

CNS 54/2018

**Opinion in relation to the consultation formulated by a City Council on the exercise of the right to portability within the scope of the City Council**

A letter from the City Council is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the issues raised in relation to the exercise of the right to portability in the field of 'Town hall.

Specifically, ask the following questions:

"1- Does the attention of the requests made by the interested parties come from the exercise of the right of portability within the scope of this City Council?

2- It is necessary that in the corresponding administrative documents drawn up by the City Council, addressed to citizens, the possibility of exercising the right of portability is indicated, in the informative data protection clause."

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

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(...)

II

Article 20 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data (hereinafter, RGPD) recognizes a new right to data portability according to which:

"1. The interested party has the right to receive, in a structured, commonly used and machine-readable format, the personal data that affect him and that he has provided to a data controller. You have the right to transmit them to another person in charge, without being prevented from doing so by the person in charge to whom they had provided them, when: a) The treatment is based on consent, in accordance with article 6, paragraph 1, letter a) , with article 9, paragraph 2, letter a), or in a contract according to article 6, paragraph 1, letter b). b) The treatment is carried out by automated means.

2. When exercising his right to data portability in accordance with paragraph 1, the interested party has the right to have the personal data transmitted directly from person in charge to person in charge, when technically possible.

3. The exercise of the right mentioned in paragraph 1 of this article is understood without prejudice to article 17. This right does not apply to the treatment necessary to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the data controller.

4. The right mentioned in paragraph 1 must not negatively affect the rights and freedoms of others.”

This right, which, according to recital 68 of the RGPD, aims to further strengthen the control that interested parties have over their data, allows interested parties to receive the personal data that they have provided to a data controller in a structured format, of common use and mechanical reading, and transmit them to the interested party, under certain conditions or, even, that the person responsible for the treatment transmits them directly to the person responsible for the treatment indicated by the interested party.

It can be considered that the right to portability complements the right of access to the extent that it allows the interested party to access their personal data, in a reusable format, but with a limitation regarding the data protected by this right

Thus, the data protected by the right to portability are defined and limited based on what is established in article 20.1 of the RGPD. According to the wording of article 20.1 of the RGPD, the right to portability will be subject to "the personal data that affect you and that you have provided to a data controller".

The Article 29 Working Group, in the document "Guidelines on the right to data portability" (adopted on December 13, 2016 and last revised and adopted on April 5, 2017) which offers guidance on how to interpret and apply the right to data portability, with respect to the data that can be considered included, stated the following:

"The following categories can be cataloged as data "facilitated by the interested party":

- **data provided actively and consciously by the interested party** (for example, postal address, user number, age, etc.); - **observed data provided by the interested party by virtue of the use of the service or device**. These may include, for example, search history, traffic data and a person's location data. They can also include other raw data such as heart rate recorded by a wearable device. (...)

So, the expression "facilitados por" includes the personal data that are related to the activity of the interested party or that derive from the observation of the behavior of a person, but not the data that result from the subsequent analysis of said behavior.

On the contrary, all personal data that have been created by the person in charge of the treatment as part of the data treatment, e.g. through a process of

personalization or recommendation, through categorization of the user or creation of profiles, are data that are deduced or inferred from the personal data provided by the interested party and are not covered by the right to data portability."

Therefore, according to the report of the Article 29 Working Group, two conditions must be met: the first is that it is personal data relating to the interested party (it includes pseudonymised data, but it remains excluding anonymous ones); the second condition is that the data has been provided by the interested party. This condition must include the personal data provided actively and consciously by the interested party, but also the data that is generated and collected from the activities of the users (for example "raw data processed by an intelligent meter smart or other type of connected objects, activity logs, website usage history or research activities"), instead, the inferred and derived data, insofar as they are created by the controller based on the data provided by the interested party will not be included in the right to data portability.

It is therefore about the data "that affect the interested party" and that "have been provided" by the interested party, excluding from this category the data provided by other people, the data created by the data controller using the data that has been provided to him or that he has extracted as a result of the observation.

To be able to make use of this right, it is necessary that the treatment, in addition to being carried out by automated means, is based on the consent of the interested party (art. 6.1.a art.9.2.a RGPD in case of categories special data), or is necessary for the execution of a contract to which the interested party is a party, or for the application, at the latter's request, of pre-contractual measures (art. 6.1.b).

Article 20.3 of the RGPD expressly excludes the application of the right when the legality of the treatment is based on the performance of a mission in the public interest or in the exercise of public powers conferred on the person responsible for the treatment:

"3. The exercise of the right mentioned in paragraph 1 of this article is understood without prejudice to article 17. This right does not apply to the treatment necessary to fulfill a mission carried out in the public interest or in the exercise of powers public conferred on the person in charge of the treatment."

Recital 68 of the RGPD specifies that they are excluded from the right to portability, in addition to treatments to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment, which provides for article 20.3 of the RGPD, the treatments based on the fulfillment of a legal obligation applicable to the person in charge of the treatment:

"(...) This right must be applied when the interested party has provided personal data by giving consent or when the treatment is necessary to execute a contract. It shall not apply where the processing has a legal basis other than consent or contract. By its very nature, this right must not be exercised against those responsible who process personal data in the exercise of their public functions. Therefore, it should not be applied when the treatment is necessary to fulfill a legal obligation applicable to the person in charge, to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge.(...)"

The Article 29 Working Group, after analyzing paragraph 3 of article 20 and the paragraph of recital 68 mentioned above, concludes that:

"data portability does not apply when the treatment of personal data 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, or when the person responsible for the treatment exercises his public functions or fulfills a legal obligation.

Therefore, in these cases those responsible for the treatment are not obliged to offer portability. However, it is a recommended practice to develop processes to respond automatically to portability requests, following the principles that govern the right to data portability. An example of this would be a government service that would provide a simple download of previous personal income tax returns. "

Therefore, the opinion of the Article 29 Working Group, after concluding that in cases where the processing of data is necessary for the fulfillment of a mission carried out in the public interest, in the exercise of public powers or in compliance with a legal obligation, the person in charge of the treatment is not obliged to offer portability, points out, as good practice, to implement voluntary data portability systems in certain cases, beyond the cases in which by legal imperative it is necessary to recognize this right to the interested parties.

Finally, it should be borne in mind that the exercise of the right to data portability is carried out without prejudice to any other right provided for in the RGPD, as specifically referred to in article 20.3 in relation to the right to deletion. This has been highlighted by the Article 29 Working Group, in its opinion when it concludes that "An interested party can continue using the service of the treatment manager and benefit from it even after a data portability operation. The portability of the data does not entail its automatic deletion from the systems of the controller, nor does it affect the original retention period applicable to the data that has been transmitted. The interested party can exercise their rights as long as the person in charge of the data is processing them."

For this reason, the report of the Working Group points out that if the interested party wishes to exercise his right to the deletion of the data, the portability of the data cannot be used by a person in charge as a way of delaying or rejecting this deletion. Similarly, please note that data portability does not automatically trigger deletion from the controllers' systems and does not affect the retention period that applies to data that has been transmitted.

On the other hand, it must be taken into account that there may be cases in which the exercise of this right may affect the rights of third parties, as the data to be transferred may contain personal data of other subjects who have not consented to this transmission

In this sense, point 4 of article 20 of the RGPD establishes that "The right mentioned in section 1 must not negatively affect the rights and freedoms of others."

And recital 68 of the RGPD, in the same sense determines that "when a certain set of personal data affects more than one interested party, the right to receive this data has

to understand without undermining the rights and freedoms of other interested parties, in accordance with this Regulation"

In this regard, the Article 29 Working Group has made it clear that "in order to avoid negative effects on the third parties involved, the treatment of said personal data by another person responsible for the treatment is permitted only to the extent that the data are kept under the exclusive control of the requesting user and are managed only for purely personal or domestic needs. A "new" responsible for the receiving treatment (to which the data can be transmitted at the request of the user) will not be able to use the data of third parties transmitted to him for his own purposes, e.g. e.g. propose marketing products and services to those interested third parties. For example, this information must not be used to enrich the profile of the interested third party and reconstruct his social environment, without his knowledge and consent, nor can it be used to extract information about those third parties and create specific profiles, even if his personal data is already in the possession of the controller. Otherwise, such treatment could be considered illegal and unfair, especially if the affected third parties are not informed and they cannot exercise their rights as interested parties."

This regulation aims to prevent the recovery and transmission of data containing personal data of other subjects, who have not given their consent, to a new controller in cases where these data may be processed in a way that negatively affects the rights and liberties of other stakeholders.

The Article 29 Working Group advises, to avoid these risks, that those responsible for the treatment implement tools that allow the interested parties to select the data they require and that can exclude the data of third parties; as well as consent mechanisms for the possible affected third parties, facilitating the transmission of data when their consent is available.

Regarding the exercise of the right of portability, it is necessary to take into account the prior information on the availability of the right, the prior identification of the interested party who exercises it and the time limitation to respond to a portability request .

In relation to the identification of the interested party, the RGPD does not impose any system of identification of the interested party, however article 12.2 of the RGPD establishes:

*"2. The person responsible for the treatment must facilitate the exercise of their rights by virtue of articles 15 to 22. In the cases referred to in article 11, paragraph 2, the person in charge must not refuse to act at the request of the interested party in order to exercise his rights under articles 15 to 22, except that he can demonstrate that he is not in a position to identify the interested party."*

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In this sense, article 12.6 of the RGPD provides that when there are doubts about the identity of the applicant, additional information can be provided for their identification:

*"6. Without prejudice to the provisions of article 11, when the data controller has reasonable doubts about the identity of the natural person who submits the request to which*

*refer to articles 15 to 21, may request the additional information necessary to confirm the identity of the interested party."*

In any case, the Article 29 Working Group recommends in this regard that those responsible for the treatment must apply an authentication procedure to determine with certainty the identity of the interested party who requests their personal data or exercises, more generally of the rights recognized by the RGPD.

In this sense and, with regard to the security of the process, it is made clear that given that data portability aims to extract personal data from the information system of the data controller, in this case the city council, the transmission can become a possible source of risks that must be minimized as far as possible. The report of the Article 29 Working Group recalls that "The data controller is responsible for adopting all the necessary security measures not only to ensure that personal data is transmitted securely (through the use of security end-to-end or encrypted data) to the correct recipient (through the use of strong authentication measures), but also to continue the protection of personal data that remains in its systems, as well as adopting transparent procedures to address possible violations of data security. In this sense, those responsible for the treatment must evaluate the specific risks related to the portability of the data and adopt the appropriate measures for their mitigation."

With regard to the deadlines in which portability requests must be answered, in accordance with article 12.3 of the RGPD they must be attended to by providing the interested party with "information related to their actions" within one month from the receipt of the request. The same article provides for the possibility of extending that one-month period by two more months, taking into account the complexity and number of requests.

The RGPD imposes an obligation on the data controller to inform "without delay and at the latest within one month from the receipt of the request, of the reasons why it does not access the exercise of the right" and likewise, of the possibility that the interested party has to submit a claim to a control authority or to take legal action (article 12.4 RGPD).

The data controller could only refuse to act in the face of a request for the right of portability that meets the requirements established by the RGPD, in the event that the requests are "manifestly unfounded or excessive, especially due to its repetitive nature" (art. 12.5 RGPD).

Regarding the format in which the data must be provided, in accordance with article 20.1 of the RGPD, whenever it is technically possible, it must deliver the data requested by the interested parties in a structured format, of common use and mechanical reading. In this regard, recital 68 provides a clarification regarding the fact that this format must be interoperable. In any case, the RGPD does not impose specific recommendations on the format of the personal data that must be provided.

Point 2 of Article 20 of the RGPD also imposes an obligation to transmit the data directly to another data controller, when the interested party has requested it and it is "technically possible".

Recital 68 of the RGPD clarifies the limits of what is considered "technically possible" indicating that "it must not oblige the person in charge to adopt or maintain treatment systems that are technically compatible".

In short, following the recommendations of the Working Group on Article 29, "when there are no formats of common use in a given sector or context, those responsible for the treatment must provide personal data using open formats of common use (e.g. XML, JSON, CSV,...) together with useful metadata with the best possible level of granularity, while maintaining a high degree of abstraction. Thus, adequate metadata must be used in order to accurately describe the meaning of the information exchanged (...). So, when selecting the data format in which the personal data will be provided, the responsible for the treatment must take into account the extent to which said format would affect or hinder a person's right to reuse the data."

Finally, another element that must be taken into account in the analysis of the right to portability is that of responsibility. In terms of responsibility, the Article 29 Working Group has concluded that data controllers who respond to a data portability request that meets the conditions established by Article 20 of the RGPD, do not are responsible for the treatment carried out by the interested party or by any other company that receives the personal data since they act on behalf of the interested party. The person in charge of the receiving treatment is the one who bears responsibility for the new data processing, must respect the principles contained in article 5 of the RGPD, and must clearly and directly indicate the purpose of the new treatment before any data transmission request.

### III

Once the content of the right to data portability of the RGPD has been analyzed, and in relation to the first of the questions raised by the City Council on whether "the attention of the requests made by the interested parties proceeds from the exercise of the right of portability in the area of this City Council", the following considerations must be made.

As has been made clear in the analysis of the right to portability, the RGPD configures a limited right to data portability both in terms of the legal basis that grounds the treatment and in terms of the means used for this treatment.

Thus, as established in the first point of article 21 of the RGPD, to be able to make use of this right it is necessary that the treatment, in addition to being carried out by automated means, is based on the consent of the interested party (art. 6.1. and art. 9.2. a RGPD in case of special categories of data), or is necessary for the execution of a contract in which the interested party is a party, or for the application, at the latter's request, of pre-contractual measures (art.6.1.b).

In the case of public administrations, article 20.3 of the RGPD specifies that the right to data portability does not apply when the processing of personal data is

necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the data controller, or as recital 68 of the RGPD adds, the processing of personal data is necessary for the fulfillment of a legal obligation.

Thus, in general, the right to portability would not be enforceable by public administrations when exercising their public powers. However, it cannot be overlooked that there are cases in which public administrations, and in the case in question, councils act before the community carrying out activities that do not entail the exercise of public powers, the performance of a mission in the public interest or the fulfillment of a legal obligation, which may entail the processing of citizens' personal data.

In cases where these processing activities are legitimated by the consent of the interested parties or in the execution of a contract in which the citizen is a party (in this case the specific case should be analyzed to rule out cases of power imbalance), and it is an automated treatment, the interested parties must be able to exercise their right to portability before the City Council.

It would therefore be an attempt to analyze whether the treatment that has generated the exercise of the right has a legitimate basis in article 6.1.a) or 9.1.a) (in the case of special categories of data) or in article 6.1 .b) of the RGPD, and if this treatment is automated, to determine if there is an obligation to attend to possible portability requests.

In cases where the legal basis of the treatments is consent, it must be remembered that this must have the characteristics provided for by the RGPD, which requires that it be informed, free, specific and granted by the interested parties through a manifestation that shows their willingness to consent or through a clear affirmative action (art. 7 RGPD).

Beyond these cases in which the City Council is carrying out data processing based on one of the cases provided for in article 20.1 of the RGPD (consent or execution of a contract), in which it would be fully applicable the right to data portability, it is necessary to take into account the recommendations of the Article 29 Working Group in relation to public administrations.

As we have seen, the report of the Article 29 Working Group, after concluding that the data controller is not obliged to offer portability in cases where the processing of the data is necessary for the fulfillment of a mission carried out in the public interest, in the exercise of public powers or in compliance with a legal obligation, makes a recommendation in the sense of considering it a good practice for public administrations to offer automatic response services to portability requests , using as an example a government service for downloading income declarations made by interested parties in previous years.

This recommendation would leave the door open for Public Administrations to implement, voluntarily, automated systems to address the right to portability beyond the legally assessed cases, with all the requirements and security requirements that the RGPD provides.



#### IV

In relation to the second question raised by the City Council, regarding whether "It is necessary that in the corresponding administrative documents drawn up by the City Council, addressed to the citizens, it should be indicated, in the informative data protection clause, the possibility of the "exercise of the right of portability", the following considerations are made.

Articles 13 and 14 of the RGPD regulate the information that the controller must provide to the interested party. In the event that the person responsible for the treatment receives the data directly from the interested party, he must provide him with the information provided for in article 13 of the RGPD, which, among others, obliges to specify the purpose and legal basis of the treatment (art.13.1.c) and the existence of the right to request from the data controller the right to data portability (art.13.2.b).

In cases, as we have seen, in which the legal basis for the treatment is consent or the execution of a contract, and, in addition, the treatment is automated, the citizen has the right to exercise his right to portability of the data.

When the legal basis of the treatment is the fulfillment of a mission carried out in the public interest, in the exercise of public powers granted to the person responsible for the treatment or in the fulfillment of legal obligations, as already indicated, the RGPD excludes in this case the application of the right to portability.

Therefore, the administrative documentation that the City Council prepares for the collection of citizens' data must contain an information clause that complies with the provisions of article 13 of the RGPD and, in cases of automated processing in which the legal basis of the treatment is consent or the execution of a contract, you must also inform about the right to data portability. On the other hand, when the legal basis is the fulfillment of a legal obligation, the exercise of a public power or the fulfillment of a mission in the public interest, information on the possibility of offering this right should not be included .

This, without prejudice to the fact that the City Council voluntarily wishes to offer this right to interested parties beyond the cases provided for in article 20.1 and 20.3 of the RGPD, and informs of this right in the corresponding administrative documents that involve the collection of data of citizens, regardless of the legal basis for their treatment.

Finally, with regard to the content of the informative clause of the administrative documentation drawn up by the City Council that incorporates the exercise of the right to portability, the recommendations of the Article 29 Working Group must be taken into consideration.

In its report, the working group recommends those responsible for the treatment to clearly explain the types of data that an interested party can receive using the right to data portability, "the persons responsible for the treatment are encouraged to identify the data in advance that fall within the scope of portability in their own systems". In short, it is about providing the most accurate information possible regarding the data that, in accordance with the regulatory provisions and the technical requirements of the information systems of the person in charge of the treatment, he will be able to provide to the interested parties in each case .

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In accordance with the considerations made in these legal foundations in relation to the consultation raised by the City Council in relation to the exercise of the right to portability within the scope of the City Council, the following are made,

### **Conclusions**

In the case of public administrations, the right to data portability is not enforceable when the processing of personal data is necessary for the fulfillment of a mission carried out in the public interest, for the exercise of public powers conferred on the person in charge of the treatment, or when the treatment of personal data is necessary for the fulfillment of a legal obligation.

With regard to the informative clauses on the right to data protection of the documents prepared by the City Council, it will be necessary to inform about the right to portability when the treatment, in addition to being carried out by automated means, has a legal basis the consent of the interested party or is necessary for the execution of a contract to which the interested party is a party, or for the application, at the latter's request, of pre-contractual measures.

Barcelona, October 22, 2018