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Köln, .10.12.2006

European Data Protection Supervisor
Rue Wiertz 60

B-1047 Brussels

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!

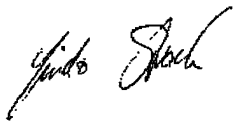
This is especially true as there would have been other ways to handle the problem. E.g. the Commission could have tried to make a call for tender with a draft contract not including such a phrase. As any insurance company may exercise its rights even by not exercising them they might have found a company 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)