

CNS 44/2018

Opinion in relation to the query made by a body about the extraction of data from a file of the body without the consent of the interested parties

A letter from an organization is presented to the Catalan Data Protection Authority in which it states that this organization has registered the file, (...) whose purpose is to "have a list of people qualified to cover temporarily jobs in (...) with sufficient information for the selection of candidates based on the profiles of the jobs to be filled". As stated, to collect this information there is an application where interested people register their data.

One of the fields of the application is that of "research/scientific activities", where candidates can enter data related to clinical trials, research projects, and attendance at congresses, among others.

The organization states that it wants to produce an annual scientific report of the work carried out by the organization's professionals and, given the difficulty of obtaining this data, the possibility of extracting the data from the file (...) is being considered. Specifically, it is stated that the aim is to "quantify the subtypes of research/active scientific elements (clinical trials, research projects, healthcare documents, etc.) as well as the titles of publications, authors, articles, books, etc. ...no prior consent would be requested for this data collection".

Having described these antecedents, the organization proposes that "it is a matter of elucidating whether, as it is a scientific research purpose and for statistical purposes, the exceptions to the rights indicated in article 89 of the RGPD can be established" and only request a report in relation to this data extraction from the application (...) without the consent of the interested parties.

Having analyzed the query, which is accompanied by the copy of the power of attorney under which the applicant acts, and in accordance with the report of the Legal Counsel I issue the following opinion:

I

(...)

II

Given the terms in which the query is formulated, a prior consideration should be made in relation to the source of the information that is to be used to carry out the study and its suitability to achieve the described objectives.

It must be taken into consideration that any processing of personal data, understood as "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, sharing or interconnection, limitation, deletion or destruction" (art. 4.2), it must be submitted to the principles and guarantees of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of data personal data (hereinafter, RGPD).

In accordance with the principle of minimization, the data processed must in each case be appropriate, relevant and limited in relation to the purposes for which it is intended to be processed (art. 5.1.c) of the RGPD) . In the case presented, it does not seem that the data intended to be used are suitable for the intended purpose.

As shown in the query, the file called (...) from which the data is to be extracted, aims to "have a list of people qualified to temporarily cover jobs in the organization with the sufficient information for the selection of candidates based on the jobs to be filled", is, therefore, a database of candidates to occupy temporary jobs in the organization.

Therefore, it would be staff who only temporarily cover jobs in the organization. If the aim is to produce an annual scientific report of the work of the organization's staff, it should initially only include candidates who have actually been selected from the job market, but in addition, it would only offer information related to the moment in which the candidates signed up for the said scholarship. It would collect their scientific activity carried out before their incorporation but not the scientific activity deployed while they are staff of the organization. This aspect would link with the requirements derived from the principle of accuracy (art. 5.1.d) RGPD).

On the other hand, there will be other staff of the organization who will not have been part of this job board, so it also does not seem to be an instrument that, on its own, allows carrying out the memory that is wanted to be carried out term

III

Aside from these considerations, what the consultation raises is whether the treatment that is intended to be carried out would fit into the regulation provided for in article 89 of the RGPD for the purposes of scientific or statistical research.

According to the RGPD, personal data must be understood as all information about an identified or identifiable natural person. The same RGPD adds that "any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or various elements of the physical, physiological, genetic, psychic, economic, cultural or social identity of said person" (article 4.1)).

As we have seen, in the case at hand it is necessary to take into account the different principles provided for in article 5 RGPD. The already mentioned principle of minimization and accuracy, and also in a special way, as we will see, the principle of limitation of purpose:

"1. The personal data must be: (...)

b) collected for specific, explicit and legitimate purposes, and will not be subsequently treated in a manner incompatible with said purposes; in accordance with article 89, paragraph 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") ;

c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated ("data minimization");

d) accurate and, if necessary, updated; all reasonable measures will be taken to delete or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed ("accuracy"); (...)"

In this same sense, recital 39 of the RGPD has come to make it clear that:

"...Personal data must be adequate, relevant and limited to what is necessary for the purposes for which they are processed. This requires, in particular, to guarantee that its retention period is limited to a strict minimum. Personal data should only be processed if the purpose of the treatment could not reasonably be achieved by other means. To ensure that personal data is not kept longer than necessary, the data controller must establish periods for its deletion or periodic review.

All reasonable steps must be taken to ensure that inaccurate personal data is rectified or deleted. Personal data must be treated in a way that guarantees adequate security and confidentiality of personal data, including to prevent unauthorized access or use of said data and the equipment used in the treatment."

Thus, personal data should only be processed if the purpose of the processing cannot reasonably be achieved by other means. Therefore, in the case at hand, the organization must carry out a prior analysis in relation to the need for treatment, in order to determine whether it can achieve the purpose of recording the scientific work carried out by its professionals without include your personal data. In this case, the research activity of the organization's staff could also be reflected, even if no references were included that would allow the activity to be linked to a specific person.

If, as proposed in the consultation, the number of clinical trials, research projects, healthcare documents, as well as the title of publications, articles and books is to be quantified, the only personal data that would be processed would be the identifiers of the authors , its omission

it would mean that the treatment of the rest of the information anonymously would not be subject to the RGPD. Thus, recital 26 of the RGPD states: "The principles of data protection apply to all information relating to an identified or identifiable natural person. (...) Therefore, the principles of data protection do not apply they apply to anonymous information, that is to say to information that is not related to an identified or identifiable natural person, nor to data that has been made anonymous in such a way that the person concerned is not identifiable or ceases to be so."

IV

In any case, from what is described in the query, it seems that it wants to be carried out by identifying the people who authored the works.

Once the need for treatment has been determined, it must be taken into account that personal data must be collected for specific, explicit and legitimate purposes and cannot be subsequently processed in a manner incompatible with these purposes. The subsequent treatment is considered compatible when it has as its object archival purposes in the public interest, scientific and historical research purposes or statistical purposes, in the terms of article 89 of the RGPD on the guarantees and exceptions applicable to the treatment with those purposes, in accordance with the principle of "limitation of the purpose" (art. 5.1.b RGPD).

It is worth saying that this principle of "limitation of the purpose" links with the principle of "quality" already provided for in article 4 of the LOPD, in its aspect of the principle of purpose, which expressly established that they were not incompatible subsequent processing of data for historical, statistical or scientific purposes (art. 4.2 LOPD).

Article 89 of the RGPD, for its part, establishes the following:

"Article 89

Guarantees and exceptions applicable to processing for archival purposes in the public interest, scientific or historical research purposes or statistical purposes

1. Processing for archival purposes in the public interest, scientific or historical research purposes or statistical purposes will be subject to adequate guarantees, in accordance with this Regulation, for the rights and liberties of the interested parties. These guarantees will require that technical and organizational measures are available, in particular to guarantee respect for the principle of minimization of personal data. Such measures may include pseudonymization, provided that in that way said ends can be achieved. As long as those purposes can be achieved through further processing that does not allow or no longer allows the identification of the interested parties, those purposes will be achieved in that way.

2. When personal data are processed for the purposes of scientific or historical or statistical research, the Law of the Union or of the Member States may establish exceptions to the rights contemplated in articles 15, 16, 18 and 21, subject to the conditions and guarantees indicated in section 1 of this article, whenever

it is likely that these rights make it impossible or seriously hinder the achievement of scientific goals and how many exceptions are necessary to reach those goals.

3. When personal data are processed for archiving purposes in the public interest, the Law of the Union or of the Member States may provide for exceptions to the rights contemplated in articles 15, 16, 18, 19, 20 and 21, subject to the conditions and guarantees cited in section 1 of this article, provided that those rights may make it impossible or seriously hinder the achievement of the scientific goals and to the extent that these exceptions are necessary to reach those goals.

4. In the event that the treatment referred to in sections 2 and 3 also serves another purpose at the same time, the exceptions will only apply to the treatment for the purposes mentioned in those sections.”

Therefore, the first thing that needs to be determined is whether we are dealing with a purpose that, as the query seems to point out, can be considered scientific or statistical.

Regarding the statistical purpose, recital 162 of the RGPD provides that "This Regulation applies to the processing of personal data for statistical purposes. The statistical content, access control, specifications for the processing of personal data for statistical purposes and appropriate measures to protect the rights and freedoms of the interested parties and guarantee statistical confidentiality must be established, within the limits of this Regulation, by the law of the Union or the member states. Statistical purposes are understood as any collection and processing of personal data necessary for statistical surveys or for the production of statistical results. In addition, these results can be used for various purposes, including scientific research. The statistical purpose implies that the result of the treatment for statistical purposes is not personal data, but aggregated data, and that this result or the personal data are not used to support measures or decisions relating to specific natural persons.

Therefore, in order to determine whether it is a study for statistical purposes, it is necessary to take into account what is established in Law 5/2016, of December 26, of the Statistical Plan of Catalonia 2017-2020, which regulates the instrument of organization and planning of the Generalitat's statistics of interest, in the terms established by Law 23/1998, of December 30, on the statistics of Catalonia.

In order for the statistical activity to be considered official, it must be declared as such in accordance with the procedures established by the Statistics Law and must form part of the Statistical Plan of Catalonia.

From the information available, it does not appear that there is any provision in the Statistical Plan of Catalonia 2017-2020 in relation to the study that is the subject of the consultation, therefore it is necessary to discard, in principle, the statistical purpose of this study.

Regarding the purpose of scientific research, recital 159 of the RGPD provides that "The processing of personal data for the purposes of scientific research must be interpreted, for the purposes

of this Regulation, in a broad way that includes, for example, the development and demonstration of technologies, fundamental research, applied research and research funded by the private sector. In addition, it must take into account the objective of the Union established in Article 179, paragraph 1, of the TFEU, to constitute a European research area. The purposes of scientific research must also include studies carried out in the public interest in the field of public health. To comply with the specifics of the processing of personal data for scientific research purposes, specific conditions must apply, in particular, regarding the publication or other type of communication of personal data in the context of scientific research purposes. If the result of scientific research, particularly in the field of health, justifies other measures for the benefit of the interested party, the general rules of this Regulation must be applied taking these measures into account."

In order to determine the scientific purpose of a study, it is therefore necessary to pay attention to the internal legislation of the states that is applicable in each case. In the case at hand, in particular, the provisions of Law 14/2011, of June 1, on Science, Technology and Innovation, and their respective development provisions, as well as the autonomous regulations in this matter

This Authority has analyzed how the scientific purpose of a study can be determined in the opinions CNS 20/2005, CNS 6/2006, CNS 6/2008 or CNS 42/2010 which can be consulted on the page www.apdcat.cat. In general, it is concluded that in view of the applicable legislation, a study starts from a scientific purpose, as long as the research meets the requirements of planning, originality, objectivity, verification, rigorous sampling and the use of data collection instruments that meet validity and reliability criteria, established by the scientific methodology.

With the information available, it cannot be concluded that the annual report of the work carried out by the body's professionals can be considered scientific research in the terms of the legislation on science and technology.

In any case, it should be noted that even if the purpose could be considered scientific or statistical, the compatibility provided for in Article 89 does not operate automatically but is subject to adoption by the responsible for the processing of the **appropriate guarantees** to guarantee the protection of the personal data involved. Consequently, the data controller must guarantee that it has the necessary technical and organizational measures to guarantee, in particular, respect for the principle of minimization of personal data (art. 89 RGPD). The same article provides that, as long as it is compatible with the achievement of the aforementioned purposes, it will be necessary to prioritize the adoption of measures such as pseudonymization or other measures that do not allow the identification of the interested parties.

The consultation letter also does not consider what the guarantees that would be adopted would be.

v

The consultation letter also raises the possibility of limiting the rights of the affected persons provided for in article 89.2 RGPD. Specifically, this article establishes the following:

"2. When personal data are processed for the purposes of scientific or historical or statistical research, the Law of the Union or of the Member States may establish exceptions to the rights contemplated in articles 15, 16, 18 and 21, subject to the conditions and guarantees indicated in section 1 of this article, as long as it is likely that those rights make it impossible or seriously hinder the achievement of scientific goals and as long as those exceptions are necessary to achieve those goals."

This section 2 of article 89 authorizes the member states to provide for exceptions to the rights of access, rectification, limitation of treatment and opposition of the interested parties, with the appropriate guarantees, "when the exercise of these rights makes impossible or limits the achievement of the purposes of scientific and historical research or statistical purposes", but does not directly establish the possibility of excluding these rights. For this reason, it is a provision that must be completed by the internal regulations that will be precisely where these exceptions are established.

In this regard, 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, Congress of Deputies Series A Núm. 13-1 of November 24, 2017, in parliamentary processing, refers in its articles 25 and 26 to the processing of data in the field of the public statistical function and for archival purposes in the public interest by the Administrations Public, respectively.

In the case of data processing in the field of the public statistical function, the possibility of limiting the rights provided for in articles 15 to 22 of the RGPD is foreseen, "when the data is protected by the guarantees of statistical secrecy provided for in state or regional legislation". It does not seem, however, as has been explained, that this is the case of the scientific memory that concerns us.

VI

Discarding the purpose of scientific research and the statistical purpose of the study subject to the consultation, it is necessary to take into consideration article 6.4 of the RGPD which 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.”

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 tasks and 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 of the 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. (...)."

In the case at hand, according to the information provided, the processing of the data in the file (...) bases its legality on the consent of the interested parties, who are informed, in the process of collecting their consent, that the purpose of the treatment is "participation in fixed or temporary selective processes, and voluntary mobility processes".

For the use of the data collected to carry out a subsequent study whose purpose is to have information on the work carried out by the professionals of the organization, the consent of the interested parties is not available and therefore this subsequent treatment only it would be lawful if it could be considered compatible with the initial purpose based on the criteria established in article 6.4 of the RGPD.

From the result of this compatibility analysis, it can be concluded that there is no relationship between the purposes for which the personal data have been collected and the purposes of further processing; that in the context in which the data were collected, the circumstances do not exist so that the interested parties can have reasonable expectations of this new treatment. On the other hand, no

it is known that no guarantees have been provided for this treatment, such as pseudonymization, information to interested parties, measures to guarantee the accuracy of the data, etc.

In short, this treatment should be considered as not complying with the requirements derived from the RGPD.

In accordance with the considerations made in these legal foundations in relation to the query raised by an organization in relation to the extraction of data from a file of the organization without the consent of the interested parties may involve a violation of the protection legislation of personal data, the following are done,

Conclusions

The extraction of personal data from the file (...) for the preparation of an annual scientific report of the work carried out by the body's professionals, in the terms proposed in the consultation, would not meet the requirements derived from the principles provided for in the RGPD, especially the principles of purpose limitation and minimization.

Barcelona, September 5, 2018