

Opinion in relation to a council consultation on the data controller

A letter from a city council is presented to the Catalan Data Protection Authority in which it raises whether, with respect to the data processing carried out by the city councils, it is necessary to state that the city council as a legal person or a specific body is responsible of the local body.

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 23/2018).

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

I

(...)

II

The City Council begins its consultation letter by referring to the definitions of responsible and person in charge of the treatment contemplated by Organic Law 15/1999, of December 13, on the protection of personal data (hereafter, LOPD).

Next, mention is made of the definitions that, in relation to these two figures, contemplate Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter , RGPD), which will be fully applicable next May 25.

Having said that, it refers to the document Guidelines on Data Protection Delegates (DPD), of December 13, 2016 (revised on April 5, 2017 (WP243, rev.1)), drawn up by the Working Group of the article 29, and, in particular, to the guidelines given on the concept of public authority referred to in the RGPD when defining the figures of responsible and person in charge of the treatment.

Finally, it mentions the Draft Organic Law on the Protection of Personal Data, which is currently being drawn up in order to adapt the Spanish legal system to the RGPD (text published in the BOCG, series A, no. 13-1, of 24.11.2017).

He points out that this regulatory text does not include a definition article, unlike the LOPD. Next, it mentions the regulation that the project makes of the person in charge and the person in charge of the treatment in its Title V and, specifically, in article 33.5, which provides that:

"In the field of the public sector, the proper powers of a data controller may be attributed to a certain organ of the General Administration of the State, the Administration of the Autonomous Communities, the Entities that make up the Local Administration or the Organisms linked or dependent on the same by means of the adoption of a rule regulating said powers, which must incorporate the content required by article 28.3 of Regulation (EU) 2016/679."

However, the City Council specifically considers whether, for the data processing carried out by the city councils, the person responsible (as indicated in the informative captions for interested parties) must be the city council as a legal entity or must there be a body of the local body (such as, for example, the mayor's office).

We refer to this issue in the following section of this opinion.

III

Certainly the definition that the RGPD makes regarding the person responsible for the treatment does not, as the City Council points out, exactly coincide with that contained in the still valid LOPD.

Thus, the LOPD provides that the person responsible for the treatment is understood as "the natural or legal person, of a public or private nature, or administrative body, which decides on the purpose, content and use of the treatment" (article 3. d)).

For its part, the RGPD provides that the person responsible for the treatment is understood as "the natural or legal person, public authority, service or other organism that, alone or together with others, determines the purposes and means of the treatment; if the Law of the Union or of the Member States determines the purposes and means of the treatment, the person responsible for the treatment or the specific criteria for its appointment may be established by the Law of the Union or of the Member States" (Article 4.7)).

Despite this divergence between definitions, it must be said that this does not entail any substantial change in relation to what is to be understood by the person in charge of the treatment in matters of personal data protection.

It should be borne in mind that the key element is, for this purpose, the ability to decide or determine the purpose, content, use or means of treatment, that is to say, to make decisions about what to do and how to treat the data personal data from the moment they are collected until their destruction. For this reason, you are also responsible when you decide on the purposes and means of the treatment despite not materially carrying it out (such as when there is a person in charge of the treatment).

Therefore, both a natural person and a legal person, who may or may not have the status of a public authority, can be responsible for the treatment. Being a public administration, in view of their organizational structure, the administrative body that has powers over the matter in relation to which or for the exercise of which the processing of data is required will normally be responsible for the processing personal data, with this body having the capacity to make decisions about the purpose and means of this treatment.

Entities without legal personality that act in legal traffic as a separate entity (for example, a municipal political group or a specialized body without legal personality) may also be responsible for the treatment.

In addition, there may be a single person responsible for the treatment or more than one (case of co-responsible persons for the treatment, expressly provided for in article 26 of the RGPD) when the purposes or means of the treatment are determined together with others (for example, a business group).

So, for the purposes of interest in the present case, given the definition of data controller contained in the RGPD, it does not seem that, with respect to the data processing carried out by the municipalities, the possibility of designating as responsible the city council itself legal entity.

However, it should be noted that, from the perspective of data protection and, especially, of the data subject's right to information (articles 13 and 14 RGPD), the affected persons must be able to easily or clearly identify who make decisions about the purposes and means of processing your data. In the public sphere, the indication, in this sense, of a public administration as a legal entity does not seem to allow, in most cases, to achieve this goal of transparency. The more complex the organizational structure of the administration, the more difficult this identification will be for those affected. For this reason, it would be more convenient if in these cases an administrative body of said administration was indicated as responsible for the treatment.

In fact, taking into account that the concept of an administrative body constitutes a mechanism that allows an act carried out by a natural person to be attributed or reperculated legally to the legal person that it represents or for which it works, that is to the Public Administration, indicating an administrative body as responsible for the treatment does not alter the fact that the public administration, in which this body is inserted, is responsible and, at the same time, allows those affected to be provided with precise and clear information about it.

For all that, in the specific case raised, although it would be possible to indicate the City Council as a legal entity as responsible for the treatment, it would be more appropriate to the data protection regulations to specify as such an administrative body, which, in attention to the functions that the local regime legislation attributes to them, it could be the mayor's office, the delegated councilor, the manager, etc.

Having said that, in relation to the information that must be provided to the persons concerned, 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/>.

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

Conclusions

From the point of view of data protection, the essential element to determine who is responsible for the treatment (Article 4.7) RGPD) is the ability to determine the purposes and means of the treatment, despite not materially carrying it out.

Although the RGPD allows for the designation of a legal person as responsible for the treatment, in relation to the data treatments carried out by the municipalities, it would be more appropriate to list an administrative body as the person responsible for the treatment.

Barcelona, April 26, 2018