



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the processing operations on personal data concerning "JRC-IRMM Childcare Facility (Crèche) in Geel".

Brussels, 23 May 2008 (Case 2008-152)

1. Proceedings

On 7 March 2008, the European Data Protection Supervisor (hereinafter "EDPS") received from the Data Protection Officer of the Commission (hereinafter "DPO") a prior check Notification regarding the "**JRC-IRMM Childcare Facility (Crèche) in Geel**" in accordance with Article 27(3) of Regulation No 45/2001.

In connection with this notification, questions were sent to the data controller by e-mail on 1 April 2008. The answers to these questions were received on 9 April 2008. On 14 May the procedure was suspended pending comments from the DPO. Comments were supplied on 21 May 2008.

2. Facts

The **purpose** of the Childcare Facility ("*crèche*") of the Institute for Reference Materials and Measurements ("*IRMM*") is to ensure that staff arriving in Geel, often far from their place of origin, have easy access to day-care facilities for young children. The purpose of the processing of personal data is to calculate the financial contribution to be paid by the parents of children enrolled at the Childcare Facility each month and to know whom to contact in case of an emergency.

The processing operation is used to collect the personal data of the parents and of the child(ren) enrolled in the *crèche* of the IRMM. It also contains information regarding persons to contact in case parents cannot collect the child(ren).

Moreover, a contract between a private *crèche* and IRMM exists. According to its Article I.9 entitled Data Protection "Any personal data included in the Contract shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data". The Contractor ('t Vaarhuis) is responsible for the daily management of the *crèche* and is controlled by IRMM and Kind & Gezin¹.

¹ Kind & Gezin is no external Contractor but it is a Flemish regional organisation that controls, inspects and supervises Flemish *crèches* and 'onthaalsoeders' (mothers who babysit other people's children). They also give instructions/advice about the food, hygiene and pedagogical material for children attending *crèches*

According to point 2.2 of the Rules of IRMM's day nursery ("*IRMM Rules*"), applications for admission must be accompanied by the following documents:

- Enrolment form containing useful information on the child's family;
- Agreement with the medical plan and internal regulations
- Child's birth certificate
- Parent's salary slips and/or tax assessment in the case of a self-employed parent.

Furthermore, point 2.3 states that "all the information given on the child's enrolment form shall be fed into a database and updated daily by the IRMM Crèche Secretariat". Other elements to be updated are for example: address, phone number, name of contact persons, the days that the child attends the crèche (full-time or part-time).

The database also contains financial information on the parents' salaries and the parental contribution to be paid on a monthly basis. The daily presences of the children enrolled at the crèche are registered in order to permit the calculation of the parental contribution.

Moreover, according to the notification, details and information given by the parent(s) are introduced in Excel format (kept on the shared Personnel drive, access limited to the members of the Personnel Office). A monthly list of amounts to be deducted from the salary is sent to the Paymaster's Office. The data are also used to have a clear overview of the child's data, especially with regards to the persons authorized to collect the child. Together with the enrolment form, the parents are asked to sign a document confirming that they agree with the medical assistance plan² of the crèche. If a child is absent for illness, the parent can ask for reimbursement as from the 6th working day of absence but this has to be accompanied by a medical certificate. These documents are kept in the individual file of the child.

The Medical Assistance Plan states that the crèche receives from the parents a completed information sheet for the child together with any specific information concerning the health of the child and that these sheets are kept in a central file at the crèche so that nursery nurses can consult them at any moment.

Specific procedures and processing operations relating to the crèches

To date, the crèche has not reached its full capacity. Therefore, there is no waiting list at the moment. The crèche accepts the enrolments when they are introduced and uses the date as a reference. Should the crèche look set to reach capacity, children shall be admitted in the following order of priority:

- Statutory staff and European School staff:

Priority 1: Children one of whose parents is an official (or other servant) of the Communities and has sole responsibility for them.

Priority 2: Children both of whose parents are officials (or other servants) of the Communities and share responsibility for them.

Priority 3: Children one of whose parents is an official (or other servant) of the Communities while the other (who is not an official) is:

and onthaalmoeders. Kind & Gezin make sure that the crèches and onthaalmoeders offer a certain quality standard

² The Medical Assistance Plan is under the responsibility of the Contractor and it explains to the parents what the procedures are in case there is an emergency or in case a child gets ill or has an accident. It also explains when an ill child could be refused in the crèche and what kind of medicines they have at the crèche (and what they are used for).

- (a) in employment,
- (b) following a full-time course of study³, or
- (c) actively seeking a job,

and both parents share responsibility for them. The fact of being registered with the *VDAB* shall serve as proof that an active attempt is being made to find a job.

Where (a), (b) or (c) applies, the necessary proof shall be supplied by the applicant.

Priority 4: Children one of whose parents is an official (or other servant) of the Communities while the other (who is not an official) is not in employment and both parents share responsibility for them.

- Non-statutory staff:⁴

Priority 5: Children one of whose parents works as a non-statutory staff member at IRMM and has sole responsibility for them.

Priority 6: Children one of whose parents works as a non-statutory staff member at IRMM while the other is also in employment and both parents share responsibility for them.

Priority 7: Children one of whose parents works as a non-statutory staff member at IRMM while the other is not in employment and both parents share responsibility for them.

The **data subjects** of the processing operation can be grouped into three categories: the parents, the child(ren) and the persons authorized to collect the child(ren) from the crèche. Parents can be IRMM staff within the meaning of Article 2(2) to 4 of Annex VII of the Staff Regulations, European School staff or staff from the Commission or other EU Institutions.

The **processed data** relate to information regarding the child enrolled at the crèche, the parents and the authorized persons to collect the children. The specific data required for each category are:

- Child: Name and first name, birth date, home address, nationality, daily presence at the crèche, hour of arrival and departure.
- Parents: Name and first name, home address, phone numbers (office, private and mobile), nationality, salary (the enrolment form also requests the personnel number to verify if indeed the information given is correct), marital status, personnel number, grade, number of dependent children, number of children enrolled at IRMM crèche.
- Contact persons: Name and first name, home address, phone numbers (office, private and mobile).

The **information** provided to the data subjects: A privacy statement of JRC-IRMM Childcare Facility (Crèche) in Geel contains the information on the purpose, legal basis, technical aspects, recipients, rights of data subjects, security aspects, conservation period, contact details, and recourse. This privacy statement is provided to the parents at the time of the enrolment.

The Crèche Internal Regulations are given to the parents prior to the enrolment together with Annexes to be signed (agreement with the Internal Regulations, Medical Plan). Moreover, in the contract with the Contractor, Article I.9 - Data Protection, information is given about the data protection regulation.

³ In the case of a course of study, the parent following the course must prove that the study programme comprises a minimum of 16 hours of classes per week.

⁴ Grant holders (visiting scientists, fellows) and END. Subject to availability.

The **rights of data subjects**: Parents have the right to consult the data relating to their child in the crèche Secretariat at any time (as stipulated in the Internal Regulations). Each year, in February, the parents are requested to complete an update form and accordingly modifications are made to the database. Moreover, upon parents' request, data can be blocked immediately.

An enrolment file (containing the following documents: enrolment form and Internal Regulations of IRMM crèche) is given to the parents (by email or by courier) and after completion the papers are kept in the child's file (stored in a closed cupboard at the Personnel Office) together with copies of evidencing documentation. A copy of the parent's agreement with the IRMM Crèche Internal Regulations (Annex VIII of the Regulations) is given to the Crèche Contractor (according to the rules of Kind & Gezin). Each month a presence list of children enrolled in the crèche is given to the Contractor.

The **recipients of the data** are the Payment master's Office, the IRMM financial department and the Crèche operator (external Contractor). For Commission personnel, an overview is sent, each month, per email to the Paymaster's Office to deduct the parental contributions from the parent's salary. For personnel of the European School and others, the amount of the parental contribution to recover is given to the IRMM financial department. The information is only transferred to OLAF or the Court of Auditors in case of an audit.

An information fiche, as required by Kind&Gezin is given to the external contractor upon arrival of the new child at the crèche. This information fiche contains information about the names and phone numbers of the parents, contact persons, family doctor and the child's paediatrician, together with any specific information concerning the health of the child. It also contains the food habits of the child, the sleeping habits, what the child likes or does not like to do and any other specific information that the parents want to tell to the Crèche. This document is kept at the crèche as this is a requirement of Kind&Gezin but JRC-IRMM does not have this information.

The parents send the reimbursement claim for refund together with the medical certificate to the Crèche Secretary if a child is ill for more than 5 working days. Each month, the Contractor provides the crèche contact person with the presence list for each child.

As regard the **storage and conservation** of data, the database is kept and completed by the Contact Person for the Crèche, on the shared drive to which only the members of the Personnel Office have access. Original documents are kept in the Personnel Office. The data (both financial and medical) are kept as long as the child is enrolled at the crèche. Once a child has left the crèche, the file goes to the archives and is kept for 5 years.

Security measures. The collected personal data are stored on the servers of JRC in accordance with the Commission Decision C (2006) 3602 of 17/08/2006 "concerning the security of information systems used by the European Commission" which defines IT security measures in force. Its Annex I defines the security requirements of EC Information Systems. Annex II defines the different actors and their responsibilities. Annex III defines the rules applicable to users.

3. Legal aspects

3.1. Prior checking

Regulation No 45/2001 applies to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all

or part of which fall within the scope of Community law (Article 3(1)). In the case in point, the data processing is carried out by the Commission and falls within the scope of Community law since it is part of activities under the first pillar.

The processing is both manual and automated, since the data being processed – the medical and administrative forms – are contained in a file. Furthermore, the processing operation forms part of a filing system or is intended to form part of a filing system. Article 3(2) is thus applicable in this case.

Accordingly, the processing falls within the scope of Regulation No 45/2001.

Article 27(1) of Regulation (EC) No 45/2001 makes "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes" subject to prior checking by the European Data Protection Supervisor. Article 27(2) contains a list of processing operations likely to present such risks, for example "*processing of data relating to health...*" (Article 27(2)(a)) or "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*" (Article 27(2)(b)). The controller states that the processing operation falls under article 27(2)(a) and 27(2)(b). As already mentioned, the purpose of the processing operation is to ensure that staff arriving in Geel, often far from their place of origin, have easy access to day-care facilities for young children. The purpose of the processing of personal data is to calculate the financial contribution to be paid each month by the parents of children enrolled at the Childcare Facility and to know whom to contact in case of an emergency. This processing is thus intended to use criteria to assess personal and family situations of parents and their children so as to include them in the benefit of admission (Article 27(2)(b)). Moreover, data relating to health and administrative data is collected in the context of assessing and selecting children admitted to the crèches and childcare facilities based on the criteria set out in section 2 of this opinion. This processing operation therefore falls within the scope of the prior checking procedure based on Article 27(2)(a) and (b) of the Regulation.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be implemented accordingly.

The notification from the Commission DPO was received on 7 March 2008. Under Article 27(4) of the Regulation, the EDPS should have delivered his opinion within two months. Pursuant to Article 27.4 of Regulation (EC) No 45/2001 due to information requests and to allow comments from the DPO on the EDPS Draft Opinion the procedure was suspended for 15 days (8 days of suspension + 7 for comments). The Opinion will therefore be adopted no later than 23 May 2008.

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation No 45/2001, which stipulates that the processing must be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution*".

The processing operation under examination involves the collection of administrative and medical data for the purpose of admitting children to a dedicated crèche with which JRC-IRMM has a contract. The operation is administered by the relevant Commission department (JRC-IRMM). The procedure relates to a task of the Commission carried out in the public interest in the field of employment law. Since the crèche reserves places for children of the staff of other Community institutions, the task must be regarded as coming within the framework of the JRC's cooperation with other institutions. The processing operation is therefore lawful.

Also, the forms collected for the processing operation must be duly completed, dated and signed by the parents. The processing operation is therefore also lawful under Articles 5(d) and 5(e) of the Regulation since the data subject – the parent(s) – has (have) unambiguously given his or her consent and since processing is necessary in order to protect the vital interests of the data subject – the children.

The legal basis for the processing operation is covered by the following:

- Statute of EC Officials, Art. 9
- Mission of COPAS (Comité Paritaire pour les Activités Sociales)
- Financial Regulation
- Crèche Internal Regulations
- Regulation of Kind&Gezin, (a Flemish organisation to control, inspect and supervise crèches).

In particular, the legal basis for the processing operations is the fourth subparagraph of Article 9(3) of the Staff Regulations, which stipulates that "*the Committee shall participate in the management and supervision of social welfare bodies set up by the institution in the interests of its staff. It may, with the consent of the institution, set up such welfare services.*"

The legal basis is therefore valid and supports the lawfulness of the processing operations.

With regard to the Flemish body (Kind&Gezin) which is allowed access to the enrolment lists on request so that it can check whether the administration carried out by the Commission JRC department complies with the health and safety and childcare quality requirements set out in the Flemish Government ministerial decree, there is no doubt that Belgian national law applies to the crèche run by the Commission. Admittedly, "*the Community shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Communities ...*". The Community institutions therefore enjoy special status in the Member States. However, the Protocol on privileges and immunities provides no general exemption from any legal obligations arising from national law. The Court of Justice has emphasised that the privileges and immunities accorded to the Communities by the Protocol "*have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities*". Since the application of the Flemish decree does not jeopardise the proper functioning of the Commission's administrative activity and since the supervision carried out by the body is needed to safeguard the vital interests of the children, it is reasonable that national law should be applied and observed by the Commission. It follows that the Flemish decree constitutes the legal basis for the occasional transfer of certain data (see the analysis of the transfer under section 3.6).

The legal basis is therefore valid and supports the lawfulness of the processing operation.

3.3. Processing of special categories of data

Under Article 10(1) of Regulation No 45/2001, the processing of personal data concerning health is prohibited unless grounds can be found in Article 10(2) and (3) of the Regulation. The present case relates to the processing of personal data on health.

Processing of medical data is justified in this case, because it is needed to ensure that the JRC-IRMM (Commission) complies with its specific obligations and rights in the field of employment law as provided for in Article 10(2)(b).

Since some of the data subjects – the children – are minors, Article 10(2)(c) applies in this case. That point covers cases where "*processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his or her consent*". In this case, the children are legally incapable of consenting to processing of their data (The crèche accepts children from the age of eight weeks until 15 September of the calendar year in which they reach the age of three). Accordingly, the parents' consent must be taken into consideration for processing which is necessary to protect the vital interests of the children.

As explained in the facts, an information fiche is processed by the crèche, which mentions, inter alia, certain data about the health status of the child. For this reason Article 10(3) of Regulation (EC) No 45/2001 on the processing of special categories of data applies in the case in point. It provides that "*Paragraph 1 (prohibition of the processing of data concerning health) shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy*". The EDPS therefore recommends, for the crèche, that the staff responsible for the information fiche containing medical data and, on account of their duties, the paediatricians, nurses, directors and nursery attendants of the medical service of the crèche be reminded that they are subject to the equivalent obligation of secrecy in order to ensure that Article 10(3) of the Regulation is duly complied with.

3.4. The controller and the processor

Pursuant to Article 2(d) of the Regulation, the controller is "*the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data*". The controller is responsible for ensuring that the obligations laid down in the Regulation are met (information to be given to the data subject, ensuring the rights of the data subject, choice of processor, notification of the data protection officer, etc.). The processor is the "*natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller*" (Article 2(e)).

In the case in point, JRC-IRMM has concluded a contract with a private crèche and the IRMM Rules are applicable.

Accordingly, as the private crèche is subject to the IRMM Rules, JRC should be considered to be the controller since it determines the purposes and means of collecting data relating to the data subjects in accordance with the IRMM Rules. The private crèche is a processor, since – on the basis of the contract concluded with JRC and of the IRMM Rules – it processes the data subjects' medical data collected on behalf of JRC, provided the collection and subsequent

processing of the data are necessary to comply with JRC's specific obligations and rights in the field of employment law as set out in Article 10(2)(b).

3.5. Data Quality

Article 4(1)(c) of the Regulation provides that personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed.

Even though children's files will always contain certain standard data, such as name and date of birth, the precise content of a file relating to health will quite obviously vary according to the case. However, there must be some guarantee that the principle of data quality is complied with.

The data described in the facts appear to be relevant and not excessive in relation to the purposes for which they are collected. The collection of data concerning the child's health is clearly important for the crèche so that the child can be properly monitored by the nurses in compliance with the purpose of the processing operation. In practice, there is no waiting list for the childcare facilities and all enrolments are accepted automatically. Accordingly, the EDPS does not regard collection of the medical form at the same time as the enrolment form to be excessive. However, if there is a waiting list in future, as provided for in the respective rules, it would be excessive to collect the medical form at the same time as the enrolment form as there would be no guarantee that all enrolments would be accepted and medical information would not be part of the admission criteria, as is the case for the crèches. It is therefore recommended that if there is a waiting list in the future, the medical form should only be collected once the child is admitted to the crèche.

The EDPS also wishes to emphasise the fact that data concerning the parent's marital status required in the enrolment form does not seem relevant to the purpose of the processing operation. It is important to note that family situation/marital status is part of a broader concept. The parents' marital status indicates whether they are single, married, separated, divorced or widowed. According to the priority criteria, the important elements to be considered for the admission of children to the crèche are first of all the single-parent/two-parent situation, followed by the employment situation of the parent(s). It follows that whether two officials are married or not, they will have the same priority as their marital status is not relevant to the list of criteria. For this reason the EDPS does not consider collection of data relating to marital status to be relevant to the priorities which determine the purpose of the processing operation. Admittedly, in certain cases, for example if a parent is divorced, documents concerning marital status inevitably need to be collected in order to determine the parental contribution. In most cases, however, there is no need to supply this type of document. The EDPS therefore recommends that instead of data concerning marital status, parents should be asked if the situation is a single-parent/two-parent situation (a single parent/both parents with responsibility for the child) or, at least, that parents be informed that the collection of data concerning their marital status is not relevant/necessary to the purpose of the processing operation.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing operation has already been discussed in section 3.2 of this opinion. As for fairness, this relates to the information which must be transmitted to the data subject (see section 3.10 below).

Article 4(1)(d) of the Regulation stipulates that "*data must be (...) accurate and, where necessary, kept up to date*". Furthermore, under that Article, "*every reasonable step must be*

taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified". As already underlined above, all the information given on the child's enrolment form shall be fed into a database and updated daily by the IRMM Crèche Secrétariat. Moreover, every year, in February, parents have to fill in an update form, and accordingly modifications are made to the database.

In addition, according to the Medical Assistance plan, parents are obliged to provide to the crèche with clear information concerning the health of their child and of any other family members.

Therefore, although it is not easy to guarantee or assess the accuracy of data fed into the database, the EDPS believes that every reasonable step has been taken to ensure that data are up-to-date and relevant.

The database is kept and completed by the Contact Person for the Crèche, on the shared drive to which only the members of the Personnel Office have access (it is saved there in case of emergency, illness, etc. If it is kept on a local drive of a certain person, others persons cannot have access to it). However, it is very important to ensure that a child's medical data are filed separately from administrative data. The EDPS therefore recommends that the medical form and all other medical data collected be filed separately from forms containing administrative data, and that all health-related data be updated by the personnel staff, who must be bound by an obligation of professional secrecy equivalent to that of a health professional.

Data subjects' right to access and rectify their data is a second means of ensuring that their data are accurate and up-to-date (see section 3.9 on the right of access).

3.6. Conservation of data/ Data retention

The general principle set out in Regulation No 45/2001 is that data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*" (Article 4(1)(e) of the Regulation).

As mentioned earlier, data concerning the enrolment file are kept for five years after the child has left. The reasons given relate to information on accidents, disputes regarding the parental contribution, legal proceedings and disputes regarding invoices for services provided.

The need to use data from a child's file cannot of course be predicted, given that recourse to legal proceedings and accreditation procedures may be lengthy. However, having regard to the purposes for which the data are collected (admission of children to the crèche) and subsequently processed (calculation of reimbursements and tax requirements), the EDPS regards the time-limit as excessive in view of the purpose of the operation and recommends that a shorter time-limit be adopted depending on the need for the data and files. A new time-limit that is proportionate to fulfilling the purpose of the processing operation must be adopted and data must be destroyed once a file has been closed and is no longer needed for the intended purpose. As in previous cases analysed, the EDPS suggests a one year time limit⁵.

⁵ It should be noted that the EDPS opinion of 8 December 2006 on "*Medical files – Parliament crèche and private crèches*", case 2006-0267/2006-0268, considered a one-year data-storage period to be justified for both administrative and medical data, see page 9 of the opinion.

3.7. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation No 45/2001. The processing covered by Article 7(1) concerns the transfer of personal data between or within Community institutions or bodies.

In the case in point, for Commission personnel, the data is transferred to the Paymaster's Office to deduct the parental contributions from the parent's salary. For personnel of the European School and others, the amount of the parental contribution to recover is given to the IRMM financial department, which are all JRC departments.

Data may also be transferred to other institutions, i.e. to the welfare departments of the other institutions for the allocation of annual enrolments, and to the Court of Auditors and OLAF for the purpose of fulfilling the contract, i.e. verification and checking of payments between the Commission and the company running the crèche, audit. The transfer therefore complies with Article 7(1) since the data collected are necessary for carrying out the processing and, furthermore, are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". The EDPS recommends that recipients within the Commission and in other institutions be reminded to process the data exclusively for the purposes for which they were transmitted.

Since the Flemish Community accreditation body Kind & Gezin and the contractor running the crèche for the Commission are external entities governed by Belgian law, they constitute recipients under national law, i.e. Belgian law adopted pursuant to Directive 95/46/EC. The data transfers in the processing operation will therefore be scrutinised under Article 8 of Regulation No 45/2001. This particular transfer is covered by Article 8(a) which states that transfer is possible "*if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". If data is transferred in the course of an inspection by an official of the Flemish Ministry, the transfer is justified insofar as it is necessary to enable the Flemish body to perform its task as a public authority. The need to transfer certain administrative data to the company running the crèche is also justified, as these transfers are necessary to enable the two companies to perform their task in the public interest. It is recommended, however, that the external recipient be reminded that it may only use the data in the strict and limited context of implementing the provisions of the Flemish decree and the contract respectively.

As regards the private crèche, medical data are collected directly by the private crèche so there is no transfer within the meaning of Article 8 of the Regulation

3.8. Processing of personal number or unique identifier

Article 10(6) of the Regulation provides that "*the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body*".

The staff number is collected and processed when the child's file is established and it is therefore necessary to apply Article 10(6). The use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal-data controller. Such use may, however, have significant consequences. This was why the

European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation, which makes provision for action by the EDPS. Here, it is not a case of establishing the conditions under which the Commission may process an identifying number, but rather of drawing attention to this point in the Regulation. In this instance, the Commission's use of the staff number is reasonable because it is a means of facilitating the processing task.

3.9. Right of access and rectification

Article 13 of Regulation No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to its source.

Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification. In addition to being given access to their personal data, data subjects may also have the data amended if necessary.

Parents have the right to consult the data relating to their child in the crèche Secretariat at any time. Moreover, the "Privacy Statement" relating to the JRC-IRMM Childcare Facility (Crèche) in Geel specifies that: "if you want to verify which personal data is stored on your behalf by the responsible controller, have it modified, corrected, deleted or blocked, please write an e-mail message to the functional mailbox address mentioned (...), explicitly specifying your request". However, third persons (contact persons) allowed to collect or bring the children enjoy similar rights. The EDPS recommends that the parents be instructed to inform these contact persons of their rights of access and rectification.

3.10. Information to be given to the data subject

Articles 11 and 12 of Regulation No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of mandatory and optional items. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subject and others from other persons.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on the information to be supplied to the data subject apply here insofar as parents supply the requisite information themselves by filling in the enrolment form as part of the procedure for having their children admitted to the crèche.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case because the data relating to the reliable persons who may be contacted in the event of an emergency are supplied to the crèche by the children's parents.

As mentioned earlier, a privacy statement is given to the parents at the moment of the enrolment. However, the EDPS would also like this privacy statement to also be published on the Intranet of the JRC.

The privacy statement indicates the identity of the controller, the purpose of the processing and its legal basis, the technical information, the data recipients, the existence of a right of access and rectification, security aspects, conservation period, contact details of the controller and the right to have recourse to the EDPS at any time.

The EDPS therefore welcomes the fact that the content of the privacy statement almost corresponds to both the mandatory and optional information referred to in Articles 11 and 12 of Regulation No 45/2001. However, the EDPS would like that the mandatory nature of the data be added in the privacy statement. Indeed, some information is necessary in order to complete the file and open the possibility to use the crèche. In addition, the EDPS recommends that the parents be instructed to inform the other persons authorised to collect the child about their rights under Article 12 of Regulation 45/2001.

3.11. Processing data on behalf of controllers

Where a processing operation is carried out on its behalf, Article 23 of Regulation No 45/2001 stipulates that the controller must choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by the Regulation. Performance of a processing operation by a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that the processor must act only on instructions from the controller and that the obligations with regard to confidentiality and security of personal data processing are also incumbent on the processor.

The EDPS therefore recommends that the contract between the processors (the private crèche) and the controller (JRC) should contain all the terms used in Article 23(2) of the Regulation, namely stating that the processor can act only on instructions from the controller and is also bound by the obligations set out in Articles 21 and 22 on security.

As mentioned earlier, the service contract concluded between JRC and the contracted company which runs the crèche on JRC's behalf contains a provision on data protection (Article I.9). The EDPS would welcome an extension of Article I.9 of the contract to refer to data transferred and processed as a consequence of performance of the contract in the context of the processing operation under examination. The EDPS emphasises, however, that the sentences of Article I.9 of the contract stating that the contractor (the company) has a right of access to and right to rectification in respect of personal data relating to him/her and that the contractor has the right to have recourse at any time to the European Data Protection Supervisor, are incorrect in terms of the processing operation in question, as Regulation No 45/2001 does not apply to legal entities. It is therefore recommended that these two sentences be removed and that the rights of data subjects in this processing operation be protected by means of a clause inserted into the contract.

Moreover, there is no security measure mentioned. The EDPS therefore considers that the provision on data protection (Article I.9 of the contract) needs to be reworded by including a reference to the data transferred and processed as part of the processing operation in question. Article I.9 of the contract also needs to be supplemented by a reference to the level of security adopted within the meaning of Article 23(2)(b) of the Regulation. Given that the processor is governed by Belgian law, it needs to be subject to the security obligations set out in national law, pursuant to the second indent of Article 17(3) of Directive 95/46/EC.

3.12. Security measures

In accordance with Article 22 of Regulation No 45/2001 on security of processing, "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*".

The EDPS considers that the full set of security measures taken to ensure maximum processing security are such that they can be regarded as adequate within the meaning of Article 22 of the Regulation.

Conclusion:

The proposed processing operation does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This implies, in particular, the following recommendations to the Commission:

- For the crèche, the staff responsible for the information fiche containing medical data should be reminded that they are subject to the equivalent obligation of secrecy in order to ensure that Article 10(3) of the Regulation is duly complied with.
- The EDPS recommends that if there is a waiting list in the future, the medical form should only be collected once the child is admitted to the crèche
- The EDPS recommends that instead of data concerning marital status, parents should be asked if the situation is a single-parent/two-parent situation (a single parent/both parents with responsibility for the child) or, at least, that parents be informed that the collection of data concerning their marital status is not relevant/necessary to the purpose of the processing operation.
- The EDPS recommends that the medical form and all other medical data collected be filed separately from forms containing administrative data, and that all health-related data be updated by the personnel staff, who must be bound by an obligation of professional secrecy equivalent to that of a health professional.
- A new time-limit that is proportionate to fulfilling the purpose of the processing operation must be adopted and data must be destroyed once a file has been closed and is no longer needed for the intended purpose.
- The EDPS recommends that recipients within the Commission and in other institutions be reminded to process the data exclusively for the purposes for which they were transmitted.
- The privacy statement should also be published on the Intranet of the JRC.
- The mandatory nature of the data requested should be added in the privacy statement.
- The EDPS recommends that the parents should be instructed to inform the other persons authorised to collect the child about their rights under Article 12, 13 and 14 of Regulation 45/2001;

- The EDPS recommends that the contract between the processors (the private crèche) and the controller (JRC) should contain all the terms used in Article 23(2) of the Regulation, namely stating that the processor can act only on instructions from the controller and is also bound by the obligations set out in Articles 21 and 22 on security.
- The EDPS recommends amending article I.9 of the contract between IRMM and the private crèche, as explained in the opinion and that the rights of data subjects in this processing operation should be protected by means of a clause inserted into the contract

Done at Brussels, 23 May 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor