CNS 23/2019

Opinion in relation to the query made by a City Council on the possibility of consulting data of the members of the family unit without the consent of all of them in a subsidy awarding procedure

A letter from a City Council is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the possibility of consulting the data of the members of the family unit without the consent of all of them in a procedure granting grants.

Specifically, it sets out the doubts raised by the applicability of the provisions contained in article 28.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC), relating to the consultation of data held by the public administrations, regarding the people who make up the family unit or cohabitation unit who have not signed the grant application.

The consultation has been analysed, which is accompanied by the basis for a call for housing subsidies with an application model, and also some criteria for granting school canteen grants in which, as set out the City Council, different criteria are applied in relation to the issue raised, and in accordance with the report of the Legal Counsel I issue the following opinion:

I

(...)

II

As explained in the background section, the consultation raises the doubts that arise in relation to the application of article 28.2 of Law 39/2015, of October 1, on common administrative procedure of public administrations (henceforth, LPAC). Specifically, the doubts that are raised have to do with the applicability of article 28.2 LPAC in relation to the data of people who are part of the family unit or the cohabitation unit and who have not signed the request to participate in a grant awarding procedure. The specific query raises whether the authorization of these people is necessary to be able to consult their data in the terms established in that article.

Article 28.2 of the LPAC, in the wording given by the twelfth final provision of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), establishes the following :

"2. Those interested have the right not to provide documents that are already in the possession of the current Administration or have been prepared by any other Administration. The acting administration may consult or collect said documents unless the interested party opposes it. There will be no opposition when the provision of the document is required in the framework of the exercise of sanctioning or inspection powers.

The Public Administrations must collect the documents electronically through their corporate networks or by consulting data brokerage platforms or other electronic systems enabled for this purpose.

When it comes to mandatory reports already drawn up by an administrative body other than the one processing the procedure, these must be sent within ten days of the request. Once this deadline is met, the interested party will be informed that they can submit this report or wait for it to be sent by the competent body."

For its part, article 6.1 of Regulation (EU) 2016/679, of the Parliament and of the Council, of April 27, 2016, General Data Protection (hereafter RGPD) establishes:

"The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;

(...)

e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;

(...)"

Article 8 of the LOPDGDD establishes that treatments that can only be protected on the legal basis provided for in Article 6.1.e) of the RGPD, relating to the fulfillment of a mission in the public interest or the exercise of public powers, when it comes to the exercise of a competence attributed by a norm with the rank of law.

In accordance with this, and as this Authority has already held in other opinions (CNS 56/2016, CNS 35/2017 or CNS 69/2017) the legal basis for the exchange of information provided for in article 28.2 of the LPAC is not the consent of the affected persons but the fulfillment of a mission in the public interest or the exercise of public powers established in a rule with the rank of law, in this case the LPAC.

Therefore, to carry out the treatment provided for in said article, consent will not be necessary.

In the form that has been attached to the request for opinion, it is stated that the person signing the request "AUTHORIZES" the consultation of different data, both of the person requesting and of other members of the unit of coexistence

Although the legal basis on which the administration can process the data of the people who submit to a call for subsidies is not consent (art. 6.1.a) RGPD) but the fulfillment of a mission in public interest (art. 6.1.e), articulating the possibility of direct consultation of data based on consent would not be contrary to data protection regulations. Normally, consent cannot operate in relations between citizens and the administration due to the inequality of the position from which the citizen relates to the administration, which prevents consent from being qualified as free in the sense of the article 4.11 RGPD. However, as highlighted by the Article 29 Working Group in the "Guidelines on consent in the sense of Regulation (EU) 2016/679", consent can form the basis of the treatment carried out by the public administrations when the citizen really has the ability not to give it without negative consequences.
This would be the case we are dealing with, because the citizen who does not want to authorize the direct consultation of the data, has an alternative provided consisting of the possibility of providing the documentation himself.

Despite this, if you wanted to articulate the consultation based on consent (unnecessary if article 28.2 LPAC applies) it would be necessary to take into account that the applicant could only grant consent with respect to their own data, but not with respect to of the members of the rest of the family unit. If you wanted to articulate the consultation of the data of the entire family unit based on consent, the consent of all members of the unit (those over 14 and the legal representatives of those under 14) would be necessary, as it seems get rid of the criteria for granting school canteen grants also attached to the consultation.

In any case, in order to answer the question raised in the consultation, it is necessary to see if the provisions of article 28.2 enable only the communication, without consent, of the data relating to the person requesting or also cover the information relating to other people who are part of the family or cohabitation unit. And if so, we will also have to analyze what are the guarantees that must be applied with respect to these third parties.

It should be noted that article 28.2 does not only apply to procedures initiated at the request of the person concerned, but also refers to other procedures, such as sanctioning procedures or inspection actions, as is clear from the last indent of the first paragraph. However, given the subject of the consultation, referring to procedures for granting subsidies, in this opinion we will refer to procedures initiated at the request of the person concerned.

III

A literal interpretation of what is established in article 28.2 does not seem to allow distinguishing the cases in which the documents contain only data relating to the applicant, from those in which there are also data of other people who are members of the family unit

Thus, the first paragraph (and also the other two), does not refer to the applicant's data, but refers to the "right not to provide documents" without distinguishing depending on what the content of the document is, nor the persons affected It does not seem that it can be concluded from the wording of section 2, that these documents cannot include data from third parties, as long as it is data required by the regulations governing the procedure in question.

Obviously, the principle of minimization (art. 5.1.c) RGPD) must lead us to exclude from the communication the data that are unnecessary given the purpose pursued. But when it comes to data that is required by the applicable regulations, the article does not seem to want to distinguish between those that affect the applicant or those that affect the members of his family unit.

This interpretation would be fully aligned with the purpose of the rule, that is to recognize the right not to provide documents that are already in the possession of the administrations, given that if a restrictive interpretation of this possibility were made, many cases would be out of its applicability in which the administration must assess not only the fulfillment of the requirements from the point of view of the applicant but also of the people with whom he lives.

On the other hand, this interpretation would not be contrary to what is established in article 6.1.e) RGPD, in the understanding that this article does not limit the authorization for the treatment to those data relating to the person who has initiated a procedure, but must be understood as an authorization for the treatment of all data, whoever it is the holder, which are necessary for the fulfillment of a mission in the public interest or the exercise of public pov

We leave aside, however, the case in which it was a question of some data that has the consideration of a special category of data (art. 9.1 RGPD) because then it would also be necessary to have one of the enabling circumstances provided for in article 9.2 RGPD (for example, the express consent of the affected persons). Although in the currently valid wording of the section the mention contained in the original wording regarding the non-applicability when "the applicable special law requires express consent" has disappeared (which, however, has been maintained in the section 3), it does not seem that a provision such as that of article 28.2 allows us to state that, in general, any of the exceptions provided for in article 9.2 RGPD apply.

For this reason, in cases such as that of the form attached to the query in which the query affects special categories of data (in the model provided the query of the degree of disability is included) the explicit consent of the persons will be necessary affected (or another of the exceptions provided for in article 9.2 RGPD).

As the consultation points out, some sectoral rules, even before the approval of the LPAC, had established the possibility that public administrations could consult, without the consent of the people affected, the data required to access certain benefits, as would the case of the provision of the seventh additional provision of Law 2/2014 regarding access to benefits that are part of the portfolio of social services.

In fact, the LOPDGDD itself contains a provision similar to that of article 28.2 LPAC. Thus, the eighth additional provision establishes the following:

> **"When requests are made by any means in which the interested party declares personal data held by the Public Administrations, the body receiving the request may, in the exercise of its powers, carry out the necessary checks to verify the accuracy of the data. "**

The assumption is not exactly coincidental, because the eighth additional provision does not refer to the provision of documents required by the applicable regulations but to the possibility of verifying the data that have previously been declared by the applicant himself. But as in the case of article 28.2 LPAC, the LOPDGDD does not distinguish between whether the data declared are relative to the subject who declared them or to other members of their family or cohabitation unit, as long as it is data previously declared by the applicant and that it is necessary to check its accuracy for the processing and verification of the application.

However, the fact that the consent of all members of the family unit is not necessary does not mean that these people do not have to have adequate guarantees to be able to assert their rights.

IV

As we have already argued in other opinions (CNS 35/2017, among others), regardless of whether the legal basis for the treatment is not found in consent but in the law, it will be necessary to comply with the rest of the principles and obligations derived from data protection regulations, in particular, the right to information.

In this sense, article 12 of the RGPD establishes that when the data is collected from the interested person - the case to which, in principle, the consultation refers - the affected person must be informed, at the time of collection and 'a concise, transparent, intelligible and easily accessible way, about (art. 13 RGPD):

- **The identity and contact details of the person in charge and, where appropriate, of their representative.**
- **The contact details of the data protection officer, if applicable.**
- **The purposes of the treatment for which the personal data are intended and the legal basis of the treatment.**
- **The legitimate interest pursued by the controller or by a third party, when the treatment is based on this legitimate interest.**
- **The recipients or categories of recipients of the personal data, if applicable.**
- **The forecast, if applicable, of transfers of personal data to third countries and the existence of a decision of adequacy or adequate guarantees, and the means to obtain a copy.**
- **The term during which the personal data will be kept or, when it is not possible, the criteria used to determine it.**
- **The existence of the right to request from the data controller access to the personal data relating to the interested party, to rectify or delete them, to limit the processing and to oppose it, as well as the right to data portability.**

- When the treatment is based on consent, the right to withdraw it at any time, without this affecting the legality of the treatment based on consent prior to withdrawal.

- The right to submit a claim to a control authority.

- If the communication of personal data is a legal or contractual requirement, or a requirement necessary to sign a contract, and if the interested party is obliged to provide personal data and is informed of the possible consequences of not doing so.

- The existence of automated decisions, including the creation of profiles. If it produces legal effects on the data subject or significantly affects it, or affects special categories of data, it must contain significant information about the logic applied and about the expected consequences of this treatment for the data subject.

However, it should be borne in mind that in a case such as the one proposed, certain data will not be obtained from the interested person, as would be the case with the data to which the query refers, that is the data obtained from other files or administrative records of the same or another administration. Regarding this data, it will be necessary to inform more about (art. 14 RGPD):

- The categories of personal data in question.

- The source of the personal data and, if applicable, whether they come from access sources public

But in addition, it should be borne in mind that article 28.2 establishes that the consultation or collection of the aforementioned documents can only be carried out if the person concerned does not oppose it. For this reason, it is necessary to establish mechanisms to make it possible for both the applicant and the other affected persons to access the information just referred to, and in light of this to decide whether they oppose it . In any case, remember that opposition will not be possible, in accordance with article 28.2, when it comes to the provision of documents that are required in the framework of the exercise of sanctioning or inspection powers .

One way to articulate the fulfillment of this obligation can be the inclusion of the aforementioned information in the application form, including a clause in which the applicant declares that the rest of the affected persons have accessed this information and that they have not objected to the possibility of making the query or, where appropriate, whether they have objected. In the event that any member has objected, it will be necessary, of course, to provide the required documents.

Articles 12 to 14 of the RGPD establish the obligation of the data controller to take appropriate measures to provide the interested party with all the necessary information. In this case there would not be a single interested person but a plurality of interested persons in the sense provided for in article 4.1 RGPD. The articulation of compliance with the duty to inform based on a mechanism such as the one described, can be compatible with the provisions of article 14.5.c) RGPD that make compliance with the obligation to inform when obtaining or the communication are provided for by a law that applies to the person in charge and appropriate measures are established. This measure would be appropriate considering that it deals with the information of each of the

affects only individually, but affects and qualifies all of them to the extent that they are part of a family or cohabitation unit, for example, with a certain level of income; it must also be taken into account that the fulfillment of this burden by the applicant is not disproportionate given that these are people who are part of his family unit with whom, in principle, he must be able to communicate easily.

In accordance with the considerations made in these legal foundations in relation to the query raised, the following are made,

Conclusions

Article 28.2 of the LPAC allows public administrations to consult, without the consent of the affected persons, the data relating to the members of the family or cohabitation unit, as required by the sectoral regulations, unless one of the members opposes it or that these are special categories of data.

In any case, it is necessary to guarantee the information to the affected people about this consultation or communication, as well as the possibility to oppose it.

Barcelona, May 14, 2019