

Report in relation to the Draft order approving, modifying and repealing evaluation tables and document access

A letter from the Commission is presented to the Catalan Data Protection Authority National Committee for Documentary Access, Evaluation and Selection (hereinafter, the Commission), in which the Authority is requested to issue a report on the Draft order by which evaluation tables are approved, modified and repealed and documentary access.

Having examined the project, which is not accompanied by any other documentation, and taking into account the current applicable regulations, and having seen the report of the Legal Counsel, the following report is issued.

Legal foundations

I

(...)

II

The evaluation and document access tables (hereinafter, TAAD) incorporate, in accordance with the provisions of article 9 of Law 10/2001, of July 13, on archives and document management, the evaluation and the retention period for each documentary series.

According to article 9, cited, once the active and semi-active phases have been concluded, the evaluation regulations must be applied to all public documents, and conservation must be determined, due to their cultural, informational or legal value or, where appropriate, its removal.

From the perspective of the right to the protection of personal data, it is necessary to take into account 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 processing of personal data (RGPD), applicable from May 25, 2018 (Article 99 RGPD).

According to article 5.1 of the RGPD, personal data must be:

"a) treated in a lawful, fair and transparent manner in relation to the interested party ("lawfulness, loyalty and transparency"); 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, 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**") ; c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated ("**data minimization**"); (...) e) maintained in a way that allows the identification of the interested parties for no longer than is necessary for the purposes of data processing

personal; personal data may be kept for longer periods as long as they are treated exclusively for archival purposes in the public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, section 1, without prejudice to the application of the measures appropriate technical and organizational techniques that this Regulation imposes in order to protect the rights and freedoms of the interested party ("**limitation of the conservation period**"); f) processed in such a way as to guarantee adequate security of personal data, including protection against unauthorized or illegal processing and against accidental loss, destruction or damage, through the application of appropriate organizational technical measures ("**integrity and confidentiality** »).

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According to article 89 of the RGPD:

"1. The treatment **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 freedoms 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 goals can be achieved through further processing that does not allow or no longer allows the identification of the interested parties, those goals will be achieved in that way."

In other words, the preservation and access to documentation that contains personal data constitutes data processing (Article 4.2 RGPD), which must be subject to the principles and guarantees of the data protection regulations, among others, the principles of purpose, limitation of the retention period, minimization and confidentiality (art. 5.1 RGPD).

From the perspective of the protection of personal data, it is necessary to know the specific information treated in each table, to determine, among others, the possible compatibility of the initial treatment with a subsequent treatment for archiving purposes (art. 5.1. b) RGPD). As can be seen from the provisions of Article 89 of the RGPD, a subsequent treatment - and detached from the initial purpose of the treatment - for archival purposes, requires the application of adequate guarantees to protect the rights of those affected, which make this subsequent treatment compatible.

Likewise, it is based on the information contained in each table, that it can be determined if the guarantees that have been established are adequate, and if the planned measures protect the confidentiality of the data.

The processed information also determines the proportionality of the subsequent treatment for archival purposes and the retention period that may be considered appropriate in each case (even, where appropriate, permanent retention).

It should be noted that, at the time of issuing this report, the Project Report is not available in order to analyze the appropriateness of the cultural, historical, legal or other reasons that may justify the preservation of the information in each case (article 9 Law 10/2001).

The Project refers, in most of the tables, to the fact that the documentation may contain personal data, using formulas similar to the following: "mostly

they may contain personal data that is neither merely identifying information related to the organization, operation or public activity of the Administration nor particularly protected". In several tables of the Project the expression is also used: "occasionally they may contain specially protected data such as those of Article 7 of Organic Law 15/1999 (...)", and reference is also made, in some tables, to "other information in which eventual access could lead to damage for other rights or interests (...)." In other tables (for example, File CNAATD 81/2017) it is mentioned that: "It may occasionally contain personal data that is not particularly protected."

As this authority has already done on previous occasions (Reports PD 15/2015 and PD 6/2017), although specifying which categories of data are not treated would already provide a certain amount of information (especially when it is ruled out that the information may contain specially protected data or, in the terms of Article 9 of the RGPD, "special categories of data"), it would be appropriate, as far as possible, to specify which categories are being treated. This would make it possible to specify not only the conservation of the information, but also the access regime in each case - to which we will refer later - as well as other issues to which we have referred, in relation to compliance with the principles of article 5.1 of the RGPD, among others, what could be the appropriate guarantees that the regulations require for the processing of data for archival purposes.

In this sense, we note that in a large part of the Project tables (for example: Files: 32/2017; 7/2018; 27/2017; 28/2017; 36/2017; 47/2017, etc. ..), refers to "merely identifying data related to the organization, operation or public activity of the Administration".

Without prejudice to the fact that the mention of "merely identifying" data may respond to the provision of article 24.1 of Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), in the which we will refer to later in relation to access to information, from the perspective of data protection, the processing of identifying data or any other type of data (economic-financial data, professional or academic profile, etc.), not is harmless, in the sense that a disproportionate treatment (for example, the retention of data for a disproportionate period or without sufficient guarantees), may lead to harm to the rights and interests of the affected person, whatever the category or type of the processed data, even if the documentation in question contains exclusively identifying data.

In addition, apart from the special categories of data (art. 9.1 RGPD) and identifying data, there is a wide range of data categories (economic and financial data, data on personal characteristics, social circumstances, academic and professional data, employment data...) which, if contained in the documentation of the tables, may condition their treatment for archival purposes (technical or organizational measures to be applied, retention period, access...). The assessment of this treatment, from the perspective of data protection principles, would require knowing which categories of data are effectively treated in each case, and not just knowing whether identifying data or special categories of data are treated.

For all that has been said, it must be noted that the information available does not allow us to clearly know which categories of data are being treated, a question that is key, from the perspective of data protection, for the purposes of the principles of the regulations of data protection (art. 5.1 RGPD).

Finally, a couple of formal observations should be noted, regarding the content of Annex 1 of the Project, which includes the approved TAADs:

"1. Documentation common to Catalan public administrations (...). 2. Own documentation of the Generalitat de Catalunya (...). 4. Local Administration's own documentation (...)".

The enumeration of the sub-sections in annex 1 is not correct, given that section 4 should be section 3.

Apart from that, Annex 1 of the Draft Order does not include the code numbers that correspond to each table that is created in said Annex. Therefore, we will refer to the file number. In any case, we acknowledge that some of the forecasts included in the TAADs that we refer to in this report are repeated in identical terms in several tables, so that the mention of the file number in each case is not exhaustive and does not necessarily include all TAADs that include a certain mention.

Still at a formal level, we note that in some tables "total elimination" is foreseen and, in others, "total destruction". It would be advisable to unify both expressions.

III

Having said that, reference will be made below to the forecasts relating to the **term of conservation** of certain tables of the Project.

1) As has been pointed out, in a large part of the Project's tables reference is made to the treatment - in some cases, occasional - of "specially protected data such as that of Article 7 of Organic Law 15/1999, of December 13, protection of personal data." (as an example: CNTAAD files 27/2017; 28/2017; 62/2017; 76/2017; 37/2017; 32/2017, etc...).

Without prejudice to the fact that, from 25 May 2018, some aspects regulated by Organic Law 15/1999, of 13 December (LOPD), may continue to be applicable - either because they fall outside the scope of application of the RGPD or because the same RGPD allows regulation at state level -, the processing of data of natural persons is subject to the provisions of the RGPD.

For this reason, at the outset, in relation to the tables referring to documentation that may contain personal data that the LOPD qualified as "specially protected", it would be appropriate to refer, where appropriate, to the provisions of article 9.1 of RGPD, and not in article 7 of the LOPD. In line with this, it should be noted that the categories of data in Article 7 of the LOPD do not have an exact correlation with the special categories of data in Article 9.1 of the RGPD, a matter that should be taken into account when determining whether a table contains special categories of data.

On the other hand, in different tables of the Project, the permanent conservation of the documentation is foreseen which, due to the information available, may include special categories of data. As an example, in File CNAATD 7/2018, from the series: "Register of trade union representatives", it is foreseen that it may contain identifying data and "other personal data including specially protected data". These mentions do not

allow to determine which categories of data the documentation includes, nor can it be assessed whether permanent conservation is appropriate, for the purposes of the aforementioned data protection principles.

2) In File CNAATD 17/2017, of the series: "files of communication of displacement of workers in the framework of the provision of transnational services", of the department competent in labor matters, the total destruction is foreseen in a term of "three years from the prescription of the infringement." The documentation of this series may contain, due to the information provided, "personal data that is neither merely identifying (...) nor particularly protected". Since the table refers to the displacement of workers, it is not clear that the documentation in this table must actually contain information about violations. It would be appropriate, if necessary, to clarify the content of this table in terms of the personal information processed, because in the event that there is no data on infringements, the established term would not start the calculation.

3) In File CNAATD 13/2018, from the series: "initial work authorizations for foreigners", the total elimination is foreseen in 10 years. The file provides that "occasionally they may contain specially protected data (...) of the person at risk of exclusion." Given that the table refers to the hiring of foreigners, it is not clear that the documentation in this table must effectively contain information about people who, by the mere fact of being foreigners, can qualify as "at risk of exclusion".

We extend this consideration to File CNAATD 27/2017, from the series: "Management of identifications of people in police departments", in which reference is made to the treatment of "specially protected data" (referring, again, to the article 7 LOPD) "of the person at risk of exclusion", and also, in the same sense, in File CNAATD 28/2017, of the series: "identification register book". In relation to both tables, although certain people identified in police departments may have personal circumstances of risk of social exclusion, it does not seem that this should be generalized in all cases, so it would seem clearer to refer to "the identified person".

4) With regard to the table with code 609, from the series "sanctioning files of a social order", we note that the "total destruction within a period of five years from the resolution of the file or twenty years when that date is not known."

Also, in this table it is foreseen that the documentation contains, among others, data "restricted subjects due to infringement, investigation or sanction of infringements." Regarding this last mention, for terminology purposes, and taking into account the provisions of article 27 of the Draft Organic Law on data protection, in parliamentary processing at the time of issuing this report, from the perspective of the data protection regulations would be more appropriate to refer to "data relating to infringements and administrative sanctions."

We note that data relating to administrative violations and sanctions are not included in the special data categories of Article 9.1 RGPD, unlike Article 7 of the LOPD.

Given that the table refers to social disciplinary proceedings, as far as possible and for purposes of clarity, it would be appropriate to clarify whether this table contains categories

special data (art. 9.1 RGPD), apart from containing data relating to infringements and administrative sanctions.

With regard to the conservation forecast for a period of up to 20 years, we note that, as provided in article 4 of the law of infringements and sanctions in the social order of 2000 (approved by Royal Legislative Decree 5 /2000, of August 4):

- "1. The infractions in the social order referred to in this Law prescribe three years from the date of the infraction, except as provided in the following numbers.
2. The infractions in the field of Social Security will expire after four years, counted from the date of the infraction.
3. In terms of occupational risk prevention, minor infractions will be prescribed for one year, three years for serious ones and five years for very serious ones, counted from the date of the infraction. (...)."

Given that the general prescription periods in the social order do not exceed five years, and taking into account the information discussed in this table, in accordance with the principles of minimization and limitation of the conservation period, it would be appropriate to assess the possibility of preserving the information for a period of less than twenty years, unless other legal regulations apply that make it advisable to maintain this term.

5) Finally, we note that in the table File CNAATD 22/2017, code 527, of the series: "register of vehicles abandoned on public roads", total destruction is foreseen within 15 years. Regarding the processed information, it is foreseen that "occasionally they may contain personal data that are not particularly protected or merely identifying (...)."

As already mentioned, personal data can be grouped into several categories (apart from special categories of data and identifying data), of which the Project does not provide information. It would be appropriate, as far as possible, to specify which categories of data are those that are effectively dealt with in this table, and in others that contain similar forecasts.

Given the information available on this table, it is not possible to assess the appropriateness of keeping the documentation for 15 years. In any case, unless the applicable regulations allow the maintenance of the information for the indicated period, the retention period could be shorter.

There is also not enough information to assess whether in the CNAATD File 8/2017, code 522, of the series "registry of notices of opening or resumption of activities of work centers", in which it is only foreseen that there there is "merely identifying" data, the permanent preservation of the documentation is necessary, and for what purposes.

IV

The TAAD of the Order Project include the **access regime** that is considered applicable in each case.

According to article 34.1 of Law 10/2001:

"1. People have the right to access public documents under the terms and conditions established by Law 19/2014, of December 29, on transparency, access to public information and good governance, and the rest of the regulations that are applicable. "

As this Authority has agreed on previous occasions, the provision for access made in the Draft order for each TAAD is an indicative indication, given that in accordance with the regime established in the state and Catalan legislation of transparency, access to public information and good governance (Law 19/2013, of December 9 (LT), and Law 19/2014, of December 29 (LTC), respectively), the possibility of granting access or not to a document will not depend on the form as it is collected in this section of each TAAD, but on the existence of any applicable limit of those provided by the transparency legislation, mentioned, or by other rules with the rank of law.

Article 5.1.a) RGPD establishes that all processing of personal data (art. 4.2 RGPD) must be lawful, loyal and transparent in relation to the interested party. In order for the treatment, for the purposes that concern us, access by third parties to the personal data contained in the documentation referred to in the TAAD, to be lawful, one of the conditions provided for in article 6 must be met RGPD and you must also take into account article 9 RGPD, in the case of special categories of personal data.

In any case, as this Authority has done on previous occasions, the TAADs include initial guidance which, without prejudice to the fact that the resolution of specific access requests requires analyzing the concurrent circumstances in each case, offers initial information on the applicable regime.

Having said that, it is necessary to refer to some issues that affect a large part of the TAADs included in the Draft Order that we are analyzing.

In line with what has been pointed out regarding the applicable data protection regulations, in those tables (such as, for example, CNAATD File 3/2017, from the series "overrun of expenses for third-party healthcare ") in which specific articles of the LOPD are mentioned (in this case, article 7.3 of the LOPD), it would be appropriate, where appropriate, to refer to the provision of the RGPD that is relevant.

In several tables, reference is made, regarding the access regime, to: "free access. In case there is a limit that must prevail, partial access." (For example, the CNAATD File 6/2017, 35/2017, 36/2017, or 14/2018, among many others).

As has already been said on previous occasions, in accordance with the regime established in the transparency legislation (LT and LTC), which is based on the existence of a general rule, such as access to all the public information, and of limits that may lead to a limitation of access, the consequence of the concurrence of some limit must not always and necessarily be partial access, but could also be the total denial of the access, in those cases where partial access does not allow safeguarding the limit that must prevail.

For this reason, an expression similar to "free access unless there is a limit that must prevail" could be more adjusted to the transparency regulations. This formula does not presuppose whether the limit will lead to partial access or denial of access.

The wording used in other tables (such as, for example, File CNAATD 71/2017, among others) is also more appropriate, in which reference is made to: "free access, without prejudice of the eventual denial or restriction due to the concurrence of limits."

Still in relation to the access regime provided for in the transparency legislation, we note that in several tables of the Project mention is made of: "Validity of the restriction: for specially protected data, this exclusion ceases to have effect on the 25 years since the death of the person concerned and, if the date is unknown, 50 years after the production of the document. For the rest of personal data, this exclusion ceases to have effect 30 years after the production of the document."

In other tables (such as File CNAATD 35/2017, or File CNAATD 36/2017, among others), it is simply provided that "this exclusion ceases to have effect 30 years after the production of the document." Thus, exclusion is foreseen for 30 years, when the documentation only contains "merely identifying data related to the organization, operation or public activity of the Administration."

These temporary restrictions on access correspond to the provision of article 36.1 of Law 10/2001, according to which:

"1. In a general way, the legally established exclusions regarding the consultation of public documents cease to have effect thirty years after the production of the document, unless specific legislation provides otherwise.

If these are documents that contain personal data that may affect the security, honor, privacy or image of people, as a general rule, and unless specific legislation provides otherwise, they may be subject to public consultation with the consent of those affected or when twenty-five years have passed since their death or, if the date is not known, fifty years since the production of the document."

As has been mentioned on previous occasions, it should be borne in mind that article 22.2 of the LTC provides that:

"2. The limits of the right of access to public information are temporary if so established by the law that regulates them, and they remain as long as the reasons that justify their application last.

Thus, we remind you that, in accordance with the transparency legislation, the limits are only temporary "if so established by the law that regulates them."

In any case, it does not seem that a 30-year exclusion should be foreseen for access to documentation that only contains identifying data related to the organization, operation or public activity of the Administration (as provided for in some tables, for example, File CNAATD 36/2017), if we take into account the terms of access provided for in the regulations that provide for the regulations (art. 24.1 LTC).

Regarding this, we note that in some tables (such as, for example, the CNAATD File 5/2017, series: "editing and publication management files of editorial products"), it is foreseen that "they may contain merely identifying personal data related to the organization, functioning or public activity of the Administration", and in the legal basis section the reference to article 24.1 of the LTC is explained, a mention which is adequate and clarifying, and which should be included in the "Legal Basis" sections of those tables that only contain purely identifying personal data referred to in article 24.1 LTC, quoted.

For all this the following are done,

Conclusions

Having examined the draft order approving, modifying and repealing evaluation tables and document access, it is considered adequate to the provisions established in the regulations on the protection of personal data, as long as they are taken into account the considerations made in this report.

Barcelona, 31 October 2018

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