Insight into medical consultant assessments

Date: 18-11-2019

Decision

Private companies

The Danish Data Protection Agency has made a decision in a case where a citizen complained that his pension company refused to give him insight into a medical consultant assessment that had been prepared in connection with the processing of his case. In the case, the Danish Data Protection Agency found reason to express serious criticism and issue an order to the pension company.

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Summary

The Danish Data Protection Agency has made a decision in a case where a citizen complained that his pension company, Juristernes og Økonomernes Pensionskasse (JØP), refused to give him insight into a medical consultant assessment.

In the case in question, JØP had refused to provide insight into the medical consultant assessment in question, e.g. because it is a fixed business practice at the company that assessments are obtained from medical consultants for use in the company's internal processing of cases, and as it is a standard practice that these assessments are not shared with customers, as these are internal documents.

In its decision, the Danish Data Protection Agency included emphasis that, as an overriding general rule, access to personal data must be provided, and that a concrete assessment must always be made of whether access can be refused in accordance with the exemption rules. JØP could therefore not - as was the case in this case - generally cut off certain types of information from the right of access.

In the Data Inspectorate's view, JØP had not acted in accordance with Article 15 of the Data Protection Regulation on the right of access, which gave the Authority an opportunity to express serious criticism.

Against this background, the Danish Data Protection Agency issued an injunction to JØP to make a specific assessment of whether complaints can be given insight into personal information about complaints contained in the medical consultant assessment.

Decision

The Danish Data Protection Agency hereby returns to the case, where complainants on 4 February 2019 complained to the Authority about a response from the Lawyers 'and Economists' Pension Fund (hereinafter JØP) of his request for insight under the Data Protection Ordinance.

The Danish Data Protection Agency has understood the complainants' inquiry as a complaint about JØP´'s refusal of insight into documents prepared by JØP´'s medical consultant and correspondence between JØP and the medical consultant that has been included in the case processing regarding the award of invalidity pension to complainants.

The case has been discussed at a meeting of the Data Council.

1. Order

The Danish Data Protection Agency is of the opinion that JØP has not acted in accordance with Article 15 of the Data Protection Regulation [1].

The Danish Data Protection Agency therefore finds grounds for expressing serious criticism that JØP has not processed the complainant's request for access in accordance with Article 15.

The Danish Data Protection Agency must then issue an order to JØP to make a specific assessment of whether complaints can be given insight into personal information about complaints contained in the medical consultant assessment. The order is issued pursuant to Article 58 (1) of the Data Protection Regulation. 2, letter c.

The deadline for compliance with the order is 18 December 2019. The Danish Data Protection Agency must request no later than the same date to receive a confirmation that the order has been complied with, as well as a copy of JØP´'s reassessment of the question of insight and response to complaints.

According to the Data Protection Act [2] § 41, para. 2, no. 5, is punishable by a fine or imprisonment for up to 6 months for anyone who fails to comply with an order issued by the Danish Data Protection Agency pursuant to Article 58 (1) of the Data Protection Regulation. 2.

2. Case presentation

It appears from the case that complaints in connection with a request for insight did not receive a number of documents and internal correspondence between JØP and a medical consultant.

JØP has refused to provide complainants with insight into the medical consultant's statement.

2.1. JØP's remarks

JØP has generally stated that by letter of 6 December 2018, JØP has complied with the complainant's request for insight, however, so that a medical consultant assessment was exempted from insight. This medical consultant assessment has been included in JØP´'s decision basis to award the complainant a disability pension in accordance with his application.

The medical consultant's assessment has been made on the basis of material with which the complainants are fully aware, including specialist doctor's statements and supplementary health information which the complainants have submitted to JØP.

JØP has stated that the complainants have gained insight into all personal data that the insurance company processes about him, however, access to the medical consultant assessment has been denied.

JØP has stated that it is standard business practice at JØP - as is generally the case in the insurance and pension industry - that assessments are obtained from medical consultants for use in JØP's internal processing of cases. In this case, the medical consultant's task is to assess medical issues for use in JØP's decision on the case.

It is standard practice throughout the industry that the medical consultants' internal assessment and medical advice to the claims therapists is not shared with the customers to whom the assessments relate. In order to ensure adequate and professional claims handling, it is crucial that the claims handlers can obtain medical advice in confidence.

The need for confidentiality is due, among other things, to the fact that medical assessments naturally contain uncertainties and arguments for and against a result. The medical consultant's internal assessment must thus be equated with an internal legal note. On that basis, the medical consultant assessment is considered to be covered by the right to exempt internal assessments pursuant to section 22 (1) of the Data Protection Act. 1.

The confidentiality also ensures that in the interaction between the claims handler and the medical consultant, all relevant questions are asked, so that the entire case is uncovered. The confidentiality thus actually also takes place for the sake of complaints themselves.

The medical consultant assessment may also - in JØP's opinion - be exempted from the right of access for reasons of JØP's private interests, including consideration of JØP's business basis and business practice as well as the possibility of representing its interests in any disputes.

Finally, JØP states that these are trade secrets that can be exempted from the right of access under Article 15 (1) of the Data Protection Regulation. 4.

2.2. Complainant's remarks

Complainants have generally stated that complainants cannot recognize that there is a trade secret or a violation of the freedoms of others.

Complainants have further stated that JØP's refusal of access to the information in question means that complainants cannot verify the accuracy of the personal data that has been processed.

Furthermore, the complainants have stated that the medical consultant's statement is seen to have legal effect, as JØP has stated complaints that the medical consultant has assessed that complaints can not currently be granted a permanent disability pension.

2.3. Insurance & Pensions remarks

As an industry organization, Forsikring & Pension has, at the request of JØP, submitted a submission for use in the case.

Forsikring & Pension finds that this is a matter of principle for the insurance and pension industry.

Forsikring & Pension has confirmed that medical consultants' assessments are generally not shared with customers / victims. The assessments are intended to contribute to the company's decision basis, but are not in themselves conclusive.

Forsikring & Pension has stated that if it is not possible to secure a space for internal assessment, there is a risk that no statements will be obtained or that the statements will be incomplete because the doctors state knowing that insight can be given later. This could damage the policyholder's case.

Finally, Forsikring & Pension has stated that a further argument that these statements can be exempted under the Data Protection Act, section 22, subsection. 1, is the consideration of the policyholder himself. Medical assessments can contain a number of uncertainties and considerations, which can create misunderstandings and unnecessary concern for the policyholder.

The legal basis

3.1. The concept of personal data

The concept of personal data is defined in Article 4 (1) of the Data Protection Regulation as any information relating to an identified or identifiable natural person ('the data subject'). Identifiable natural person means a natural person who, on the basis of the information, can be directly or indirectly identified.

3.2. Right of access under Article 15 of the Data Protection Regulation

Article 15 of the Data Protection Regulation states that the data subject has the right to have the data controller's confirmation

of the processing of personal data concerning him or her and, where applicable, access to the personal data and the following information:

the purposes of the treatment

the affected categories of personal data

the recipients or categories of recipients to whom the personal data are or will be transferred, in particular recipients in third countries or international organizations for the intended period of time during which the personal data will be stored or, if this is not possible, the criteria used to determine this; period of time

the right to request the data controller to rectify or delete personal data or to restrict the processing of personal data concerning the data subject or to object to such processing;

the right to lodge a complaint with a supervisory authority

any information available on the origin of the personal data, if not collected from the data subject

the existence of automatic decisions, including profiling, as referred to in Article 22 (1); 1 and 4, and as a minimum meaningful information about the logic therein as well as the significance and the expected consequences of such processing for the data subject.

Preamble No 63 of the Data Protection Regulation states, inter alia: following:

“A data subject should have the right to access personal data collected about him or her and to exercise this right easily and at reasonable intervals in order to ascertain and check the legality of a processing. This includes data subjects' right of access to their health information, e.g. data in their medical records about diagnoses, examination results, medical assessments as well as any treatment and any procedure performed. […] This right should not infringe the rights or freedoms of others, including trade secrets or intellectual property rights, in particular the copyrights by which the programs are protected. […] ”

However, the right of access is limited by Article 15 (1) of the Regulation. 4, according to which the right to receive a copy of the personal data processed must not violate the rights and freedoms of others.

Furthermore, section 22 of the Data Protection Act contains restrictions on the right of access. The right of access is limited i.a. pursuant to section 22, subsection 1, according to which the right of access does not apply if the data subject's interest in the information is found to give way to decisive considerations of private interests, including the consideration of the person in question himself.

3.3. Case law of the European Court of Justice

In Joined Cases C-141/12 and C-372/12 YS and M and S v Minister for Immigration, Integration and Asylum ('Immigration'), the European Court of Justice has ruled, inter alia: stated that a legal analysis prepared in an internal administrative document with a caseworker's justification for the draft decision in connection with an asylum seeker's application for a residence permit is not personal data about the asylum seeker. The judgment states i.a. following:

”40. As the Advocate General essentially states in point 59 of his Opinion, and as stated by the Netherlands, Czech and French Governments, such a legal analysis does not constitute information about the applicant for a residence permit, but rather, in so far as: it is not limited to a purely abstract interpretation of the legal rules, information on the assessment of the competent authority and the application of these legal rules in relation to the applicant's situation, as this situation i.a. is determined on the basis of the personal data of the applicant's person available to the authority. […]

44. As regards the data subject's rights within the meaning of Directive 95/46, it should be noted that the protection of the fundamental right to respect for privacy, inter alia, implies that the data subject must be able to be assured that the personal data about the person in question are correct and legally processed. […]

45. Contrary to the information concerning an applicant for a residence permit contained in a statement, which may form the factual basis for the legal analysis of the statement, such an analysis - as the Netherlands and French Governments have stated - cannot is in itself subject to the applicant's verification of its correctness and to a correction pursuant to Article 12 (b) of Directive 95/46.

46. In those circumstances, an extension of the right of access for an applicant for a residence permit to include the legal analysis does not really serve the purpose of the Directive to ensure the protection of that applicant's right to privacy in the processing of information about the applicant, but the purpose to ensure the person's right of access to administrative documents, which, however, is not covered by Directive 95/46.

47. In a similar context as regards the processing of personal data by the institutions of the Union, which is governed by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data of the Community institutions and bodies and of the free movement of such data (OJ 2001 L 8, p. 1), and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding access to the European Parliament , Council and Commission documents (OJ 1994 L 145, p. 43), the Court

has already ruled in paragraph 49 of the judgment in Commission v Bavarian Lager (C-28/08 P, EU: C: 2010: 378) that these regulations have different that Regulation No 45/2001, unlike Regulation No 1049/2001, is not intended to ensure transparency in the decision-making process of public authorities and to promote good administration by facilitating the exercise of the right of access. That finding also applies to Directive 95/46, the purpose of which is essentially the same as that of Regulation No 45/2001.

48. It follows from all the foregoing considerations that the first and second questions in Case C-141/12 and the fifth question in Case C-372/12 must be answered by Article 2 (a) of Directive 95. / 46 must be interpreted as meaning that the information concerning an applicant for a residence permit contained in a statement and the information about the person concerned contained in the legal analysis of the statement, if any, constitute 'personal data' within the meaning of this provision, as the legal analysis, on the other hand, cannot in itself be qualified in the same way. "

In Case C-434/16 Peter Nowak v Data Protection Commissioner (hereinafter the Nowak case), the European Court of Justice has further ruled that a written answer given by a participant in connection with a professional test and any corrections and comments made by the examiner this answer is considered personal data. The judgment states i.a. following:

”34. The use of the term 'any kind of information' in the definition of the term 'personal data' in Article 2 (a) of Directive 95/46 reflects that the EU legislature intended to give this concept a broad meaning, as it is not limited to sensitive or private information, but potentially includes any kind of information, both objective and subjective in the form of opinions or judgments, provided that the information is 'about' the person concerned.

35. As regards the latter condition, it is fulfilled if, because of its content, purpose or effect, the information is linked to a particular person. […]

42. As regards the examiner's corrections and comments on the participant's answer, it should be noted that these, like the answer given by the participant in connection with the test, constitute information about this participant.

43. The content of these corrections and comments thus reflects the examiner's opinion or assessment of the participant's individual performance on the test and in particular of his knowledge and competence in the field in question. The corrections and comments are, moreover, precisely intended to document the examiner's evaluation of the participant's performance and may thus have effects on the latter, as stated in paragraph 39 of this judgment. […]

46. Contrary to the submissions of the Data Protection Supervisor and Ireland, the classification of the answer given by the

participant in a professional test and any corrections and comments made by the examiner on that answer as personal data are not affected by that fact. , that this classification in principle entitles the participant to access and rectify pursuant to Article 12 (a) and (b) of Directive 95/46. "

4. Justification for the Danish Data Protection Agency's decision on insight into medical consultant assessments

According to the information in the case, there is no agreement between the parties as to whether the complainants - in addition to the medical consultant assessments - have gained insight.

The Danish Data Protection Agency finds no basis for disregarding JØP's information that JØP does not process more information on complaints than the personal data that has already been provided with insight into and personal data contained in the medical consultant assessment in question in this case.

In this connection, the Danish Data Protection Agency notes that the Authority only processes cases on a written basis, and that the Authority therefore does not have the opportunity to carry out an actual investigation of the case. The final assessment of such evidentiary issues can be made by the courts, which in contrast to the Danish Data Protection Agency have the opportunity to shed more light on the matter, including by questioning witnesses.

4.1. Is this personal information?

The question of whether insight should be given into the medical consultant assessment initially depends on whether the assessment can be regarded as personal data.

Personal information is defined as any kind of information about an identified or identifiable natural person. There is thus no doubt that information about the pensioner, which appears from the underlying material, including specialist doctor's statements, patient records, etc., must be regarded as personal information.

The question then is whether the medical assessment made by a medical consultant on the basis of this material can also be regarded as personal data.

In the opinion of the Danish Data Protection Agency, a medical assessment differs from a legal analysis - as referred to in the Immigration case - in several respects. First, the medical assessment differs from the legal analysis in that the medical assessment in the present case will be based on personal data. A legal analysis, on the other hand, will not in the same way depend on personal information about a specific person, but will instead be based on a set of rules, preparatory work, case law, etc. with a view to subsuming the facts of the case in relation to the given legal basis.

Furthermore, a medical assessment is seen in itself to be able to lead to new personal information. The actual assessment of the medical material involves a new assessment of the person's health conditions and thus specific statements about the person's health conditions, which in itself must be regarded as personal data. Reference is made in this connection to the opinion of the Article 29 Working Party on Personal Data [3], according to which it is information about a person when the data relates to that person, and it appears that the results of a medical analysis are considered personal data.

The opinion of the Article 29 Working Party also states that, inter alia: will be personal data when there is a "purpose element", ie. when the information is used or can be expected to be used for the purpose of assessing a person, treating that person in a certain way or influencing that person's status or behavior. In line with this, it appears from the opinion of the European Court of Justice in the Nowak case that an examiner's corrections and comments constitute personal data about the person who wrote the answer. The content of the corrections and comments reflects the examiner's opinion or assessment of the person's performance. The corrections and comments are precisely intended to document the examiner's evaluation of the participant's performance.

Overall, the Danish Data Protection Agency is of the opinion that the content of a medical consultant assessment must in principle be regarded as personal data to the extent that it is information about an identified or identifiable natural person, cf. Article 4, no. 1.

The fact that the classification of the content of a medical consultant assessment as a personal data means that such an opinion will be covered by the Data Protection Regulation and the rights that follow from it have - as stated in p. 46 in the Nowak case - not in itself significant for the qualification.

4.2. Is the information covered by the right of access?

The Danish Data Protection Agency is of the opinion that it follows from the Data Protection Ordinance that, as a general rule, insight into personal data must be provided, and that a concrete assessment must always be made of whether access can be refused under the exemption rules. JØP can thus not - as is seen to have happened in the present case - generally cut off certain types of information from the right of access.

When the content of medical consultant assessments is classified as personal data, complainants are in principle entitled to access the personal data in the opinions under Article 15 of the Data Protection Regulation.

The Danish Data Protection Agency further refers to the fact that it follows from preamble recital no. 63 that the right of access

includes the right of access to health information, e.g. medical assessments.

4.2.1. Exemption under Article 15 (1) of the Data Protection Regulation 4

The right of access is limited i.a. of Article 15 (1) of the Data Protection Regulation 4, according to which the right of access must not violate the rights or freedoms of others. The rights or freedoms of others may include trade secrets.

JØP has not further explained why these are trade secrets and thus information that can be exempted from the right of access under Article 15 (1) of the Regulation. 4.

It is on the basis of the information provided by the Danish Data Protection Agency that the personal information that appears from the medical consultant's assessment from JØP's medical consultant cannot be considered to be business secrets, in particular because it has not been proven that the information has a commercial value or otherwise includes , what may otherwise be considered trade secrets. In this connection, the Danish Data Protection Agency has also emphasized that JØP itself has informed the Authority about its handling of claims, etc., including for what purposes and how opinions are obtained from medical consultants. Furthermore, according to the information, this is a fixed practice throughout the industry, which is why insight into these statements cannot, in the Authority's view, be regarded as constituting a trade secret.

Against this background, the Danish Data Protection Agency finds that JØP does not, with reference to Article 15 (1) of the Regulation. 4, may refuse to provide insight into personal information about complaints contained in medical consultant assessments.

4.2.2. Exemption pursuant to the Data Protection Act, section 22, subsection 1

Pursuant to the Data Protection Act, section 22, subsection 1, the right of access may be limited if the data subject's interest in the information is found to give way to decisive considerations of private interests, including consideration for the person himself.

According to this provision, JØP will, after a specific assessment, be able to refuse to provide insight into information if it will entail that the company's business basis, business practice or know-how will thereby suffer significant damage. Furthermore, after a specific assessment, it will be possible to refuse insight into internal assessments of whether the company on the basis of available information will enter into a contractual relationship, change an existing contractual relationship, set special conditions for continuation, possibly completely terminate a contractual relationship and similar cases. In the same way, depending on the circumstances, it will be possible to refuse insight into e.g. a memorandum assessing whether there is a

prospect of a particular lawsuit against a customer being won, or an internal memorandum in a case indicating possible evidence that a customer has attempted to engage in insurance fraud against an insurance company or attempted to evade the obligation pursuant to e.g. a loan contract. [4]

There must be "decisive considerations", which means that an exception can only be made from the right of access in cases where there is an imminent danger that the interests of private individuals will suffer significant damage.

It appears from the Register Committee's report no. 1345/1997 on the processing of personal data, p. 311, that it is recognized that private data controllers, like public data controllers, need to be able to protect internal decision-making processes to a certain extent. The right of access may be limited on the basis of the company's decisive interest in partly having the freedom to assess the conclusion of, among other things, contracts and existing customer relationships, and partly in preventing competitors from gaining information that is purely internal assessments or trade secrets. The Committee thus considered that it should be possible to limit the right of access if disclosure of information in the specific situation would entail an imminent risk of injury. On the other hand, the fact that there are internal assessments, etc., should not in itself justify a refusal of a request for access.

It is the Data Inspectorate's opinion that the personal information in the medical consultant assessment is in principle not internal information that can be exempted from insight pursuant to section 22 (1) of the Data Protection Act. 1.

Particular emphasis is placed on the fact that there are no such internal documents mentioned in the comments on the provision, which state that an exception can only be made from the right of access if there is an imminent danger that the interests of private individuals will suffer significant damage. Concrete statements about health conditions from medical consultants are not seen to be able to have a content that can entail such an imminent danger that private interests will suffer significant damage.

The fact that the statements can be withdrawn in connection with any complaints about or litigation against JØP is also not seen to mean that the personal information in the statements can be exempted from insight pursuant to section 22 (1) of the Act. Thus, it does not appear to be a memorandum in which it is assessed whether there is a prospect that a particular lawsuit against a customer can be won, just as it does not appear to be an internal memorandum in a case that points out possible signs that a customer has attempted to engage in insurance fraud against an insurance company or attempted to evade the obligation pursuant to e.g. a loan contract or any other matter of a similar nature. On the other hand, it is a contribution to the

decision basis for the overall assessment and thus for the decision that JØP makes on the award of invalidity pension.

In the opinion of the Danish Data Protection Agency, the need for confidentiality to create a freer framework for being able to ask questions to the medical consultant and for the medical consultant to express himself cannot in itself justify the personal data in the statements being exempted from insight.

The fact that JØP considers the medical consultant assessment as an internal document and as part of JØP's decision basis, for which confidentiality is sought, and that the statements could potentially be included in any subsequent disputes with pensioners, is not seen to be of such decisive importance under the Data Protection Act. § 22, para. 1, that the data subject's right to insight - and thus i.a. the possibility of checking the accuracy of personal data - can generally be overridden.

Finally, the consideration for the data subject himself is not seen to mean that the assessments can generally be exempted from the right of access. The consideration that the data subject gains insight into the information that is processed about the person in question, and thus knowledge of any misunderstandings or incorrect information, is generally seen to weigh more heavily.

It is noted that the Danish Data Protection Agency is of the opinion that the exceptions to the right of access are very narrow. In this connection, the Danish Data Protection Agency attaches particular importance to the fact that the right of access gives the data subject access to check the accuracy of personal data and the legality of the processing, and that this starting point can only be deviated from in exceptional cases.

Accordingly, the Danish Data Protection Agency is of the opinion that JØP has not acted in accordance with Article 15 of the Data Protection Regulation in dealing with the question of insight into the medical consultant assessment.

The Danish Data Protection Agency therefore finds grounds for expressing serious criticism that JØP has not processed the complainant's request for access in accordance with Article 15.

The Danish Data Protection Agency must then issue an order to JØP to make a specific assessment of whether complaints can be given insight into personal information about complaints contained in the medical consultant assessment. The order is issued pursuant to Article 58 (1) of the Data Protection Regulation. 2, letter c.

According to the Data Protection Act, section 41, subsection 2, no. 5, is punishable by a fine or imprisonment for up to 6 months for anyone who fails to comply with an order issued by the Danish Data Protection Agency pursuant to Article 58 (1) of the Data Protection Regulation. 2.

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC (General data protection regulation).

[2] Act No. 502 of 23 May 2018 on supplementary provisions to the Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Act).

[3] Article 29 Working Party Opinion No 4/2007 on the concept of personal data (WP136) of 20 June 2007

[4] Bill no. 68, FT 2017/18, comments on section 22 of the bill