



Opinion on a notification for prior checking received from the Data Protection Officer of the European Commission on the management of the medical data of children attending the inter-institutional crèches and kindergartens managed by the OIB

Brussels, 27 April 2009 (Case 2009-088)

1. Procedure

On 2 February 2009, the Data Protection Officer (DPO) of the European Commission sent the European Data Protection Supervisor (EDPS) a notification, by email, under Article 27(3) of Regulation (EC) No 45/2001, concerning the management of the medical data of children attending the inter-institutional crèches and kindergartens managed by the OIB.

This opinion specifically covers the management of the medical data in the crèches and childcare facilities, and supplements the opinion adopted in case 2007-148 on the management of crèches and childcare facilities managed by the OIB.

On 17 April 2009, the EDPS' draft opinion was sent to the DPO for his comments. He replied on 24 April 2009.

2. Facts

The management of the inter-institutional crèches and kindergartens was entrusted to the Office for infrastructure and logistics in Brussels (OIB.OS2 - formerly OIB.6) by Commission Decision 2003/523/EC of 6 November 2002 establishing the Office for infrastructure and logistics in Brussels. There are medical services consisting of paediatricians and nurses in every inter-institutional crèche and kindergarten managed by the OIB.

The **processing of medical data** is carried out by the medical staff of ADMIN.C2 (Directorate-General for Personnel and Administration, Directorate C, Medical service - Day-care centres), seconded to the medical services of each of the OIB's crèches and kindergartens. The personnel of ADMIN C.2 carry out their duties independently of OIB.OS2 and work exclusively under the responsibility of their unit of origin.

The **purposes** of the data processing are to enable the health care professionals seconded to the crèches and kindergartens (i) to determine whether the crèches and kindergartens managed by the OIB are equipped to admit the children, in view of any particular medical needs; (ii) to collect all the medical data necessary for them to be properly looked after in those crèches or kindergartens; and (iii) to ensure that the best possible care is taken of all data of a medical nature received for the children throughout their time there.

The **data subjects** of this processing are: (i) the children attending the crèches and kindergartens, and (ii) the parents of those children and possibly close family members.

The **data processing** involved is manual. [...]. It is intended that the data will be kept for 30 years after the last consultation or medical examination of the child, by analogy with the storage period applied for the medical files of members of staff.

When a place is available for a child, a meeting is arranged between the parents and the paediatrician. At that interview, the parents fill in and sign the document about vaccinations and the steps to be taken in an emergency. The paediatrician fills in by hand a medical form containing all the necessary information.

The medical file contains the following **personal data**:

- Concerning the child: (i) *Authorisation* for the medical service to take the necessary medical steps in an emergency or in the event of a minor accident, and to give vaccinations, (ii) *Medical record*: surname, first name, date and place of birth, nationality, home address, general practitioner, date of arrival and departure, vaccinations, allergies, childhood diseases, tuberculosis test, duration of pregnancy, details at birth (weight, length, head circumference, APGAR test), neonatal pathology, feeding (milk, solids, current, intolerances), diseases, medication, operations, previous childcare arrangements, possible childcare arrangements in the event of illness, environmental factors (housing, tobacco, animals), initial examination (general state, neurological examination (reflexes), ENT); psychomotor development (posture, toilet training, walking), development chart by age (height, weight, head circumference, teeth, information on diseases, medical treatment, accidents), clinical examination, psychomotor and general development of the child; and (iii) *Growth curves* (girl or boy): head circumference, height, weight, body mass index.
- Concerning the family (father, mother): name, telephone numbers, date of birth, nationality, mother tongue, whether the child has any brothers/sisters, family history (allergies, fits, eyesight, hearing, sudden death, others).

The medical file may also contain additional medical documents handed in by the parents (analyses, medical reports, medical certificates).

If they feel it to be necessary, the medical staff may pass on some of the information in the medical file to the staff of the crèches and kindergartens (staff of OIB.OS2), so as to ensure that the child is properly handled and cared for in the crèche or kindergarten. The information passed on by the medical staff generally relates to feeding (diet, allergy, growth curve) and is intended for the dietician, cooks, nurses or educational psychologists concerned. The information is passed on orally, in a hand-written note (nurses, cooks) or by e-mail.

Regarding data subjects' **rights of access and rectification**, parents are entitled to consult the data concerning them on request, by appointment. No copy of the data will be given. Requests for blocking or erasure are acted on within two weeks following the agreement of the data controller.

Information is given to data subjects at the first interview between the parents and the paediatrician, when the latter hands over an information note about data protection.

3. Legal aspects

3.1. Prior checking

This prior check relates to the processing of personal data (*"any information relating to an identified or identifiable natural person* - Article 2(a) of Regulation (EC) No 45/2001) and in particular to the processing of medical data, mainly concerning the children attending the Commission's crèches and kindergartens, but possibly also including data about their parents and family members.

This data processing is carried out by an institution - the Commission - in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation). The data processing is manual, and is kept in a structured way in a file which is accessible in accordance with set criteria. Article 3(2) is therefore applicable in this case. This processing operation is therefore within the scope of Regulation (EC) No 45/2001.

This processing operation was submitted for prior checking by the EDPS by virtue of Article 27(1) of the Regulation, because of the specific risks it presents. In particular, the processing operation falls within the scope of Article 27(2)(a) of the Regulation, since it relates specifically to the processing of data relating to health.

In principle, checks by the EDPS should be performed before the processing operation is implemented. Otherwise the check necessarily becomes ex post. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The DPO's notification was received on 2 February 2009. According to Article 27(4) this opinion must be delivered within a period of two months following receipt of the notification. Because of the 22 days' suspension while awaiting additional information, the EDPS had to deliver his opinion by 27 April at the latest.

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be scrutinised in the light of Article 5(a) of Regulation (EC) No 45/2001.

The notification states that the processing operation is carried out in the context of the tasks entrusted to the OIB in accordance with Commission Decision 2003/523/EC of 6 November 2002 establishing the Office for infrastructure and logistics in Brussels, which states that the Office is responsible for providing services to the institutions covering certain social welfare facilities such as crèches and after-school child-minding services.

The legal basis mentioned in the notification covers in a general fashion the management of social welfare facilities by the OIB, but not specifically the processing of medical data in this context. Given the specific nature of the processing operation, the data subjects and the categories of data processed, the EDPS recommends that a specific legal basis should be adopted for the Commission medical service's processing of medical data in the context of the management of the inter-institutional crèches and kindergartens, so as to comply with Article 5(a) of the Regulation.

Besides, insofar as the processing is intended to protect the vital interests of the child, and only for that part of the processing operation which concerns the protection of the child's vital interests, the processing comes within the scope of Article 5(e) of the Regulation.

Regarding the management of the medical data of children and family members, and the medical monitoring of the children by the Commission's medical staff, and taking particular account of the fact that no other legal basis has yet been put in place, the EDPS recommends that the processing of medical data by the Commission's medical service implanted in the crèches and kindergartens managed by the OIB should be based on the unambiguous consent of the data subjects - in this case the parents acting both for themselves and as the legal representatives of family members whose data are collected - in order to comply with Article 5(d) of the Regulation.

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 that Regulation. In this case, the processing relates specifically to personal data concerning health, mainly relating to the children attending the Commission's crèches and kindergartens, and may also include data relating to the health of their parents and family members.

Since the processing of the data relating to health is, in part, necessary to protect the vital interests of minors, Article 10(2)(c) of the Regulation applies. In this case, the children are legally incapable of consenting to the processing of their data. Accordingly, the parents' consent must be taken into consideration for the processing of data relating to health, with a view to protecting the vital interests of the child.

As regards the processing of data relating to the health of the parents and family members, the EDPS recommends that the explicit consent of the data subjects - in this case the parents acting both for themselves and for other members of the family whose data might also be collected - should be obtained, in accordance with Article 10(2)(a) of the Regulation.

Furthermore, the processing falls within the scope of Article 10(3) of the Regulation, insofar as it is necessary *"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 data relating to health are collected by the Commission's medical staff seconded to the crèches and kindergartens in the context of preventive medicine and for the provision of care. Access to the medical file is restricted to members of the medical service, i.e. the doctors and nursing staff of ADMIN C.2. Because of their duties, these doctors and nurses of the medical service in each crèche and kindergarten are subject to the obligation of professional secrecy or an equivalent obligation of secrecy.

The medical service also has to pass on data relating to feeding (diet, allergy, growth curve) to third parties outside the medical service, so as to protect the vital interests of the children. According to the information provided by OIB.OS2, those third parties are not health-care practitioners and have not signed any confidentiality statement concerning the processing of that information. Since the dietician, the cooks, the nurses or the educational psychologists may be the recipients of some medical data received by the medical service, the EDPS recommends that those persons should be subject to an equivalent obligation of professional secrecy in order for Article 10(3) of the Regulation to be complied with.

3.4. 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/or further processed.

The collection of data relating to the health of the child (such as allergies, diseases, and vaccinations) and the health of family members (medical history of parents and family members) when the child is enrolled in the crèche or kindergarten, carried out once a place is available, is necessary in order to establish whether the child is in a situation which requires special care and/or the provision of treatment while the child is at the crèche or kindergarten. The collection of this data also enables the medical team, and where necessary the staff of the crèches and kindergartens, to take the necessary measures to protect the child's health in an emergency. However, the EDPS would recall that only data which is strictly necessary for the purposes of the processing operation must be collected, and therefore invites the Commission to re-evaluate whether the data collected on the medical form is proportionate.

Regarding the subsequent collection of data by the medical staff while the child is attending the crèche or kindergarten, whether by means of medical examinations by the medical staff seconded to the crèches or kindergartens or through medical documents obtained by the parents, the EDPS would recall that the principle of the proportionality of the data collected must be complied with, in accordance with Article 4(1)(c) of the Regulation. This means that only the data which is strictly necessary for the intended purpose should be collected, particularly taking into consideration the specific task of the medical service of the crèches and kindergartens, which should not be to act as a substitute for the role of the child's general practitioner.

Moreover, the data must be "*processed fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing operation has already been discussed in point 3.2 of this opinion. As for fairness, this relates to the information to be given to the data subject (see point 3.8 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*". In this case, the relevance of the data relating to health collected by the medical staff of ADMIN C.2 during the enrolment interview with the parents, and the data collected while the child is attending the crèche or kindergarten (such as notes or results of medical examinations) must be ensured. This question will be examined in the context of the exercise of data subjects' rights of access and rectification (see point 3.7 below).

3.5. Data storage

The general principle set out in Regulation (EC) 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).

According to the information provided by OIB.OS2, it is intended that the medical data collected will be kept for 30 years after the last consultation or medical examination of the child, by analogy with the storage period applied for the medical files of members of staff. The EDPS considers that this storage period is most excessive in relation to the purposes of the processing operation. In particular, there is no reason to believe that it is necessary to keep the

data after the children have left these establishments, given the purposes for which the data are collected and processed.

The EDPS therefore recommends that a much shorter data storage period should be adopted, in line with the need for the data. In this respect, it should be noted that in a similar case a storage period of one year was felt to be appropriate¹. It should also be ensured that the medical data are not kept for longer than the storage period adopted. For example, it could be arranged that once the child stops attending the establishment, the medical file temporarily held by the crèche or kindergarten should be transferred to the child's general practitioner, in a secure manner in accordance with Article 22 of the Regulation.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001 relating to the transfer of personal data within or to other Community institutions or bodies.

This case involves transfers within one institution, between the medical staff of ADMIN C.2 and the staff of OIB.OS2. When they feel it to be necessary, members of the medical team may pass on certain information from the medical file to the staff of OIB.OS2, namely the educational staff, the dietician, the coordinators, and the staff who distribute the meals. These data transfers are necessary for the performance of tasks covered by the competence of the recipients, particularly since they enable them to ensure the welfare and health of the children entrusted to them.

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 ADMIN.C2 working in the crèches and kindergartens be reminded to process the data exclusively for the purposes for which they were transmitted.

3.7. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access to personal data – and the arrangements for exercising it – upon request by the data subject. Article 14 of the Regulation allows the data subject a right of rectification.

The right of access by parents to their child's medical file, as allowed by the Commission, is limited; they have to consult the data on the spot, and are unable to obtain a copy. The EDPS finds that this restriction on the right of access is excessive and that the right of access by parents to their child's medical file must also include the possibility of obtaining copies of the medical data relating to a child for whom they have parental responsibility. Furthermore, this right of access must be guaranteed to any data subject whose data are contained in the child's medical file, i.e. the father and mother for data concerning them or for data relating to members of their close family (such as the brothers and sisters of the child).

As regards the right of rectification of the data, there are no arrangements in place to ensure that the data collected are accurate. The EDPS therefore recommends that persons with parental responsibility should be able to have data relating to the child corrected (for example

¹ It should be noted that in his opinion of 8 December 2006 on *"Medical files – Parliament crèche and private crèches"*, case 2006-0267/2006-0268, the EDPS considered a one-year data-storage period to be justified for medical data; see page 9 of the opinion.

on presentation of medical evidence), and that any data subject should be able to rectify data about themselves.

3.8. 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 compulsory and optional items of information. 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 or his or her legal representatives, and others from other persons (general practitioner/vaccination record). Consequently, the provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) and Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) of the Regulation apply in this case.

The information note attached to the notification contains most of the compulsory and optional information necessary. The EDPS recommends that arrangements for the right of access and rectification as described in point 3.7 above should be added to the information note. The EDPS also observes that the information note fails to mention that members of the staff of the crèches and kindergartens could also be recipients of certain data. The EDPS therefore recommends that the information note should specify that some data relating to feeding (allergies, diets, growth curve) may be passed on by medical staff to members of staff of the crèches and kindergartens, to ensure that the child is properly cared for.

3.9. Security measures

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller is to 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*".

On the basis of the information available, the EDPS has no reason to believe that the Commission has not respected the security measures required by Article 22 of the Regulation.

Conclusion:

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means, in particular, that the Commission should:

- adopt a specific legal basis for the processing by the Commission medical service of medical data in the context of the management of crèches and kindergartens by the OIB, so as to comply with Article 5(a) of the Regulation;
- in the absence of a specific legal basis, at the very least obtain the unambiguous consent of the data subjects - in this case the parents acting both for themselves and as the legal representatives of the members of their families whose data are collected - to the processing of their medical data by Commission medical staff seconded to the crèches and kindergartens managed by the OIB, in order to comply with Article 5(d) of the Regulation;

- obtain the explicit consent of the data subjects, in this case the parents acting for themselves and as the legal representatives of their children and other family members whose data are collected, to the processing of data relating to their health, in accordance with Articles 10(2)(a) and 10(2)(c) of the Regulation;
- impose compliance with an obligation of secrecy equivalent to professional secrecy on the staff of the crèches and kindergartens who do not belong to the medical service and who are recipients of personal medical data, in accordance with Article 10(3) of the Regulation;
- at the time of enrolment, only collect the data which are strictly necessary for the purposes of the processing operation, and thus re-evaluate the proportionality of the data collected on the medical record form;
- ensure that the collection of data relating to health while the child is attending the crèche or kindergarten is carried out in compliance with the principle of proportionality, having regard to the purposes for which that data is being collected, in accordance with the provisions of Article 4(1)(c) of the Regulation;
- adopt a much shorter storage period for the medical files which is proportional to achieving the purposes of the processing operation, and ensure that medical data are not kept beyond the end of that period;
- remind recipients in ADMIN.C2 working in the crèches and kindergartens to process the data exclusively for the purposes for which they were transmitted;
- make it possible for legal representatives to obtain copies of documents contained in the medical file of a child for which they have parental responsibility, and to have corrected the data concerning them and/or their child and/or a family member;
- amend the information note in line with the recommendations made in points 3.7 and 3.8 of this opinion.

Done at Brussels, 27 April 2009.

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor