CNS 16/2019

**Opinion on the consultation formulated by a department of the Generalitat in relation to the scope of the obligation to provide deputies with access to information in the exercise of their function, under the protection of the right of access recognized in article 6 of the Regulation of the Parliament of Catalonia.**

**The data protection representative of a department of the Generalitat requests the opinion of this Authority in relation to the scope of the obligation to provide deputies with access to information in the exercise of their function, under the protection of the right of access recognized in article 6 of the Regulation of the Parliament of Catalonia.**

**Specifically, it is stated that (...) it is interesting to know in which cases the right to the protection of personal data must prevail over the right of access to public information of deputies in the exercise of their duties , taking into account that data or documents included in or related to judicial proceedings are frequently requested, among which there may be sensitive ones (juvenile proceedings, liability of a health nature, education, social services, labor procedures, etc.).**

**It is highlighted that in the light of the provisions of article 7 of the Parliament's Regulations on the limits of the right of access to information, it is sometimes difficult to assess the appropriateness of providing the information requested by deputies or deputies or how to do it, especially in those cases that are not entirely subsumable in those provided for in article 21 et seq. of Law 19/2014, of 29 December on transparency, access to public information and good government to which the aforementioned article is referred.**

**Having analyzed the query, which is not accompanied by any other documentation, and in accordance with the report of the Legal Adviser, I issue the following opinion.**

**I**

**(...)**

**II**

**Article 4.1 of 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 the processing of personal data (hereinafter, RGPD), the 'RGPD defines the concept of personal data as "any information about an identified or identifiable natural person ("the data subject")", and considers as an identifiable natural person "any person whose identity can be determined, directly or indirectly, in particular through a identifier, such as a number, an identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person."**

**Article 5.1.a) RGPD establishes that all processing of personal data must be lawful, loyal and transparent in relation to the interested party ("lawfulness, loyalty and transparency"). In order for this processing or transfer of personal data to be lawful, one of the conditions provided for in article 6 RGPD must be met, and in the case of special categories of data, the provisions of the article must also be taken into account 9 GDPR.**

**Article 6.1 RGPD provides that in order to carry out a treatment there must be a legal basis that legitimizes this treatment, either the consent of the affected person, or any of the other circumstances provided for in the same precept, such as "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c).**

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

**a) the Law of the Union, or**

**b) the law of the Member States that applies to the person responsible for the treatment.**

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

**The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of**

**Thus, the new Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereafter LOPDGDD), provides in article 8 that "1. The treatment of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1.c) of Regulation (EU) 2016/679, when this is provided for by a law of the European Union or a rule with the rank of law, which may determine the general conditions of the treatment and the types of data subject to it as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation. Said rule may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679."**

**In this sense, article 73.2 of the Statute of Autonomy of Catalonia (EAC) establishes:**

> **"2. The Parliament may request from the Government and its members the information it considers necessary for the exercise of its functions. It can also require its presence in the Plenary and in the committees, in the terms established by the Regulations of the Parliament."**

**Article 6 of the Regulations of the Parliament of Catalonia (hereafter RPC) provides:**

"1. Deputies, in the exercise of their function, have the right to access information, and obtain a copy, from the Administration of the Generalitat, from the bodies, companies and entities that depend on them and from the institutions and the bodies of the Generalitat that act with functional independence or with a special autonomy recognized by law. Deputies can request this information directly or, if they consider it relevant, they can request it by communicating it to the president or through him.

2. The required authorities or administration must provide the deputies, preferably electronically, or on paper, with the requested information.

3. The requested information must be delivered within fifteen days, extendable for a maximum of seven more days, starting from the day after the request has been communicated."

And with regard to the possible existence of limits to this right of access, article 7 of the RPC establishes the following:

"1. The right of access to information is part of the essential content of the representative and parliamentary function that corresponds to deputies and can only be limited by the concurrence of one of the restrictions established by the legislation regulating the right of access to information public

2. The right of access to the information of the deputies has, in any case, a preferential nature and must be able to be made effective whenever the rights or legal assets protected can be safeguarded through partial access to the information, the anonymization of sensitive data or the adoption of other measures that allow it."

The right of access to information of members of Parliament is part of the essential content of the "ius in officium" or representative and parliamentary function recognized by Article 23.1 EC according to which "citizens have the right to participate in public affairs" , directly or through representatives, freely elected in periodic elections by universal suffrage."

As stated in STC 32/2017, "we are faced with "an individual right" of the Deputies that is integrated into the status of the office; right that: a) empowers them to collect information from the Regional Administration or "from the Central Administration, Local and other institutions in the territorial scope of Castilla-La Mancha" (art. 13.3); b) they are granted "for the best fulfillment of their functions"; c) its specific purpose is "to know certain facts and situations, as well as the administrative documents that evidence them, relating to the activity of public administrations; information that may well exhaust its effects in obtaining it or be instrumental and serve later so that the Deputy who receives it, or his parliamentary group, carry out a judgment or assessment on that specific activity and the Government's policy, using other instruments of control" ( STC 203/2001 (RTC 2001, 203) , FJ 3); yd) whose exercise only requires directing the request to the President of the Courts who will transfer it to the Board of the Regional Ministry and that provided information and documentation is necessary for the development of their tasks (art. 13.1 of the Regulation)."

It has also been recalled, in other judgments (SSTC 44/2010, 27/2011 or 28/2011) the relevance of the possibility of formulating parliamentary questions, which is still a way of

be able to request information. Thus, in STC 27/2011 it is stated: "In STC 44/2010, of July 26, the doctrine of this Court has been recalled in relation to parliamentary questions: "the faculty to formulate questions to the Government Council belongs to the core of the parliamentary representative function, since the participation in the exercise of the function of controlling the action of the Council of Government and its President and the performance of the rights and powers that accompany it constitute constitutionally relevant manifestations of the ius in officium of representative ( SSTC 225/1992, of December 14 [ RTC 1992, 225] , F. 2; 107/2001, of April 23 [ RTC 2001, 107] , F. 4; and 74/2009, of March 30 [ RTC 2009, 74] , F. 3), so that any limitation of the rights and powers that make up the constitutionally relevant status of political representatives whose first constitutional requirement is that such limitation appear sufficiently motivated (SSTC 38/1999 [ RTC 1999, 38 ] , F. 2; and 74/2009 [ RTC 2009, 74] , F. 3)" (F. 4)."

However, in the case of the RPC, even though the preferential nature of the right of access of the members of parliament is established (art. 7.2) it is also expressly recognised, the applicability of the limits provided for in the regulation that regulates the right of access to public information, this is basically the limits established in State Law 19/2013, of December 9, on transparency, access to public information and good governance (LT) and the Law 19/2014, of 29 December on transparency, access to public information and good governance (LTC) (art. 7.

Consequently, any conflict between the right of deputies to access information and the right to data protection must be resolved in accordance with the criteria provided for in articles 23 and 24 of the 'LTC and with the principles of data protection regulations.

In this regard, it should be borne in mind that article 22.1 of the LTC establishes that "the limits applied to the right of access to public information must be proportional to the object and purpose of the protection. The application of these limits must take into account the circumstances of each specific case, especially the concurrence of a higher public or private interest that justifies access to the information."

The consideration of this right as preferred by article 7.2 of the RPC, given the public interest linked to the exercise of the parliamentary function and the fact that this is an expression of the fundamental right of participation in the article 23 EC, means that deputies have a stronger position than that of citizens in general, as was already highlighted in our opinion CNS 4/2015. Consequently, the limitations of the right of access will have to be interpreted even more restrictively.

Point out, on the other hand, the duty of secrecy of the deputies regarding the information that can be provided to them, derived not only from the RGPD (art. 5.1.f) but also from the Regulation of the Parliament of Catalonia (article 10 RPC ), so that the processing they do of the information obtained must always be linked to the exercise of their parliamentary functions and control of government and administrative action.

Having said that, in the consultation it is stated that it has been established that deputies repeatedly request data or documents included in or related to judicial proceedings, and this Authority is asked to pronounce itself in relation to the assessment that it is necessary to do about the prevalence between one and another right.

**Despite the terms in which the query is formulated, it is necessary to start from the basis that this assessment can only be made taking into account the circumstances of each specific case, given that the prevalence of one or another right will depend not only on the matter or the object of the judicial proceedings, and the nature of the personal data that are affected, but also of a correct weighting that, with criteria of necessity and proportionality, determines whether these personal data are necessary for a deputy to be able to exercise the function of control of the government or administration. This is, in short, the purpose that must underpin the communication in this case.**

**In accordance with article 55 of the EAC, the Parliament represents the people of Catalonia, and "exercises legislative power, approves the budgets of the Generalitat and controls and promotes political and government action."**

**Remember in this regard that the principle of data minimization (article 5.1 d) RGPD) requires that the data subjected to treatment are adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated. This means that it is not possible to give a generalized answer about the cases in which one or the other right should prevail.**

**It is, in short, to see in each case what is the personal information that is affected, and to apply the guidelines and criteria provided for in the transparency legislation and the principles and guarantees provided for in the data protection regulations, all this, having present that the right of access to the information of the deputies, is inserted within the parliamentary functions, singularly within the functions of impulse and control of the Government and the administration. This function of parliamentary control constitutes a main function, recognized in the EC and the Statute of Autonomy and is closely related to the parliamentary system of government and to the democratic system of control of the activities of the public authorities by the elected members as to representatives of the citizens.**

**Having said that, which inevitably refers the analysis of the question raised in the consultation to a case-by-case analysis of the requests for information that are raised, yes they can be made, below are some general considerations regarding the application of articles 23 and 24 of the LTC with respect to requests for access to information made by deputies.**

**III**

**According to article 23 LTC, "requests for access to public information must be denied if the information sought contains particularly protected personal data, such as those relating to ideology, the trade union affiliation, religion, beliefs, racial origin, health and sex life, and also those relating to the commission of criminal or administrative offenses that do not entail a public reprimand to the offender, unless the affected party expressly consents to it by means of a written document that must accompany the request."**

**In the same line, article 15 of the LT, provides, according to the new wording given by the eleventh final provision of the LOPDGDD:**

> **"1. If the requested information contained personal data that revealed the ideology, trade union affiliation, religion or beliefs, access could only be authorized if the express and written consent of the affected person was obtained, unless**

said affected person had made the data manifestly public before access was requested.

If the information includes personal data that refers to racial origin, health or sex life, includes genetic or biometric data or contains data related to the commission of criminal or administrative offenses that did not lead to a public reprimand to the offender, access only it may be authorized if the express consent of the affected person is counted or if the latter is covered by a rule with the force of law."

These precepts exclude the public's right of access to certain data considered particularly protected, generally requiring the express consent of their holders.

It should be borne in mind that the specific right of elected officials to the information necessary for the exercise of their representative functions derives from the fundamental right to political participation contained in Article 23.2 EC as recognized by the doctrine maintained by the Court Constitutional, and goes beyond what is recognized by article 105.b. EC to all cit

STC 57/2011, of May 3, 2011, summarizes in the FJ2 the doctrine of the Constitutional Court in relation to the intervention of the Bureau of the Parliament in requests for information presented by deputies, and points to the 'affect that the right to information of deputies has on the right of participation in public affairs of all citizens through their representatives. In this sense, it is highlighted that "Article 23.2 EC, which recognizes the right of citizens to access public functions and positions under conditions of equality, with the requirements set forth by law, not only guarantees equal access to public functions and positions, but also their performance in accordance with the law. This added guarantee is of particular relevance when the request for protection is made by parliamentary representatives in defense of the exercise of their functions, since in such a case the right of citizens to participate in public affairs through their representatives is also affected , recognized in article 23.1 CE. This direct connection is emphasized because it is primarily the political representatives who give effectiveness to the citizen's right to participate in public affairs, so that it would be empty of content, or would be ineffective, if the political representative was deprived of it or disturbed in his exercise."

A strict application of article 23 of the LTC to any request for information of this nature interested by a deputy in the exercise of his office, would mean having to restrict without making any further assessment the access to the same by the mere fact of being considered for the purposes of transparency is particularly protected, and would in any case require the prior consent of the person concerned.

The query refers to liability processes of a health nature. It is foreseeable that in the proceedings where the Generalitat's patrimonial responsibility is demanded for the damages caused to individuals in their persons, as a result of the malfunctioning of public health services, there will be information about the people (victims) who claim compensation. Given the limitation of access provided for in articles 23 of the LTC and 15 of the LTC, the access of deputies to any data related to the physical or mental health of these persons (art. 4.1.15 RGPD) or of any other included in article 23, would require the

express consent of the affected persons, unless it is data that the interested person himself has made manifestly public.

As this Authority already held in opinion CNS 5/2009, prior to the approval of the LT and the LTC, the application of the limit provided for in article 23 LTC in relation to access to information on the part of the deputies must necessarily lead to excluding the possibility of general access to the information on citizens to which this article grants special protection.

This must be the general criterion from which to start. However, it should also be borne in mind that the interpretation that is made of the applicability of the limits provided for in the LTC must be done in the light of the peculiar position held by the deputies due to the functions entrusted to them , in particular, for its function of controlling the Government.

A restrictive interpretation of the limitation provided for in article 23, placed in relation to the functions attributed to Parliament, and the preferential nature of the right of access in this area, does not allow us to rule out that there may be cases in which the information that is requested is related to actions of officials or public employees in the exercise of their functions, and that is essential for the deputies to be able to exercise their function of controlling government action. We think, for example, that even in the case of information that has been declared or reserved, article 11 of the RPC allows access, under certain conditions, to representatives of parliamentary groups. Absolutely limiting the access of deputies to the information referred to in articles 15.1 LT and 23 LTC could prevent the exercise of the specific function of controlling the Government's actions that the EAC attributes to Parliament, emptying of content the citizen's right to participate in public affairs through their representatives, which could be unjustified.

It will therefore be necessary to bear in mind that from the perspective of data protection regulations, the limitation of article 23 LTC (and 15.1 LT) would not allow generalized access to the information of citizens referred to in this article, although and that the access of deputies to certain information referred to in these articles cannot be ruled out, always with restrictive criteria, in particular when it refers to public positions that are subject to Parliament's control, which may be essential for to the exercise of the functions attributed to the Parliament.

IV

Regarding the rest of personal information, and in accordance with article 24.1 of the LTC: " Access to public information must be given if it is information directly related to the organization, the operation or the public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case the protection of personal data or other constitutionally protected rights must prevail."

In this case, the identification data (first and last name and position) of the public employees who appear identified for having intervened in the exercise of their functions in the actions subject to appeal or requested in court would be included. In principle, there should be no from the perspective of data protection regulations when providing said informatio

**Beyond this, the query refers to the existence of judicial procedures where "sensitive" data may be recorded, giving as an example the procedures for minors, education, social services, labor procedures, etc.. must point out that, although this information can be qualified as "sensitive", as the query does, it must be made clear that in this section we are no longer referring to the information referred to in articles 15.1 LT and 23 LTC , given that we have already referred to this type of information in the preceding legal basis, but to other information that, despite being able to be classified as sensitive, is different from that provided for in the aforementioned articles.**

**For these purposes, article 24.2 of the LTC provides that "2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons. To carry out this weighting, the following circumstances must be taken into account, among others:**

**a) The elapsed time. b)**
**The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people.**

**(...)"**

**It should be noted that the fact that information is part of a judicial procedure does not mean that for this fact alone it should be considered as specially protected. The limits must be applied in the same way as with the rest of the information. Even in the case that it is information that is part of judicial proceedings subject to summary secrecy, it must be taken into account that STC 13/1985 established that "summary secrecy would only affect if the request for information out of documents that are part of the summary itself and only from it, but this circumstance is not predicable of those about which information is requested because said documentation pre-existed in the summary and therefore, whether or not they have been incorporated into it, its public nature is previous, therefore, the partial refusal contained in the act whose constitutionality is questioned is not in accordance with law". Also in this sense the SSTS of Febru**

**With regard to access to minors' data, article 21.1 g) of the LTC, provides that the right of access to public information may be denied or restricted if the knowledge or disclosure of the information entails a damage to the rights of minors. The legal system establishes the basic principle of the best interests of the minor, which must govern all the actions of the public authorities in relation to this (article 11.2.a) of Organic Law 1/1996, of January 15, of legal protection of minors, partial modification of the Civil Code and the Civil Procedure Law, and article 5.1 of Law 14/2010, of May 27, on rights and opportunities in childhood and adolescence). Taking this into account, and as provided for in article 21.1 g) and 24. 2. c) LTC, it will be necessary to assess in each specific case in the light of this principle, the scope of access to the personal data of minors affected, take into account the harm that access may entail on their rights, assess whether access is essential for the purpose of control of the government or**

**It is also possible that access may affect information that, without referring to people's physical or mental health, may affect people's most intimate and private sphere.**

**Article 21.1 f) of the LTC expressly provides that access to this type of information may be denied. In these cases, it will be necessary to assess whether the deputy's access to this type of information is essential for the performance of his task, and whether the affected person's right to honor or privacy is affected.**

**The consultation also refers to legal proceedings related to social services, which may mean the existence of information about people who are in a particularly vulnerable situation or at risk of social exclusion. Again in this case, it will be necessary to assess, in view of the intended purpose of control, whether it is necessary to facilitate access to said information, taking into account the negative consequences that may arise for the people affected. Once again, the application of the principles of finality and minimization are what must finish determining the prevalence of one or another right.**

**This rule must be extended to the rest of personal information that may affect access beyond data deserving of special protection (article 23 of the LTC), and of a sensitive nature.**

**Warn that the concurrence of limitations does not prevent but that the information may be delivered in a partial and previously anonymized form. In fact, this possibility is expressly provided for in section 2 of article 7 of the RPC, considering the preferential nature of the right of access of the deputies, and providing that this must be effective whenever " protected legal rights or assets can be safeguarded through partial access to information, the anonymization of sensitive data or the adoption of other measures that allow it."**

**For the purposes of proceeding with the anonymization of the information, it must be agreed that in order for it to be considered sufficient, in terms of data protection legislation, it is necessary to guarantee that the information provided cannot be related to an identified or identifiable natural person. Thus, anonymization would require the elimination of all the information that could allow the identification of the person or persons affected, taking into account not only the information contained in the document but also the data that can be obtained by other means, assessing objectively whether or not there is a real risk of re-identifying the affected persons without making disproportionate efforts.**

**There is also the possibility of providing information prior to pseudonymisation of the data, which in terms of article 4.5 of the RGPD, consists in treating the personal data in such a way that those provided can no longer be attributed to the owner of the data data without using additional information, provided that such additional information is recorded separately, and is subject to technical and organizational measures aimed at ensuring that the personal data is not attributed to an identified or identifiable natural person.**

**CONCLUSION**

**Faced with the various requests for access that may be presented by the deputies, in relation to information or documents related to judicial processes, the prevalence between the right of access to the information of the deputies and the right to the protection of personal data must be resolved according to the circumstances of the specific case, taking into account the nature of the personal data affected and the consequences that can be derived from it for the people affected, weighing up the relevance of the information for a**

**the effective exercise of the functions attributed to the deputies and the limits provided for in the transparency legislation, in accordance with the principles and guarantees of the data protection regulations.**

**Barcelona, April 12, 2019**