

Opinion on the notification for prior checking from the Data Protection Officer of the GSC of the European Union on the "*Management of the crèche of the General Secretariat of the Council and billing*" case

Brussels, 15 January 2009 (Case 2007-0441)

1. Proceedings

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 concerning the "*Management of the crèche of the General Secretariat of the Council and billing*" case was given by the *Data Protection Officer* ("DPO") of the *Council of the European Union* ("GSC") by letter received on 6 July 2007.

In connection with this notification, questions were put to the DPO of the GSC by e-mail on 25 July 2007 and replies were received on 19 February 2008. A statement of facts with further questions and requests for documents was sent to the DPO on 13 March 2008. Subsequent clarifications were provided by the controller by telephone and in the form of further documents and information on 24 September 2008. The exchanges were brought to a close by e-mail on 16 December 2008. On 6 January 2009 the draft opinion was sent to the DPO of the GSC for comments. Comments were supplied on 13 January 2009.

2. Facts

The purpose of the GSC crèche is to enable parents from the different Member States of the Union, often far from their place of origin, to find day-care facilities for their young children without too much difficulty as soon as they arrive in Brussels. The secretariat of the Social Unit's Crèche and Childcare Facilities Department (the Crèche Department) manages enrolments at the crèche, which opened in November 2006, and billings. The Commission's Office for Infrastructure and Logistics (OIB)¹ is responsible for the administrative and pedagogical management and day-to-day running of the GSC crèche, providing the staff required for it to function.

Purpose

The processing operation concerns, firstly, the procedure for enrolment and admission, as the case may be, of children to the GSC crèche through the examination of administrative and financial data provided by the persons having legal responsibility for the child.

¹ The OIB was set up on 1 January 2003 by a Commission Decision of 6 November 2002. Its mission is to carry out all tasks relating to accommodation of staff, social infrastructure management and logistics at the Commission.

It is also designed to monitor the child's presence at the facilities, particularly with a view to:

- monitoring attendance for billing and day-to-day management purposes (meals, staff, etc.);
- controlling access of persons authorised to drop off or collect children; and
- reimbursing crèche expenses upon submission of medical certificates in accordance with the GSC crèche rules.

This case does not consider the management of medical files by the GSC within the medical service of the crèche, i.e. the medical examination of children carried out by the medical service of the crèche and data relating to vaccinations and food allergies. That processing operation has already been the subject of prior checking².

Legal basis

The legal basis for the processing operation is Article 1e of the Staff Regulations of officials ("the Staff Regulations") and the Rules of the GSC crèche of 13 March 2007 ("the crèche rules").

The contract between DG Personnel and Administration of the GSC and the Commission's OIB entitled "*Administrative arrangement for the management of the Dailly crèche*" is governed by Belgian law. It is an SLA (*Service Level Agreement*) concluded between the Directors of the two administrations as appointing authorities. The Social Unit's Crèche Department is responsible for all administrative matters relating to enrolments, admissions, billing and planning of medical visits. A manager, assisted by two secretaries, is responsible for the operational, pedagogical and day-to-day management of the GSC crèche, providing the staff and material required and performing all other duties necessary for the crèche to function smoothly. Article 12 of the administrative arrangement provides that "*the parties shall respect the confidential nature of the information and data received from the other party where those data are sensitive or personal. They undertake not to use such information and data except where necessary for the performance of this administrative arrangement and not to disclose any such information and data without the authorisation of the other party ...*" Article 13 states that "*this administrative arrangement shall be governed by Belgian law and shall be applied and interpreted in accordance therewith*".

A contract has also been concluded between the GSC's Security Office and an outside security firm although the EDPS has not been provided with a copy of that agreement.

Data subjects

The data subjects of the processing operation can be grouped into four categories:

- children of staff (officials and other servants) of the GSC, the EESC, the CoR and the Commission³;
- children of external staff (seconded national experts and officials of the Permanent Representations);
- their parents;

² See EDPS opinion of 17 January 2008 on the "*Management of medical files of children attending the Council crèche*", case 2007-491.

³ Some places are occupied by children from the Commission. In those cases, the applicable admission criteria are those set out in the Rules of the Early Childhood Centre - Crèche/Kindergarten Section. (See EDPS opinion of 27 July 2007 on the "*Management of crèches and childcare facilities in Brussels*", case 2007-148). Once the child has been admitted to the GSC crèche, the rules of the GSC crèche apply.

- persons authorised to drop off or collect the children.

Enrolment procedure for the GSC crèche

Children are admitted to the GSC crèche in the following order of priority:

Officials and other servants:

Priority 1: Children one of whose parents is an official (or other servant) of the GSC, the EESC, the CoR or the Commission 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 GSC, the EESC or the CoR while the other (who is not an official) is:

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

and both parents share responsibility for them. The fact of being registered with the *Office Régional Belge de l'Emploi* serves as proof that an active attempt is being made to find a job.

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

External staff, subject to availability:

Priority 5: Children one of whose parents is a seconded national expert and has sole responsibility for them.

Priority 6: Children one of whose parents is a seconded national expert while the other is also in employment and both parents share responsibility for them.

Priority 7: Children one of whose parents is a seconded national expert while the other is not in employment and both parents share responsibility for them.

Priority 8: Children of officials of the Permanent Representations.

Enrolment applications must be submitted:

- in the case of staff of the GSC and of the Permanent Representations, to the Crèche Department of the Social Unit of the GSC;
- in the case of staff of the EESC and the CoR, to the relevant Welfare Offices.
- in the case of Commission staff, to the OIB.6 secretariat at the Commission.

The processing operation includes a waiting list. There is however no mention of a waiting list in the crèche rules

Data collected:

Under Article II (Enrolment) of the crèche rules, applications for admission must be submitted together with the following documents:

- ✓ *an enrolment form*, including acceptance of the rules of the GSC crèche, containing relevant family information concerning the child, namely the child's surname and forename, the (expected) date of birth, its mother tongue, the attendance arrangements (full time/half time), the desired date of admission to the crèche, whether the data subject has another child at the GSC crèche, an interinstitutional crèche or the crèche of the European Parliament and, if so, the name of the crèche/section, the surname and forename of the child's mother and the father, their marital status, nationality, employer, office address, telephone number, private address, personnel number, grade, total income, monthly financial contribution, maintenance payments (if applicable) and two to four

names, addresses and telephone numbers of persons authorised to collect the child in the absence of the parents;

- ✓ *a medical form;*
- ✓ *a birth certificate; and*
- ✓ *salary slips.*

In the case of an official or other servant of the GSC, and where the other parent works and resides abroad, the supporting documents to be provided are:

- ✓ proof of employment (work contract); and
- ✓ certificate evidencing residence abroad.

It should be noted that although information on the parents' marital status is required on the enrolment form, the controller, when queried by the EDPS, stressed that the information was not relevant and would not be requested in the future.

Under Article VIII of the crèche rules, "*children shall be admitted only after the paediatrician attached to the crèche has carried out a medical examination by appointment.*" At the medical examination, parents are required to submit a medical certificate listing all the vaccinations already given and an outline of the child's diet. Vaccinations may be administered by the family doctor or, exceptionally, by the medical service of the crèche.

However, it transpired from questions put by the EDPS to the controller that no medical data are collected before a child has obtained a place at the crèche and that the child is required to undergo a medical examination only if a place has been given.

Enrolment applications are filed in chronological order of arrival. After assessing the enrolment applications, the relevant department of each institution/body forwards the selected dossiers to the Crèche Department in accordance with the number of places allocated to them for each school year.

Under Article II/C of the crèche rules, the enrolment form, signed by both parents, must bear the names of at least two persons who are authorised to collect the child on the parents' behalf or to be contacted in the event of an accident or other circumstances preventing the parents from collecting the child by the crèche's specified closing time. Where a person other than those mentioned on the enrolment form comes to collect the child, the OIB crèche manager and the GSC Crèche Department must be notified in writing before the arrival of the person concerned, who must present the manager/nursery nurse with an authorisation, duly dated and signed by the person(s) having legal responsibility for the child, and prove their identity.

In relation to billing, medical certificates can be sent together with refund requests to the Crèche Department by parents wishing to obtain a refund of the monthly parental contribution proportional to the number of days of absence from the sixth day of absence onwards. The medical certificate is a supporting document, attached to the refund request and signed by the family doctor, stating simply whether the child is or is not fit to attend the crèche. It is transferred to the financial file.

Handling of the processing operation

Article II on the enrolment procedure states that all information given on the child's enrolment form will be fed into a database (LOUSTIC) and updated daily by the Crèche Department. The database is consulted by the crèche managers and the Crèche Department only.

Recipients

The data recipients for the purposes of the processing operation are as follows:

- the OIB has access to the child's first name, surname and date of birth, the names of the parents and the list of authorisations (date of the entry authorisation, first name and surname of the person authorised to collect the child and their telephone number);
- the "*Salaries*" Department receives data on the amount of the parental contribution (first name, surname and personnel number of the paying parent) to enable it to make the deduction;
- the security guards have access to the following data on LOUSTIC: the child's first name, surname, date of birth and section and the first name and surname of the person authorised to pick the child up. The security guards are employed by an outside security firm. A contract governed by the laws of Belgium has been concluded between the GSC's Security Office and the security firm in question.

Rights of access, rectification, blocking, erasure:

As far as the rights of access and rectification are concerned, parents can consult their data at the Crèche Department by appointment and make rectifications if necessary.

Section 5 of the GSC decision (see Articles 13, 14, 15 and 16 of Regulation (EC) No 45/2001) sets out the procedures for ensuring rights of access, rectification, blocking and erasure. When they enrol their children, parents receive an information document which refers to those Articles and gives the name and contact details of the controller. No time limits are specified for the blocking and erasure of data.

Right to information

No document providing the information set out in Articles 11 and 12 of Regulation (EC) No 45/2001 is available.

Data storage

The administrative data concerning children admitted to the crèche are deleted one year after the child has left the crèche. Financial data relating to them are kept for 5 plus 2 years under the provisions of the Financial Regulation.

The administrative and financial data concerning children not admitted to the crèche are kept until the child has reached the age limit for attending the crèche (i.e. for 5 years at most). The data are kept so that parents can be contacted if a place at the crèche becomes available.

Storage and security measures

The enrolment and update forms as well as main and supporting documentation are kept in files stored in locked filing cabinets in a closed office fitted with a TESA locking system. Since 2008, the documents have been kept in two separate files depending on whether they are administrative or financial. Computer data are stored in accordance with the security standards in force on hardware installed by the Information Technology Department (ITD); access by authorised personnel is password-protected.

3. Legal aspects

3.1 Prior checking

Regulation (EC) 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 GSC 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 data are obtained on paper (enrolment form, supporting documentation and medical certificates) and the data on the enrolment form are entered into the LOUSTIC database. Article 3(2) is thus applicable in this case.

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

Article 27(1) of Regulation (EC) No 45/2001 requires prior checking by the EDPS of all *"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"*. 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 purpose of the processing operation is to select a certain number of children for admission on the basis of the criteria set out in the crèche rules. It follows that the processing operation is intended to evaluate the personal and family circumstances of parents and their children in the light of the eligibility criteria for admission (Article 27(2)(b)). The processing operation also concerns data relating to health as mentioned in Article 27(2)(a) since the medical certificates contain the name of the data subject, the specialisation of the doctor and the words *"not fit"*. The processing operation therefore falls within the scope of the prior checking procedure based on Article 27(2)(a) and (b) of the Regulation.

In principle, checking by the EDPS should be performed before the processing operation is implemented. In this case, as the EDPS was appointed after the system was set up, the check necessarily has to be performed *ex post*. This does not make it any the less desirable that the recommendations issued by the EDPS be implemented.

The formal notification was received on 6 July 2007. In accordance with Article 27(4) of the Regulation, the two-month time limit within which the EDPS must deliver an opinion was suspended. Taking into account the 487 days of suspension, the EDPS will deliver his opinion by 23 January 2009 (425 days of suspension + 2 months of August + 7 days for comments).

3.2 Lawfulness of processing

Article 5 of Regulation (EC) No 45/2001 provides that personal data may only be processed if at least one of its five conditions are met.

The processing operation under examination meets the condition in Article 5(a) of the Regulation, in accordance with which personal data may be processed if *"processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities [...] or in the legitimate exercise of official authority vested in the Community institution."*

Three matters have to be considered in relation to this condition: firstly, whether the processing operation is provided for under the Treaties establishing the European Communities or other legal instruments; secondly, whether the processing operation is in the public interest; and thirdly, whether the processing operation is necessary for the performance of the task (the necessity test).

The **legal basis** for the processing operation in this case is Article 1e of the Staff Regulations which states that *"officials in active employment shall have access to measures of a social*

nature adopted by the institutions [...]". The crèche rules are also a legal basis for the processing operation.

As for **the public interest** element, the EDPS considers the tasks performed by Secretariat of the Social Unit's Crèche Department to be in the public interest in the field of employment law. Since the purpose of the processing operation includes the admission of children of staff of other institutions, i.e. the EESC, the CoR and the Commission, the GSC's task within the meaning of Article 5(a) of the Regulation is also performed in cooperation with those institutions.

The necessity of the processing operation is also covered by Recital 27 of the Regulation, which states that "*processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies*". The processing operation for admission of children to the crèche is necessary for the smooth functioning of the GSC.

The processing operation moreover meets the requirements of Articles 5(d) and 5(e) of the Regulation. All the data (enrolment form signed by the parents plus supporting documentation and medical certificates) are collected on the basis of consent and the processing operation is necessary in order to protect the vital interests of the data subject, i.e. the children.

The processing operation proposed is therefore lawful.

Moreover, data relating to health are among the data which Article 10 of Regulation (EC) No 45/2001 classes as "*special categories of data*".

3.3 Processing of special categories of data

Under Article 10(1) of Regulation (EC) 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.

The collection of medical certificates in this case is necessary in the context of the specific rights and obligations of the GSC in the field of employment law and is therefore justified under Articles 76 and 76a of the Staff Regulations. Processing of such data therefore complies with Article 10(2)(b) of the Regulation, which states that the prohibition on processing data concerning health does not apply where "*processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*".

Furthermore, the prohibition on processing data concerning health does not apply where "*processing is necessary to protect the vital interests of the data subject [...] where the data subject is [...] legally incapable of giving his or her consent*" (Article 10(2)(c)) and "*where the data subject has given his or her express consent*" (Article 10(1)(a)).

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 processing which is necessary to protect the vital interests of the children.

Furthermore, parents wishing to be reimbursed explicitly consent to providing medical certificates when their children have been ill for more than six days.

The medical certificates are sent to the Crèche Department. The certificates are declarations based on data concerning health since they state the child's name, the doctor's specialisation and the fitness or otherwise of the child to attend the crèche. In order to ensure compliance with Article 10(3) of the Regulation, the EDPS therefore recommends that the managers of the Crèche Department be reminded that they are subject to an obligation of medical professional secrecy equivalent to that of a health professional.

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 this case, the GSC has an administrative arrangement with the Commission's OIB for the management of the GSC crèche. The security guards are managed by a security firm with which the Security Office of the GSC has concluded a contract.

In the case of the OIB, the GSC is regarded as the controller as it is the one which determines the purpose and means of collecting the data of the data subjects, i.e. it is the GSC which assesses and selects the children for admission based on the criteria set out in the crèche rules. In particular, the GSC manages enrolments and billing and takes the final decision on admissions. The managers of the OIB are responsible for the administrative and pedagogical management and day-to-day running of the GSC crèche, providing the staff required for it to function. The OIB is therefore a processor under the administrative arrangement and performs tasks on behalf of the GSC. The OIB is required to comply with the GSC's obligations, and exercise its specific rights, in the field of employment law, in accordance with Article 10(2)(b) of the Regulation. The respective roles of the GSC and the OIB therefore comply with the provisions of Article 2(d) and (e) of the Regulation.

The security firm which manages the security guards is regarded as a processor as it processes administrative data on behalf of the GSC. The security guards have access on LOUSTIC to the child's forename, surname, date of birth and section, as well as to the forename and surname of trusted persons so that, in accordance with the purpose of the processing operation, access can be restricted to persons authorised to drop off and collect the children. The roles of the controller and the processor therefore comply with Articles 2(d) and 2(e) of the Regulation, respectively.

3.5 Data quality

In accordance with Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed.

The administrative, financial and medical certificate data described in section 2 appear to be relevant and not excessive in relation to the purposes for which they are collected, including examination of the priorities set out in the crèche rules.

However, certain provisions in the crèche rules are inconsistent with the data collected and processed in the course of the processing operation. In particular, Article II (enrolment arrangements) states that an application for admission must be accompanied by a medical form. Furthermore, under Article VIII of the crèche rules, "*children shall be admitted only after the paediatrician attached to the crèche has carried out a medical examination by appointment.*" However, it transpired from questions put by the EDPS to the controller that no medical data are collected before a child has obtained a place at the crèche and that children are only required to undergo a medical examination if they obtain a place at the crèche. Therefore, although current practice is in line with the principle of data quality, Articles II and VIII of the crèche rules are inconsistent with the current admission procedure and do not comply with the data quality requirement. The EDPS consequently recommends that the requirement to submit a medical form be removed from Article II of the crèche rules and that Article VIII be clarified so that it can be understood that there will be no medical examination until after the child has obtained a place at the crèche.

It was also pointed out that the processing operation includes a waiting list. There is no mention of a waiting list in the crèche rules. The EDPS considers that since no medical form is collected before the child has obtained a place at the crèche, a waiting list is not excessive given the purpose of the processing operation. However, it is important that the existence of a waiting list be mentioned in the crèche rules.

The EDPS welcomes the fact that the GSC considers the data concerning parents' marital status to be irrelevant and that such data will cease to be requested in the enrolment form. The EDPS recommends that these data be removed from the enrolment form as soon as possible and that an updated copy of the enrolment form be sent to the EDPS.

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 3.9 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 data subjects themselves provide the required data (enrolment form, supporting documentation and, if they so wish, medical certificates). The data on the enrolment form are entered into the LOUSTIC database. The procedure in place gives sufficient cause to believe that the data are accurate and kept up to date. Furthermore, the right of data subjects to access and rectify is a second means of ensuring that their data are accurate and up-to-date (see section 3.8 on the right of access).

3.6 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).

As mentioned earlier, the administrative data of children admitted to the crèche are deleted one year after the child has left the crèche. Financial data relating to them are kept for 5 plus 2 years under the provisions of the Financial Regulation.

The administrative and financial data of children not admitted to the crèche are kept until the child has reached the age limit for attending the crèche (i.e. for 5 years at most). According to the controller, these data are kept in case the child can be offered a place at the crèche.

The EDPS considers that the storage period is reasonable in the case of children admitted to the crèche given the purpose of the processing operation.

However, the EDPS finds the maximum period of 5 years for children who are not admitted excessive. Furthermore, no storage period has been defined for the waiting list. In any event, there is no justification for storing data relating to children who have not been admitted unless they are on the waiting list. The GSC is therefore recommended to adopt a new storage period, proportional to the achievement of the purpose of the processing operation. It would for example seem reasonable and proportional to keep the data concerning children on the waiting list for one year, until the start of the following school year.

3.7 Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation. The processing covered by Article 7(1) is the transfer of personal data between or within other Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

To comply with Article 7(1), the GSC must ensure that all the recipients have the appropriate competence and that the transfer is necessary. Here a transfer takes place within the GSC itself (the Crèche Department and the Salaries Department) and within a department of the Commission (the OIB). Both recipients have a specific competence and the data transferred to each are necessary for the legitimate performance of the tasks falling within their respective competences. The EDPS therefore considers the transfer acceptable under Article 7(1) of the Regulation.

Furthermore, in accordance with Article 7(3) of the Regulation, which provides that *"the recipient shall process the personal data only for the purposes for which they were transmitted"*, it is essential that all persons at the GSC and the OIB receiving and processing data in connection with this particular processing operation be informed that the data are to be used for the purposes of the processing operation only

The transfer of data to the security firm, an outside entity governed by Belgian law, is a transfer to a recipient subject to national law, i.e. the Belgian law adopted for the implementation of Directive 95/46/EC. The data transfer in the processing operation will therefore be scrutinised under Article 8 of Regulation (EC) 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"*. The need to transfer certain administrative data to the security guards recruited by the security firm is justified because the transfer is necessary to enable the firm to perform its task in the public interest. It is recommended, however, that the security guards be reminded that they may only use the data in the strict and limited context of performance of the agreement between their firm and the GSC.

Right of access and rectification

Article 13 of Regulation (EC) 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 their source.

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

As far as the rights of access and rectification are concerned, parents can consult their data at the Crèche Department by appointment and make rectifications if necessary. Furthermore, when they enrol their children, parents receive an information document referring to Section 5 of the GSC decision (see Articles 13, 14, 15 and 16 of Regulation (EC) No 45/2001 and giving the name and contact details of the controller.

The EDPS therefore welcomes the fact that the obligations in Articles 13 and 14 of Regulation (EC) No 45/2001 are duly complied with.

3.9 Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) 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 and some from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on the information to be given to the data subject applies in this case insofar as parents provide the required information themselves as part of the procedure for admission of their children to the crèche, as well as medical certificates for reimbursement purposes.

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 persons authorised to collect the child and who may be contacted in the event of an emergency, are supplied to the Crèche Department. These data are then processed by the managers of the Crèche Department and of the OIB, as well as by the crèche security guards.

As was mentioned earlier, no document providing the information set out in Articles 11 and 14 of Regulation (EC) No 45/2001 is available.

The EDPS therefore recommends that all the information set out in Articles 11 and 12 of Regulation (EC) No 45/2001, both compulsory and optional, be mentioned in an internal note or statement in time for the next applications for admission; the internal note or statement should make specific reference to the relevant processing operation and be sent to the data subjects. It is important that the note be attached to the enrolment form and that it be communicated before the data are processed. Furthermore, the EDPS recommends that once parents have been informed about their rights, it is for them to inform the persons authorised to collect the child about their own rights under Articles 11 and 12.

3.10 Processing by a processor

Where a processing operation is carried out on behalf of the controller, Article 23 of Regulation (EC) 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 GSC has concluded an "*administrative arrangement*" with the OIB and a contract with an outside security firm. The EDPS has not received a copy of the contract with the security firm.

The EDPS welcomes the fact that the administrative arrangement with the OIB includes a provision on the principle of confidentiality as does Belgian law to which the arrangement is subject. However, the arrangement does not specify that the processor can act only on instructions from the controller, or set out the security measures applicable to the data to which the OIB has access. It is therefore recommended that the arrangement be brought into line with Articles 23(2)(a) and (b) of the Regulation.

Since the EDPS has been unable to check whether the contract with the security firm complies with Article 23 of the Regulation, it wishes to make the following recommendations: the provisions relating to the respective roles of the data controller and processor should be explicit and the contract between the GSC and the security firm should clearly contain provisions relating to the confidentiality and security obligations in respect of the processing operation in order to ensure compliance with Article 23 of the Regulation.

3.11 Security measures

In accordance with Article 22 of Regulation (EC) 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 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 means, in particular, that the GSC should:

- remind the managers of the Crèche Department that when collecting medical certificates they are subject to an obligation of medical professional secrecy equivalent to that of a health professional;

- remove the requirement to submit a medical form from Article II of the crèche rules and clarify Article VIII so that it is understood that there will be no medical examination until after the child has obtained a place at the crèche;
- refer in the crèche rules to the existence of a waiting list;
- remove the data concerning marital status from the enrolment form as soon as possible and send an updated copy of the enrolment form the EDPS;
- in the case of children who are not admitted, only envisage keeping the data relating to those on the waiting list and adopt a new storage period which is reasonable and proportional to the achievement of the purpose of the processing operation.
- remind recipients within the GSC and the OIB to process the data exclusively for the purposes for which they were transmitted. It is also important that external recipients, i.e. the security guards, also be reminded to use the data in the strict and limited context of performance of the agreement between their firm and the GSC;
- prepare a note providing all the information set out in Articles 11 and 12 of Regulation (EC) No 45/2001. The note should be communicated before processing commences and once parents have been informed of their rights, it is for them to inform the persons authorised to collect the child about their own rights under Articles 11 and 12;
- ensure that the administrative arrangement with the OIB specifies that the processor can act only on instructions from the controller, and that it sets out the security measures applicable to the data to which the OIB has access; and
- ensure that provisions relating to the respective roles of the data controller and processor are explicit in the contract concluded with the security firm and that the contract contains provisions relating to the confidentiality and security obligations in respect of the processing operation.

Done at Brussels, 15 January 2009

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor