

## **Opinion in relation to a consultation of a town council on the figure of the Delegate of Data Protection and the conflict of interests**

A letter from a city council is presented to the Catalan Data Protection Authority in which it considers whether it can designate the Provincial Council as Data Protection Delegate (hereinafter, DPD), given its status as data controller in the management of the municipal register of inhabitants, and, if so, what contact information about the DPD should be provided to interested persons.

In the same letter, the Authority is asked another query which, since it refers to a different issue, will be analyzed in a specific opinion (CNS 24/2018).

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The City Council states, in its letter of consultation, that the Provincial Council provides them with the computerized management service of the Municipal Register of Inhabitants, in relation to which it holds the status of data controller.

Next, it refers to Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (hereinafter, RGPD), which will be fully applicable on May 25, to point out that, in accordance with its article 37, the City Council is obliged to appoint a DPD.

In view of the regime applicable to the DPD, the City Council considers whether it is possible for the same legal entity - the Provincial Council - to have the status of data controller and DPD. If so, it also raises what contact information about the DPD should be made available to interested parties, in particular, whether it is sufficient to provide a generic email address.

We refer to these issues in the following sections of this opinion.

III

One of the novelties that the RGPD incorporates in the field of personal data protection is the figure of the DPD.

Article 37 of the RGPD regulates its designation, in the following terms:

"1. The person in charge and the person in charge of the treatment will appoint a data protection delegate provided that: a) the treatment is carried out by a public authority or body, except the courts that act in the exercise of their judicial function; b) the main activities of the person in charge or the manager consist of processing operations that, due to their nature, scope and/or purposes, require a regular and systematic observation of interested parties on a large scale, or

c) the main activities of the person in charge or the manager consist of the large-scale processing of special categories of personal data in accordance with article 9 and of data relating to convictions and criminal offenses referred to in article 10.

2. A business group may appoint a single data protection officer as long as he is easily accessible from each establishment.

3. When the person responsible for the treatment is a public authority or body, a single data protection officer may be appointed for several of these authorities or bodies, taking into account their organizational structure and size.

4. In cases other than those contemplated in section 1, the person in charge or the person in charge of the treatment or the associations and other organizations that represent categories of persons in charge or persons in charge may appoint a data protection delegate or must appoint him if so required by the Law of the Union or of the Member States. The Data Protection Officer will be able to act on behalf of these associations and other organizations that represent those responsible or in charge.

5. The data protection delegate will be appointed based on his professional qualifications and, in particular, his specialized knowledge of law and practice in the field of data protection and his capacity to perform the functions indicated in article 39.

6. The data protection delegate may form part of the staff of the person in charge or of the person in charge of the treatment or perform their functions within the framework of a service contract.

7. The person responsible or the person in charge of the treatment will publish the contact details of the data protection officer and will communicate them to the control authority.”

For its part, article 38 of the RGPD specifies the position of the DPD in the organizational structure of the person in charge and of the person in charge of the treatment, in the following terms:

"1. The person in charge and the person in charge of the treatment will guarantee that the data protection delegate participates adequately and in a timely manner in all issues related to the protection of personal data.

2. The person in charge and the person in charge of the treatment will support the data protection delegate in the performance of the functions mentioned in article 39, facilitating the necessary resources for the performance of said functions and access to personal data and treatment operations , and for the maintenance of their specialized knowledge.

3. The person in charge and the person in charge of the treatment will guarantee that the data protection delegate does not receive any instructions regarding the performance of said functions. The person in charge or the person in charge will not be dismissed or sanctioned for performing their functions. The data protection officer will report directly to the highest hierarchical level of the person in charge.

4. Interested parties may contact the data protection officer for all questions related to the processing of their personal data and the exercise of their rights under this Regulation.

5. The data protection officer will be obliged to maintain secrecy or confidentiality in the performance of his duties, in accordance with the Law of the Union or of the Member States.

**6. The data protection officer may perform other functions and tasks. The person responsible or in charge of the treatment will guarantee that said functions and tasks do not give rise to a conflict of interest.”**

Finally, article 39 of the RGPD determines the specific functions of the DPD, establishing that:

"1. The data protection delegate will have at least the following functions: a) inform and advise the person in charge or the person in charge of the treatment and the employees who deal with the treatment of the obligations incumbent upon them by virtue of this Regulation and other protection provisions data from the Union or member states;

b) supervise compliance with the provisions of this Regulation, other data protection provisions of the Union or Member States and the policies of the person in charge or of the person responsible for the treatment in the area of personal data protection, including the assignment of responsibilities, the awareness and training of the personnel who participate in the treatment operations, and the corresponding audits; c) offer the advice requested about the impact assessment related to data protection and supervise its application in accordance with article 35; d) cooperate with the control authority; e) act as the point of contact of the control authority for issues related to the treatment, including the prior consultation referred to in article 36, and make inquiries, as the case may be, on any other matter.

2. The data protection officer will perform his duties by paying due attention to the risks associated with processing operations, taking into account the nature, scope, context and purposes of the processing.”

It follows from this legal regulation, for the purposes of interest in the present case, that:

a) All public administrations and their linked or dependent public bodies, which act as responsible or in charge of the processing of personal data, must mandatorily appoint a DPD (article 37.1.a) RGPD).

This designation should occur before May 25, the date on which the RGPD will be fully applicable (Article 99.2 RGPD).

b) It is possible to designate a single DPD for several of these administrations and public bodies. It will depend on their organizational structure and size (article 37.3 RGPD).

However, it cannot be ruled out that, in complex administrative structures, it is more appropriate to have several DPDs.

c) The DPD can be a public administration worker (internal DPD) or the services offered by a professional or an organization/company outside the public administration organization (external DPD) can be contracted (article 37.6 RGPD).

Therefore, the DPD can be a natural person or a legal person.

d) The DPD can perform its functions full-time or part-time (article 38.6 RGPD).

In public administrations, departments or large public bodies in which there is a single DPD, this can perform the functions full time. This does not mean that it may be supported by a work team or a unit specifically dedicated to data protection.

In public administrations, departments or public bodies of medium or small size, this DPD will probably carry out his functions by combining them with others (part-time DPD).

In the specific area of local administrations (such as the case at hand), it is possible that the dimensions and resources of these organizations make it unfeasible to have a DPD integrated into the staff (internal DPD), either full-time or part time. Therefore, it could be common to have an external DPD.

e) It must be guaranteed that the DPD acts, at all times, with independence (article 38.3 RGPD), so it is necessary to avoid any possible conflict of interest in the exercise of DPD functions (article 38.6 RGPD).

The conflict of interest may arise in those cases in which a part-time internal DPD is chosen. Given that the DPD acts as an internal adviser and supervisor of GDPR compliance, as well as serving as a point of contact and interlocutor between the organization, data protection authorities and interested parties (Articles 38.4 and 39.1 RGPD), it seems clear that it cannot at the same time perform other incompatible functions, in the sense that it involves participating in decision-making about the existence of data treatments or about the way in which these data must be treated.

As highlighted by WG29 (Guidance Document on DPDs, 13 December 2016, revised 5 April 2017 (WP243, rev.1)), managerial or command jobs but also other lower positions in the organizational structure that intervene, directly or indirectly, in the processing of personal data, even positions of legal representation, are areas in which conflicts of interest can potentially or objectively arise. Therefore, it should be avoided to accumulate these tasks with those of the DPD (for example, if secretaries, comptrollers or treasurers are appointed as DPD of a town hall or to the person in charge of ICT or information security, a conflict of interest may end up arising).

However, it cannot be ruled out that a conflict of interest may arise if an external DPO is appointed. In this sense, WG29 points out, in said document, that, in the case of outsourcing the provision of the service to a company or team of professionals, it is essential that each of the people in this organization who exercise the functions of DPD fulfill all the requirements referred to in articles 37 to 39 of the RGPD. In particular, it emphasizes that none of these people have a conflict of interest and, in order to avoid this, it proposes as good practice that tasks within the DPD team are clearly assigned and appoint a single person as contact and person in charge of each client (in this case, of each administration, department or public body).

- f) It is necessary to publish the contact details of the DPD and communicate them to the control authority (article 37.7 GDPR).

Given the special "triangular" position of the DPD, which, as has been said, acts as an interlocutor between the interested parties, the public administration (responsible or in charge) and the control authority, it is necessary to provide information that allow you to easily and directly contact them.

#### IV

In view of these considerations and in view of the terms in which the present consultation is formulated, a priori there would be no inconvenience for the City Council to appoint an organ or a person at the service of the Provincial Council as external DPD of the we are local

In fact, this is an even recommended option in small municipalities (such as the case at hand), which, as has been said, may have effective problems to incorporate this figure into their workforce or even to proceed with the outsourcing of this type of service (for example, due to the lack of workers in the local body who meet the highly specialized skills profile required by the RGPD, due to budgetary restrictions, etc.).

In this sense, it can be an operational instrument that the provincial councils, in exercising their powers of assistance and technical cooperation to the municipalities (article 36.1.b) of Law 7/1985, of April 2, regulating the bases of the local regime, and article 92 of the Revised Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28), can provide the DPD service to different local entities.

However, in these cases, it is equally necessary to accredit the professional competences of the DPD referred to in article 37.5 of the RGPD (legal knowledge in matters of

data protection and also in matters of technology applied to data processing), to which it would be necessary to add knowledge of the order and administrative procedure.

Likewise, it is necessary to guarantee that a conflict of interest will not be incurred. For this purpose, it would be necessary to individualize the provision of services in a worker of the County Council who is singled out as DPD of the City Council (who, as we have seen, could be assisted by other professionals of the County Council) or in a certain body of the Provincial Council. In this sense, and given that the Provincial Council provides, by order of the City Council, the service of computerized management of its Municipal Register of Inhabitants, it would be convenient for the exercise of the DPD's own functions to fall to another employee (or unit) of the Provincial Council other than those who participate in decision-making on delegated matters or in the implementation of measures to deal with them.

The most correct way to articulate this relationship seems to be the formalization of an agreement between the City Council and the County Council, in which the aforementioned requirements of accreditation of professional skills, non-concurrence of conflict of interests and individualization of the person who will act as DPD, given that, in short, it is up to the City Council, as responsible, to appoint the DPD.

Also, given that the DPD, in the exercise of their functions, must be able to access the data being processed (Article 38.2 RGD), a processing order should be formalized (in the same agreement) between the City Council and the Provincial Council, in the terms established in article 28.3 of the RGD, so that the DPD can access the personal information for which the City Council is responsible, necessary for the performance of its functions.

In relation to the subscription or adaptation of the aforementioned processing order and also, if applicable, to adapt the currently valid processing order for the management of the Register by the Provincial Government, it may be of interest to consult the Guide on the person in charge of the treatment in the RGD prepared by the data protection authorities to help those responsible and those in charge in adapting to the requirements of the RGD, available on the website of the Authority <http://apdcat.gencat.cat/en/start/>.

Having done this, the City Council should make public the designation of the DPD as well as their contact details (article 37.7 RGD).

On this issue, the City Council specifically considers whether it would be sufficient if, as information to be provided to interested parties, an electronic address was disseminated that included only generic information on the figure of the DPD and not data relating to the individual of the Provincial Council that develops these functions (for example, an email address (...)).

As pointed out by GT29 (Document of guidelines on DPDs, already cited), it is not required that the contact details of the DPD that is the subject of dissemination include their first and last name. In view of the functions carried out by the DPD (article 39 RGD), it is necessary to provide information that allows the interested parties to contact them easily and directly, a purpose which it is understood could be achieved by publishing a telephone number, a postal address (optionally, a post office box could be added) and, if available, a specific email address (this could also consist of a URL that allows access to an application or an electronic form to contact them).

Therefore, the option proposed by the City Council in its letter would be correct, although it should be accompanied by a direct telephone number and a postal address relative to the physical place where the DPD is located. This, without prejudice to the fact that the dissemination of the first and last name may also be enabled, if deemed appropriate.

All this, also without prejudice to the DPD's obligation to identify himself to the people he attends in the exercise of their duties if they so request, in accordance with article 53.1.b) of Law 39/ 2015, of October 1, of the common administrative procedure of public administrations.

In relation to the rest of the information that must be provided to interested persons, it may be of interest to consult the Guide for the fulfillment of the duty to inform in the RGPD prepared by the data protection authorities to help the responsible and those in charge of adapting to the requirements of the RGPD, available on the Authority's website <http://apdcat.gencat.cat/ca/inici/>.

On the other hand, despite not being required, in view of the functions attributed to the DPD, it would be advisable to communicate their identity and contact details to City Council workers (for example, through their Intranet).

Finally, it would also be necessary to notify this Authority, before next May 25, of the designation of the DPD through the corresponding form, available at the Authority's electronic headquarters <https://seu.apd.cat/ca/tramits/DPD>.

In this form, the identification data of the person who will act as DPD can be entered, in which case it is necessary to inform them in advance of the communication of their data to the Authority.

Point out that it will also be necessary to notify the Authority of any modification that affects this designation, such as a change in the contact details of the DPD or the termination/termination of the agreement with the Provincial Council, through the corresponding form (also available at the headquarters electronic of the Authority).

In accordance with the considerations made so far in relation to the query raised, the following are made,

## **Conclusions**

Based on the information it has, the City Council could designate a body or a person in the service of the Provincial Council as DPD of the local body, as long as it is guaranteed that there is no conflict of interest.

In this sense, given that the Provincial Council carries out the computerized management of the Municipal Register of Inhabitants on behalf of the City Council, it would be advisable for the designation of DPD to be individualized in a body or employee of the Provincial Council different from the one who participates in making decisions about the delegated subjects or in the implementation of the measures to deal with them.

The contact details on the DPD that are published to comply with the provisions of the GDPR must allow interested parties to contact them easily and directly. This purpose could be achieved by disseminating a direct telephone number, a postal address and an email address, without necessarily including first and last names.

Barcelona, April 26, 2018