

Twelfth Meeting of European Labour Court Judges

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Protection of worker's privacy

Questionnaire

**General Reporter: Judge Pekka Orasmaa, President, Labour Court
Helsinki, Finland**

**National Reporter : Judge Pekka Orasmaa, President, Labour Court
Helsinki, Finland**

2. Legal framework

Please provide a brief description of the legal system governing the protection of worker's privacy in your country.

Is the issue covered by constitutional provisions/civil or labour laws/specific data protection laws/collective agreements/case law etc.?

The Act on the Protection of Privacy in Working Life (477/2001) entered into force on 1st October 2001. This special Act incorporates the main data protection issues relating to working life by creating procedures for the needs of working life in particular. The aim is to add to this Act provisions on data processing concerning the use of drugs, camera surveillance and the protection of employees' e-mail. A government bill on the matter is currently being considered by Parliament.

The Act on Protection of Privacy in Working Life supplements the Personal Data Act, which incorporates general provisions relating to data protection which are also applied as they stand in working life. In addition, there are a number of mutually complementary provisions associated with data protection in working life, such as fundamental rights, labour law, the law on civil servants, law on safety at work and criminal law.

3. Sensitive data

3.1 Is there a legal definition for the concept of sensitive data in your country? Does it cover all relevant aspects of data protection at work? (For more information please see the following website:

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31995L0046&model=guichett)

According to the Personal Data Act (§ 11) the processing of sensitive data is prohibited. Personal data are deemed to be sensitive, if they relate to or are intended to relate to

- race or ethnic origin,
- the social, political or religious affiliation or trade-union membership of a person,
- a criminal act, punishment or other criminal sanction,
- the state of health, illness or handicap of a person or the treatment or other comparable measures directed at the person,
- the sexual preferences or sex life of a person, or
- the social welfare needs of a person or the benefits, support or other social welfare assistance received by the person.

3.2. What are the general principles recognised in your legal system concerning the collection and processing of workers' personal data? Are the principles, laid down in the Directive 95/46/EC, transposed and applicable as such in the employment context (the principles of legitimacy, finality, transparency, proportionality, confidentiality and security, and control)?

All the principles mentioned above are recognised in the Finnish legal system and they are applicable in the employment context.

3.3. Is there an additional general requirement that the employer may only have access to workers' personal data if the information is relevant to the work tasks or the employer's functions? Please describe the content of this requirement.

An employer may process only personal data that are directly necessary as regards an employee's employment relationship, relating to the management of the rights and obligations of the parties to the employment relationship or the benefits provided to employees by the employer or which are due to the special nature of the work.

Data that are necessary as regards managing an employer's and employee's rights and obligations include, for example, data relating to the performance of tasks, selection of an employee, working conditions and compliance with the regulations in collective agreements. Data relating to the benefits provided by an employer can relate, for example, to swimming pool tickets and discounts provided by an employer and to the use of these. Data based on the special nature of work can relate, inter alia, to the family circumstances of an employee

who is to be transferred to assignments abroad whenever the employer is responsible for the education of the children or to pets in the home of a family day carer so that allergic children are not assigned to be cared by that family.

- 3.4. Does the above principle accept that, as an exception, the employer may collect and where appropriate disclose, sensitive personal data when such is justified on grounds such as national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?**

No exceptions can be made.

- 3.5 What is the role of the worker's consent as a justification for processing sensitive data? Can the worker lawfully give his or her consent in the individual employment contract?**

As mentioned in 3.4. no exceptions can be made, not even with the employee's consent.

- 3.6 Can the workers:**

- a) be granted access to all their personal data either processed by automated or electronic systems, or kept manually on file?**

As a rule, an employee is entitled notwithstanding the confidentiality rules to be allowed to know what data on him or her have been recorded in a personal data file. This refers to a file that is kept manually or by means of automatic data-processing. The Personal Data Act includes provisions which restrict this right to check, as follows:

- the provision of information might damage state security, defence or general order and safety or obstruct the prevention or investigation of crimes,
- the provision of information might result in a grave danger to the health or treatment of the registered person or to the rights of someone else,
- the personal data in the file are used solely for historical or scientific research or for the statistics, or
- the personal data in the file are used in monitoring and inspection tasks and the withholding of the data is necessary for safeguarding an important economic or financial interests of Finland or the European Union.

- b) be granted the right to obtain and examine a copy of any such data and the right to demand that incorrect or incomplete data be deleted or corrected?**

An employer shall without undue delay reserve the worker an opportunity to inspect the data on him/her or, upon request, provide a hard copy of the data. The data shall be given in an intelligible form.

An employer shall, on its own initiative or at the request of the worker, erase or supplement personal data contained in its personal data file and erroneous, unnecessary, incomplete or obsolete as regards the purpose of the processing. The employer shall also prevent the dissemination of such data, if this could compromise the protection of the privacy of the worker or his/her rights.

3.7 A list of typical items of sensitive data is given below.

- a) health or medical data;
- b) pregnancy;
- c) HIV/AIDS data;
- d) results of drug and alcohol tests;
- e) genetic data;
- f) psychological and personality tests, including graphological tests;
- g) religious belief;
- h) marital status;
- i) sexual orientation;
- j) political opinion;
- k) trade union membership, and
- i) data related to criminal conduct?

a) What are the specific rules, in force or under preparation in your country, concerning the processing of this data?

aa) The employer has the right to process information concerning an employee's state of health only if the information has been collected from the employee him/herself or elsewhere with the employee's written consent and is needed in order to pay sick pay or other comparable benefits, or to establish whether there is a justifiable reason for absence, or if the employee expressly wishes his ability to work to be assessed on the basis of information concerning his/her personal health.

In addition, the employer is entitled to process this information in the circumstances and to the extent separately provided elsewhere in the law. This mainly means legislation on safety at work and occupational health.

Information concerning the employee's health may only be processed by persons who prepare, make or implement decisions regarding employment relationships on the basis of such information.

ab) There are no specific rules.

ac) See aa).

ad) Concerning the new provisions on drug tests the starting point is that the job-applicant or employee himself would submit a certificate on a drug test to the employer. The duty to submit the certificate would mainly be an obligation related to the employment relationship.

- The employee would be obliged to submit a drug test certificate, when
- it is justified to suspect that he/she is subject to drugs at work or he/she is dependent on drugs,
 - the testing is necessary to clear the employee's capacity to work, and
 - he/she works in tasks which require special accuracy, reliability, independent judgement or good ability to respond.

A further requirement would be that the employee works in tasks, the performance of which subject to drugs or dependent on drugs would either severely endanger life or health or could cause some other significant damage. Interests to be protected include securing of life, health, work, communications, data and governmental interests, environmental interests, business and professional secrets as well as the property of the employer.

ae) The employer has no right to require the employee to take part in genetic testing during recruitment or during the employment relationship, and no right to know whether or not the employee has ever taken part in such testing.

af) A job-applicant or employee can be tested only if he/she gives his/her consent for this. Tests can be conducted if their purpose is to determine prerequisites for carrying out tasks or the need for training or other professional development. In accordance with the aforesaid, the results obtained by means of tests should be directly necessary as regards the employment relationship.

The results of the tests must be flawless. In order to secure this, the employer has the duty to ensure that tests are carried out using reliable testing methods, that the people conducting them are experts and that the data obtained with the testing are free of error. However, the employer has to take into account the testing method and its character.

The employer or tester must provide a job-applicant or employee with the written statement compiled in the personality and aptitude assessment upon request and without charge. If the statement has been given orally to the employer, it can also be given orally to the employee.

ag-ai) There are no specific rules.

- c) **Please also explain the conditions under which job-applicants may be required to provide the data or to undergo the tests based on these data. What are the consequences of their refusal to do so?**

The provisions applied to the employees can in general be applied, when applicable, to job-applicants, too.

The employer can ask for a certificate on a drug test, if it is the job-applicant's intention to work in tasks that require accuracy, reliability, independent judgement or good ability to respond. Additionally, it is required that the employee works in tasks, the performance of which, subject to drugs or dependent on drugs, would either endanger life or health or could cause other damage bigger than just insignificant. The interests to protect are in the situation of recruitment the same as during the employment relationship.

The provisions concerning the job-applicant do not oblige the employer to ask the applicant to submit a certificate, nor would the applicant be obliged to submit a certificate. The employer can, however, when choosing an employee, decide not to notice an applicant who is not willing to submit a certificate to the employer. The right to process data entered in the drug test certificate will only apply to a person chosen for the task.

3.8 Can a worker claim damages in the case where:

- a) **the employer has abusively or illegally stored or used data when it is not relevant to the job which a worker has applied for or for which he has been hired?**
- b) **the employer has illegally disclosed such data to third parties?**

The employer is liable to compensate for the economic and other loss suffered by the employee or another person because of processing of personal data in violation of the provisions of Personal Data Act.

If a worker can claim damages in the above-mentioned cases, what is the competent jurisdiction to hear and adjudicate such claims, and what remedies can that jurisdiction order?

The claims for damages are handled in courts of general jurisdiction.

4. Electronic surveillance and monitoring

4.1 Are there specific rules or provisions in force in your country, applicable to

monitoring telecommunication in the workplace? What is the role of case law in this respect?

The new Act on Data Protection in Electronic Communications will enter into force on 1 September 2004. The act will safeguard confidentiality and protection of privacy in electronic communications. It will clarify the rules of processing confidential identification and location data and provide new means to prevent spam and viruses. It is aimed to promote users' trust as well as information security and development of electronic services.

The rules and obligations related to the processing of identification data cover all enterprises and associations that process confidential data in their telecommunications networks. On the other hand, the employer as a user is entitled to receive, at request, a fully itemised phone bill from the operator as well as the identification data concerning his or her own communication, e.g. the location data of the mobile phone.

4.2. E-mail

a) Are there any circumstances in which an employer has the right to examine a worker's e-mail message? Is a worker's private message seen/treated in a different manner from a work-related message?

The aim of the provisions on e-mail messages is that the secrecy of the employee's confidential e-mail messages would not be endangered, and that necessary messages belonging to the employer could be accessible for the employer when the employee is prevented from attending his/her work. The regulation aims at separating clearly the employee's confidential messages from those belonging to the employer.

To examine and open messages sent to the employee or sent by him/her to the employer's organisation would be based on the consent of the employee. Yet, the employer would be provided with an opportunity of discovering messages belonging to his operations in situations where it would not be possible to get the consent of the employee and where the information concerned is necessary for securing the continuance of the employer's activities.

The employer has the right to find out whether e-mail messages have been sent to the employee when absent or whether the employee immediately before his absence has sent e-mail messages belonging to the employer, if the employer necessarily would have to get information for the finishing of negotiations related to his/her activities, for serving customers or for otherwise securing his functions. If it is obvious that the message belongs to the employer, it can also be opened.

b) Should an employer follow a certain procedure in the event where he/she wishes to examine the e-mailbox and e-mail messages sent to or by a worker?

The employer can examine and open the e-mail message only by means of a person using the authority of the main user of the data system. A written clarification has to be made on the examining the e-mail. This clarification must be submitted to the employee. A corresponding clarification shall also be made, if it is necessary to open the message.

c) What is the role of the worker's consent in these cases?

See 4.2.

4.3. Internet

In the event where the worker is allowed access to the Internet at the workplace, is the employer allowed to exert control over the worker to ensure that he/she follows the instructions and rules given by the employer? What are the methods for such control?

The questions concerning the use of Internet at workplace fall under the scope of Act on Data Protection in Electronic Communications. The identification data reveal, among other things, callers and senders and receivers of SMS messages, and the Internet pages the user has browsed. The user has the right to get the identification data concerning his/her communication from the telecommunications operator.

4.4. Camera surveillance

a) Are there any general rules in your country governing camera surveillance at work?

Provisions on camera surveillance include to the Act on Protection of Privacy in Working Life.

b) What are the preconditions for camera surveillance of workers in general and of an individual worker?

The employer is allowed to use camera surveillance in premises at his disposal, if the aim of the surveillance is the securing of the personal safety of the employees and other persons in the premises, protection of property or the surveillance of the adequate operations of production processes. Surveillance could also be used in cases of prevention or clarification of situations endangering safety, property or production processes.

Camera surveillance must not be used for the surveillance of a certain employee or certain employees at the workplace. Nor shall there be any camera surveillance in toilet, dressing room or staff rooms. It is also

prohibited in working rooms, which are designed for the personal use of the employees.

Camera surveillance is possible to focus on a certain place of work to prevent an obvious risk of violence related to the employee's work, inconvenience or danger to his safety or health or, if the surveillance is necessary for the prevention and clarification of offences toward property.

c) Do workers have to be informed of camera surveillance/location of cameras?

Yes. The camera surveillance has to be as open as possible.

d) Does the employer have to obtain permission from an outside body for secret camera supervision?

No.

4.5 Are there rules governing other forms of electronic surveillance (recording devices, control systems etc.)?

There are not any specific rules for employment relationships.

4.6 What are the consequences if the rules on electronic surveillance are violated?

Employer or employer's representative who deliberately or out of gross negligence violates the provisions on electronic surveillance, may be ordered to pay a fine for violating the Act on Data Protection in Working Life.

5. Surveillance outside the workplace

Can the employer monitor the worker's activities outside the workplace (for example to control absences from work for alleged sickness or accident)?

No.

6. **Collective guarantees**

Is there an obligation to inform/consult workers or their representatives when implementing, changing or withdrawing workplace rules or practices on processing personal data?

The purpose of technical monitoring, its introduction at the workplace and the methods employed in this kind of monitoring as well as the use of electronic mail and a data network are among the matters which must be considered in cooperation procedure.

In those companies and public corporations such as municipalities which the cooperation acts do not apply to, the employer should provide employees or their representatives with an opportunity to be heard before decision-making on corresponding matters.

Following the cooperation or hearing procedure, the employer must define both the purpose for which monitoring is to be used and the monitoring methods to be employed and the principles relating to the use of electronic mail and a data network. After this the employer must make sure that employees are notified of the content of the decision so that they are aware of the procedures and of the dates when these are to be introduced.