



Mr Philippe RENAUDIÈRE
Data Protection Officer (DPO)
European Commission
BERL 12/350
1049 Brussels

Brussels, 09 January 2014
GB/XK/sn/D(2014)0031 C 2013-1229
Please use edps@edps.europa.eu for all
correspondence

Subject: Notification for prior-checking on the processing operation concerning "Individual vs. Peer rewards for increasing children's physical activity: A school based study" carried out by the JRC Institute for Health and Consumer Protection (IHCP), case 2013-1229

Dear Mr Renaudière,

Thank you for the notification you submitted to the EDPS on 5 November 2013 for prior-checking under Articles 27(2)(a) and 27(2)(b) of Regulation (EC) No 45/2001 (the Regulation) on a processing operation to be launched by the JRC Institute for Health and Consumer Protection (IHCP) in 2014. The processing operation concerns the conduction of studies related to the promotion of children's physical activity and collective behaviour at schools in the region of Varese, Italy.

On 22 and 25 November 2013 the EDPS asked for further clarifications and information about the processing and the JRC IHCP provided its replies on 29 November 2013.

After careful consideration of the notification, the privacy statement and the additional documents and information received, the EDPS considers that the processing under analysis should not be subject to prior checking. Please find our conclusions and recommendations as follows.

According to the notification, **the purpose** of the processing operation under analysis is to examine how different incentives schemes based either on individual or on others' performance could actually motivate children to increase their physical activity level. The study aims to evaluate the possibility of using the latest insights from the field of behavioural

Postal address: rue Wiertz 60 - B-1047 Brussels

Offices: rue Montoyer 30

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

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

economics namely "peer reward incentives" (PRI) for tackling the problem of childhood obesity.

The study is carried out on a voluntary basis and the children's parents and teachers are thoroughly informed by the privacy statement about the study. If parents wish to participate, they will need to fill in a questionnaire with the following information:

- gender of the child,
- nationality of the child,
- age in months (not precise date of birth) of the child,
- height (in cm) of the child at the beginning and at the end of the study, and
- weight (in kg) of the child at the beginning and at the end of the study.

Parents should not indicate the name of their child. Once they hand over the questionnaire to the teacher, the latter will add the code which corresponds to each child. The code will be unique and will correspond to only one name. Only the teacher will know the name. The JRC IHCP will know the codes but not the names.

Teachers will provide the children with codified accelerometers. JRC researchers will receive every week the accelerometers for a couple of hours and by using appropriate software(s) they will extract the physical activity data for each different code. It was indicated that their conclusions will be related to the effectiveness of each condition in aggregated level and not to the performance of each child separately.

In light of the above and additional information provided, it seems that the JRC IHCP does not collect or store any personal data related to the children, but the researchers receive codes and indicate numbers for their survey's results. The children cannot be directly identified by the JRC researchers. However the fact that JRC's processors, the teachers, know which name corresponds to a specific code, means that the children could be indirectly identified by the JRC researchers. It follows that the JRC IHCP, an EU body, processes codified and not anonymised personal data, which relate to identifiable persons in the sense of Article 2(a) of the Regulation. The principles of the **Regulation** are therefore **applicable** to the processing of personal data at stake.

The question which arises relates as to whether the processing is likely to present specific risks to the rights and freedoms of the data subjects (children and their parents) under any of the four categories of Article 27(2) of the Regulation.

The EDPS notes that the notification indicates Articles 27(2)(a) and 27(2)(b) of the Regulation as legal basis for prior-checking the processing operation under analysis.

According to the information provided, the JRC IHCP processes information on children's height and weight with the purpose of tackling childhood obesity. Such data may constitute personal data related to health. The processing could therefore present risks to the rights and freedoms of the children by virtue of its purpose under the specific category of Article 27(2)(a) of the Regulation. In addition, due to the fact that the processing aims to evaluate the physical ability and motivation (conduct) of the children, the processing could be subject to prior-checking under Article 27(2)(b) of the Regulation.

Nevertheless, due to the fact that the JRC IHCP receives, extracts, draws conclusions and stores only codified data in aggregated level, it seems that the processing itself does not present any risks under any of the categories of Article 27(2) of the Regulation. The EDPS

therefore considers that the processing under analysis should **not be subject to prior checking by the EDPS**.

Without prejudice to this decision, the EDPS examined some aspects of the processing on the basis of the notification received, and would like to comment on the following points:

Codified data and anonymised data

The EDPS notes that the terms "codified data" and "anonymised data" are used interchangeably throughout the notification and privacy statement. This can be misleading especially due to the fact that there is an important distinction between the two categories related to the applicability of the Regulation. The EDPS highlights that anonymisation of personal data means changing a data set so that it becomes impossible for the controller or for anyone else to identify a person to whom the data relate either directly or indirectly. Anonymous data are not personal data and fall outside the scope of the Regulation. On the contrary, a code or personal number, are personal data and fall within the scope of the Regulation¹.

The EDPS therefore recommends that the JRC IHCP uses only the correct term, which is "codified data" and modifies both notification and privacy statement accordingly.

Consent

The JRC IHCP mentions in both the notification and the privacy statement that the participation is based on a voluntary basis and children's parents are free to participate. However, the JRC IHCP has not explained how it envisages obtaining their free consent.

Under Article 5(d) of the Regulation, one of the grounds of lawfulness of the processing at hand, the children's parents should give their consent freely without any doubt (Article 2(h)). It is therefore important to take into account that consent shall not be valid unless it is freely given, specific and constitutes an informed indication of the data subject's wishes². Consent must be obtained *before* the personal data are collected, as a necessary measure to ensure that parents can fully appreciate that they are consenting and what they are consenting to. The EDPS therefore recommends that parents are given the possibility to express their consent through an opt-in mechanism; the JRC IHCP could for example prepare a document requiring an affirmative action from the parents who should freely state and sign "*Yes, I want to participate to the study*".

Moreover, the EDPS recommends that the JRC IHCP indicates in the privacy statement that in case parents decide not to give their consent, this will not be detrimental to them and if they do decide to give their consent, they should have the right of withdrawal at any time.

Confidentiality declaration with processor

According to the facts, the JRC IHCP will carry out its study with the active involvement of the teachers and they are the only ones to know which name corresponds to which code.

In light of Article 23 of the Regulation, when a processing operation is carried out on behalf of the controller, the latter should ensure that its processor can provide sufficient guarantees

¹ See Article 10(6) of the Regulation.

² See Article 29 Working Party's Opinion 15/2011 on Consent and Opinion 2/2010 on behavioural advertising: "... Giving the data subjects a stronger voice 'ex ante', prior to the processing of their personal data by others, however requires explicit consent (and therefore an opt-in) for all processing that is based on consent ...". An opt-out approach therefore is questionable because not opting out is not the same as positively consenting. See point 4.1.3 of the Opinion on behavioural advertising, page 16.

in respect of technical and organisational security measures for the processing of the personal data. This means that the JRC IHCP should ensure that the processor is bound by the legal requirements laid down in Article 23(2) of the Regulation, namely that the teachers:

- shall act only on instruction from the JRC IHCP and
- are subject to obligations with regard to confidentiality and security laid down in the applicable national law (the Italian one), under Directive 95/46/EC.

The EDPS therefore recommends that the JRC ICHP prepares a confidentiality declaration, to be signed by the teachers, in conformity with the Regulation. A draft copy of the declaration should be sent to the EDPS.

The EDPS invites the JRC IHCP to adopt and implement the above recommendations regarding the processing operation under analysis. It would be appreciated if you could provide the EDPS with all relevant documents to evidence that the recommendations have been implemented before the processing is launched.

Brussels, 09 January 2014

(signed)

Giovanni BUTTARELLI

Cc: Mr Ciaran NICHOLL, Internal and External Communications Unit, Programmes, JRC
Mr Dariusz WIECLAWSKI, Data Protection Coordinator of JRC