

CNS 5/2019

**Opinion in relation to the query made by the manager of an entity about the identification of those interested in the various publications within a personnel selection process.**

**A letter from the Manager of an entity is presented to the Catalan Data Protection Authority regarding the identification of those interested in the various publications within a personnel selection process.**

**Specifically, it states that they have doubts regarding the application of the Seventh Additional Provision of Organic Law 3/2018, of December 5, on the Protection of Personal Data and the guarantee of digital rights in relation to its application with respect to selective procedures of personnel, in order to determine which data must be published regarding the**

**Having analyzed the consultation, which is not accompanied by other documentation, and in accordance with the report of the Legal Counsel, I issue the following opinion:**

**I**

**(...)**

**II**

**In order to interpret the regulation contained in the Seventh Additional Provision of Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of digital rights regarding the identification of those interested in notifications through advertisements and publications of administrative acts, it is necessary to take into account the regulatory principles of the right to the protection of personal data.**

**In accordance with article 4.1) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), is understood as data of a personal nature: "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".**

**The RGPD establishes that the processing of personal data, understood as "any operation or set of operations carried out on personal data or sets of personal data, already**

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, comparison or interconnection, limitation, deletion or destruction", it must be subject to the principles and guarantees of the RGPD.

Among these principles it is necessary to take into consideration, first of all, the principle of lawfulness (article 5.1.a) according to which personal data must be treated lawfully, loyally and transparently in relation to the interested party. According to article 6 of the RGPD, the treatment will only be lawful if it meets at least one of the following conditions:

"a) The interested party has given consent for the processing of their personal data, for one or several specific purposes. b) The treatment is necessary to execute a contract in which the interested party is a party or to apply pre-contractual measures at their request. c) The treatment is necessary to fulfill a legal obligation applicable to the person responsible for the

treatment.

d) The treatment is necessary to protect the vital interests of the person concerned or of another natural person. e) The treatment is necessary 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. f) The treatment is necessary to satisfy legitimate interests pursued by the person in charge of the treatment or by a third party, as long as the interests or fundamental rights and freedoms of the interested party that require the protection of personal data do not prevail, especially if the interested is a child. (...)"

But in addition, once the legality of the treatment has been determined, the personal data must be treated in accordance with the principle of minimization provided for in article 5.1.c) of the RGPD, according to which

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

c) adequate, relevant and limited

to what is necessary in relation to the purposes for which they are treated ("minimization of data"); (...)"

### III

In the case we are dealing with, the legality of the treatment is given by the provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPACAP), and, depending on the matter, by other sectoral regulations.

Article 45 of the LPACAP establishes the cases in which administrative acts must be published, in the following terms:

"Article 45. Publication.

**1. Administrative acts must be published when the regulatory rules for each procedure establish it or when reasons of public interest appreciated by the competent body so advise.**

**In any case, administrative acts must be published, and this has the effects of notification in the following cases:**

**a) When the act is addressed to an indeterminate plurality of people or when the Administration considers that the notification made to a single interested party is insufficient to guarantee the notification to all, and in the latter case it is additional to the one made individually.**

**b) When it comes to acts that are part of a selective procedure or competitive competition of any kind. In this case, the call for the procedure must indicate the medium in which successive publications will be carried out, and those carried out in different places are not valid.**

**2. The publication of an act must contain the same elements that article 40.2 requires regarding notifications. What is established in section 3 of the same article is also applicable to the publication. In cases of publication of acts containing common elements, the matching aspects may be published together, and only the individual aspects of each act must be specified.**

**3. The acts must be published in the corresponding official newspaper, according to the Administration from which the act to be notified comes from.**

**4. Without prejudice to the provisions of article 44, the publication of acts and communications that, by legal or regulatory provision must be practiced on a notice board or edicts, is understood to be completed by its publication in the newspaper corresponding official."**

**Also for publication purposes, article 44 of the LPACAP establishes:**

**"Article 44. Unsuccessful notification.**

**When the persons interested in a proceeding are unknown, the place of notification is ignored, or, once this has been attempted, it has not been possible to practice, the notification must be made by means of an announcement published in "Official Bulletin of the State".**

**Likewise, previously and on an optional basis, the administrations can publish an announcement in the official bulletin of the autonomous community or province, on the notice board of the City Council of the last address of the person concerned or of the consulate or section consular of the corresponding**

**Public administrations can establish other complementary forms of notification through the rest of the media, which do not exclude the obligation to publish the corresponding announcement in the "Official State Gazette".**

**Pursuant to these provisions, we may encounter different cases of publication of administrative acts, including the resolutions, decrees and announcements to which the query may refer. Thus, in accordance with these forecasts, the publication proceeds in the following cases:**

- When the act has an indeterminate plurality of people.
- When the Administration considers that the notification made to a single interested party is insufficient to ensure notification to all.
- When it comes to selective procedures or competitive competition, in accordance with that establishes the applicable regulations and the call.
- When established by the regulatory rules of each procedure.
- When advised by reasons of public interest appreciated by the competent body.
- When personal notification has been attempted and failed.
- When the interested parties are unknown or the place of the notification is ignored.

In cases where the applicable regulations or the purpose inherent in the publication do not require the inclusion of personal data, the application of the minimization principle must lead to not including any identifying data of the affected person.

In cases where the events or announcements subject to publication contain personal data that allow the identification of the affected persons, we must distinguish two basic situations, to which a third can be added:

- a) Cases in which the publication is made for advertising purposes, so that anyone can become aware of it. This would be the case, for example, in which the regulations applicable to a selective or competitive process provide for personal notification to the affected persons, but also publication to ensure general knowledge of the winners of the process. This would also be the case, for example, of Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC) and Law 19/2013, of December 9, on transparency, access to public information and good governance (LT), which imposes on Public Administrations certain obligations to "advertise" the public information they generate.
- b) Cases in which publication is carried out as a substitute or complementary means of individual notification. In this case, the purpose of the publication is not to provide general information, but rather that the publication is addressed to the interested person himself. This would be the case, for example, of the publication of an advertisement as a result of an unsuccessful notification in accordance with the provisions of article 44 LPAC.
- c) Cases in which the publication fulfills both the purpose of general publicity set out in letter a) and the notification function set out in letter b). It would be the case of concurrent processes in which individual notification to the affected persons is not foreseen but only a publication of the result, both so that the interested persons themselves can know the result, and so that third parties can also be aware of it.

This distinction is relevant because, for the purposes of the application of the provisions of the seventh additional provision of Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of digital rights (LOPDGDD), the regime to be applied it will have to be one or the other.

#### IV

The seventh Additional Provision of the LOPDGDD has come to specify, under the prism of proportionality, a criterion that allows to minimize the impact on the right to the protection of personal data that the legal provision of publishing certain information that contains data personal

To determine which are the identifying data of those affected that are considered appropriate and relevant in the notifications by means of announcements and, in the publications of administrative acts, the Additional Provision Seven of the LOPDGDD establishes the following criteria:

"Seventh additional provision. Identification of those interested in notifications through announcements and publications of administrative acts.

1. When it is necessary to publish an administrative act that contains personal data of the affected person, it must be identified by means of his first and last name, with the addition of four random numerical figures from the national identity document, the foreigner's identity number, the passport or an equivalent document. When the publication refers to a plurality of those affected, these random numbers must be alternated.

When it comes to notification by means of announcements, particularly in the cases referred to in article 44 of Law 39/2015, of October 1, on the common administrative procedure of public administrations, it has to identify the affected person exclusively by means of the full number of their national identity document, foreigner's identity number, passport or an equivalent document.

When the affected person does not have any of the documents mentioned in the two previous paragraphs, he must be identified solely by his first and last name. In no case should the name and surname be published together with the full number of the national identity document, the alien identity number, the passport or an equivalent document.

2. In order to prevent risks for victims of gender-based violence, the Government must promote the development of a collaboration protocol that defines safe procedures for the publication and notification of administrative acts, with the participation of the bodies with competence in the field."

This provision differentiates the mechanism of identification of interested parties according to whether the need to make the data public derives from an obligation to publish an administrative act or is a consequence of the need to make a notification through announcements, to one or several interested parties, of an administrative act and, in particular, as a result of an "unsuccessful" notification provided for in article 44 of the LPACAP.

That is why we must distinguish:

a) When the publication of the administrative act that contains personal data that must be published for the purpose of publicity, of general knowledge by any person (situation described in section a) of Legal Basis III of this opinion), the identification of

affected will have to be done in accordance with what is established in the first paragraph of the first section of the seventh additional provision, that is, through the name and surname of the affected person adding four random numerical digits of the number of their national document identity card, the foreigner's identity number, the passport or an equivalent document.

For the determination of these four figures, as a provisional criterion until there is a regulatory deployment of this aspect that allows the provisions of this paragraph to be applied with full guarantees for the right to data protection, this Authority considers that the right can be guaranteed by applying the guidelines that have been jointly adopted by the Spanish Data Protection Agency, the Basque Data Protection Agency, the Andalusian Data Protection and Transparency Council and this Authority. This guidance can be consulted on the Authority's website at the following link: <http://apdcat.gencat.cat/web/.content/01-authority/normative/documents/VAR-9-2019-orientacio-disposicio-addicional-7-cat.pdf> .

The joint adoption of this guiding criterion aims to prevent the adoption of different formulas in application of the aforementioned provision from giving rise to the publication of numerical figures of the identification documents in different positions in each case, enabling the complete recomposition of 'these documents.

b) In the situation described in section b) of Legal Basis III of this opinion, that is to say, when the purpose of the publication is only the notification of the administrative act to the interested person, the second paragraph of the The first paragraph of the seventh additional provision of the LOPDGDD has provided that the mechanism for identifying those affected contains the minimum data necessary to allow them to know that the communication is addressed to them. Consequently, in this case, the identification of the interested party will be carried out through the full number of his national identity document, the foreigner's identity number, the passport or an equivalent document. Only with respect to those interested who do not have any of these documents, they can be identified by their first and last names.

c) It cannot be overlooked, however, as explained in section c) of Legal Basis III, that there are cases in which the publication of the administrative act has a dual purpose, on the one hand the purpose of notification, of knowledge by those affected that an administrative act has been issued that affects them and, likewise, a purpose of general knowledge on the part of the entire population. In these cases, the identification criterion must be the one established in the first paragraph of the first section of the seventh additional provision of the LOPDGDD, in order to guarantee that any person can have knowledge of it. Therefore, it will be carried out by means of the name and surname of the person affected by adding four random numerical digits of the number of the national identity document, the foreigner's identity number, the passport or an equivalent document, taking into account, for to the determination of the four random numerical figures, the guidance referred to in letter a) of this Legal Basis IV.

In short, the determining element for the application of one or another of the mechanisms provided for by section 1 of the seventh additional provision of the LOPDGDD is the purpose pursued by the publication of the act, as it concerns the publication as a means of communication to those affected by the administrative act and integration of its effectiveness or other public purposes different from the previous one in which the ultimate objective of the publication is to give publicity to the act , whether for purposes of transparency, control of administrative action, guarantee of participants in a public call, exemplary purpose, etc.

The analysis of the purpose pursued will determine, in each case, whether for the identification of those affected it is sufficient to indicate only the DNI number or it is necessary to publish the first and last names of the participants with the addition of four random numerical figures from the national document identity card, the foreigner's identity number, the passport or an equivalent document.

v

The consultation raises what should be the criterion to be applied with respect to personnel selection procedures for the purposes of determining which data must be published with respect to the people who participate.

In personnel selection procedures, as competitive competition procedures, the acts that make it up must be published and this will have the effect of notification, in accordance with the provisions of article 45.1.b) LPACAP, having considering that the call for the procedure must indicate "the medium in which successive publications will be made".

Such procedures are governed by the principles of publicity and transparency. In this sense, the Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law of the Basic Statute of the Public Employee (EBEP) (applicable as established in the article 2.1.c) to the official staff and, where applicable, to the labor staff of the Local Entities), establishes these principles in article 55, where it is foreseen that:

"1. All citizens have the right to access public employment in accordance with the constitutional principles of equality, merit and capacity, and in accordance with the provisions of this Statute and the rest of the legal system.

2. The Public Administrations, entities and organisms referred to in article 2 of this Statute will select their official and labor personnel through procedures that guarantee the constitutional principles expressed above, as well as those established below:

a. **Publicity** of calls and their bases. b. transparency  
c. Impartiality and professionalism of the members  
of the selection bodies. d. Independence and technical discretion in the  
performance of the selection bodies. e. Adequacy between the content of the selective  
processes and the functions or tasks to be developed. f. Agility, without prejudice to  
objectivity, in the selection processes."

In the same way Legislative Decree 1/1997, of October 31, which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in the field of public function, which is applicable "to personnel at the service of local corporations located in the territory of Catalonia, in the terms established by the legislation on local civil service" (article 2.2.c) is included in its article 42, among the principles that govern personnel selection processes , regarding the publicity of calls.

Also Law 7/1985, of April 2, regulating the Basics of the Local Regime, provides in article 91.2 that "The selection of personnel by means of a public call must be made in accordance with the principle of free opposition or free opposition contest in which the constitutional principles of equality, merit and capacity are guaranteed, in any case, as well as that of publicity."

For its part, the Municipal and Local Regime Law of Catalonia establishes in article 285 that "local corporations must publicly formulate their employment offers", and in article 286:

"286.1 Access to the status of career official or labor personnel of local corporations must be done in accordance with the public offer of employment, through a public call and the systems of competition, competitive competition or free opposition, in which compliance with the constitutional principles of equality, merit and capacity must be guaranteed.

286.2 Announcements of calls for local public service entrance tests and competitions to provide jobs must be published in the BOP and the DOGC.

286.3 The selection must be made in accordance with the basic rules, the minimum programs and the qualification contained in the basic regulations of the State and of the development of the Generalitat de Catalunya. The general meeting of the corporation must approve the rules.

286.4 If the plenary session of the local corporation agrees, the selection of its staff can be entrusted to the Generalitat, through the School of Public Administration of Catalonia. In this case, the Generalitat approves the bases and makes the call and the selection process, within the framework of what is established in section 3."

The regulatory development of these forecasts carried out by Decree 214/1990, of July 30, which approves the staff regulations in the service of local entities, regulates, under the principle of publicity, the personnel selection procedure, both official and labor of local entities (leaving to their own regulation the access to the condition of official with national qualification). Thus article 76 establishes that the selection procedure must begin with the call that "must be published in the DOGC and the BOP together with the bases" and the announcement of the call that, with the content that is defined in those articles, it must be published in the DOGC and the BOE.

With regard to the phase of admission of applications, article 78 of Decree 214/1990, establishes that the resolution of the same must be published in the DOGC (although it allows its replacement by any other system of notification provided for in the administrative procedure law) and which must indicate the place where the complete lists of admitted and excluded applicants are made "public". From the point of view of data protection and under the prism of the principle of minimization it would be sufficient with the publication of admitted applicants, however there is an express provision in the rule that enables the publication of the list of excluded candidates as well.

Article 79 of Decree 214/1990 provides that once the selective tests have started, the publication of the announcements of the remaining tests is carried out in the premises where the previous tests have been carried out, that it will no longer be mandatory its publication in the BOP, and that it will be in



this place where they must be made public, for each test, in accordance with article 80, the list of passers in order of score, while the final score of the tests and the list of passers are must publish on the notice board of the local body and, in accordance with article 82 the appointments must be published in the BOP. It should be borne in mind that, in this phase of the procedure, unlike the phase of admission of applications, the rule only provides for the publication of the lists of approved applicants. In this case, from the point of view of data protection, the principle of data minimization would also limit the publication of the lists of suspended candidates.

Finally, with regard to the labor force, article 92 of Decree 214/1990 establishes that once the announcement has been published in the DOGC and the BOP, the rest of the announcements must be made public at the headquarters of the local corporation.

Regarding the weighting of the principle of publicity that must govern personnel selection processes and its impact on the right to the protection of the personal data of the affected persons, the Judgment of the National Court, of 26 d April 2012, already concluded that in the processing of the selective procedures the principle of publicity must prevail, in accordance with this criterion it states that:

"(...)

In the present case, since it is a procedure of competitive competition we must attend to what is indicated in article 103 of the Constitution when it states that the Public Administration serves objectively the general interests and acts in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, with full submission to the law and the Law (paragraph 1) and when it states in paragraph 3 that "The law will regulate the status of public officials, access to public office in accordance with the principles of merit and ability (...)

From this point of view, we must conclude that the consent of those people who participate in a competitive competition procedure is not required for the treatment of the qualifications obtained in said procedure and it as a guarantee and requirement of the other participants to ensure the cleanness and impartiality of the procedure in which they participate. (...)

In short, in the selective procedures the principle of publicity and transparency is essential as a guarantor of the principle of equality, therefore the publication of the identification data of the participants in the process, through the inclusion of their names and surnames in the lists both provisional and definitive, is necessary for the achievement of these objectives, but at the same time, the publication of the lists has the purpose of notifying the interested parties who participate in the process (art. 45.1.b LPAPCAP). It would therefore be the case provided for in section c) of Legal Basis IV of this report, in which the publication of the administrative act has a dual purpose, on the one hand the purpose of notification, of knowledge by those affected an administrative act has been issued that affects them and, likewise, a purpose of general knowledge.

As has been explained, in these cases the identification criterion must be that established in the first paragraph of the first section of the seventh additional provision of the LOPDGDD, according to which the identification of the participants in the selection procedures of personnel in the publication of both provisional and definitive lists that must be carried out, will be carried out by means of the name and

**surnames of the affected person by adding four random numerical figures from the number of the national identity document, the alien identity number, the passport or an equivalent document.**

**In accordance with the considerations made in these legal foundations in relation to the query raised by the Manager of an entity regarding the identification of those interested in the various publications within a personnel selection process, the following are made,**

### **Conclusions**

**The identification of the participants in personnel selection procedures will be carried out by means of the name and surname of the person concerned by adding four random numerical figures from the number of the national identity document, the foreigner's identity number, the passport or a equivalent document.**

**Barcelona, March 5, 2019**

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