

CNS 56/2019

Opinion on the consultation of an association of professional colleges regarding the criteria in relation to the e-mail of members

A letter from an association of professional associations is presented to the Catalan Data Protection Authority in which two inquiries are formulated by a professional corporation member of the association.

In its letter, the Association formulates two inquiries carried out by a professional Corporation that is a member of the Association. This report analyzes the second of the consultations carried out in which it is considered whether "can a professional association authorize a spouse or business partner to continue using the e-mail of a deceased member for a prudent period of time to serve customers?. If so, it could be established as an express condition that in every communication that is made, the death of the employee is reported and that the response that is formulated is, for courtesy purposes, a corporate email provided to a person collegiate becomes data of a personal nature?".

According to the consultation, a professional association would have received the communication from the spouse of a member informing of his death and would have requested to be able to access and have the e-mail of the deceased member activated in order to inform to the clients of the office and attend to the communications that arrive during a period of six months, all this covered by articles 3 and 96 of Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights.

Having analyzed the consultation, in accordance with the report of the Legal Counsel I issue the following opinion:

Legal Foundations

I

(...)

II

The query raised asks whether the professional association can authorize a spouse or business partner to continue using the e-mail of a deceased member for a reasonable period of time to serve clients, and if so, if the professional association may establish as an express condition that in every communication that is made, the death of the member is reported and that the answer that is formulated is for the purposes of courtesy and information of the situation, without can provide professional solutions.

It is worth noting that the query does not provide information about the professional association to which the deceased belonged and, therefore, the profession of that member is unknown, and whether his activity is

subject to the legal obligation of professional secrecy in relation to the information it receives from its clients. However, from the content of the same, it can be deduced that the person formulating the query (...). Given the terms of the consultation, it seems that the member carries out his activity in an office together with other members.

Nor is it indicated whether the professional association has approved and has rules for the use of e-mail and whether any limitation had been established regarding its strictly professional use.

In any case, the hypothetical use of the e-mail of a deceased member by other people, entails access by the person to whom authorization is given to all the functionalities offered by the e-mail system used, mainly the access to mail messages stored in the various mailboxes, although it could also allow access to other system functions such as a contact mailbox or the calendar.

It should be taken into account that an email contains various information, such as the email address of the sender and the recipient or recipients; the subject of the mail; the date and time of the mail; the body or content of the message; the signature foot; and, where applicable, the attached documents. This information to the extent that it offers information about identified or identifiable natural persons can be considered as personal data. It should be remembered that Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), defines "personal data" as "all information about a identified or identifiable natural person (the interested party)"; an identifiable natural person shall be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, 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 this person" (article 4.1 RGPD).

The contact box and the agenda information, if they are functions of the mail system, would also contain personal data.

Regarding the situation raised in the consultation, it must be taken into consideration that the authorization to use the e-mail of the deceased person will allow access to information not only of that person but also of third parties. In addition, this information, in principle, can be part of both the deceased's private sphere and his professional sphere, and to the extent that it may include information provided by clients, it may be protected by the duty of secrecy inherent in some professions .

This Authority has previously expressed the desirability of approving rules for the use of the professional associations' email system, which have been approved and accepted by their users and which provide, in addition to the access system to mail, the conditions of use and conservation, and other eventualities such as the destination of the information in the event of death, which are applicable in the absence of express manifestation of the interested person.

It should not be ruled out that these rules anticipate a solution to possible requests such as the one stated in the consultation, in which the objective seems to be to attend to the communications that arrive at the member's email to report the death of the collegiate person. So, for example, by implementing an automatic response system with a

preset message, such as those activated in cases of absence, in which the sender of the message is informed that it cannot be delivered to the recipient due to his death, and, where applicable, the data of the people who can take care of the possible issues raised in that communication.

Beyond this recommendation, this Authority must only pronounce on the application of data protection regulations to those situations that affect the data of natural persons.

This Authority had the opportunity to analyze whether the relatives of a deceased lawyer and, in their case, other people such as firm partners, had the right to obtain from a Bar Association the user and the password to access the email account that the College had provided to the deceased, in Decree 35/2010 (which can be [consulted on the Authority's website, www.apdcat.cat](http://www.apdcat.cat)). Although the issue analyzed in that opinion is very similar to the one that is the subject of this report, the conclusions contained in it are not applicable to the issue that is now being raised, given the modifications that have occurred in the framework app

III

With regard to data protection regulations, the RGPD does not apply to the protection of data of dead persons, as established in Recital 27, which provides, however, that "The member states are competent to establish rules relating to the processing of personal data of deceased persons".

In application of this provision, article 3 of Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), has established the following criteria:

"1. Persons linked to the deceased by family or de facto reasons, as well as their heirs, may contact the person responsible for the treatment to request access to their personal data and, where applicable, their rectification or deletion.

As an exception, the persons referred to in the previous paragraph will not be able to access the deceased's data, nor request its rectification or deletion, when the deceased person had expressly prohibited it or as established by law. Said prohibition will not affect the right of the heirs to access the property data of the deceased.

2. The persons or institutions to which the deceased had expressly designated for it may also request, according to the instructions received, access to his personal data and, where appropriate, their rectification or deletion.

By royal decree, the requirements and conditions will be established to certify the validity and validity of these mandates and instructions and, where appropriate, their registration.

(...)"

Therefore, according to the provision of article 3 of the LOPDGDD, certain people linked by family or de facto reasons to the deceased person and his heirs, or the people or institutions that have been expressly designated by him, can address to the person in charge or the p

of the treatment for the exercise of the right of access to that person's data and if applicable to its rectification or deletion. All this except that he has expressly prohibited this possibility or a law establishes the contrary.

These same people are also authorized, in accordance with the provision contained in article 96 of the LOPDGDD ("right to digital testament") to address the service providers of the information society for the purpose of access the digital contents of the deceased person and give the appropriate instructions on their use, destination or deletion. However, in accordance with paragraph 4 of the same article 96, the provisions of this article do not apply to autonomous communities with their own civil, regional or special law, in which case they are governed by the provisions of that regime .

In the case of Catalonia, Law 10/2008, of July 10, of the fourth book of the Civil Code of Catalonia, relating to successions (CCC), has regulated "digital wills in case of death" in article 411-10, in the following terms:

1. Digital wills in the event of death are the provisions established by a person so that, after his death, the heir or universal executor, if any, or the person appointed to execute them acts against digital service providers with whom the plaintiff has active accounts.

2. The testator, in digital wills in the event of death, can provide the specific content and scope of the order to be executed, including that the designated person carry out one or some of the following actions:

a) Notify digital service providers of your death.

b) Request digital service providers to cancel their active accounts.

c) Request the digital service providers to execute the contractual clauses or to activate the policies established for cases of death of active account holders and, if applicable, to deliver a copy of the digital files that are in them servers

3. Digital wills can be ordered through the following instruments:

a) Testament, codicil or testamentary notes.

4. The document of digital wishes can be modified and revoked at any time and does not produce effects if there are provisions of last will.

5. If the causer has not expressed his digital wishes, the heir or the universal executor, if there is one, can execute the actions of letters a, b and c of section 2 in accordance with the contracts that the due to having signed with the digital service providers or in accordance with the policies that these providers have in force.

6. If the causer has not established otherwise in his digital wills, the person responsible for executing them cannot have access to the contents of his accounts and digital files, unless he obtains the corresponding judicial authorization.

7. If the testator has not established otherwise, the expenses incurred by the execution of digital wills are borne by the inherited assets.

IV

In order to determine the applicable legal regime, the first issue is to analyze whether the professional association that offers an email service to its members acts as an information society service provider in accordance with Law 24/2002, of July 11, on information society services and electronic commerce.

To this end, it is necessary to analyze the definition of "Services of the Society of Information", which letter c) of the Annex of the aforementioned law defines as "the natural or legal person that provides a Service of the Society of the Information". This must be completed with the definition of "Services of the Information Society" offered by letter a) of the aforementioned Annex where it is defined as "todo Servicio prestado normalmente a título oneroso, a distancia, por vía electrónica ya individual request of the recipient (...)The concept of service of the information society also includes unpaid services by their recipients, to the extent that they constitute an economic activity for the provider of Services". Understanding "recipient of the service", as "the natural or legal person who uses, whether for professional reasons or not, a Service of the Information Society".

On the other hand, it will be necessary to comply with what is established by the Statutes of the professional association in question, regarding the definition of the professional functions that, in the development of Law 2/2017, of February 13, on professional associations, are assigned .

There is not enough information to assess whether the professional association would be subject to the legal regime of the LSSI, but, in any case, there is no doubt that the email service would be included in the definition of society's service of the information contained in the Annex of the LSSI and that the professional association, in providing this service, would act as an information society service provider.

Consequently, the professional association that provides an email service must be understood as a digital service provider and will be subject to the provisions of article 411-10 of the CCC.

V

In this situation, the professional association may find itself with two different scenarios depending on whether the deceased member has expressed his digital wishes through the instrument provided for in article 411-10.1 of the CCC or that he has not 'have performed

In the first case, the heir or the universal executor or the person designated for that purpose by the deceased member in his "digital wills", would be in charge of executing them. In this case, the digital wishes of the deceased professional must be complied with, in such a way that the professional association could only give the designated person a copy of the digital files

that are on their servers, in this case of stored emails, when this is expressly provided for in the document of digital wills, or unless it has the corresponding judicial authorization (article 411-10.6 CCC).

In the absence of a digital will document, the heirs or the universal executor, if any, are entitled to contact the professional association and notify it of the death of the member, request the cancellation of your email account and to activate, where appropriate, the policies established for the death of members, as well as to request a copy of the emails stored on their servers.

Therefore, the deceased member's spouse could have the right to request from the professional association a copy of the deceased's e-mails, stored on the association's servers, when they prove the existence of the corresponding digital will document of the one in which he designates him as the person in charge of the execution of his digital wills and expressly foresees that he can have access to the contents of his accounts and digital files, or that, in the absence of digital wills, in his condition of heir of the deceased professional.

In the case of a partner in the firm, also referred to in the query, he could only have access to the e-mails of the deceased, as explained, if he had been expressly authorized to do so in a digital will document.

In any case, the person who is the recipient of the digital contents of the deceased becomes responsible for the processing of the personal data of third parties contained in them and, as such, assumes the responsibilities established by the RGPD, including providing them the exercise of their rights recognized in the RGPD.

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

Conclusions

The spouse of a deceased member may request the professional association that provides an email service to provide him with a copy of that member's e-mails that are on the association's servers provided that he proves the existence of a document of digital wills in the terms of article 411-10 of the CCC, in which that person is designated as the person in charge of the execution of the digital wills and expressly authorized in this sense .

A member of the deceased person's professional office will only be able to access the deceased person's data if they have been expressly authorized to do so in a digital will document.

Barcelona December 11, 2019