

CNS 26/2018

Opinion in relation to the query made by a mayor about a parent's request for a copy of their children's kindergarten pre-registration forms

A letter from a mayor is presented to the Catalan Data Protection Authority in which he requests that the Authority issue an opinion to assess whether it would be possible to transfer the data of minors to either parent provided that exercise parental authority and it is documented.

Specifically, the mayor's request states that he has received a request from a citizen who requests a copy of his children's kindergarten registrations, but does not provide documentation relating to parentage or other documentation relating to the custody and parental authority of minors. That they have given a negative response to this request for information since the pre-registrations contain personal data and they do not have consent to transfer them. That they have received a new letter insisting on the issue, which is why they are making this inquiry, considering that since it is data related to the education and training of minors, it would be possible to transfer the minors' data to any of the parents as long as paternal authority is exercised and documented.

Attached to the request is a copy of the request made by the citizen, in which it is stated that he is the father of the minors and that the mother of the minors, without their consent, has submitted the registration request to the municipal kindergarten and who, consequently, requests a copy of the registration application for their children in the kindergarten.

Having analyzed the consultation, and in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

The City Council considers whether it would be possible to transfer the data of minors to any of the parents as long as they exercise parental authority and it is documented, in the context of a request made by a parent who requests a copy of the enrollment of their children in a municipal kindergarten, carried out by the children's mother.

It should be taken into account that all information about specific natural persons is protected by Organic Law 15/1999, of December 13, on the protection of personal data (hereafter LOPD), and by Regulation (EU) 2016/679, of the Parliament and the European Council, of April 27, 2016, General Data Protection Regulation (hereafter, RGPD) which will apply from May 25, 2018.

The LOPD defines personal data as any information relating to identified or identifiable natural persons (art.3.a), and as transfer or communication of data, any disclosure of data made to a person other than the interested party (art.3.i).

In the same sense, article 4.1 of the RGPD defines personal data as:

"any information about an identified or identifiable natural person (the interested party). Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of this person."

And in article 4.2 treatment as:

"any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification , extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, access or interconnection, limitation, deletion or destruction".

Data protection legislation has recognized interested parties, so that they can defend their privacy by controlling the use made of their personal data, the right to access their personal data that has been collected. This right is regulated in article 15 of the RGPD, in terms similar to the previous article 15 of the LOPD, in the following terms:

Article 15. Right of access of the

interested party 1. The interested party has the right to obtain from the data controller confirmation of whether personal data affecting him is being processed, and if so, he has the right to access this data and the following information: a) The purposes of the treatment. b) The categories of personal data in question. c) The recipients or the categories of recipients to whom the personal data have been communicated or will be communicated, in particular recipients in third countries or in international organizations. d) The planned retention period for personal data. If this is not possible, the criteria used to determine this term. e) The right to request from the person in charge of the treatment access to the personal data relating to the interested party, to rectify or delete them, to limit the treatment or to oppose it, as well as the right to data portability. f) The right to present a claim before a control authority. g) When the personal data has not been obtained from the interested party, any available information about its origin. h) The existence of automated decisions, including the creation of profiles, referred to in article 22, sections 1 and 4, and at least in these cases, it must provide information

significant about the logic applied as well as the importance and expected consequences of this treatment for the interested party.

2. When personal data is transferred to a third country or an international organization, the interested party has the right to be informed of the appropriate guarantees relating to the transfer, pursuant to the provisions of article 46.

3. The controller must provide a copy of the personal data subject to processing. For any other copy requested by the interested party, the controller has the right to charge a reasonable fee based on administrative costs. When the interested party submits the request by electronic means, and unless the latter requests that it be done in another way, the information must be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 does not negatively affect the rights and freedoms of others.

The right of access can be limited in certain cases provided for by the personal data protection regulations, thus the LOPD allows access to be limited when dangers may arise for the defense of the state, public security, the protection of the rights and freedoms of third parties or the needs of the police investigations that are being carried out, as well as in those cases where access may hinder the fulfillment of tax obligations or the actions of the tax inspection (art. 23 LOPD).

Apart from these cases, article 30.2 of the RLOPD also provides for the possibility of denying access "in the cases in which a law or a rule of community law directly applicable or when this law or rule prevents the person in charge of treatment reveal to those affected the treatment of the data to which the access refers."

For its part, the RGPD establishes in article 23.1 the possibility that the law of the Union or the law of the member states provide, through the corresponding legislative measures, limitations to the rights of access, rectification, deletion, limitation of treatment, data portability and opposition. The rules that regulate these limitations must respect, in what is essential, fundamental rights and freedoms and must be necessary measures to safeguard:

"a) State security. b) The defense. c) Public security. d) The prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including protection against threats to public security and their prevention. e) Other important objectives of general public interest of the Union or a member state, in particular an important economic or financial interest, even in the fiscal, budgetary and monetary areas, in public health and in social security. f) The protection of judicial independence and judicial procedures. g) The prevention, investigation, detection and prosecution of violations of ethical standards in the regulated professions. h) A supervisory, inspection or regulatory function that is linked, even occasionally, to the exercise of public authority in the cases provided for in letters a) e) ig). i) The protection of the interested party or the rights and freedoms of others.

j) The execution of civil demands."

It must be taken into account that the right of access is a very personal right that must be exercised by the person affected, although, in relation to minors, the development regulations of the LOPD provide for its exercise by representation. Thus, according to article 23 of the RLOPD:

"1. The rights of access, rectification, cancellation and opposition are very personal and must be exercised by the affected person.

2. These rights must be exercised

*by: a) The person affected, proving his identity, in the manner provided for in the following article. b) When the affected person is in a situation of incapacity or underage that makes it impossible for him to exercise these rights personally, **his legal representative can exercise them**, in which case it is necessary to prove this condition. (...)."*

With respect to the representation of minors for the exercise of ARCO rights, this Authority has maintained the criterion, included, among others, in opinion CNS 58/2017 which can be consulted on the website www.apdcat.cat, that *"the data protection regulations provide for the possibility that minors, who are over 14 years of age, can provide their own consent for the processing of their data (art. 13 RLOPD), from which it is inferred, as this Authority has done on previous occasions, the possibility of exercising ARCO rights by minors over the age of 14."*

It must be understood that these development regulations, relating to the exercise of the rights of the interested parties, will remain in force after the RGPD is applicable in everything that is not contrary to or incompatible with what the RGPD establishes. This is what the Draft Organic Law on the Protection of Personal Data, approved by the Council of Ministers on November 10, 2017, and published in the BOCG, Congreso de los Diputados Series A Núm. 13-1 of November 24, 2017, in the single repealing Provision, (hereinafter LOPD Project) according to which:

"Without prejudice to the provisions of the seventeenth additional provision and the fourth transitional provision, Organic Law 15/1999, of December 13, on the protection of personal data and any provisions of equal or lower rank that contradict it, are hereby repealed. oppose, or are incompatible with the provisions of Regulation (EU) 2016/679 and this organic law."

The RGPD has introduced, in article 8, modifications regarding the consent of minors in relation to the services of the information society, for which it has provided that they can provide it if the minor is at least 16 years old. In the case of children under the age of 16, the treatment will only be considered lawful if it is given by the holder of parental authority or guardianship over the child. This article also provides that the states can establish by law, a lower age as long as it is not lower than 13 years.

In line with this, the aforementioned LOPD Project has made a general provision in relation to the consent of minors. Thus, article 7 provides:

"1. The treatment of the personal data of a minor can only be based on his consent when he is over thirteen years old.

The cases in which the law requires the assistance of the holders of parental authority or guardianship for the celebration of the legal act or business in whose context consent for the treatment is obtained are excepted.

2. The processing of the data of minors under the age of thirteen will only be lawful if there is the consent of the holder of parental authority or guardianship, with the scope determined by the holders of parental authority or guardianship."

It must be said that the aforementioned LOPD project also provides that the rights of the interested parties can be exercised through a legal representative, in this sense article 12 establishes:

"Article 12. General provisions on the exercise of rights.

1. The rights recognized in articles 15 to 22 of Regulation (EU) 2016/679 may be exercised directly or by means of a legal or voluntary representative..."

In relation to the legal representation of minors, the second book of the Civil Code of Catalonia, relating to the person and the family approved by Law 25/2010, of July 29 (hereinafter, CCC), regulates parental authority and establishes that the parents are the holders of parental authority over non-emancipated minor children (art. 236-1 CCC). According to article 236-2 of the CCC, parental authority is an inexcusable function that, within the framework of the general interest of the family, is exercised personally in the interest of the children, in accordance with their personality and for to facilitate its full development.

The exercise of authority over the children involves their legal representation as established in article 236-18.1 CCC. It is worth saying that paragraph 2 of article 236-18 of the CCC excludes from the legal representation of children acts relating to personality rights, unless the laws that regulate them establish something else. As has been said, the possibility for the right of access to be exercised by representation is expressly provided for in the data protection regulations.

On the other hand, article 236-17.1 of the CCC, which regulates the relationship between parents and children, states that: *"Parents, by virtue of their parental responsibilities, must take care of their children, provide them with food in the sense wider, live with them, educate them and provide them with a comprehensive training. The parents also have the duty to administer the children's patrimony and to represent them."*

Therefore, the duties that the legal system attributes to the holders of parental authority, which includes, as we have seen, care regarding their training and education, as well as the duties of representation of minors, would enable access to the information necessary for its exercise.

In short, we can conclude that the current personal data protection regulations allow the right of access to be exercised by representation, and in the case of minors who cannot exercise their rights by themselves - we understand that until the LOPD project is approved, this age remains 14 years as established in article 13 RLOPD, legal representation can be exercised by the holders of parental authority.

In the case we are dealing with, and since it is information related to registration in a municipal kindergarten, it would be about children under 14 and, therefore, the parent requesting access as the holder of parental authority must be able to access the data of minor children.

IV

According to the information provided by the city council, it is not known that the applicant has been deprived of parental authority. It cannot be ruled out, however, that there is a dispute between the two parents, as can be seen from the request presented by the claimant to the town hall, where it states that the school registration was made by the mother of the minors without her consent

It must be taken into account that the legal system establishes and regulates certain cases that may entail the loss of the parents' capacity to exercise the legal representation of the children
minors

At the outset, the CCC foresees that the judicial authority adopts the measures it deems necessary to avoid any personal or patrimonial harm to the children in custody and, for this purpose, may limit the powers of the parents (art. 236-3). Thus, in the event that the parents (or one of them) is judicially deprived of the parental authority of the minor child, they would not be able to exercise the right of access by representation.

Article 236-18.2.c) of the CCC, cited, also excludes from the legal representation of children:

"c) Acts in which there is a conflict of interest between both parents or between the parent exercising authority and the children."

The exceptional case provided for in section c) of article 236-18.2 of the CCC, deprives the parent of the status of legal representative of his children in power with respect to *"acts in which there is a conflict of interests"* between the parent and the children, but also in the case of conflict of interests between both parents.

On the other hand, in the case at hand, the regulations governing the pre-registration and subsequent enrollment of students in daycare centers established by Resolution ENS/406/2017, of February 24, which in accordance with Law 12/2009 , of July 10, of Education and Decree 75/2007, of March 27, which establishes the procedure for the admission of students to schools in courses covered by public funds, regulates the pre-registration procedure and enrollment in the educational centers of the Catalan Education Service or other educational centers, in the various courses supported with public funds for the 2017-2018 academic year, as set out in its article 3.11:

"In the case of minors, whoever submits and signs the pre-registration application, father, mother, or legal guardian, is responsible for the application and that the requests contained in it are 'have done with the agreement of the other parent, if any.

In the event that there is a lack of agreement between the persons who share the parental authority of the minor and as long as there is no judicial resolution, the pre-registration requests that have been submitted are left without effect and the student remains in the same school where he is schooled. And if it is a new registration or in other circumstances that the admission guarantee commissions consider, the commissions determine the schooling center after listening to the interested people."

The legal system establishes the basic principle of the best interests of the minor, which must govern all the actions of the public authorities in relation to this (Article 11.2.a) Organic Law 1/1996, of January 15, on legal protection of the minor, of partial modification of the Civil Code and the Civil Procedure Law, and article 5.1 LDOIA).

In short, the legal system, in these and other rules, foresees certain situations or circumstances in which the principle of the best interests of the minor - which must inform all actions carried out towards minors 'age', would limit the exercise of parental authority.

Therefore, despite the right of access that both parents have with respect to the personal data of minor children, and if there are doubts about the existence of discrepancies between the parents, it will be necessary for the City Council to notify the other parent that he has received a request for access and that it will proceed to communicate the minor's data contained in the registration form unless, as a result of the hearing procedure, some circumstance results that should lead to a limitation of this right of 'access, as it would be if the father were deprived of parental authority or if access entailed a conflict with the interests of the minors.

It should be clarified, however, that this right of access would allow access to the data on the minors and the applicant's own data, but not to the mother's data that may appear on the registration form.

v

In accordance with the considerations made in these legal foundations in relation to the consultation raised by a mayor in relation to a parent's request for a copy of the pre-registration forms for their children's kindergarten, it may constitute a violation of the personal data protection legislation, the following are made,

Conclusions

If the father has parental authority, he can access the data of his minor children that appear on the kindergarten registration form, in accordance with the right of access to information provided for in article 15 of the RGPD, by virtue of the capacity of legal representation provided for in article 136-18 of the CCC.

In the case consulted, given that the information provided shows the existence of a possible conflict between the parties, it is necessary to transfer this request to the mother so that she can allege if there is any circumstance that should lead to a limitation of this right of access.

Barcelona, May 22, 2018