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.

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[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

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