CNS 39/2018

Opinion in relation to the consultation of a city council on the use of data from the Register for the holding of a popular consultation

A letter from the City Council of (...) is presented to the Catalan Data Protection Authority in which it is considered whether certain data from the Municipal Register of Inhabitants can be used to inform residents about the holding of a consultation popular to name a square in the municipality, as well as to prepare the census.

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

I

(...)

II

The City Council of (...) states, in its consultation letter, that it is evaluating the holding of a public consultation to decide the name of a square in the municipality and requests this Authority if it can use, in for this purpose, the Municipal Register of Inhabitants. In particular, it asks if it can use the name, surname, ID and address data of the citizens of the municipality to draw up the electoral roll and to inform them about the holding of this consultation.

The Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD), fully applicable since the last May 25 (article 99), establishes that all processing of personal data must be lawful (article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6, which do not maintain any relationship of priority or precedence.

The aforementioned article 6.1 of the RGPD provides, specifically, that:

> "1. The treatment will only be lawful if at least one of the following conditions is met: a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; d) the treatment is necessary to protect the vital interests of the interested party or another natural person; e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment; f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.

The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions."

In the field of public administrations, as in the case at hand, the following legal bases are of particular interest:

- The treatment is necessary for the fulfillment of a legal obligation applicable to data controller (Article 6.1.c) RGPD).
- The treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment (article 6.1.e) RGPD).

However, as can be seen from article 6.3 of the RGPD, the basis of the treatment indicated in both cases must be established by the Law of the European Union or by the law of the Member States that applies to the person in charge of the treatment .

Despite the fact that recital 41 of the RGPD provides that "when the present Regulation makes reference to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament", it must be taken into account that the same recital establishes that this "without prejudice to the requirements in accordance with the constitutional order of the Member State in question".

The referral to the legitimate basis established in accordance with the internal law of the member states referred to in article 6.3 of the RGPD requires, in the case of the Spanish State, that the development rule, to be a fundamental right, has the status of law (Article 53 EC).

In this sense, the Draft Organic Law on the Protection of Personal Data, approved by the Council of Ministers on November 10, 2017 (BOCG, series A, no. 13-1, of 24.11.2017), although for reasons obviously not applicable, establishes:

"Article 8. Data treatment protected by law.
1. The processing of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1 c) of Regulation (EU) 2016/679, when this is provided for by a rule of European Union law or a law, which may determine the general conditions of the treatment and the types of data subject to it as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation. The law may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679.

2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1 e) of Regulation (EU) 2016 /679, when it derives from a competence attributed by law."

Therefore, to consider the data treatments covered by the legal bases of article 6.1.c) i) of the RGPD there must be a regulatory provision with the rank of law.

In the present case, reference must be made to Law 7/1985, of April 2, regulating the bases of the local regime (hereafter, LRBRL).

Article 16.1 of this law defines the Municipal Register in the following terms:

"1. The municipal register is the administrative register containing the residents of a municipality. Your data constitutes proof of residence in the municipality and of habitual residence in the same. The certifications that are issued of said data will have the character of a public and binding document for all administrative purposes. (…)".

The LRBRL (and, in the same sense, the revised Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28) establishes the obligation of all residents to register in the Register of the municipality where you have established your residence with a triple purpose: to determine the population of a municipality, to be required to acquire the status of resident and to serve as proof of residence and habitual residence (articles 15 and 16 LRBRL).

Likewise, it establishes that the registration in the Municipal Register will contain the following data as mandatory: first and last name, sex, usual address, nationality, date and place of birth, number of the identity document (or, for foreigners, the card residence or identity document number), certificate or school or academic degree, and, finally, those data that may be necessary for the preparation of electoral censuses, as long as fundamental rights are respected (article 16.2 LRBRL).

And also that "the formation, maintenance, review and custody of the municipal Register corresponds to the City Council, in accordance with what is established by State legislation. (…)" (article 17.1 LRBRL).

In view of these precepts, it can be said, therefore, that the treatment of the data of the Municipal Register of Inhabitants by the municipalities in compliance with the obligations established in the LRBRL would be legitimized by article 6.1.e) of the RGPD.

III

Having said that, it must be borne in mind that this data processing, like any other, must also comply with the rest of the principles established in the RGPD, especially, for the purposes that are of interest in the present case, the principle of limitation of the purpose (previously included in article 4.2 of Organic Law 15/1999, of December 13, on the protection of personal data).

Article 5.1.b) of the RGPD establishes that:

"1. The personal data will be: (...)
b) collected with specific, explicit
and legitimate purposes, and will not be subsequently processed in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose") ; (...)".

Regarding this, recital 50 of the RGPD provides that:

"The processing of personal data with purposes different from those for which they were initially collected must only be allowed when it is compatible with the purposes of their initial collection. In such a case, a separate legal basis is not required, other than the one that allowed the personal data to be obtained. If the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment, the

> and the purposes for which the subsequent treatment should be considered compatible and lawful can be determined and specified in accordance with the Law of the Union or Member States. Subsequent processing operations for archival purposes in the public interest, scientific and historical research purposes or statistical purposes must be considered compatible lawful processing operations. The legal basis established in the Law of the Union or of the Member States for the treatment of personal data can also serve as the legal basis for the subsequent treatment. In order to determine whether the purpose of the subsequent treatment is compatible with the purpose of the initial collection of personal data, the person responsible for the treatment, after having fulfilled all the requirements for the authorization of the original treatment, must take into account, among other things , any relationship between these purposes and the purposes of the intended subsequent treatment, the context in which the data were collected, in particular the reasonable expectations of the interested party based on their relationship with the person responsible for their subsequent use, the nature of the data personal, the consequences for the interested parties of the planned subsequent treatment and the existence of adequate guarantees both in the original treatment operation and in the planned subsequent treatment operation. (…)."

As we have seen before, the Municipal Register is a type of file with a very specific purpose: to determine the population of the municipality, to be required to acquire the status of resident and serve to certify residence and habitual address (article 15 LRBRL).

Point out that these purposes are clearly included in Sentence 17/2013, of January 31, of the Constitutional Court, where the Municipal Register is defined as:

> "The administrative register containing the residents of a municipality, a register managed by the local councils through computerized means (art. 17.1 LBRL) in which the persons residing in a municipality must be registered with a triple purpose, according to the arts. 15 and 16 LBRL, determine the population of the municipality, acquire the status of neighbor and accredit residence and usual address.
> In addition to these functions, the electoral regime legislation provides for the preparation of the electoral census based on the data contained in the Register, which also serves to prepare official statistics subject to statistical secrecy. So, from the regulation of the LBRL itself we can conclude that the register contains an organized set of personal data referring to identified physical persons, the residents of a municipality, being therefore a personal data file to which the regulations provided for in the LOPD."

Thus, in accordance with the aforementioned principle of purpose limitation (Article 5.1.b) RGPD), the data of the Municipal Register may only be used for other purposes to the extent that they are not incompatible with this triple purpose that in justifying the initial collection.

On this matter, it must be said that this Authority, in previous opinions (among others, CNS 9/2013, CNS 67/2015, CNS 46/2016 or CNS 12/2017, available on the website http://apdcat.gencat.cat/ca/inici/), has considered that, in view of the type of personal data that must be included in the Register (article 16.2 LRBRL), it is understood that there may be municipal purposes that could enable the processing of these data to the extent that they are not purposes incompatible with the Padró's own, previously described. Specifically, we are referring to the exercise of the powers that the local regime legislation attributes to the town councils, mainly following the provisions of articles 25 and 26 of the LRBRL (and, in similar terms, articles 66 and 67 of TRLMRLC).

It has also been pointed out, in the aforementioned opinions, that, since the LRBRL itself (article 16.3) admits the communication of data from the Municipal Register to other administrations

public bodies that request them when they are necessary for the exercise of their powers and exclusively for matters in which residence or address are relevant data - possibility also endorsed by the Constitutional Court (STC 17/2013, of January 31 , cited)-, with greater reason it can be admitted that the different units or administrative bodies of the same municipality can access these data when they are necessary for the exercise of their functions and when the given residence or address is relevant.

In the present case, the City Council intends to use the data from the Register to inform the citizens who reside in the municipality about the holding of a popular consultation to decide the name of a place and to draw up the electoral roll. It must be seen, therefore, whether these new purposes are compatible with the Padró's own.

Article 6.4 of the RGPD establishes that:

> "4. When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives indicated in article 23, paragraph 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data was initially collected, will take into account, among other things: a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided; b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller; c) the nature of personal data, in particular when special categories of personal data are treated, in accordance with article 9, or personal data relating to criminal convictions and infractions, in accordance with article 10; d) the possible consequences for the interested parties of the planned subsequent treatment; e) the existence of adequate guarantees, which may include encryption or pseudonymization."

Given that in the case examined the initial collection of data from the Register is carried out, as seen, in compliance with a requirement of the LRBRL, it is necessary to see if this legal provision could act as a legal basis for the change intended purpose.

Article 18 of the LRBRL (and, in similar terms, article 43 of the TRLMRLC) lists the rights of residents, among others:

> "b) Participate in the municipal management in accordance with the provisions of the laws and, as the case may be, when the voluntary collaboration of the neighbors is interested in the governing bodies and municipal administration. (...) f) Request the popular consultation in the terms provided for in the law."

Article 69.1 of this same law (and, in similar terms, article 154 of the TRLMRLC) provides that "local corporations will facilitate the most extensive information on their activity and the participation of all citizens in local life."

Article 70.bis of the LRBRL adds, for the purposes that are now relevant, that:

> "1. The town councils must establish and regulate in organic standards procedures and bodies suitable for the effective participation of the neighbors in the affairs of local public life, both in the scope of the municipality as a whole

as in that of the districts, in the event that said territorial divisions exist in the municipality. (...)

3. Likewise, local entities and, especially, municipalities must promote the interactive use of information and communication technologies to facilitate participation and communication with neighbors, for the presentation of documents and for the completion of procedures administrative, surveys and, where appropriate, citizen consultations. (...).”

Article 71 of the LRBRL expressly refers to popular consultations in the following terms:

"In accordance with the legislation of the State and of the Autonomous Community, when it has competence statutorily attributed to it, the Mayors, prior agreement by absolute majority of the Plenary and authorization of the Government of the Nation, may submit to popular consultation those issues of own municipal competence and of a local character that are of particular relevance to the interests of the neighbors, with the exception of those related to the local Hacienda."

The competence for the initial awarding of the names of roads and public spaces, as well as their subsequent name changes, corresponds to the town councils, as can be seen from article 75 of the Regulation of population and territorial demarcation of local entities , approved by Royal Decree 1690/19986, of July 11, as well as other legal provisions, such as the Historical Memory Law (article 15) or Law 1/1998, of January 7, of language policy (article 18.3).

Given, therefore, that we are facing the development of functions included in the exercise of the municipal powers provided for in the LRBRL (facilitating the exercise of the right to participate in local affairs), in which the accreditation of the condition of a neighbor is an essential element (article 18 LRBRL), the use of data from the Register in order to inform about the holding of a citizen participation process in the municipality, in any of the forms of participation provided for in the legal system, it could be considered legitimate, as it is a purpose compatible with that of the Register (Article 5.1.b) RGPD), protected by the LRBRL itself (Article 6.4 RGPD).

Treatment which, it should be noted, by application of the principle of data minimization (Article 5.1.c) RGPD), should be limited, in any case, to only the minimum data from the Registry necessary to fulfill the stated purpose. In this sense, agree that the use of the data relating to the first and last name and address of the citizens mentioned in the consultation letter is considered appropriate. On the other hand, the use of the data relating to the DNI would be excessive.

With regard to the use of data from the Register to complete the corresponding electoral census, to the extent that the data relating to the domicile may be relevant to implement these forms of citizen participation and as long as the regulations that regulate them do not provide for a specific instrument to constitute the census, its treatment for that purpose could also be considered legitimate, being equally compatible with that of the Register (article 5.1.b) RGPD).

However, if we were faced with the holding of a municipal referendum popular consultation, we would have to take into account the provisions of Law 4/2010, of March 17, on popular consultations by referendum, in accordance with the pronouncement of the Constitutional Court in its Judgment 51/2017, of May 10, relating to the appeal of unconstitutionality 8912-2010 (BOE no. 142, of June 15, 2017).

However, in the event that we are faced with the holding of a non-referendum popular consultation (as could be the case examined), the following should be taken into account.

IV

The non-referendum popular consultation is a form of citizen participation that has its own regulation: Law 10/2014, of September 26, on non-referendum popular consultations and other forms of citizen participation.

This law establishes the legal regime and the procedure for calling non-referendum popular consultations and other participation mechanisms, as instruments aimed at finding out the position or opinions of citizens in relation to any aspect of public life in the area of Catalonia and within the jurisdiction of the Generalitat and local bodies.

In accordance with Sentence 31/2015, of February 25, of the Constitutional Court (BOE no. 64, of March 16, 2015), relating to the Appeal of unconstitutionality 5829/2014, brought by the President of the Government in relation to several precepts of this Law 10/2014, the first two sentences of article 3.3 are unconstitutional and null ("non-referendum popular consultations may be of a general or sectoral nature. General consultations are those open to persons authorized by to participate in the terms established in article 5") and sections 4 to 9 of article 16 of Law 10/2014. Not so the rest of the challenged precepts, as long as it is interpreted that they are applicable to the sectoral consultations regulated in the same Law.

This is clear from its FJ 7th, when the TC concludes that "(...) sectoral consultations are channels of participation whose regulation by the Catalan autonomous legislator is possible, in consideration of the competence title established in art. 122 EAC, as it was said in STC 31/2010, of June 28, when judging this statutory precept: public through any procedures' different from those that qualify a consultation as a referendum" (FJ 69)."

In the present case, the popular consultation that is proposed to be carried out could be of a sectoral nature, therefore, the provisions of this Law should be taken into account.

Article 4 of Law 10/2014 establishes that non-referendum popular consultations can be promoted by institutional initiative or citizen initiative. Section 3 of this precept specifies that local institutional initiative means the consultation promoted by:

> "a) Municipal meetings and other local bodies, by means of an agreement adopted by a simple majority, at the proposal of two fifths of the councilors or the representatives of the local body. b) The county councils, by means of an agreement adopted by an absolute majority, at the proposal of one fifth of the councilors of the county, who must represent, at least, 10% of the municipalities. c) The deputations or councils of vegueria, by means of an agreement adopted by an absolute majority, at the proposal of one fifth of the councilors of the province or vegueria, who must represent, at least, 10% of the municipalities. d) The mayor or president of the local entity, on his own initiative or at the proposal of two fifths of the members of the local corporation. e) Two-fifths of the municipalities, by means of an agreement of their plenary sessions adopted by a simple majority, at the proposal of two-fifths of their councilors, if it is a supra-municipal territorial area not coinciding with any of the above, which has

to be proposed by the promoters of the consultation. In this case, the call for the consultation corresponds to the president of the Generalitat."

Article 5 of Law 10/2014 establishes the persons authorized to participate in non-referendum popular consultations (understanding, as such, the sectoral consultations provided for in the law) that are held, establishing the minimum age of participation at 16 years and requiring the status of neighbor. Specifically, it provides that:

"1. The following can be called to participate in non-referendum popular consultations by voting: a) People over the age of sixteen who have the political status of Catalans, including Catalans residing abroad. The latter must previously apply for registration in the register created for this purpose (Register of Catalans and Catalans residing abroad). b) People over the age of sixteen who are nationals of member states of the Union

European citizens registered in the Population Register of Catalonia who provide proof of one year of continuous residence immediately prior to the call for the consultation. c) Persons over the age of sixteen, nationals of third countries registered in the Population Register of Catalonia and with legal residence for a continuous period of three years immediately prior to the call for the consultation.
2. In the area referred to in paragraph 1, the decree convening the consultation must delimit, with full respect for the requirements derived from the principle of equality and non-discrimination, the people who can participate. The delimitation must be done according to the territorial scope and the interests directly affected by the subject of the question, taking into account, in the latter case, criteria that allow a clear and objective identification of the collective or groups to which the call is addressed.
3. The convening decree, if it is of a municipal scope, may dispense with compliance with the requirement established by the letters bic of section 1 regarding the minimum period of residence."

For the purposes of this opinion, it should be noted that Law 10/2014 itself creates, in its article 6, the Register of participation in non-referendum popular consultations, in the following terms:

"1. The Register of participation in non-referendum popular consultations is created, assigned to the competent department in matters of popular consultations and citizen participation, which includes all the people who may be called to participate in a consultation, in accordance with the law.
2. The Register of participation in non-referendum popular consultations is made up of the data of the Population Register of Catalonia and of the Register of Catalans and Catalans Abroad, both at their last close before the date of the call, and for the data of other registration instruments that attest to the status of legitimate person, determined by the specific rules of the call.
3. The communication and updating of the data in the registers referred to in section 2 by the responsible body do not require the consent of the interested party, in accordance with the data protection regulations.
4. Once the consultation has been called, the body responsible for the Register of participation in non-referendum popular consultations must establish a period so that Catalans resident abroad and the persons referred to in the letters bic of the article 5.1 can express their will to participate in the consultation.
5. The body responsible for the Register of participation in non-referendum popular consultations must draw up, at the request of the convening body, the list of people called to participate, in accordance with what is established in the convening decree.
6. The necessary data to guarantee people's participation must be included in the Register of participation in non-referendum popular consultations

legitimized in accordance with the provisions of this law. This register cannot include any data relating to the ideology, beliefs, religion, ethnicity, health or sexual orientation of the people called to participate in a non-referendum popular consultation.

Law 10/2014 establishes that the electoral body in this type of popular consultations is made up of the people included in the Register of participation in non-referendum popular consultations. This Register, according to the aforementioned precept, integrates the personal information of the Population Register of Catalonia (Article 47 et seq. Law 23/1998, of December 30, on Statistics of Catalonia), of the Register of Catalans resident in the abroad (Decree 71/2014, of 27 May, which creates the Register of Catalans residing abroad and establishes the requirements and registration procedure), and other registration instruments that certify the status of legitimate person. That is to say, information on a wider population group than that contained in the Municipal Register of Inhabitants.

Therefore, it must be taken into account that, in the event of a non-referendum popular consultation, the use of the Municipal Register to verify compliance with the participation requirements would exclude part of the people who could be called to participate in said consultation, according to article 5 of Law 10/2014, cited.

For this reason, said check, in accordance with the examined provisions of Law 10/2014, should be done in these cases on the basis of the personal information contained in the aforementioned Register of participation in non-referendum popular consultations.

Agree that it would correspond to the body responsible for the Registry to prepare the census, at the request of the City Council, in accordance with the municipal decree calling for the consultation in question (article 6.5 Law 10/2014).

Likewise, point out that, by application of the principle of data minimization (article 5.1.c) RGPD), the data of this Register to which the City Council had access should be limited to the minimum necessary to comply with the intended purpose, that is to check the effective compliance with the requirements for participation in the non-referendum popular consultation of the municipality

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

Conclusions

The City Council can access data from the Municipal Register of Inhabitants in order to inform the residents of the municipality of the holding of a public participation process to decide the name of a square, given that it is a purpose compatible with that of the Register and protected by the exercise of the powers entrusted to it in the matter of promoting citizen participation (articles 5.1.b) and 6 RGPD).

It could also use this data to make up the electoral roll, unless it is a mode of participation for which a specific instrument has been provided for that purpose. Thus, in the event that a non-referendum popular consultation of a sectoral nature is held, the accreditation of compliance with the requirements to be able to participate should be carried out through the Register of participation in non-referendum popular consultations, in accordance with the Law 10/2014.

Barcelona, July 5, 2018