful. The EDPS recognises that the restriction applied in accordance with Article 20 (1) (c) was justified on grounds that it aimed to protect the mental health of the data subject. We have answered the data subject bearing in mind the specificity of this restriction.

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Therefore regarding the first point of the complaint, the EDPS has closed its investigation and informed the complainant as follows:

> *The EDPS reviewed the legal position of the European Commission PMO and concluded that your personal data had been processed correctly. The European Commission PMO has confirmed the information included in your complaint that Dr. Helmer is preparing a medical certificate about your state. They added, however, that there is no final document available yet.*
>
> *The EDPS draws your attention to the standard procedure in similar cases: once the report is finalised, you should be provided access via your doctor without delay. We request the controller to inform you about the moment you can have access as soon as possible.*

As to the second point of the complaint, we require further information. Please provide the EDPS with an accurate list of categories of data, which have been transferred to the insurance company AXA.

Furthermore, we would appreciate if you could send us a copy of the contract signed between the Commission and the AXA - in English, if available.

I would appreciate receiving your reaction within six weeks after receipt of this letter. Should the sending prove impossible because of the summer holidays, please inform the EDPS as soon as possible and please also let us know the date when your answer will likely to be sent.

Finally, if any part of your comments should be regarded as confidential, please indicate this clearly and state the reasons therefore, so that these parts could be dealt with accordingly, where appropriate.

Best regards,

Joaquín BAYO DELGADO

Cc : Mr. Philippe RENAUDIERE, Data Protection Officer, European Commission

EUROPEAN COMMISSION
OFFICE FOR THE ADMINISTRATION AND SETTLEMENT OF INDIVIDUAL ENTITLEMENTS

PMO.3 - Sickness and accident insurance

Brussels, 18/10/2006
PMO.3/AV D(2006) 23028

M. P. Hustinx
European Data Protection
Supervisor
rue Montoyer 63
1047 Bruxelles

Subject: Complaint regarding denial of access to and transfer of personal data

Dear Sir,

Following your letter of 4 October 2006, you will find enclosed a copy of the file held on Mr Strack.

You will find in it a copy of the correspondance with different services concerning Mr Strack's request, a.o. with the firm AXA.

Mr Strack was only denied access to the intermediary medical report (marked red), this for the reasons stated in my previous letter. The final report was only registered at PMO on 28 September last. This will be communicated to Mr Strack shortly, via a medical doctor of his choice.

Yours sincerely,

Ludovic PROMELLE
Head of Unit

c.c.: Ms. D. Deshayes - Director PMO
Mr. P. Renaudiere

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.
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E-mail: ludovic.promelle@ec.europa.int

EUROPEAN DATA PROTECTION SUPERVISOR

CONFIDENTIAL

Decision on a complaint received from Mr. Guido Strack (case 2006-0120)

1. Proceedings

Mr. Guido Strack (hereafter "the complainant") lodged a complaint with the European Data Protection Supervisor (EDPS) on 9 March 2006 about the refusal by the Office for administration and payments of individual entitlements (PMO) of the European Commission to grant him full access to his personal data and about the transfer of his medical data to AXA Belgium.

After further clarification received from the complainant, the EDPS asked PMO by letter of 15 May 2006 to provide information on the complaint. After receiving on 20 June 2006 some information by letter of 2 June 2006, the EDPS requested further details from PMO by letter of 27 July 2006.

On 27 July 2006 a decision by the EDPS on the first part of the complaint was sent to the complainant and he was informed about the fact that an in-depth investigation was being carried out on the second part of his complaint. The complainant asked for a revision of this decision on 28 July 2006 and the decision on that revision was sent to him on 30 October 2006 (case 2006-0390).

On 22 September 2006 a letter of 7 September 2006 from PMO was received by the EDPS with a list of documents exchanged between PMO and AXA Belgium and a copy of the insurance contract between the European Communities and AXA Belgium.

On 4 October 2006 the complete content of the correspondence of PMO with AXA Belgium was asked for, and on 18 October the dossier was received by the EDPS.

2. Facts

The complainant has introduced a request before the Commission asking that the medical reasons that have led to his early retirement be recognized as professional sickness.

The second part of the complaint was expressed in these terms:

> *I learned that the PMO had leaked my personal medical data to the private insurance company AXA-Belgium. I had never agreed to such a data exchange nor do I see any legal norm allowing the PMO to do so. Consequently I told Mr. Pires that this is illegal but he was not at all willing to stop the data leakage as this seems to be the "normal" treatment at PMO, however even he could not name a legal norm permitting such a behaviour.*

The documents exchanged with AXA Belgium[1] are:
1. Letter of PMO to AXA of 9 March 2005 - Notification of the request entered by Mr. Strack, with a copy of the request in annex.
3. Letter of PMO to IDOC of 1 July 2005, with a copy of the dossier opened to process the request of Mr. Strack.
5. Letter of PMO to AXA of 4 July 2005 - Communication of information on the file transmitted to IDOC (doc. 3).
6. Letter from Dr. Jadot (Medical Service of the Commission) to PMO of 11 July 2005 - Information on Mr. Strack's request.
7. Letter of PMO to AXA of 28 July 2005 - Communication of the information received from Dr. Jadot (doc. 6)
8. Letter of AXA to PMO of 5 August 2005 - Confirmation of receipt of the request; no annexes.
9. Letter of AXA to PMO of 30 September 2005 - Second confirmation of receipt; no annexes.
9bis. Letter of PMO to AXA of 12 October 2005 - Communication of the report from IDOC of 16 September 2005[2].
10. Exchange of e-mails between AXA and PMO of November 2005 on the reference number to be used; no annexes.
11. Letter of IDOC to PMO of 6 February 2006 (see footnote 2).

The complainant has had access to all these documents, according to PMO, except document 9 bis.

The insurance contract (Convention 99/24/IX.D.1) of 28 January 2000 between the European Community, represented by the Commission, and AXA-Belgium has as object, among others,

> les conséquences pécuniaires des obligations statutaires que les Communautés assument du fait des accidents et maladies professionnelles dont seraient victimes les personnes auxquelles s'applique l'article 73 du Statut.

Its Articles 7 and 9 read, as regards aspects related to the present complaint, as follows:

> 7. SECRET PROFESSIONNEL
>
> Les assureurs et le médecin désigné par l'Institution s'engagent à garder le secret le plus absolu sur les renseignements dont ils pourraient avoir connaissance en exécution de la convention.

[1] Numbered as PMO has listed them. Only documents relevant in the context of communications between PMO and AXA Belgium are listed here. Additional description is done when needed.
[2] This document was not listed/numbered by PMO. There are two communications from IDOC to PMO: one of 16 September 2005, with the conclusions annexed and signed, and a second one, of 6 February 2006 (numbered by PMO as document 11), which makes reference to the previous communication and has an annex also called conclusions; those "conclusions" are not signed and are shorter, although with the same three conclusive paragraphs. The first communication and annex are the annexed documents to the letter of 12 October 2005 from PMO to AXA Belgium

9. PROCEDURES

9.1 Les autorités administratives compétentes des Communautés conviendront avec les assureurs des dispositions pratiques touchant les informations sur la survenance des accidents et maladies professionnelles ainsi que sur la gestion des dossiers afin de permettre aux assureurs de suivre l'évolution des cas et de leur faciliter l'exercice des recours contre le tiers responsable et l'établissement des réserves auxquelles ils sont tenus en vertu de la législation sur le contrôle des assurances.

9.2 Les autorités administratives compétentes des Communautés aviseront les assureurs de la survenance des accidents et maladies professionnelles dans le mois qui suit la date à laquelle elles en ont eu connaissance. Toutefois, les assureurs n'invoqueront pas la déchéance sauf cas de négligence grave dûment prouvée.

[...]

9.4 Le rapport du médecin désigné par l'Institution est communiqué préalablement pour avis aux assureurs.

[...]

b. Le médecin désigné par l'Institution transmet son avis simultanément à l'Institution et aux assureurs.

The complainant has had access to this contract.

In its answer to the Assistant EDPS of 2 June 2006, PMO adds:
Please note that the above-mentioned agreement was signed before Regulation (EC) No 45/2001 came into force. The new agreement which is in the process of being drawn up foresees that: "Any personal data included in the Contract shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. It shall be processed solely for the purposes of the performance, management and follow-up of the Contract by [entity acting as data controller] without prejudice to possible transmission to the bodies charged with a monitoring or inspection task in conformity with Community law. The Contractor shall have the right of access to its personal data and the right to rectify any such data that is inaccurate or incomplete. Should the Contractor have any queries concerning the processing of its personal data, it shall address them to [entity acting as data controller]. The Contractor shall have right of recourse at any time to the European Data Protection Supervisor.]"

3. Legal analysis

3.1. Preliminary aspects

According to Article 2 (a) of Regulation (EC) 45/2001, the data that have been communicated by PMO to AXA Belgium are 'personal data' relating to Mr. Strack. Making available those data is 'processing' as defined in Article 2 (b). PMO, as part of the European Commission, has acted in the framework of activities which fall within the scope of Community law. The data were made available from and are still part of a filing system. As the processing has been

done after the entering into force of Regulation (EC) 45/2001, that Regulation applies according its Article 3.

Furthermore, on the basis of Article 32(2) of the Regulation, the EDPS is competent to deal with the complaint.

3.2. Communication of data

The complainant objects against the fact that medical data relating to him have been made available to AXA Belgium. This raises different issues under Regulation (EC) 45/2001 which will be considered here.

Lawfulness of processing
Article 4(1)(a) states that "[p]ersonal data must be ... processed fairly and lawfully". Fairness is linked to the information to be given to data subjects and will be dealt with in that context (see paragraph 3.4).

Article 5(a) makes the processing lawful if it "is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities". Recital 27 specifies that "[p]rocessing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies". Employment issues are clearly within the management of the European Communities administration.

Institutions and bodies must take the necessary measures so as to minimize the financial impact of professional diseases. In that context, it is not unusual and in the public interest to enter into an agreement with an insurance company to guarantee in relevant cases that the financial burden of a professional disease of a staff member will be covered by the insurance company.

The common principles of the law of contracts, as resulting from common European practice, include the right of the insurance company to have enough information on the professional sickness to be able to exercise all rights and actions available to it. This is a consequence of the principle of proper defence of one's own rights. The inclusion of a provision to that effect in a contract between the Communities and the insurer is in accordance with that right. This also applies to Article 9 of the present insurance contract as quoted in paragraph 2.

As data concerning health are the object of the processing operation being analysed, Article 10 of the Regulation is also relevant. The prohibition of processing data concerning health established in its first paragraph can only be overcome if one of the other provisions of the same article applies. Article 10(2)(b) allows processing when it "is necessary for the purpose of complying with the specific rights and obligations of the 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...". Article 73 of the Staff Regulations, adopted on the basis of the Treaties, obliges the Community to insure staff members against occupational disease, and, as explained, the principle of sound administration makes it strongly advisable for the Communities to cover such risk through an insurance contract with a third entity.

Compatible use
The health related data collected from the complainant and other sources (medical service, IDOC) were collected for specified, explicit and legitimate purposes, and were further processed, i.e. disclosed to AXA Belgium, for fully compatible purposes. Processing the complainant's request that his disease be considered as a professional disease in order to benefit from the financial consequences of such recognition is fully in line with adequate steps to ensure payment by the insurance company. Article 4(1)(b) has therefore been respected, and Article 6 was not applicable.

Proportionality
According to Article 4(1)(c) "[p]ersonal data must be...adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed". Although the collection of data itself is not questioned by the complainant, after analysis of the information received, it seems to fulfill those requirements. The further disclosure to AXA Belgium must also be assessed against those requirements. One might ask if a selection of data could have served the purpose of assuring the insurance company the possibility to exercise its rights and duties under the contract. The answer must be negative because the complex decision of considering a psychiatric or psychological problem as professional sickness must take into account all elements. A selection of data would therefore not be appropriate.

Transfer of data
The transfer of personal data to AXA Belgium involved a recipient, other than a Community institution or body, subject to Directive 96/46/EC. Therefore, it also had to respect Article 8.

The necessity for AXA Belgium to receive the data has already been discussed. The insurance company is subject to Belgian legislation implementing the Directive. This means in particular that it is bound by professional secrecy and a strict limitation on the use of any personal data received to what is necessary for the performance of the insurance contract. This is also implicit in Article 7 of the present contract as quoted in paragraph 2. The new agreement mentioned in paragraph 2 will be more explicit on this subject. As a consequence, there is no reason to assume that the complainant's legitimate interests in continued protection of his personal data might be prejudiced as a result of the transfer.

Interim conclusion
The processing under consideration was therefore lawful, also in the absence of the data subject's explicit consent, and the complaint has to be rejected on that point. As this was the only aspect mentioned by the complainant, the analysis could stop here. Nevertheless, other aspects have to be considered *ex officio*.

3.3. Right of access

Article 13 of the Regulation gives data subjects the right to access their own data. This right, according to the information given by PMO, has been exercised by the complainant (either under Regulation 1049/2001 or under Article 13 of Regulation 45/2001) and it has been granted as concerns the 12 documents listed by PMO and (it is assumed) to their annexes. This access concerns all relevant documents and data exchanged between PMO and AXA Belgium, as it results from the information given by PMO, with the exception of document 9bis.

As concerns document 9bis, the letter itself is a formal one ("cover letter") but its annex (full IDOC report) contains health related data transferred from PMO to AXA Belgium. As there

are differences with the annex to document number 11, accessed by complainant (see footnote 2), only partial access has been granted. From the e-mail exchange between complainant and PMO (included in the dossier made available to the EDPS) it results that PMO has indeed decided that only partial access can be given to complainant, i.e. document 11 and its annex. The grounds for this decision are stated in the e-mail of 1 February 2006 from Mr. Mozzaglia (PMO.3) to the complainant; they are Article 8.2 of Council Regulation 1073/99, Article 4.3 of Council Regulation 1049/2001, and Article 2.2 of Annex IX of Staff Regulations.

Article 8.2 of Regulation 1073/99 applies to OLAF and not to IDOC. The EDPS has had occasion to analyse the right of access within investigations conducted by IDOC in his prior check opinion of 20 April 2005 (case 2004-187)[3]. In the present case the investigation done by IDOC is of a very special nature, namely the administrative enquiry foreseen in Article 16.2[4] of the "Common Rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease", implementing Article 73 of the Staff Regulations. In fact, Article 2.2 of the Commission Decision C(2004)1588 of 28 April 2004 on IDOC[5], foresees this type of investigations related to Article 73 of the Staff Regulations. This means that any legal provision limiting access has to be interpreted in this context, which is not aiming at finding out any wrongdoing of the public servant. Therefore, all formally applicable provisions have to be interpreted in line with the special nature of the enquiry. But, as a matter of fact, the right to full access to the final document of an investigation is granted in those provisions.

Article 2.2 of Annex IX of the Staff Regulations obliges to communicate the conclusions of the enquiry, meaning the entire concluding document (not only the last conclusive paragraphs). Furthermore, Article 3 of the IDOC Decision establishes a hearing of the concerned person pursuant to Article 3 of the Annex IX of the Staff Regulations, which foresees this hearing after an administrative enquiry[6]. This hearing has not been done by IDOC in the context of Article 73 of the Staff Regulations, because IDOC's enquiry is a stage of the procedure for recognition of professional disease and therefore it has a very special nature.

Any restriction to the right of access has therefore to be based either on Article 4 of Regulation 1049/2001, or on Article 20 of Regulation 45/2001, in the context of the processing operation for the recognition of the qualification of occupational disease as a whole, which is still taking place. Article 4 of Regulation 1049/2001 is also relevant for complainant's request for access to documents at the EDPS, and will therefore be discussed in that context (see paragraph 5).

As to Article 20 of Regulation 45/2001, the analysis of the deleted parts of the conclusions of IDOC do not appear to fall in any of the grounds of that article; it does not involve, indeed, the investigation of criminal offences (or wrongdoings in general), for the reasons explained, nor the protection of the data subject or the rights and freedoms of others. In any case, the lapsing of time has to be taken into account, as the grounds for restriction may disappear as the procedure advances.

[3] http://www.edps.europa.eu/legislation/Opinions_PC/05-04-20_Opinion_IDOC_EN.pdf
[4] Previously Article 17, in the "Common Rules" last amended on 18 July 1997.
[5] General implementing provisions on the conduct of administrative inquiries and disciplinary procedures
[6] And Article 13 of the Annex IX makes it mandatory the access to the complete file after completion of disciplinary investigations

3.4. Information

Fair processing of personal data - in cases such as the present one - means that all information prescribed in Articles 11 and 12 has to be provided to the data subject, except where he or she already has it. In the case under analysis both articles apply, as some data were received by PMO from the complainant and some came from other sources, before being transferred to AXA Belgium.

There is no evidence that the required information has been given to the complainant. The normal moment to fulfil the duty to inform would have been the confirmation of receipt given to the retired official about his request, as concerns both Article 11 and 12, as it was known from the beginning of the procedure that his personal data would be disclosed to the insurance company. No copy of that confirmation is in the file received by the EDPS, but the terms used in the complaint clearly imply that the complainant was not aware of the disclosure of information to an insurance company.

If this is indeed the case, PMO has failed to comply with its obligation to provide adequate information under Regulation 45/2001.

4. Prior checking

This complaint gives the occasion to mention that Article 27(2)(a) of Regulation 45/2001 subjects to prior checking any processing operation of data relating to health. Since PMO activities, and more specifically the insurance contract, are prior to the starting of activities of the EDPS and the policy for those cases has been to check those operations *a posteriori*, which has not yet been the case for PMO operations, PMO has to notify them, if not done yet, to the Commission's Data Protection Officer (DPO), so that he is in a position to notify the relevant cases for prior checking to the EDPS.

5. Request for access to documents at EDPS

A further decision has to be taken on complainant's request for access to documents exchanged between the EDPS and PMO. In this context, explicit reference is made to the decision of 30 October 2006 (page 2-3), since the considerations and standards used in that decision continue to apply.

At this stage of the procedure, dealing with the second part of the complaint, only document 9bis has to be excluded from access, since it is covered either by Article 4(2) of Regulation 1049/2001 or the confidentiality which is inherent in the role of the EDPS further to Article 20(4) of Regulation 45/2001. This obligation is expressed in Article 45 of Regulation 45/2001. Disclosing this document now would undermine the supervisory task of the EDPS. However, this in no way limits PMO in taking a new decision on a possible full access to this document and its annex.

Other relevant documents exchanged with PMO are attached, unless full access has been granted before (see annex A).

6. Conclusions

The preceding considerations lead to the following conclusions:

- The disclosure of health related data concerning the complainant by PMO to AXA Belgium was lawful and not excessive.

- If PMO has not provided information required in Articles 11 and 12 of Regulation 45/2001, this constitutes a breach of the Regulation.

- PMO is recommended to reconsider the granting of full access to document 9bis, containing the IDOC conclusions, taking into account the above considerations (see paragraph 3.3).

- The complainant's request for access to documents in the case file is granted in part to a larger extent (see paragraph 5 and annexed documents)

- PMO is requested to notify without delay any processing operation subject to prior checking, and specifically those processing health related data, to the DPO of the European Commission, so that he can notify them to the EDPS for prior checking.

As the complainant is a former official of the European Communities and the complaint has been lodged in that capacity, not only Articles 32 and 33 of Regulation 45/2001 apply but also Articles 90b and 90(2) of the Staff Regulations, and therefore, the complainant may ask for a revision by the EDPS of this decision within three months from the notification of the present decision.

As to the decision on access to documents in the case file, the complainant may ask for reconsideration. This should be done within 15 days after receiving this decision.

Brussels, 30 November 2006

Joaquín BAYO DELGADO
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Köln, .10.12.2006

European Data Protection Supervisor
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By Email to: edps@edps.europa.eu

Complaint according to article 90b, 90 (2) of the Statute of Officials
Request for reconsideration
EDPS letters D(2006)1303 (30/11/2006) and 1145 (30/10/2006) – C2006-0120 and -0390

Dear EDPS, dear Mr. Hustinx,

A. Admissibility of request and complaint:
Letter D(2006)1145 phrase two of the second bullet point on page 4 stated: *"A further decision will be taken when the second part of your initial complaint in case 2006-0120 has been with."* The issue was therefore still pending until reception of letter D (2006)1303 on 30th November 2006, which means that the 15 working day deadline for requesting reconsideration is still pending for the whole issue. This reconsideration request is therefore in time and legal. The same fits for the parallel complaint according to article 90b, 90 (2) of the statute.

B. Justification of request for reconsideration of my data access request:
The request for reconsideration is also justified, as I was and still am illegally not granted full and unlimited access to all personal data for which I requested access, thus constituting a breach of article 13 of Regulation 45/2001.

It is obvious that article 13 of Regulation 45/2001 is applicable and that it covers the full dossier at PMO, AXA and yours about my case. Apart from the parts of the dossiers which I got from you, the letters of PMO directly addressed and sent to me, including the first three Pages of its decision of 8/11/2006 (but not the closed envelope attached to that decision) for the rest of the dossier I have not been granted access in line with article 13 of Regulation 45/2001 (which is only one of the three legal bases under which I should have been granted this access, the others being Regulation 1049/2001 and article 26 of the Statute). The possibilities granted to me on 2/3/2006 in Brussels, i.e. looking through the *"cleaned"* file without having the right of taking notes or photos or requesting photocopies, were too limited to satisfy my rights. Please remember the statement in the letter of PMO of 2/6/2006 to you *"He was not permitted to make*

photocopies" is only half of the truth, I was also not permitted to take notes or photographs. That means the file access was more or less useless as I can not keep the wording of a whole file – with parts in different languages – in my head as such.

In the current case article 20 (1) was not invoked by PMO to justify their data access refusal. Neither did PMO fulfil the requirements of article 20 (3). Article 20 (5) is not applicable. Thus article 20 for purely formal reasons can not be used to limit my rights.

Also for material reasons article 20 is not applicable. The only clause which you refer to is article 20 (1)c. That would mean that the *"restriction constitutes a necessary measure to safeguard"* my protection. Concerning this clause the only relevant phrase in your letter of 30/10/2006 states: *"There is no reason to think that this would be inappropriate in your case"*. This phrase shows that you did not apply the correct legal standards. As article 20 is an exception of the rule of article 13 and the underlying principles of Regulation 45/2001 it needs to be interpreted narrowly and the one invoking it has the burden of proof concerning its conditions. For invoking article 20 (1)c the Commission would therefore have the burden to proof that in my concrete case (each case has to be handled separately – i.e. I can not be denied data access if in another case someone might be too sensitive so information about him might hurt him – and that is also why the Heads of Adminstrations Decision 221/04 of 19/2/2004 is illegal) denial of data access was necessary to protect my health. This is the only standard to be applied.

Applying that standard, one would have to ask this question separately for each single data within my PMO file. E.g. there is no indication that I could have been hurt by the purely administrative information part of the file, e.g. the IDOC investigation information. But even for the preliminary and the final version of the medical reports that criteria is not met nor proven. I was the one openly communicating all medical dossiers from my doctors to the Commission, the Commission therefore knew that I am fully aware of my medical status and the way doctors see it. Additionally there is no indication in any of the existing medical reports that I could be harmed by knowledge of my medical situation. If you consult the preliminary report of Dr. Helmer and he really did state something like that, the situation might be different, but you would have to tell me so and as long as you do not I conclude that there is no such warning. As far as harming my health is concerned, it is harmed, not by transparency but by the contempt of my rights by the Commission and PMO which is also illustrated by the medical certificate which I attach and of which PMO is also well aware. Please protect my health by assuring transparency and respect of my rights by ordering PMO and the Commission to give me full and unconditioned access to my file executing your rights under article 47 and 49 of Regulation 45/2001.

Because article 20 (1) of Regulation 45/2001 is not applicable, article 20 (4) is not applicable. If concerning Regulation 1049/2001 you want to invoke article 4 (2) of that regulation you would need not only to drop the name of the article but, according to the standards developed by the court, give sufficient reasoning allowing a legal analysis if that exception is invoked for valid reasons. Your letters do not meet that standard. Article 45 of Regulation 45/2001 is not applicable either as it has to be read stating that you have the obligation of professional secrecy provided that there is no legal rule providing an obligation for information. Here there are such rules. Concerning article 4 (3) of Regulation 1049/2001 you did not meet the standards of proof either as you did not explain how your decision making process could be endangered (especially not while this should be a danger even after the case has been closed).

Concerning your recommendation to PMO *"to provide access to the final version of the report by Dr. Helmer, and to reconsider whether there still is a sufficient need* [how could that still harm me if the final version does not? – why has it not been given to my doctor either?] *to restrict access to the preliminary version of that report"* this is a friendly gesture. However PMO has not respected it by sending the final report only in a closed envelope that I need to hand over to my doctor and by not even answering my additional request (see attached) as far as the preliminary version is concerned. Besides that I do not want grace but my rights to be respected.

From the above legal analysis it follows that the general practice of PMO not to inform officials concerned about the AXA involvement and not granting them full access to their medical file is just illegal (it might have been legal many years ago when the court backed it up, but with development of data protection and document access laws it is illegal now), except for individual cases in which doctors find specific limitations necessary to protect the health of the official concerned – it is your responsibility to stop that illegal behaviour.

C. Justification of my complaint and the illegality of the AXA related data processing:

C.1. Concerning the breach of article 11 and 12 and 27 of Regulation 45/2001:
You correctly came to the conclusion that PMO has violated articles 11 and 12 of Regulation 45/2001, however I need to complain about that part of your decision as it is limited just to the conclusion that a violation has taken place. Understanding the reason of existence of your institution correctly you are there to assure that violations of Regulation 45/2001 do not take place and are sanctioned properly. Therefore you have been granted the specific rights of articles 47 and 49 of Regulation 45/2001. But having these rights also constitutes the obligation of using them properly. In the concrete case the minimal activity of yours indicated by needs of data protection would have been not only to make a – correct – legal statement but to use the right of articles 47 (1)d) and f) warning PMO to respect the legal obligations and imposing a temporary ban on processing as long as they have not fulfilled that obligations vis a vis me (in my concrete case) but also vis a vis all other data subjects in similar situations. This should have also included issuing a clear obligation to PMO to notify all data subjects concerned about their rights under articles 11, 12 and (see above) 13 of Regulation 45/2001. That ban should also have been extended to assure prior checking by the Commissions DPO according to article 27 (2)a) of Regulation 45/2001.

C.2. Concerning the right of access (article 13 of Regulation 45/2001):
If I understand part 3.3. of your letter of 30/11/2006 correctly there is an IDOC report about my case of which the dossier (which I was allowed to look in once on 2/3/2006 without permission to take notes or copies) only contained a cover page (I remember that there were in fact only a few lines), while there exists a fully fledged report which has been handed over to AXA without informing me even about its existence. It is true that all this was done without my knowledge and that there was no hearing involving me at IDOC or PMO. You state that article 20 is not applicable for that part of the dossier. Grant me access to that part or at least order PMO to do just that? There is no reason (and no reasoning given) to believe that article 4 (2) of Regulation 1049/2001 could justify denial of that document – especially after the PMO decision of 8/11/2006 closing that part of the procedure.

C.3. Respect of article 8 by transferring my data to AXA:
While I will later argue on the necessity for AXA to receive the data, I will firstly concentrate on the formal respect of the law. In fact there is reason to believe that the data subject's legitimate interests might be prejudiced.

This firstly is the case as article 7 of the current contract is not clear enough to assure compliance with Regulation 45/2001. This problem is not solved by the future event of a new contract as the problem has occurred in the past and is still ongoing at present. From my understanding the Commission – i.e. the institution proposing Regulation 45/2001 – could have implemented the necessary standard much earlier and had the obligation of implementing it when Regulation 45/2001 came into force. The Commission also had the possibility to request a respective modification of the current contract at that very moment which would have meant that by now necessary standards would have been assured.

Based on these arguments I kindly request you to temporarily ban all data exchange under the current contract until it has been amended accordingly. Normally that should not be a harsh sanction as AXA should have no reason to block such an amendment, if they would try, this would already give an important reason to believe that the data subject's legitimate interests might be prejudiced.

But this reason is there as is illustrated by the handling of my requests to AXA and by the *"Commission de la protection de la vie privee"* in Belgium. On 6/3/2006 I made the following request to the data protection officer at AXA-Belgium Mr. Fréderic Meur:

> *"I learned that AXA in the execution of a contract with the European Communities Health Care System got hold of my private data. I do not know any details, but on your side, Md. Daniela Fico might have been involved.*
> *I inform you that this data transfer was done without my consent and without any other legal basis. Executing my data-protection-rights I therefore request you:*
>
> *a) to send me a complete copy of all data related to me which you received from the European Communities Health Care System (or elsewhere) and of all communication between you and them on those issues;*
>
> *b) to fully erase the data mentioned under a) after sending me the copies and to avoid any future handling of personal data related to me without my explicit prior consent.*
>
> *To proof my identity I attach a copy of my Personalausweis."*

An answer to that request was provided to me in French, by Email and on 16/5/2006 stating:

> *"> Cher Monsieur Strack,*
> *>*
> *> Faisant suite à votre correspondance du 06/03/2006, et notre demande*
> *> de délai complémentaire nous avons recherché dans nos bases de données*
> *> toutes informations que nos traitements contiennent à votre sujet au*
> *> sein de notre compagnie.*
> *>*
> *> Vous voudrez bien excuser le délai pris à vous répondre, celui-ci*

> *étant notamment dû aux recherches fastidieuses réalisées dans nos*
> *services. A cet effet, nous n'avions relevé aucune souscription de*
> *contrat d'assurance de votre part ni de sinistre comme personne*
> *assurée ou tiers impliqué.*
>
> *Toutefois, nous avons pu relever, en notre qualité d'assureur de la*
> *Communautés européennes et pour laquelle nous réassurons*
> *contractuellement les conséquences pécuniaires des obligations*
> *statutaires que les Communautés assument du fait des accidents et*
> *maladies professionnelles dont seraient victimes les personnes*
> *auxquelles s'applique l'article 73 du Statut des fonctionnaires, un*
> *dossier à votre nom.*
>
> *Les Communautés nous ont adressé une déclaration de sinistre vous*
> *concernant.*
> *Celle-ci comprend les données nécessaires au traitement du dossier*
(nom, prénom,date de naissance, fonction, demande de reconnaissance de
maladie professionnelle).
> *En date du 05/08/2005 avec les réserves d'usage, notre département*
"accident du travail" a accusé réception de votre dossier à la Commision
en leur demandant de nous tenir informé de l'issue de la procédure
d'examen auprès du médecin agréé de l'AIPN en conformité avec les
obligations afférentes à l'article 73 du statut.
>
> *A ce jour, nous n'avons pas connaissance de l'avis médical prescrit*
> *par la procédure. De même, aucune procédure d'indemnisation n'est en*
> *cours. Nous ne pouvons en l'état actuel rendre compte quant à l'issue*
> *de ce dossier et maintenons toutes les réserves.*
>
> *Nous vous prions, cher Monsieur, d'agréer l'expression de nos*
> *salutations distinguées.*
>
> *Frédéric Meur*
> *AXA Belgium - Legal Department.*
> *Legal Manager*
> *Intern postal Code: 322 /895*
> *Tel. + 32.(0)2.678.60.24.*
> *Fax.* *.60.10.*
> *E-mail: frederic.meur@axa.be*
>"

It is obvious from the list contained in your letter of 30/11/2006 that AXA was just lying to me at that moment, thus denying me my legal rights and also proving the existence of an important reason to believe that the data subject's legitimate interests might be prejudiced. Therefore I would urge you to assure protection of my rights by requesting PMO and AXA to delete all data about me at AXA immediately.

To round up the picture of the effectiveness of the data protection my data has at AXA and in Belgium I also attach the non-result of my complaint to the Belgium data protection authorities. They obviously did not check if the AXA answer was true, neither provide sufficient arguments on the legitimacy of the data transfer to AXA.

Another question to be raised is if and how AXA assures that medical data is only *"processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy"* (according to article 10 (3) of Regulation 45/2001). Articles 7 and 9 of the contract with AXA refer only to *"l'Institution"* and not to AXA!

And even if there would be an obligation of AXA the above mentioned handling of my request should give more than enough reason to doubt that AXA respects it.

C.3. Lawfulness of data transfer to AXA:
The standards against which the lawfulness of the data transfer to AXA has to be measured are article 4, 5 and as far as medical data is concerned article 10 of Regulation 45/2001. You state that it is *"in the public interest to enter into an agreement with an insurance company"*. I doubt already this, as with the mass of people involved and the fact that the private insurance company will try to make profit out of the contract there is in fact no reason to believe that private insuring including contract handling costs will be cheaper than just paying the bills directly from the community accounts.

It has also to be taken into account that the rules of the Statute do not foresee such insuring and that therefore in the end the institutions are always fully liable vis a vis their staff. And this is already the second issue. Even if an insurance system is in general legal and permitted it can not at all lead to any, not even implicit, changes of the Statute of Officials and its implementing rules governing the whole system.

Article 73 of the statue and the implementing rules set up a clear procedure how PMO needs to handle a request for recognition of the job-relatedness of a sickness. According to its article 17 (2) there has to be a administrative investigation (which needs to be a proper one and was not in my case), here by IDOC. This rule also states what has to be done with its results: according to the last subparagraph they have to be given to the doctor(s) named by the institution for them to establish their position. Article 19 clearly states how the decision of the AIPN should be taken, i.e. by respecting article 21 and eventually article 23. From this it follows that despite providing them with the results of the administrative investigation nobody should have any influence on the pure medical decision of the doctor(s) and that those two elements should be the only ones influencing the AIPN decision.

Looking into the AXA contract however we learn that: *" 9.4. Le rapport du médecin désigné par l'Institution est communiqué préalablement pour avis aux assureurs."* And from the following paragraphs it becomes quit clear that without the positive *"avis"* of AXA the PMO will never recognise job relatedness and either prolong the procedure or put pressure on the doctor or exchange him to assure that an AXA conform result is achieved. This it how it works in general, in my case (explaining why Dr. Helmer did not stick to what he said to me when I saw him) and this is how the Statute and its implementing provisions are constantly breached by PMO and the Commission.

You state:" *The common principle of the law of contracts, as resulting from common European practice, include the right of the insurance company to have enough information on the professional sickness to be able to exercise all rights and actions available to it. This is a consequence of the principle of proper defence of one's own rights. The inclusion of a provision to that effect in a contract between the Communities and the insurer is in accordance with that right. This also applies to Article 9 of the present insurance contract".*

Besides the last phrase you are perfectly right in general and from a civil law perspective of the insurer. But that is not really the question here. The real question is, has the Commission the right to engage into a contract with a clause like Nr. 9. The Commission being bound by the Statute and its implementing rules the answer is: No!

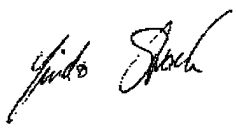
This is especially true as there would have been other ways to handle the problem. E.g. the Commission could have tried to make a call for tender with a draft contract not including such a phrase. As any insurance company may exercise its rights even by not exercising them they might have found a company signing a contract without such a clause. But there would have been even another possibility: The insurer could be informed that there is claim of an official which would not even need to mention other information but age and grade at that stage, thus allowing the insurer to calculate the risk. Then the Commission could go through all steps of its internal procedures according to Statute and implementing rules and come to a legally correct decision vis a vis the official. And finally it could grant the insurer the right to control that decision and to accept coverage or not. Eventually leading to a legal dispute between the Commission and the insurer about the coverage by the insurer but not at all giving the insurer any influence on the execution of internal Commission procedures of under European pubic law (as this is just done by the contract as it exists now).

When the Commission engages itself into contracts which allow breaches of the staff regulations, it can not invoke these contracts vis a vis its own officials to legitimize data transfers. Therefore the data transfer to AXA, at least as far as transfer of medical data before the end of the internal procedures is concerned can not be justified, but constitute breaches of articles 4, 5 and 10 of Regulation 45/2001.

I hope that you I have been able to convince you and that you now assure respect of law by issuing proper measures according to articles 47 and 49 of Regulation 45/2001.

While here I concentrated on the demonstrating reasons for the illegality of data access denial and data transfer under Regulation 45/2001 I would also like to point your attention to my attached statement in the parallel case at the European Ombudsman in which I concentrate on Regulation 1049/2001 thus leading to the same conclusions. In addition to these two pieces of secondary law one would also need to take into account the EU Charter of Fundamental Rights and especially its articles 1, 8, 20, 26, 41, 42 and 47 and the similar legal traditions of the member states, articles 5 (1), 255 of the EC-Treaty and also the European Convention on Human Rights (articles 1, 6, 8 and 13) all these pieces of primary law also support my arguments and need to be respected while interpreting and applying secondary law.

Best regards,



Guido Strack

Attachments:
Medical certificate of Dr. Wellerhoff (6/3/2006)
Email to Mr. Promelle of 23/11/2006
Letter to Mr. Meur of AXA (6/3/2006)
Email from Mr. Meur (21/5/2006)
Email from Francoise.Gilles@privacycommission.be (5/10/2006)
Email to the European Ombudsman concerning complaint 723/2005/WP (10/12/2006)