

CNS 56/2018

Opinion in relation to a consultation on the interpretative scope of article 13.5 of Organic Law 1/1996, of January 15, on the legal protection of minors

A query from a public body is presented to the Catalan Data Protection Authority, in which it is requested that the Authority issue an opinion on the interpretative scope of article 13.5 of Organic Law 1/1996, of January 15, on the legal protection of minors (hereinafter, LOPJM).

According to the query, the us provides professional training courses for employment at its occupational training centers (hereafter, the Centers). The students of these courses are between 16 and 65 years old.

Given that article 13.5 of the LOPJM provides as a requirement for access and the exercise of professions, trades and activities that involve regular contact with minors, the provision of a negative certification from the Central Register of Sex Offenders , questions whether the Centers should obligatorily request the certificate from the trainers of the centers, the internship tutors appointed by the companies that host students in internships and the staff of the Centers, taking into account the percentage of minors who usually attend these training courses professional training for employment.

After analyzing the consultation, which is not accompanied by any other documentation, the current applicable regulations and the report of the Legal Counsel, the following is ruled:

Legal Foundations

I

(...)

II

The consultation explains that the public body provides vocational training courses for employment at its Occupational Training Centers, which are aimed at people in a situation of unemployment (...).

According to the consultation, the number of registered students under the age of 18 is very small. As an example, the consultation explains that in 2017, out of a total of 3064 students, only 42 students were under 18 (1.3%). And in any case they were over 16 years old.

The query refers to section 5 of article 13 of the LOPJM (introduced by article one, eight, of Law 26/2015, of July 28, amending the child protection system and adolescence), which provides the following:

"5. For access to and exercise of professions, trades and activities that involve regular contact with minors, it is a requirement not to have been convicted by a final sentence for any crime against sexual freedom and indemnity, which includes assault and sexual abuse, sexual harassment, exhibitionism and sexual provocation, prostitution and sexual exploitation and corruption of minors, as well as human trafficking. For this purpose, whoever wants to access these professions, trades or activities must prove this circumstance by providing a negative certification from the Central Register of Sex Offenders."

The query asks if the element of habitual contact with minors would be met in the case raised (art. 13.5 LOPMJ) and, consequently, if the Centers should obligatorily request the criminal certificate from the trainers of the centers, from the tutors appointed by the companies which welcome students in internships, as well as the staff of the Centres. This, according to the consultation, taking into account the percentages of minors who usually attend these professional training courses for employment.

At the outset, it is necessary to refer to the regulatory framework in which the provision of article 13.5 of the LOPJM is inserted.

The Convention of the Council of Europe for the protection of children against sexual exploitation and abuse, of 25 October 2007 (Lanzarote Convention), ratified by Spain (BOE 12.11.2010), provides that: " Each Party will adopt all legislative or other measures that are necessary to promote awareness of the protection and rights of children on the part of the people who maintain regular contact with them in the sectors of education, health , social protection, justice and law enforcement, as well as in areas related to sport, culture and leisure."

According to article 10 of Directive 2011/92/EU, of 13 December, relating to the fight against sexual abuse and sexual exploitation of minors and child pornography:

"1. In order to avoid the risk of recidivism in crimes, the Member States will adopt the necessary measures to guarantee that a natural person who has been convicted (...), temporarily or permanently, for the exercise of activities, at least professional, that involve direct and regular contact with minors.

2. Member States will adopt the necessary measures to ensure that employers, when hiring a person to carry out professional activities or organized volunteering activities that involve direct and regular contact with minors, (...)."

Article 13.5 of the LOPJM has not had, until the moment of issuing this opinion, a regulatory development that specifies the interpretation or the casuistry of what must be understood by "habitual contact with minors".

In the area of Catalonia, Instruction 1/2015, of November 6, has been issued on the requirement to access and exercise jobs that involve regular contact with minors, from the Department of Governance and Institutional Relations, according to which:

"Given the difficulty of providing general criteria on the concept of "habitual contact with minors", this Secretariat understands that, in case of doubt, the superior protection of minors would always justify their involvement. Anyway,

habitual contact with minors is understood as the potential accessibility to relate to minors as a result of the occupation of the site (due to the location or location of the site itself, for example), regardless of the functions and tasks strictly considered."

By way of illustration, add that several Autonomous Communities (CA) have approved regulations referring to article 13.5 of the LOPJM. Thus, according to article 7 of Decree 18/2016, of November 22, applying article 13.5 of the LOPJM (CA of Extremadura):

"1. According to the terms of Directive 2011/93/EU, of the European Parliament and the Commission, of December 13, 2011, should be understood as those that involve regular contact with minors, those that involve direct and regular contact with minors.

2. Likewise, since the terms of article 13.5 of Organic Law 1/1996, of January 15, on the Legal Protection of Minors, cover the exercise of professions, trades or activities, they must be considered affected by said provision, both the positions of work that by their specific functions involve regular contact with minors, such as those that involve said contact for reasons of the location or assignment of the post that facilitates said contact."

According to Instruction no. 1/2016, of August 22, applying article 13.5 of the LOPJM (CA of Cantabria):

"1. The purpose of this Instruction is to establish the management criteria for the provision of the negative certification of the Central Registry of Sex Offenders (...). For the purposes of this Instruction, habitual contact means regular and direct contact and not merely sporadic or circumstantial.

We note that the Ministry of Justice, according to the information available on its website in relation to the RCDS (www.mjusticia.gob.es), refers to Report 0401/2015, of the Spanish Data Protection Agency (AEPD), relating to the interpretation that must be given to the criterion of "regular contact with minors", which the consultation mentions. Thus, according to the aforementioned website:

"The Spanish Agency for Data Protection in its report 0401/2015 and in the answers to frequently asked questions interprets that to consider "habitual work with minors", it is necessary that the job implies by its own nature and essence, a regular contact with minors, the minors being the main recipients of the Service provided. It is not necessary to present the certificate in those professions that, having regular contact with the public in general, among those who may find minors, are not by their nature exclusively intended for a minor public."

The AEPD Report states that it is a case-by-case criterion "that will have to be assessed for each job position, and not objective or generic".

However, it must be agreed that it is not up to this Authority to determine in which cases it is required to provide the negative certification of the RCDS under the terms of article 13.5 LOPJM or, specifically, to determine whether it should be required of professionals to whom the query refers (trainers and staff of the Centers, as well as business tutors) the presentation of said certification. Therefore, this opinion

it will be limited to analyzing the repercussions that the data processing may have for the rights of those affected by the requirement of the RCDS negative certificate - in the event that its presentation is required based on the regulations - and in any case proportionality of the measure, taking into account the information provided with the consultation on the training courses subject to consultation in relation to minors.

III

From the perspective of data protection it is necessary to take into account the Regulation (EU) 2016/679 (RGPD), general data protection.

According to article 4.1 of the RGPD, personal data is: "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person;

According to article 4.7 of the RGPD is responsible for data processing:

"the natural or legal person, public authority, service or other body that, alone or together with others, determines the ends and means of the treatment; if the Law of the Union or of the Member States determines the purposes and means of the treatment, the person responsible for the treatment or the specific criteria for his appointment may be established by the Law of the Union or of the Member States;

In the event that, by application of the regulations (LOPJM and, where appropriate, development regulations) it is required to provide negative RCDS certifications by the trainers, other workers of the Centers, or tutors of the training courses from of the companies, this will lead to a processing of personal data subject to the principles and obligations of the RGPD.

According to article 3.1 of Royal Decree 1110/2015, of December 11, which develops the Central Registry of Sex Offenders (hereinafter, RCDS), this is an information system, non-public and free, relative to the identity, genetic profile, penalties and security measures imposed on people convicted in a final sentence for any crime against sexual freedom and compensation or for trafficking in human beings for the purpose of sexual exploitation, including pornography, regulated in the Criminal Code, regardless of the age of the victim.

This Authority has already ruled on the possibility of certification being requested not only by the people affected, but also by public administrations with their consent. In this regard, we refer to Opinions CNS 29/2016 and CNS 44/2016, which can be consulted on the website www.apd.cat.

As stated in those opinions, the answer provided following a consultation with the RCDS can be of two types: firstly, it can confirm that the person has no history, or else, it can indicate that the query cannot be answered, and that the applicant will receive information later, "when the certificate is available".

For the purposes concerned, the fact of not receiving the certificate at first could be indicative of several situations, given the information available, such as

there are identity errors, or the certificate is not available. This second assumption could be made, given the information available, in those cases where it is not clear that those affected do not have criminal records or crimes of a sexual nature.

It follows from this that, when it is the administration itself that requests the certificate, even though it may be information that is not accurate, the fact of not obtaining the certificate could be interpreted as an indication of the commission of 'criminal offenses which, from the point of view of the protection of personal data, can have such harmful consequences for the affected person (in the case we are dealing with, trainers and other staff of the Centers, and guardians of companies) as if the information regarding these antecedents were accurate.

It is necessary to take into account the special nature of crimes committed against sexual freedom and compensation (Title VIII of the Penal Code, articles 178 to 194). Having, at least, an indication of the commission of these crimes, would involve the processing of data on the sexual life of those affected, at least, in certain cases, in relation to some of these criminal types.

For this reason, given the nature of the information that can be derived from this type of certificate, which affects data related to criminal convictions and even data related to the sexual behavior of the people affected (or the assumptions it can give place the fact that the certificate is not obtained), it is necessary to analyze the requirement of the certificate from the point of view of the principle of proportionality.

It should be taken into account in this regard that article 5.1.c) of the RGPD includes the principle of minimization, according to which, the personal data that are processed must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

Thus, from the perspective of data protection, it will be necessary to assess, on the one hand, the benefit that may be for the protection of the minors affected by requiring the presentation of the certificate to certain persons and, on the other, the repercussion that the processing of personal data may have for those affected (the trainers and staff of the Centres, and the tutors appointed by the companies).

IV

The consultation refers "to the trainers of the centers, the trainee tutors appointed by the companies that host trainees and the Centre's staff."

The provision of article 13.5 of the LOPJM is required, in principle, for all natural persons who carry out professional tasks that involve "habitual" contact, that is, "regular and direct contact" with persons under the age of age, as can be seen from the regulations studied.

The subject matter of inquiry is within the general scope of education and training, although it would fall outside the education specifically aimed at minors (childhood, primary and secondary education, and high school), which is necessarily affected by the provision of article 13.5 of the LOPJM, as can be seen from the Lanzarote Convention and the rest of the regulatory provisions studied.

According to the information available, the training courses are not mainly or mainly aimed at minors, but at unemployed people who, in a

quite a low percentage, they may be minors, of a high age group (16 and 17 years old).

Certainly, the provision of article 13.5 of the LOPJM is applicable in relation to minors in general, without this rule establishing limitations to the requirement of negative certification of the RCDS based on the range of age of the minors affected.

However, it should be borne in mind that in the case raised the percentage of minors (16 and 17 years old) is clearly in the minority. As the inquiry points out, the percentage of underage students in training courses is quite low (between 0.32% and 1.3% in recent years).

It should be added that, as has been explained, the expression "regular contact with minors" (art. 13.5 LOPJM) must be interpreted in the sense of "direct and regular contact", which is the expression used by Directive 2011/92/CE.

Although, as has been said, it is not up to this Authority to determine whether the provision of article 13.5 of the LOPJM can be considered applicable, nor if negative certification is required for those affected, the following should be noted.

In the case of the trainers of the centers, the existence of a percentage that is between 0.32% and 1.3% of underage students (that is, on average less than one underage student for each group of twenty students), does not allow to consider that these trainers are in regular contact with minors. And with less reason if these minors are already older than 16, which is an age at which they can already be integrated into the labor market. This is without prejudice to the fact that, given that the percentages provided refer to an average of the set of groups, if minors are grouped in the same group the percentage may end up being more significant and may justify the requirement of the certificate. Taking this into account, and given the terms in which current legislation provides for the obligation to have the certificate, requiring it in the case described in the consultation may be disproportionate.

With more reason, the proportionality of the requirement in relation to the tutors appointed by the companies that host trainees from the Centers' courses must be discarded. The fact that certain professionals from companies external to the institution can occasionally attend students from the Centers, among whom there may be minors in a very minority form, does not seem to necessarily entail "regular contact" with the minors by these guardians, in the sense provided for in the regulations studied.

Likewise with regard to the "Centre staff" to which the consultation refers in broad terms. From the information provided, it is not clear which workers the query refers to, but it seems that it may be referring to administrative or service personnel other than trainers. In any case, it also does not seem that any person working at the Centers should have regular contact with minors who, in a minority form, could attend training courses. In this case it does not even seem that it can be maintained that the contact would be "regular" or, probably, "direct".

Therefore, it is not clear in this case either that the premise of regular and direct contact with minors must be considered to be met.

Certainly, this is a requirement that will have to be determined case by case, but in any case, given the characteristics of the training courses subject to consultation (minimum percentage of minors affected and age range of minors, over 16 years), in principle does not seem sufficiently justified, from the perspective of the principle of minimization, the treatment of special categories of data (article 9.1 RGPD) of

affected persons and, therefore, that the presentation of the RCDS negative certification must be required in any case.

In accordance with the considerations made so far, the following are made,

Conclusions,

Given the characteristics of the training courses subject to consultation (very small percentage of minors affected and the age range of the minors), it does not seem that the requirement of habituality is met, therefore, from the perspective of the protection of data, the treatment of special categories of data would be disproportionate (article 9.1 RGPD).

Barcelona, December 11, 2018

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