CNS 24/2019

Opinion on the query made by a concessionary company for the water supply service of a City Council, in relation to the lawfulness of the transmission of personal data of its workers to the corporation.

A company (...) presents a letter in which it explains that it is the concessionary company for the drinking water supply service in the municipality (...) since 2004, when the award was made and formalized corresponding concession contract.

It is pointed out that the Local Government Board of the City Council approved "The Municipal Instructions governing the control procedure of the drinking water supply concession in the municipality (...), and that these were approved, " ...in accordance with the powers held by the Contracting Administration, in order to facilitate the contractual relationship between the City Council (...) and the concessionaire, such as the fulfillment of the obligations by the successful bidder" .

It is stated that the instructions contemplate the criteria that must govern the action in relation to the company's own staff, and specify the data of the workers that must be provided to the City Council, detailed below:

Company's own staff:

- **Annually the company will present a work plan, the existing human resources, the work calendar and vacations.**
- **Quarterly, before 10 calendar days before the quarter begins will**

  facilitate: 1. Work calendar, working hours, scheduled holidays for each worker. A report will be provided per day and grouped for each month for each worker.

  2. Quarterly program of the guard staff.

- **Monthly, within the maximum period of ten calendar days following the end of each month, for each worker, will be provided:**

  i. Theoretical hours and actual work done.

  ii. Tasks performed, for each part of work: the code of the operator assigned to (...), place, working time, geolocation of the task in the municipality. iii. Labor incidents: leave, personal matters..."

The entity affirms that it has received a request from the City Council requesting that it provide, within 10 working days, all the documentation detailed in the aforementioned Instructions. He considers that these instructions were approved before the application of the new RGPD and that the personal data of the workers requested are not proportionate, necessary and suitable to attend to the control of the fulfillment of the obligations by the concessionaire, assuming, in his opinion of the entity, a violation of the principle of data minimization.

Taking into account what has been stated, the opinion of the Authority is requested in relation to the lawfulness of the provisions contained in the aforementioned Instruction regarding the transmission of the personal data of the company's workers required by the Town hall.

Having analyzed the consultation, which is accompanied by the Instructions of the Plenary of the City Council on which the consultation is formulated, and in accordance with the report of the Legal Counsel I issue the following opinion.

I

(...)

II

The query raises whether the transmission of certain labor information of the own staff of the concessionaire company, contained in the "Municipal Regulatory Instructions of the Control Procedure for the drinking water supply concession in the municipality (...) awarded to (....)" approved by agreement of the Local Government Board, conforms to the rules and principles 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).

Article 4.1 of the RGPD defines the concept of personal data as "any information about an identified or identifiable natural person ("the interested party")", and considers as an identifiable natural person "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 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) or that "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 treatment " (letter e)), which is provided for in a legal basis in accordance with the provisions of sections 2 and 3 of the same article.

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 Constitutio Spanish, that the development rule, as it is a fundamental right, has the status of law.

In this sense, the new Organic Law 3/2018, of December 5, on Data Protection Personal and guarantee of digital rights (hereafter LOPDGDD), provides in article 8:

"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.

2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679 , when it derives from a competence attributed by a rule with the rank of law. "

From here, and considering that the consent of the affected workers is not available, it is necessary to analyze the regulatory context in which these instructions are issued, the personal information that could be affected by the content of the Municipal Instructions, and whether according to of the provisions of the data protection regulations, whether or not there is a legal basis that enables the processing of the requested data.

III

The Municipal Instructions governing the management control procedure of the water supply concession granted under a concession regime to the consulting entity, are approved, as indicated in the text of the publication announcement, "in accordance with the powers held by the Contracting Administration, in order to facilitate the contractual relationship between the city council and the concessionaire, such as the fulfillment of the obligations by the successful bidder."

The domestic potable water supply service is publicly owned (66.3 of Legislative Decree 2/2003, of April 28, which approves the revised text of the Municipal and Regime Law

local of Catalonia (hereinafter, TRLMRLC), linked to the principle of inalienability of competences (article 8.1 of Law 40/2015, of 1 October, on the legal regime of the public sector).

In accordance with articles 67.a) of the TRLMRLC and 26.1.a) Law 7/1985, of April 2, Regulating the Bases of the Local Government, the supply of drinking water is one of the minimum public services that have to lend all the municipalities. The City Council, as owner of the service, is responsible for guaranteeing users the correct operation of the same, and is obliged to ensure that its management is carried out in the most sustainable and efficient way possible, directly or indirectly (article 249 TRLMRLC).

Law 9/2017, of November 8, on Public Sector Contracts, which transposes into the Spanish legal system Directives of the European Parliament and of the Council 2014/23/UE and 2014/24/UE, of 26 of February 2014, (hereafter LCSP), introduces numerous control mechanisms in order to guarantee the quality of the execution of the services contracted by the public sector.

Article 62 LCSP, in addition to providing for the appointment of a person in charge of the contract, regardless of the ordinary monitoring and execution unit of the contract, section 3 provides specifically for cases of concessions of public works and services, the appointment of a person to act in defense of the general interest, to obtain and to verify compliance with the obligations of the concessionaire, especially with regard to the quality of the provision of services.

Article 190 LCSP attributes to the procurement body, a series of prerogatives and grants it, among others, the powers of inspection of the activities carried out by the contractors during the execution of the contract, in the terms and with the limits established by this Law. These powers of inspection, however, in no case can imply a general right of the contracting body to inspect the facilities, offices and other locations where the contractor develops its activities, unless these locations and their technical conditions are decisive for the development of the services subject to the contract, assuming that the contracting body must justify this in an express way detailed in the administrative file.

In turn, article 238 of the ROAS (Decree 179/1995, of June 13, approving the Regulation of works, activities and services of local bodies) provides that local bodies have the power to direct and control of the public service and article 248 attributes to the grantor administration, among others, the power to "b) Supervise the management of the concessionaire. For this purpose, the local entity can inspect the service, the works, the installations and the premises, and the documentation related to the object of the concession, and issue orders to maintain or restore the corresponding service.

In this context, the City Council must be able to know whether or not the personnel that the company assigns to the service are adequate to attend to the service and conform to the forecasts contained in the specifications, and in view of the details of the data contained in the Instruction, it seems logical that the City Council requires from the successful bidder the annual work planning, existing human resources, and information on work and vacation calendars.

It also seems logical that, with the aim of guaranteeing a certain level of service quality, the City Council aims to obtain quarterly the work calendar, working hours and

the holidays scheduled for each worker (point 1), as well as the quarterly program of the on-call staff (point 2).

This would allow the City Council to know what the company's forecasts are to cover the needs of the service, and to verify that the assigned workers (operators, technicians, etc.) as well as the support structure to guarantee the response time in cases of incidents, it complies with the commitments made by the company and is sufficient to gua

In addition, the monthly delivery of the theoretical and effective hours of the work performed (i), the tasks performed by each part of the work (operator code assigned to (...), the place, the work topics and the geolocation of the task in the municipal term), as well as labor incidents (leaves, personal matters).

Leaving aside the information on the leave of workers (which due to its nature we will analyze in basis V), the requested monthly information would make it possible to compare the scheduled working hours for each assigned worker with those actually carried out, and verify that these correspond to services provided to the municipality. This is information that may be relevant and necessary to monitor the commitments acquired by the successful bidder, and to assess the quality and efficiency of the service provided.

Taking all of this into account, and given that the labor organization of the staff in charge of providing the service has a direct impact on its operation, the powers of control and inspection attributed to the administration (owner of the service), could justify the transmission of 'labour information of the awardee's workers assigned to the service, without the need to have consent, in accordance with article 6.1.c) RGPD.

However, 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.

In the case analyzed, there is no doubt that it may be relevant to have the individualized information for each worker about the hours of work scheduled and actually carried out in the terms provided for in the Instruction for the purposes of complying with the purpose of monitoring and control of the management of the service and the fulfillment of obligations by the adjunct.

This purpose, however, would also be achieved without needlessly sacrificing the privacy of the workers/anything affected. In fact, in the section referring to the information on the tasks performed and their geolocation, the same instructions ask to identify them with the code of the operator who performed them.

Access to information about a person's place of work, the hours they work, what period they take holidays, or the days they are absent from work for personal matters, is an invasion of privacy of the workers Taking into account that the purpose of monitoring the obligations could be achieved without the need to identify the workers with their first and last names, in application of the principle of minimization it will be necessary to provide the data in such a way that the City Council cannot relate the information to the specific natural person, pseudonymizing the information.

The pseudonymization of the data, in terms of article 4.5 of the new RGPD, consists in treating the personal data in such a way that they can no longer be attributed by third parties to the data holder without using additional information, provided that this additional information is recorded separately, and be subject to appropriate technical and organizatio

Thus, the requested data could be provided by substituting the first and last names of the workers affected by a code that would not allow their identification. Re-identification should only be possible by linking this code to the worker to whom it was associated, and therefore it could only be done by the person responsible for the treatment, in this case the awarding company.

To warn in this regard, that it would be advisable to provide the information with a code expressly created for the purpose, different from the operator code that the workers may have. To the extent that this operator code is used for other purposes, as it could be for example as an access control system to certain facilities, it could not be effective for the purposes of avoiding identification.

In any case, the principles of data protection must apply to any information relating to an identifiable natural person, and as pointed out in recital 26 of the RGPD "Los datos personales seudonimizados, which could be attributed to a natural person through the use of additional information, they must be considered information of an identifiable natural person." Therefore, it must be borne in mind that the data protection regulations apply to pseudonymised data.

Finally, note that it cannot be ruled out that the City Council's access to the identity of the awardee's workers may be justified in order to fulfill other purposes.

Noting that article 201 of the LCSP obliges the contracting body to "adopt the relevant measures to guarantee that in the execution of the contracts the contractors comply with the applicable obligations in environmental, social or labor matters established by the law of the European Union, national law, collective agreements or the provisions of international environmental, social and labor law that bind the State, and in particular those established in Annex V."

Aside from the provisions of public procurement legislation, it should be borne in mind that article 42.2 of the Workers' Statute declares the employer's joint and several liability with respect to the wage and social security obligations contracted by the contractor with its workers (supposition that was analyzed by the Authority in opinion CNS 32/2013, available on the website www.apdcat.cat). For this purpose, and in order to verify that the company complies with salary and Social Security obligations, access by the City Council to certain personal data of the workers could be justified. However, this opinion does not analyze this issue, but focuses exclusively on the purposes set out in the consultation.

v

With regard to the data on workers' absences from work, it must be borne in mind that information that allows the direct or indirect identification of the worker who is on leave, is information that must be treated as data relating to the Health.

Article 4.15) RGPD defines data relating to health as: “personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health;”

Recital 35 of the RGPD specifies that "Personal data relating to health must include all data relating to the state of health of the interested party that provide information on their past, present or future state of physical or mental health. (...).

To the extent that absences from work are caused by illnesses (common or not), accidents at work or maternity, the information about the absence situation of a worker is related to his/her state of health, it must be treated as such, even if the cause or reason for the termination is not specified.

Article 9.1 RGPD includes data relating to health within the special categories of data, and prohibits its treatment unless one of the exceptions provided for in paragraph 2 of the same article 9 RGPD applies.

Recital 51 of the RGPD highlights the restrictive nature with which the processing of this data can be admitted:

"(51) "Personal data that, by its nature, are particularly sensitive in relation to fundamental rights and freedoms, deserve special protection, since the context of their treatment could entail significant risks for fundamental rights and freedoms. (...)Such personal data must not be processed, unless its treatment is allowed in specific situations contemplated in this Regulation, given that the Member States may establish specific provisions on data protection in order to adapt the application of the rules of this Regulation to the fulfillment of a legal obligation or to 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. In addition to the specific requirements of that treatment, the general principles and other rules of this Regulation must be applied, especially with regard to the conditions of legality of the treatment.
Exceptions to the general prohibition of the treatment of these special categories of personal data must be explicitly established, among other things when the interested party gives his explicit consent or when it comes to specific needs, in particular when the treatment is carried out in the framework of legitimate activities by certain associations or foundations whose objective is to allow the exercise of fundamental freedoms.

(52) Likewise, exceptions to the prohibition of processing special categories of personal data must be authorized when established by the Law of the Union or of the Member States and provided that the appropriate guarantees are given, in order to protect personal data and other fundamental rights, when it is in the public interest, in particular the processing of personal data in the field of labor legislation, legislation on social protection, including pensions and security purposes, supervision and health alert, the prevention or control of communicable diseases and others serious threats to health.(...)"

In accordance with these considerations, the treatment of workers' health data will require not only the concurrence of one of the legal bases established in article 6 of the RGPD but, in addition, one of the exceptions will have to concur provided for in article 9.2 of the RGPD.

Having said that, from the content of the Instructions subject to consultation, it does not appear that the treatment of this data by the City Council for the purposes of monitoring compliance with the obligations of the successful tenderer provided for in the clauses of the contract with the in order to guarantee the correct operation of the service, it may fit into any of the exceptional cases provided for in article 9.2 of the RGPD.

Even so, in order to assess the correct operation of the service, it would not be necessary to identify which people are on leave.

If what is intended is to assess the degree of impact on the service of the absences of the workers initially scheduled to cover the different needs, it does not seem that it can be relevant that the reason is for a leave of absence or for personal matters.
It would be sufficient to know the workplaces where and when the absences occurred, and whether these were covered or not. Given this, pseudonymised data should not include the detail or reason for the absence.

If the aim is to assess the number of layoffs produced and which positions they affect, it would be enough to know how many workers have been affected by layoffs, for how long and whether or not they have been replaced, but without providing information that allows it to be linked to specific workers.

CONCLUSION

With the information available, and in application of the principle of minimization, the transmission to the City Council of the detailed labor information of the workers/res of the awarded company contained in the Regulatory Instructions of the control procedure for the concession of water supply, should be provided in an anonymized or pseudonymized manner. For the purposes of quality control of the service, it does not appear that in this case it is necessary to identify the affected workers.

Barcelona, May 28, 2019