

CNS 50/2019

Opinion regarding the consultation on the communication of personal data of high school and higher education students likely to take the university entrance exams at the University Access Office (OAU)

A query is submitted to the Catalan Data Protection Authority regarding the communication of personal data of high school and higher education students likely to take the university entrance exams, from the Department of Education to the Office of Access to the University (hereinafter, OAU).

(...)

In relation to the hypothesis raised, the following question is formulated: "If the Department has legal authorization to make this communication of data to the OAU without obtaining the prior consent of the students concerned or requires the prior consent of each of the students capable of enrolling in the PAUs listed in the Register."

Having analyzed the request, given the current applicable regulations and the report of the Legal Counsel, the following is ruled.

I

(...)

II

The query refers to the possibility of communicating personal data of high school and higher education students who could appear in the university entrance exams (PAU), contained in the "Student Register" of the Department of Education , at the OAU (Department of Business and Knowledge).

According to the consultation, the data relating to "all the students likely to present themselves at the PAU" would be communicated, adding that the planned phases for the communication of the data subject to the consultation would be the following:

- The OAU requests identifying information, the center and the baccalaureate type, if applicable, of all the students listed in the Register of students who have enrolled in the last year of baccalaureate/higher degree training cycle.
- The Department sends this information to OAU.
- The OAU uploads and registers the data in its system, and generates and sends the access credentials of all the students to the centers where they are enrolled.
- The centers distribute the access credentials to the students.
- Once the academic year for the aforementioned studies has ended, the Department sends the grades of all the students who have passed the studies.
- The OAU incorporates this data into its system."

With all this, the following question is formulated:

"If the Department has legal authorization to make this communication of data to the OAU without obtaining the prior consent of the students concerned or requires the prior consent of each of the students likely to enroll in the PAUs contained in the Register."

It is necessary to start from the basis that, according to article 4.1) of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), personal data is "all information about an identified natural person or identifiable ("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;

Order ENS/293/2015, of September 18, "creates the Register of students, as a single register, in which all students enrolled in public and private educational centers of regulated non-university courses are registered carry out their activity in Catalonia, with the content described in annex 1." (art. 1 Order).

The processing of personal data (art. 4.2 RGPD) contained in the "Student Register", cited, including its communication to the OAU, is subject to the principles and guarantees of the personal data protection regulations (in particular, the RGPD, and Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD)).

III

It must be noted that any communication of personal data contained in the Student Register that may be made by the Department of Education, specifically, to the OAU, must comply with the principle of legality (art. 5.1.a) RGPD), which requires that the treatment, specifically, the communication, have a sufficient legal basis.

According to article 6.1 of the RGPD:

"1. 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; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; d) the treatment is necessary to protect the vital interests of the interested party or another natural person; 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; (...)."

At the outset, in the event that the Department of Education obtains the consent of the affected persons, that is, of the students themselves or, where appropriate, of the parents or guardians (art. 7 LOPDGDD), this consent could enable the communication of data from the Student Register at the OAU (art. 6.1.a) RGPD).

Otherwise, it will be necessary to examine whether there is another legal basis that enables communication in the terms set out in the consultation, without having to have the consent of the people affected. Specifically, and for the purposes that interest,

it will be necessary to analyze whether the treatment would be necessary for the fulfillment of an obligation of the person in charge (art. 6.1.c)), or for the fulfillment of a mission carried out in the public interest or in the exercise of public powers by the person in charge of the treatment (art. 6.1.e)).

Article 6.3 of the RGD provides that: "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 in charge of the treatment."

The referral to the legitimate basis established in accordance with the internal law of the Member States referred to in article 6.3 RGD requires that the development rule, being a fundamental right, has the status of law (art. 53 EC) , in the terms specified in article 8 of the LOPDGD.

It should be borne in mind that, according to the consultation, the Department of Education would communicate to the OAU the data of all students who are studying high school or CFGS, which would be integrated into the OAU's information system; the system would generate credentials for all these enrolled students that would be sent to the centers, and they would distribute them among the students.

In other words, the planned data processing, given the information available, would affect all students who are studying high school or CFGS before they have passed the course and, therefore, before they know if they are ready to take the PAU.

Bearing this in mind, to analyze the concurrence of some legal basis that can enable the communication of the data in the terms proposed in the consultation (the data of the set of students enrolled in high school or CFGS), it is necessary to refer to the regulations relevant to the case at hand.

At the outset, article 89 of Law 12/2009, of July 10, on education, establishes the obligation of the Department of Education to provide educational centers with access to a set of digital and telematic services aimed at to improve the development of educational activity, consisting of didactic applications and quality educational content, as well as personal learning file and individual personal academic registration services, among others, aimed at enhancing the excellence of learning and to facilitate the operation of the centers.

On the other hand, article 168.1 of the same Law 12/2009 provides that the Government and the universities of Catalonia must establish collaborative relationships to enhance the excellence of the educational system, without prejudice to the coordination faculties that correspond to the Interuniversity Council of Catalonia, among others, in relation to "student access to university education."

According to article 32.2 of Law 1/2003, of 19 February, on Universities of Catalonia (LUC):

"2. The competent department in matters of universities must adopt the relevant measures so that universities can act in a coordinated manner in matters of access to the university, in order to guarantee that students participate in the processes

of access in equal opportunities. To this end, the Inter-University Council of Catalonia must offer access processes for the universities that are part of it, which must be respectful of university autonomy."

In this sense, according to article 117.1 of Decree 316/2016, of November 8, restructuring the Department of Business and Knowledge, the OAU has the function, among others, of coordinating and organizing the tests of access to the university for students from high school and higher education courses, by virtue of the management assignment to the Interuniversity Council of Catalonia provided for by the LUC.

Taking this into account, the OAU (to whom the Interuniversity Council of Catalonia would have entrusted the management and planning of the PAUs), must process certain information to manage access to the University, in relation to those people who wish to participate in the PAU

Now, although the studied regulations provide for certain informational flows of student data with universities or schools, which could be based on the legal basis of article 6.1.c) or 6.1.e) of the RGPD, the regulations studied do not specifically provide for the communication of data from the set of students eligible for the university entrance exams, for the purposes of management and organization of PAUs, in the terms set out in the consultation.

It should be added that Order ENS/293/2015 specifically provides for three cases of data communications different from the one raised in the consultation (art. 3.2.e) Order), which also do not refer to the communication of data in the terms set out in the query.

Beyond this, it seems clear, at the outset, that the regulations with legal status studied would not enable, for the purposes of article 6.1, sections c) and e), a communication of data of all students who are enrolled in the high school or to CFGS, to the administration competent to manage the university entrance exams (OAU), so that the communication of data from all the students taking high school or CFGS, many of whom will not take the PAU, to the body in charge of these tests.

IV

Having said that, the treatment of data subject to consultation, like any other, must comply with the rest of the principles established in the RGPD, especially, for the purposes that are of interest in this case, the principle of purpose limitation (art. 5.1.b) RGPD), according

"1. The personal data will be:
(...) b) collected with specific, explicit and legitimate purposes, and will not be subsequently processed in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose"); (...)"

Thus, taking into account the principle of purpose limitation (art. 5.1.b) RGPD), the data of the Student Register can only be used in a manner compatible with the purposes of the original processing carried out by the Department of Education with this data.

According to article 2 of the Order creating the Registry, it has the following purposes:

- "a) Have a unique identifier for each of the students mentioned in article 1, which makes it possible to provide educational centers and the students themselves with the personal academic data that must form the individual personal academic record.**
- b) Facilitate the development of the personal learning dossier.**
- c) Establish the basis for the development of electronic procedures for the benefit of students and make available to the bodies of the Administration of the Generalitat the updated data necessary for the planning, execution and evaluation of their policies."**

Although, as has been explained, the regulations with legal status studied would not enable the communication of data of all the students registered in the Student Register for the management of the PAU, it may be that, in relation to those students who decide to these tests, the OAU must process certain information and that, therefore, the communication of certain data may be compatible with the initial purpose, at least, in relation to some of the functions and activities of the OAU.

In this regard, it should be borne in mind that, in order to carry out certain tasks of planning or organizing the PAUs (such as, for example, the choice of the spaces where the exams must be carried out, or for the initial planning of the distribution of students in the different spaces selected), it does not seem necessary for the OAU to have access to the personal data of said students, but in these cases it could be sufficient to know the total number of students who must examine in a certain call.

Having said that, other functions related to the management of the PAUs could require the processing of personal data of the students who appear there, by the OAU. For example, to communicate with students competing in the PAU, to send them notifications and notices about the call, to communicate grades, to manage exam review requests, etc. , in these cases it may be necessary for the OAU to have personal information of the affected students.

Therefore, it will be necessary to see if these functions are compatible with the specific purpose of processing the data of high school and CFGS students carried out by the Department of Education as responsible (art. 4.7 RGPD).

Article 6.4 of the RGPD establishes that:

"4. When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives indicated in article 23, paragraph 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data were initially collected, will take into account, among other things:

- a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided;**
- b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller;**

c) the nature of personal data, in particular when special categories of personal data are treated, in accordance with article 9, or personal data relating to criminal convictions and infractions, in accordance with article 10;

d) the possible consequences for the interested parties of the planned subsequent treatment;

e) the existence of adequate guarantees, which may include encryption or pseudonymization.”

In line with what the Article 29 Working Group set out in Opinion 3/2013, on the limitation of the purpose of the treatment, it is necessary to take into account the different weighting criteria established by Article 6.4 of the RGPD , which can determine whether the processing of data subject to consultation could be compatible with that of the Student Register, the compatibility of the processing by the OAU with what was originally planned.

v

Regarding the relationship between the purposes of the Student Register and the purposes of the treatment that would be carried out by the OAU, it is necessary to refer to the regulatory provisions on the PAU.

Article 38 of the Organic Law 2/2006, of 3 May, on Education (LOE), which established the completion of the PAU as a requirement for access to the university, and which was modified by the Organic Law 8/2013, of December 9, on improving educational quality (LOMCE), provides the following:

"1. The Universities may determine the admission to the official university courses of students who have obtained the Bachelor's degree or equivalent exclusively by the criterion of the final qualification obtained in the Bachelor's degree.

2. In addition, the Universities will be able to establish procedures for admission to the official university courses of students who have obtained a Bachelor's degree or equivalent, in accordance with the basic regulations established by the Government, (...). (...).”

Section 6 of the fifth final provision of the LOMCE (as amended by Royal Decree-Law 5/2016, of December 9) provides that:

"6. Access and admission to official undergraduate university courses will be carried out as follows:

"a) Until the entry into force of the regulations resulting from the Pacto de Estado social y político por la educación, the requirements for access to official university education for students who have obtained the title of Bachelor will be the following:

1) Those who have previously entered the 2017/18 academic year must have passed the University Entrance Test established by Article 38 of Organic Law 2/2006, of May 3, or the tests established in previous regulations with a similar purpose.

2) For those who access in the 2017-2018 school year and until the entry into force of the regulations resulting from the Social and Political State Pact for Education, the

qualification obtained in the test taken by students who want to enter the university referred to in article 36.bis of Organic Law 2/2006, of May 3, (...).”

According to the information available (www.accesuniversitat.gencat.cat), only students who are in the 2nd year of high school in Catalonia must complete a pre-registration to choose the subjects in which they will be examined at the PAU, and subsequently they must complete the enrollment to take the PAU, specifically, to define which subjects, from those chosen in the pre-registration, will be examined in the general phase and the specific phase.

According to the same information, students with a high school diploma or equivalent approved in previous calls and who are appearing for the first time at the PAU, and students who have already passed the PAU and want to improve their grade, must register directly on the portal of access to the university within the established period (without having to pre-register).

With regard to CFGS students, to whom the query also refers, it should be noted that they can access the university without taking any entrance test, since the university admission grade is the one obtained in the cycle training carried out. Only in the case that these students want to improve the university entrance grade obtained in the cycle, they can take the specific phase of the PAU.

In this sense, it is likely that a quantitatively important proportion of the students who complete their high school studies will attend the PAU. However, not all students who are enrolled in high school will pass nor, therefore, will they be able to take the PAU, nor will all students who finish high school and who could take these tests, do so.

To this it should be added that CFGS students do not need to take the PAU to enter the university (only, if applicable, to improve the grade obtained), so it would not seem compatible with the initial purpose, to communicate the data of all the CFGS students, of whom, a good part will probably not even do the PAU.

A communication of the data of all students enrolled (baccalaureate and CFGS) at the OAU, in the terms proposed in the consultation, that is to say, when it is still unknown which students want to participate in the PAU, could not consider- as a treatment compatible with the one initially planned, since it would not be a data treatment that is neither justified nor necessary.

Taking this into account, from the perspective of the compatibility of the purposes, it could only be considered that the OAU, as a body that has the function of managing and organizing the PAUs, carries out a purpose compatible with the one initially envisaged by in the Student Register, when dealing with the data of those students who actually want to take the PAU (whether they come from high school or CFGS). In this case, the management of the university access procedure for these students by the OAU (art. 32 LUC), could be considered a subsequent treatment compatible and legitimate with the initial one, and therefore could communicate certain data of the affected students to the OAU (art. 6.4.a) RGPD).

It should be borne in mind that, according to the information available, it would be a matter of communicating identifying and academic data of those affected (the school and the type of high school). The treatment of these data, in the academic context that concerns us and for the purpose of generating credentials to perform the PAU, would have an impact on the right to data protection of those affected, so it would only be compatible if s 'use the data of people who want to pre-register or register to participate in the process in question (art. 6.4, sections b) and) RGPD).

With regard to the consequences for those affected, given that the purpose of the treatment would be to manage the accreditation procedure, communications, and completion of the PAU by those affected, it is clear that these consequences and, therefore, the intended treatment, it must occur, only, in relation to pre-registered students, and not in relation to all high school or CFGS students (art. 6.4.d) RGPD).

For all that, it can be said that the communication of data from the Student Register, as long as they refer to those students who have pre-registered in the PAU, for the purposes of generating and communicating the credentials for these students, could be considered legitimate, as it concerns purposes compatible with that of the Student Register, for the purposes of article 6.4 RGPD, and for the purposes of the principle of minimization, according to which the data must be adequate, relevant and limited to what is necessary in relation to the purpose of the treatment (art. 5.1.c) RGPD).

However, it does not seem that this possibility gives a satisfactory answer to the problem raised, given that once the pre-registration has already been made, the OAU will already have the information about them in order to issue the credentials it deems appropriate .

It is therefore necessary to analyze other possibilities that allow the OAU to provide a credential or identification system that allows interested students to carry out pre-registration and other subsequent procedures.

VI

As can be seen from the consultation, with the data communicated the OAU would generate an access credential for each student, which the school would be responsible for distributing

The query does not add more information about the said "access credential" (which identification and authentication system would be used, which procedures would allow the student to perform, etc...). Even so, it can be deduced from the available information that this credential could allow the student to complete the pre-registration and other formalities in the procedure for completing the PAU.

A first possibility would be for the OAU, directly or through an order from the Department of Education, to be able to collect the consent of students interested in participating in the PAUs, in order to be able to generate a credential for them that, based on that moment allows them to identify themselves within the framework of the PAU procedure.

Another possibility would be that a credential is not generated prior to pre-registration but is done during the pre-registration process itself (or registration when pre-registration is not necessary).

As has been said, according to the information available, students who want to do the PAU must pre-register or register through the website enabled by the OAU, within the deadlines established for this purpose in each call (for example, according to the available information, pre-registration for the June 2020 PAUs must be done from February 18 to March 2, 2020).

The identification of interested persons can be done through an electronic certificate. Certainly, the requirement to have an electronic certificate can make access to this procedure difficult, but it must be taken into account that the current regulations also provide for other possibilities of identification through shared key systems through some information that only they know the parties involved.

In this sense, article 9 of Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations establishes the following:

"1. The Public Administrations are obliged to verify the identity of those interested in the administrative procedure, by checking their name and surname or denomination or company name, as appropriate, which are contained in the National Identity Document or equivalent identification document.

2. Those interested may identify themselves electronically to the Public Administrations through the following systems:

a) Systems based on qualified electronic certificates of electronic signature issued by providers included in the "Trusted list of providers of certification services". b) Systems based on qualified electronic certificates of electronic seal issued by providers included in the "Trusted list of providers of certification services". c) Concerted key systems and any other system, which the Administrations consider valid under the terms and conditions established, as long as they have a previous registration as a user that allows their identity to be guaranteed (...). (...)."

According to article 9 of Decree 232/2013, of October 15, by which the electronic Headquarters is created:

"9.1. The Administration of the Generalitat and the entities provided for in article 2.1.a) must guarantee the identification of natural or legal persons through an electronic signature system. The associative entities without their own legal personality must also be identified by this procedure if the procedure establishes it, in accordance with the effects foreseen therein.

9.2. The electronic signature system must be based on identification documents, digital certificates, use of previously agreed keys in a register, or any other system established by the regulation of each procedure.

9.3. The electronic Headquarters must inform of the valid signature system or systems for each transaction or procedure, in accordance with the provisions of article 8.3.

9.4. Persons or entities without legal personality that do not have electronic identification or authentication mechanisms to carry out any procedure carried out by electronic means, may be identified and authenticated by staff at the service of the Government of the Generalitat. For this purpose, they must be accredited and they must give their express consent to be identified and authenticated by the staff at the service of the Administration of the Generalitat.

9.5 The staff in the service of the Administration of the Generalitat must carry out the procedure referred to in the previous section on behalf of the persons or entities without legal personality, using the electronic signature systems specified in each procedure. "

With these mechanisms, and especially through a shared key system, students who enroll to take the PAU, whether they are high school or CFGS, they can identify themselves and carry out all the procedures and receive the information that

are necessary on the part of the OAU, in relation to the procedure for taking the university entrance exams.

With the use of these mechanisms, the processing of data would only occur in relation to those students who request it and who will participate in the PAU, and not in relation to the set of high school and CFGS students, in the terms that raises the query.

In accordance with the considerations made in this opinion the following are made,

Conclusions

The legal regulations studied do not contain a sufficient authorization to communicate data on all students studying high school or CFGS.

It is recommended that the persons interested in pre-registration or enrollment in the PAUs be identified through one of the electronic identification systems established in the area of the Generalitat Administration or, where appropriate, through the prior delivery of credentials to students who have authorized it.

Barcelona, December 11, 2019