

Some thoughts about Data Protection

Cognitive ability and personality tests, 10 October 2018

Are employers allowed to process the results of employees' cognitive ability and personality tests?

Cognitive ability tests could be defined as tests which measure how well an individual solves problems, plans, organizes, thinks abstractly and the like. Often, such tests are closely related to the candidate's intellectual capabilities which could be expressed by the candidate's IQ. Personality tests could be defined as tests that determine various aspects of the personality or the emotional status of the individual examined. Many employers use these tests in the hiring process, selecting job applicants with the required cognitive abilities and personality characteristics. Employers also use it for employee's personal development or the improvement the organization's performance.

It would be a problem for the industry, and probably as well as for many employers, if the processing of employee's results of cognitive ability tests and personality tests by employers would be impossible or would be restricted considerably under the General Data Protection Regulation ("GDPR").¹ This could be the case if the results of these tests would constitute the processing special categories of personal data. The processing of special categories is prohibited, except when one can rely on an exemption from the prohibition as laid down in article 9 and 10 of the GDPR (possibly in conjunction with member state law). I am not aware of a workable exemption for the processing of employee's results of cognitive ability and personality tests by an employer.² The Article 29 Working Party seemed to consider the processing of information about a person's intellectual and emotional capacity (such as IQ) as processing special categories of personal data.³

But health data (or all data pertaining to the health status of a data subject) is a much broader term than the term 'medical'. Based on the current Data Protection Directive, national legislators, judges and DPA's have concluded that information such as [...] data about a person's intellectual and emotional capacity (such as IQ) [...] are all data concerning the health of individual data subjects.⁴

The working party specifies the scope of the definition of health data by stressing that certain data elements separately should not always automatically be considered health data if not excessive in absolute terms and without additional information indicating as such.

¹ For the sake of clarity, this analysis would have been the same under the Directive 95/46/EC.

² The use of explicit consent as an exemption from the prohibition on processing special categories of personal data is problematic in an (potential) employer-employee relationship, considering the imbalance of power.

³ There is no reason to assume that the Article 29 Working Party's opinions are not relevant anymore, unless there is a clear change in the law, which indicates such. In the case at hand there are no such indications. The Article 29 Working Party has been succeeded by the European Data Protection Board since the introduction of the GDPR.

⁴ Annex to Letter of February 5, 2015 to the European Commission on health data, p. 2 (http://ec.europa.eu/justice/article-29/documentation/other-document/files/2015/20150205_letter_art29wp_ec_health_data_after_plenary_annex_en.pdf).

For example, a single registration of a person's weight, blood pressure or pulse/heart rate (if not excessive in absolute terms), at least without any further information about age or sex, does not allow for the inference of information about the actual or likely future health status of that person. However, that aspect measured over time, especially in combination with age and sex, may be used to determine a significant aspect of an individual's health, such as the health risks related to obesity or an illness causing a significant loss of weight, high/low blood pressure, arrhythmia etc.⁵

A person's weight or blood pressure which is within the normal range (not excessive in absolute terms) does not provide information about the actual, or likely future, health status of that person. In my opinion, the same could be said about IQ which is in the normal range. However, this is different in case the IQ is, for example, below 85, indicating a mental disability. Furthermore, the personality tests are designed to help an employer or employee to make a prediction of an (potential) employee's performance in a certain position. In general, personality tests are not sophisticated enough to recognize personality disorders, such as paranoid, schizoid or borderline personality disorder.

One could argue that, if the employer can reasonably demonstrate that the IQ of its (potential) employees which it asked to perform a cognitive ability test, is within the normal range, there is no reason to consider processing the results of these tests as processing health data. Additionally, if the employer can reasonably demonstrate – probably with the supplier's help – that the personality test cannot determine personality disorders, then processing of the results of these tests should not be considered processing health data.

Although the interpretation of the GDPR above seems reasonable as well as practical to me, I cannot rule out the possibility that in the future supervisory authorities or courts will find that the scope of health data should be interpreted broader.

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⁵ Ibid, p. 4.