

Opinion in relation to the consultation of a consortium on whether the express consent of those affected is necessary to provide information on cultural and educational activities or whether it can be protected by a legal authorization.

A letter from a consortium is submitted to the Catalan Data Protection Authority, in which it requests the opinion of this Authority on whether the express consent of those affected is necessary to provide information on cultural and educational activities or can be protected in a legal qualification.

On the other hand, it is also considered whether in communications between public administrations any type of consent is required to exchange information that does not contain personal data.

Having analyzed the request, which is not accompanied by other documentation, and having seen the report of the Legal Counsel, the following is ruled

I

(...)

II

The first question raised in the consultation is whether the personal data of the contact directories they have of people who have participated over the years in various activities and visits to the museum can be treated, basing the legality of the treatment on the exercise of public broadcasting powers specified in its Statutes.

In particular, the treatment that is intended to be carried out is the transmission of information about the activities carried out (exhibitions, studies, research, etc.).

Thus, Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD) applies "to the total or partially automated processing of data personal data, as well as non-automated processing of personal data contained or intended to be included in a file" (article 2.1).

The RGPD applies, exclusively, in relation to personal data, meaning by personal data, as provided in article 4.1 of the RGPD: "all information about an identified or identifiable natural person ("the interested party").

In addition, recital 14 of the RGPD explains: "the protection granted by this Regulation must apply to natural persons, regardless of their nationality or place of residence, in relation to the treatment of their personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details.

Therefore, the RGPD applies only to the data of natural persons contained in the mentioned directories of contacts of the Consortium.

In this sense, article 1 of the RGPD establishes that: "1. This Regulation establishes the rules relating to the protection of natural persons in what represents the treatment of personal data and the rules relating to the free circulation of such data. 2. This Regulation protects the rights and fundamental freedoms of natural persons, and, in particular, their right to the protection of personal data".

Likewise, article 2 of the RGPD states that: "This Regulation applies to the total or partially automated processing of personal data, as well as to the non-automated processing of personal data contained or intended to be included in a file".

In accordance with this, we can already advance, in response to the second of the questions raised in the consultation, that when it comes to communications between public administrations that do not contain personal data, the regulations for the protection of personal data, does not apply, as long as no natural person can be directly or indirectly identified.

III

With regard to the first question raised in the consultation, it will be necessary to analyze whether the treatment of the contact data collected by the Consortium of the people who have participated in any of its activities can be used for the purpose of sending relative communications to the cultural and educational activities of the Consortium, without the consent of those affected, is covered by one of the authorizations provided for in article 6 of the RGPD.

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1.

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 the interests or rights and freedoms do not prevail over said interests

fundamental interests 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."

Section 3 of this precept provides: "the basis of the treatment indicated in section 1, letters c) and e), must be established by:

- a) the Law of the Union, or
- b) the Law of the Member States that applies to the person in charge of treatment

The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred to the person in charge of the treatment."

It must be borne in mind that these legal bases do not maintain any relationship of priority or precedence. Likewise, it is possible that the processing of the data is lawful on the basis of more than one legal basis at the same time.

In the case at hand, it should be noted that article 6.1 e) does not refer only to those entities that exercise public powers (an aspect to which the consultation expressly refers), but also to those that lead to term "a mission carried out in the public interest".

However, as follows from article 6.3 of the RGPD, the basis of the treatment indicated in article 6.1 e) must be established by the law of the European Union or by the law of the Member States that applies to the data controller.

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, therefore, in the case of the Spanish State, that the development rule, to be treated of a fundamental right, has the status of law (Article 53 CE).

In this sense, Law 40/2015, of October 1, on the Legal Regime of the Public Sector (hereafter LRJSP) establishes the entities that are considered public administrations (art. 3.3):

- The General Administration of the State
- The administrations of the autonomous communities
- The entities that make up the local administration
- Any public body or entity under public law linked to or dependent on the public administrations.

Article 118 of the LRJSP makes it clear that: "consortia are entities under public law, with their own and distinct legal personality, created by various public administrations

or entities that are part of the institutional public sector, among themselves or with the participation of private entities, for the development of activities of common interest to all within the scope of their powers".

In accordance with the Articles of Incorporation, the Consortium is an administrative entity of a local nature, with its own legal personality and full legal and operational capacity and, in the area determined by its purposes and given that it is a local institutional body, has the same powers and prerogatives that can be enjoyed by non-territorial or institutional local bodies by virtue of article 8 of the Revised Text of the Municipal and Local Government Law of Catalonia (article 5).

Thus, the Consortium is considered a public administration. More specifically, it is an entity that integrates the local administration and is linked to the Provincial Council whose aims, among others, are the dissemination of Catalan maritime cultural heritage, the promotion and promotion of exhibitions, studies and research that contribute to the knowledge of the history and the current situation of the different maritime sectors, the wider dissemination of maritime culture and guaranteeing the universal dissemination of the Maritime Museum's heritage (article 6 of the Statutes).

However, regardless of whether some of the activities it may carry out may fit within the concept of a mission in the public interest, the authorization for the processing of citizens' data by the Consortium cannot be understood as an authorization to process data of any citizen but only of those who participate in the activities carried out by the Consortium. In other words, it would be due to prior consent or the legal relationship previously established with the Consortium.

Obviously, at the time of establishing this legal relationship or of obtaining consent, the interested parties must have been informed of the various aspects referred to in article 13 RGPD (previously article 5 LOPD) and, especially, on the purpose or purposes (in this case differentiating the consent for each of them) for which the data will be processed. Regarding this, it may be of interest to consult the Guide for information on the RGPD (<http://apdcat.gencat.cat/ca/documentacio/RGPD/El-fulfilliment-de-la-dutya>).

If so, and to the extent that these purposes included the sending of information about the activities carried out by the Consortium, there would be no problem in being able to use the data obtained for this purpose.

IV

However, in the event that at the time of obtaining the contact data that is now intended to be used, the consent of the affected persons had not been obtained in order to be able to process them for the purpose of sending them advertising or communications about the activities carried out by the Consortium, it is necessary to analyze whether it would be compatible to use the data for this new purpose.

At the outset, it should be borne in mind that article 5.1.b RGPD establishes the principle of purpose, according to which the data must be collected for specific, explicit and legitimate purposes and subsequently must not be treated in a manner incompatible with these purposes. In accordance with article 89, paragraph 1, the subsequent processing of personal data for archival purposes in the public interest, for scientific and historical research purposes or for statistical purposes is not considered incompatible with the initial purposes.

However, article 6.4 RGPD establishes the following:

"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, section 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 others

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."

In the case at hand, it seems that there would be a close relationship between the activities for which the data would have been collected (activities deployed by the Consortium, such as exhibitions, studies and research) and the purpose to which they are intended (disclosure of activities of this same nature that will be carried out by the Consortium).

Secondly, it would be about people who have previously approached the Consortium and who have shown their interest in this type of activity. On the other hand, the data intended to be used would only be contact data, and would not be disclosed to third parties, nor are there foreseeable risks for the rights of the affected persons, nor particularly serious consequences for the affected persons, as long as with the first and successive communications that are made, the affected persons are informed in compliance with the principle of transparency, in particular about the origin of the data and about the possibility of objecting to the treatment in a simple and easily accessible way (for example through a link to the same electronic communication or through the web page).

As long as these guarantees were offered, with the information available it seems that the use of the information for this new purpose could be considered compatible.

This compatibility would apply even if it were electronic communications subject to Law 34/2002, of July 11, on services of the information society and electronic commerce (LSSICE), given that although this The law requires express consent for this type of communications, except for cases where there is a previous contractual relationship and the communications refer to products or services similar to those that had been contracted:

"1. It is prohibited to send advertising or promotional communications by electronic mail or other equivalent electronic means of communication

previously they would not have been requested or expressly authorized by the recipients of the same.

2. The provisions of the previous section shall not apply when there is a previous contractual relationship, provided that the provider had lawfully obtained the addressee's contact data and will use them to send commercial communications relating to products or services of his own company that are similar to those that were initially contracted with the client.

In any case, the provider must offer the recipient the possibility to object to the processing of their data for promotional purposes through a simple and free procedure, both at the time of data collection and in each of the commercial communications sent to them.

When the communications had been sent by electronic mail, said medium must necessarily consist of the inclusion of an electronic mail address or another valid electronic address where this right can be exercised, being prohibited from sending communications that do not include said address.”

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

For the information provided with the consultation, the use of the contact details of the people who have previously participated in activities organized by the Consortium (exhibitions, studies, research), may be compatible with its subsequent use to send them information about activities of this nature organized by it, as long as the guarantees referred to in Legal Basis IV of this opinion are met .

The regulations on the protection of personal data do not prevent communications between public administrations that do not contain personal data, given that these regulations do not apply, as long as no natural person can be directly or indirectly identified.

Barcelona, September 13, 2018