

BOUTTEFROY Evelyne

From: Guido Strack [stracgu@googlemail.com]
Sent: 19 February 2008 08:21
To: Euro-Ombudsman
Subject: Neue Beschwerde gegen den EDPS

Follow Up Flag: PB (EB)
Flag Status: Blue

Attachments: A07_WG Your Decision promised for today or tomorrow - C2006-0120 2006-0390.msg; A06_AW Our letter 2005-0015 D-1584.msg; A01_Decision_20061030_Letter sent by regular mail.msg; A02_Request_20061210.pdf; A03_EDPS_Reply_20070227.jpg; A04_EDPS_Reply_20070508.jpg; A05_EDPS_Reply_20070724.jpg



A07_WG Your Decision promised... A06_AW Our letter A01_Decision_2006 A02_Request_2006 A03_EDPS_Reply_2 A04_EDPS_Reply_2 A05_EDPS_Reply_2
 Decision promised... 2005-0015 D... 1030_Letter s... 1210.pdf (54 K... 0070227.jpg (2... 0070508.jpg (2... 0070724.jpg (2...

Sehr geehrter Herr Ombudsmann,

leider sehe ich mich erneut gezwungen mich mit einer Beschwerde an Sie zu wenden. Diese richtet sich gegen den European Data Protection Supervisor (EDPS) und bezieht sich auf das Verfahren C2006-0390 und dessen Folgen, insbesondere:

1. Auf die Fehlerhaftigkeit der Entscheidung des EDPS C2006-0390 vom 30/10/2006 (Anlage A1).
2. Auf die bis heute, also innerhalb von mehr als 14 Monaten, ohne die Angabe sachlicher Gründe, insoweit nicht erfolgte Bescheidung meines Überprüfungsantrages an den EPDS vom 10.12.2006 (Anlage A2)
3. Auf die Art und Weise wie der EDPS mich hinsichtlich der Bescheidung meines Antrages vom 10.12.2006 immer wieder vertröstet und mit leeren Versprechungen hingehalten hat (Anlagen A3-A7)

zu 1.:

Wie in meinem Schreiben vom 10.12.2006 im Einzelnen dargelegt, ist diese Entscheidung als fehlerhaft und somit rechtswidrig anzusehen.

zu 2.:

Mit jenem Schreiben hatte ich den EDPS u.a. gebeten seine o.g. Entscheidung zu überprüfen. Der EDPS hat gegen die Grundsätze guter Verwaltungspraxis verstoßen, in dem er mir bis heute keine Entscheidung über diesen Antrag mitgeteilt hat. Insbesondere hat er es trotz unzähliger Nachfragen auch unterlassen mir nachvollziehbare Gründe zu nennen, warum er auch innerhalb von 14 Monaten keine Sachentscheidung getroffen hat.

zu 3.:

Ich habe im Laufe der letzten 14 Monate mehrfach beim EDPS hinsichtlich der ausstehenden Entscheidung nachgehakt und bin von ihm selbst und seinen Mitarbeitern immer wieder mit neuen Versprechungen, dass ich die Entscheidung bis zum Tage X bzw. Y erhalten werden, hingehalten und vertröstet worden. Anlässlich der mit meinen Nachfragen verbundenen sehr vielen Telefonate sind mir auch nicht unerhebliche Kosten entstanden. Zwar hat der EDPS sich zunächst noch jeweils für die Nichteinhaltung seines jeweils letzten Versprechens entschuldigt, zuletzt aber jede Reaktion auf meine Nachfragen eingestellt.

Die ersten schriftlichen Versprechungen des EDPS datieren vom vom 27.2.2007 (Anlage A3: Entscheidung "by mid April"), 8.5.2007 (Anlage A4: Entscheidung "within a few weeks") und 24.7.2007 (Anlage A5: Entscheidung "during the first weeks of September"). Sodann wurde mir telefonisch eine Entscheidung jeweils bis "Mitte Oktober", "noch im November" bzw. dann "jedenfalls noch vor den Weihnachtsferien" zugesagt. Letzteres durch Herrn Hustinx persönlich (Anlage A6). Unmittelbar vor Weihnachten 2007 rief mich Herr Hustinx dann erneut persönlich an und

teilte mir mit, dass sein Computersystem zusammengebrochen sei. Man hätte die Entscheidung in meiner Sache fertig, könne jetzt aber aus technischen Gründen nicht auf die Festplatte zugreifen. Ich würde die Entscheidung dann aber sicher spätestens am 8.1.2008 erhalten (Anlage A7). Am 9.1.2008 rief ich erneut im Bürodes EDPS an, dort sagte man mir die Computer würden wieder funktionieren, nur die Entscheidung habe ich bis heute nicht erhalten. Trotz weitere etwa 10 Anrufe und mehrerer Emails meinerseits habe ich seither keine Reaktion seitens des EDPS mehr erhalten.

Meines Erachtens stellt dieses Verhalten einen schweren Verstoß nicht nur gegen menschliche Umgangsformen sondern auch gegen jegliche Grundsätze auch nur annehmbaren Verwaltungsverhaltens dar, der angesichts seiner Dauer und Schwere auch nicht mehr mit einer erneuten flapsigen Entschuldigung abgetan werden kann. Das Verhalten des Herrn Hustinx ist m.E. der Funktion des EDPS, der sich ja als oberster Fürsprecher der Bürgerinnen und Bürger in den sensiblen Angelegenheiten des Datenschutzes verstehen sollte, schlicht unwürdig. Wenn Herr Hustinx eine Entscheidung in der Sache und den Konflikt mit der Kommission scheut, was aus meiner Sicht die einzig nachvollziehbare Erklärung seines Verhaltens ist, so ist er für sein Amt ungeeignet und sollte es dann aber wenigstens Unterlassen diejenigen die bei ihm Hilfe suchen durch derartiges Verhalten noch weiter zu demütigen..

Mit freundlichem Gruß

Guido Strack
Taunusstr. 29a
D-51105 Köln

Anlagen

BOUTTEFROY Evelyne

From: Guido Strack [guido.strack@web.de]
Sent: 08 January 2008 09:39
To: 'EDPS@edps.europa.eu'
Subject: WG: Your Decision promised for today or tomorrow - C2006-0120/2006-0390
Importance: High

Dear Mr. Hustinx, Dear EDPS,

I hope you had a good start into 2008, your IT is working again and I will finally receive your decision today.

Best regards,

Guido Strack

-----Ursprüngliche Nachricht-----

Von: Guido Strack [mailto:guido.strack@web.de]
Gesendet: Donnerstag, 20. Dezember 2007 09:15
An: 'EDPS@edps.europa.eu'
Betreff: Your Decision promised for today or tomorrow - C2006-0120/2006-0390
Wichtigkeit: Hoch

Dear Mr. Hustinx, Dear EDPS,

may I kindly request that you send me your decision – which you have promised me on the phone to be taken today or tomorrow - in addition to the normal paper way by email to this address.

Many thanks in advance and my best wishes for a merry Christmas and a happy New Year.

Guido Strack
Taunusstr. 29a
D-51105 Köln
Tel.: 0221 169 2194

BOUTTEFROY Evelyne

From: Guido Strack [guido.strack@web.de]
Sent: 31 October 2007 10:01
To: 'peter.hustinx@edps.europa.eu'
Subject: AW: Our letter 2005-0015 D-1584

Dear Mr. Hustinx,

so could I please get the letter by email today.

Best regards,

Guido Strack

-----Ursprüngliche Nachricht-----

Von: peter.hustinx@edps.europa.eu [mailto:peter.hustinx@edps.europa.eu]
Gesendet: Dienstag, 16. Oktober 2007 13:30
An: guido.strack@web.de
Betreff: RE: Our letter 2005-0015 D-1584

Dear Mr Strack,

The second letter will be ready within a few weeks, but in any case before the end of October.

Best regards,

Peter Hustinx

European Data Protection Supervisor (EDPS)
Contrôleur Européen de la Protection des Données (CEPD)
Mail: Rue Wiertz 60 - MO 63
B-1047 Brussels

Office: Rue Montoyer 63, 6th floor
Tel: + 32-2-2831900
Fax: + 32-2-2831950
Email: edps@edps.europa.eu
Website: www.edps.europa.eu

From: guido.strack@web.de [mailto:guido.strack@web.de]
Sent: 16 October 2007 08:37
To: European Data Protection Supervisor
Subject: AW: Our letter 2005-0015 D-1584
Importance: High

Dear Mr. Hustinx,

from our telephone conversation I understood that on 15/10/2007 I would get answers to both of my pending complaints. However yesterday I only got one reply.

Could you please also provide me with an answer concerning C2006-0120/2006-0390.

Best regards,

Guido Strack

-----Ursprüngliche Nachricht-----

Von: EDPS@edps.europa.eu [mailto:EDPS@edps.europa.eu]

Gesendet: Montag, 15. Oktober 2007 16:59

An: guido.strack@web.de

Betreff: Our letter 2005-0015 D-1584

Dear Mr Strack,

Please find attached a scanned version of a letter sent to you by regular mail today.

Best regards,

EDPS Secretariat

European Data Protection Supervisor

Contrôleur Européen de la protection des données

Postal address : rue Wiertz 60, Brussels B-1047

Office address: rue Montoyer 63, Brussels

+32-2-283.19.05(direct phone)

+32-2-283.19.50 (fax)

www.edps.europa.eu

BOUTTEFROY Evelyne

From: EDPS@edps.europa.eu on behalf of European Data Protection Supervisor
[EDPS@edps.europa.eu]
Sent: 30 October 2006 17:11
To: guido.strack@web.de
Subject: Letter sent by regular mail
Attachments: 06-10-30 Letter Strack 2006-0390 D-1145.PDF; 06-10-30 Annex A 2006-0390.PDF; 06-10-30 Annex B 2006-0390.PDF

Dear Mr Strack,

Attached please find a scanned version of a letter sent to you by regular mail today.

Best regards,

EDPS Secretariat
European Data Protection Supervisor
Contrôleur Européen de la protection des données

Postal address :rue Wiertz 60, Brussels B-1047
Office address: rue Montoyer 63, Brussels
+32-2-283.19.05(direct phone)
+32-2-283.19.50 (fax)

www.edps.europa.eu



EUROPEAN DATA
PROTECTION SUPERVISOR

PETER HUSTINX
SUPERVISOR

Mr Guido STRACK
Taunusstrasse 29a
D-51105 Köln

Brussels, 30 October 2006
PH/ab D(2006)1145 C 2006-0390

Dear Mr Strack,

I am writing, further to my letter of 13 October and email message of 27 October, to inform you about my decision as to your request for access to documents in our files, as submitted under point 5 of your letter of 28 July 2006.

Earlier than expected, I can now also inform you about my conclusion and decision as to your request for revision of 28 July 2006, under points 1 to 4, about the way in which the first part of your initial complaint of 9 March 2006 has been dealt with. This part of your initial complaint relates to the fact that you were not allowed access to certain documents relating to you at the European Commission PMO.

For practical purposes, I will first deal with your complaint, and subsequently with your request for access. However, let me also mention that the second part of your initial complaint is currently still under investigation. A conclusion as to this part of your complaint is likely to be reached by mid November. In any case, you will be informed about this conclusion as soon as possible.

1. Access to documents at PMO (first part of initial complaint)

As mentioned in my letter of 13 October, I have requested PMO to send me a copy of the full text of any documents – relevant in the context of your request for revision – to which you were not granted access.

It has become quite clear to me, that this part of your initial complaint is focussed on the medical report by Dr Helmer. At the time of your visit to PMO on 2 March 2006, this report was only available in a preliminary version and still waiting for input from a medical expert. Meanwhile, the report has been submitted in a final version. After a careful scrutiny of this final report, I have found no reason why you should not be allowed full access to it. Therefore, I will recommend to PMO to provide such access as soon as possible, and I have reasons to believe that PMO will follow this recommendation.

Postal address: rue Wiertz 60 - B-1047 Brussels

Offices: rue Montoyer 63

E-mail : cdps@cdps.europa.eu - Website: www.edps.europa.eu

Tel.: 02-283 19 00 - Fax : 02-283 19 50

As to the preliminary version, let me point out here that Article 13 of Regulation (EC) 45/2001 provides for a right of the data subject to have access to personal data relating to him. However, Article 20 of the Regulation also provides for restrictions of this right, if the conditions for such restrictions have been fulfilled. If a restriction is relied upon to deny access to the data subject, it is the task of the European Data Protection Supervisor (EDPS), according to Article 20 (4), to investigate, in full confidentiality, whether the relevant provisions have been respected.

Some of the conditions for imposing a restriction may also be relevant in situations, such as yours, where a medical report is being prepared about the question whether someone's physical or mental condition is related to professional circumstances, more specifically whether a certain condition qualifies for recognition as an occupational disease. This may in particular be the case if that report is available in a preliminary version, reflecting only a part of the work considered necessary to reach a conclusion on the issue.

It was against this particular background that our letter of 27 July 2006 mentioned that your personal data had been processed correctly. This letter did not contain a detailed analysis of the relevant provisions, because this was not felt relevant or appropriate at that time. However, circumstances have changed, and I will now also recommend to PMO to reconsider carefully whether there still is a sufficient need to restrict access to the preliminary version of the report.

Finally, it should be noted that transmission to a medical doctor, of the staff member's choice, is standard procedure at PMO when the report is of a sensitive nature. This is a general rule which is applicable to all staff members in such cases and which PMO intends to follow in your case as well, in accordance with Article 20(1)(c) of the Regulation, which provides for restrictions necessary to prevent undue harm of the data subject. There is no reason to think that this would be inappropriate in your case.

Let me also mention that Article 46 sub (a) of Regulation 45/2001 contains a duty for the EDPS to hear and investigate complaints, and to inform the data subject of the outcome within a reasonable period. Article 32(2) provides furthermore that in the absence of a response of the EDPS within six months, the complaint shall be deemed to have been rejected. This latter provision is designed to enable a complainant to take further steps, if a response within six months has not been given. However, the way in which your complaint of 9 March 2006 has been dealt with has remained well within these limits. This also applies to the second part of that complaint since you have been informed at regular intervals about its progress.

Your letter of 28 July also points at the fact that our letter of 27 July to you has been marked as confidential. This was only aiming at third parties and not intended to limit you in any way.

2. Request for access to documents at EDPS

As to your request for access to documents in our files, let me mention first that your reference to Article 255 of the EC Treaty and therefore implicitly also to Regulation 1049/2001, suggests that it should be considered as a request for *public* access under these provisions. If such a request relates to sensitive personal files, it is likely to meet certain restrictions, especially those designed to protect the privacy of individuals to whom these documents relate. However, if a request is made by a data subject and is designed to exercise his right of access under Article 13 of Regulation 45/2001, it should be considered

accordingly, unless special circumstances indicate otherwise. Therefore, I have decided to deal with your request in a way most favourable to your position.

Case 2006-0120

As to our case file relating to your complaint of 9 March 2006, we have distinguished three categories of documents:

a. documents exchanged between yourself and my office

These documents will not be made available to you, since they are already in your possession. A detailed list of these documents is laid down in annex A.

b. documents exchanged between my office and PMO

These documents are relevant for the investigation of your complaint. As to the first part of your complaint, some elements have been received under strict confidentiality. As to the second part of your complaint, the investigation is still ongoing. Most of these elements have been excluded from access, because they are 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 them would undermine the supervisory task of the EDPS. A further decision will be taken as soon as the second part of your complaint has been dealt with.

All other documents or relevant parts are attached and have been listed in annex A. In some cases you have had access to certain documents before. In such cases they have not been attached again.

c. documents for internal use within my office

These documents are excluded from access, because they are covered by Article 4(3) second paragraph of Regulation 1049/2001 or Article 45 of Regulation 45/2001. This relates to documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution. Disclosing them, either now or at a later stage, would seriously undermine the decision making process. However, please note that relevant elements have been included in the final versions of documents sent to you earlier or made available now.

Case 2005-0015

As to our case file on your complaint of 26 January 2005, we have distinguished two categories of documents:

a. documents exchanged between yourself and my office

These documents will not be made available to you, since they are already in your possession. A detailed list of these documents is laid down in annex B.

b. documents for internal use within my office

These documents are excluded for similar reasons as mentioned above. However, please note again that relevant elements have been included in the final versions of documents sent to you earlier.

Finally, it should be noted that a preliminary evaluation of your complaint in this case led to the conclusion that no further action should be taken. As you know, a copy of our letter of 19 May 2005 has been sent to the Data Protection Officers of the European Commission and OLAF for their information. Other documents have not been exchanged in this case.

3. Conclusions

The preceding considerations lead to the following conclusions and decisions:

- Your complaint of 28 July 2006, as to the first part of your initial complaint, is partially justified in view of present circumstances. PMO will be recommended to provide access to the final version of the report by Dr. Helmer, and to reconsider whether there still is a sufficient need to restrict access to the preliminary version of the report (see point 1).
- Your request for access to documents in case files 2006-0120 and 2005-0015 will be granted in part (see point 2 and annexed documents). A further decision will be taken when the second part of your initial complaint in case 2006-0120 has been dealt with.

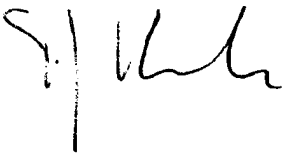
If you do not agree with these decisions, you could take the following actions.

As to the decision on your request for revision, you could ask the Court of First Instance to annul it. This should be done within two months after you received this decision.

As to the decision on your request for access to our case files, you could ask for reconsideration. This should be done within 15 working days of receiving this letter.

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

Sincerely yours,



Peter HUSTINX

Annex A – Case file 2006-0120

Documents exchanged between Mr Strack and EDPS (already available)

09 Mar 2006 Email Mr. Strack to EDPS sent at 08:09
06 Apr 2006 Email Mr. Szabó to Mr. Strack sent at 11:07
06 Apr 2006 Email Mr. Strack to Mr. Szabó sent at 17:31 with attachments
25 June 2006 Email Mr. Strack to Mr Szabó sent at 12:05 with attachments
27 June 2006 Email Mr. Szabó to Mr. Strack sent at 12:35
27 July 2006 Letter Mr Bayo Delgado to Mr Strack

Documents exchanged between EDPS and PMO (if made available)

15 May 2006 Letter Mr Bayo Delgado to Director PMO
02 June 2006 Letter PMO to Mr Bayo Delgado *
27 July 2006 Letter Mr Bayo Delgado to PMO *
07 Sep 2006 Letter PMO to Mr Bayo Delgado with annexes *
13 Sep 2006 Fax PMO to Mr Szabó
04 Oct 2006 Letter Mr Hustinx to PMO

* made available only partially

Annex B – Case file 2005-0015

Documents exchanged between Mr Strack and EDPS (already available)

26 Jan 2005 Letter Mr. Strack to EDPS with 7 annexes (EN/DE)
26 Jan 2005 Email Mr. Strack to EDPS sent at 08:35
16 Mar 2005 Letter Mr. Sjönell to Mr. Strack
19 May 2005 Letter Mr. Sjönell to Mr. Strack
20 May 2005 Email Mr. Strack to Mr. Sjonell sent at 21:40
23 May 2005 Email Mr. Sjönell to Mr. Strack sent at 08:52
23 May 2005 Email Mr. Strack to Mr. Sjönell sent at 11:52
23 May 2005 Email Mr. Sjönell to Mr. Strack sent at 14:47
23 May 2005 Email Mr. Strack to Mr. Sjönell sent at 16:46
27 May 2005 Letter Mr. Sjönell to Mr. Strack

Guido Strack
Taunusstrasse 29a
51105 Köln
guido.strack@web.de
Tel.: 0221 1692194

Guido Strack – Taunusstrasse 29a – 51105 Köln

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 prove 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 Administrations 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 (1d) 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 privée*" in Belgium. On 6/3/2006 I made the following request to the data protection officer at AXA-Belgium Mr. Frédéric 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'avons 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 Commission
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 statute 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!

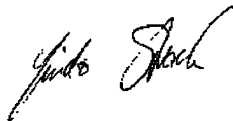
This is especially true as there would have been other ways to handle the problem. E.g. the Commission could have tried to make a call for tender with a draft contract not including such a phrase. As any insurance company may exercise its rights even by not exercising them they might have found a company 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 public 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 Françoise.Gilles@privacycommission.be (5/10/2006)

Email to the European Ombudsman concerning complaint 723/2005/WP (10/12/2006)



PETER HUSTINX
SUPERVISOR

Mr Guido STRACK
Taunusstrasse 29a
D-51105 Köln

Brussels, 27 February 2007
PH/ab D(2007) 307 C 2006-0120/2006-0390

Dear Mr Strack,

Further to your email of 15 February 2007, I want to inform you that the relevant documents are presently being considered.

I expect to be able to decide on your complaint and request for reconsideration by mid April.

Sincerely yours,

Peter HUSTINX



EUROPEAN DATA
PROTECTION SUPERVISOR

PETER HUSTINX
SUPERVISOR

Mr Guido STRACK
Taunusstrasse 29a
D-51105 Köln

Brussels, 8 May 2007
PH/ab D(2007)671 C 2006-0120/2006-0390

Dear Mr Strack,

Further to your recent inquiries, I want to confirm that you will be receiving a formal reply to your complaint and request for reconsideration within a few weeks.

In the light of this reply you will be able to decide about any further steps, if required.

Sincerely yours,

Peter HUSTINX



PETER HUSTINX
SUPERVISOR

Mr Guido STRACK
Taunusstrasse 29a
D-51105 Köln

Brussels, 24 July 2007
PH/ab D(2007)1205 C 2006-0120/2006-0390

Dear Mr Strack,

Further to your recent inquiry, I want to inform you that a formal reply to your complaint and request for reconsideration has unfortunately been delayed and will now be sent to you during the first weeks of September.

In the light of this reply you will be able to decide about further steps, if required.

Sincerely yours,

Peter HUSTINX