PD 3/2019

Report in relation to the Draft Decree on the Rights and Duties of Children and Adolescents in the Protection System, and the Procedure and Protection Measures for Childhood and Adolescence

The Catalan Data Protection Authority is presented with the Draft Decree on the rights and duties of children and adolescents in the protection system, and on the procedure and protection measures for children and adolescents, so that the 'Authority issues its opinion on the matter.

The Draft Decree consists of a preamble, a total of 188 articles divided into 9 chapters, an additional provision, two transitional provisions, a repealing provision and two final provisions.

Having examined this Draft Decree, and having seen the report of the Legal Counsel, the following is reported.

Legal foundations

I

(...)

II

The Draft Decree being examined aims to implement Law 14/2010, of 27 May, on the rights and opportunities of children and adolescents (preamble). For these purposes, it dedicates:

- **Title 1 to the rights and duties of children and adolescents in the protection system.**
- **Title 2 to be regulated:**
  - **o The intervention and procedure of social services, basic and specialized in childhood and adolescence, and of the public body for the protection of children and adolescents, in situations of risk, helplessness, guardianship and guardianship. o The content of the protection measures for helpless children and adolescents. o The regime of relationship and visits. o The procedure for adopting assistance measures. o The intervention and procedure with children and adolescents under 14 years of age who commit criminal offences.**

The processing of personal information, mainly of minors but also of other people who are linked, either for family or other reasons, as well as of adults who have been looked after by the administration, by the various agents involved in the child and adolescent protection system, which, it must be said, must be adapted to the provisions of the

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (hereinafter, RGPD) and Organic Law 3/2018, of 5

December, on protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

In this sense, the explicit references made throughout the text to the regulations on data protection and, specifically, to article 56 of the Project, should be positively assessed, without prejudice to the considerations that will be made later in this respect.

Having said that, those provisions of the Project that have a particular impact on the fundamental right to the protection of personal data are examined below, the perspective from which this report is issued.

III

Section 1 of Chapter 2 of Title 1 of the Project refers to the rights of children and adolescents in the protection system.

Considering that these rights are enshrined in the Spanish Constitution and the laws that develop them, and in other legislation, such as the aforementioned Law 14/2010, the convenience of assessing the need for its inclusion in this Draft Decree, given that, as it is not an exhaustive list, it could lead to confusion.

In the event that it is considered pertinent to maintain these provisions, it is recommended to assess the possibility of also incorporating an explicit reference to the fundamental right to the protection of personal data (Article 18.4 CE) that goes beyond what is established in the article 9.3 of the Project, to which we mention later.

To this end, it could be appropriate to establish, in a new article, that children and adolescents in the protection system have the right to the protection of their personal data in the terms established in current legislation on this matter and, particularly , to the security and confidentiality of the data, as well as to the exercise of the rights to informative self-determination recognized in articles 15 to 22 of the RGPD.

If incorporated, it should be noted that the exercise of these rights corresponds to the holders of parental authority, guardianship or guardianship of minors under 14 years of age, or to the minor himself when he is 14 years of age or older, either directly or through a representative (article 12 LOPD

It might also be appropriate to note that children and adolescents in the protection system have the right to submit a claim to the Catalan Data Protection Authority (article 77 RGPD).

Otherwise, these forecasts could be appropriate to be incorporated into article 56 of the Project, to which we refer in section IX of this report.

Aside from these considerations, it is worth highlighting, among the different provisions contemplated, article 9 of the Project, relating to the right to honor, privacy and one's image.

Section 2 of this precept states that "the competent administrations must ensure that the presence of protected children and adolescents in digital environments is appropriate to their age and personality in order to protect them from the risks that may arise. To this end, they can promote appropriate and timely measures against digital service providers in accordance with what is established by current legislation on the autonomy of the person in the digital world".

This provision, which would come to specify what is established in article 36.2 of Law 14/2010, is adequate in attention to what is established in the second book of the Civil Code of Catalonia in relation to the presence of minors in the environments digital, and complements the provisions established in the LOPDGDD regarding the protection of minors on the Internet.

Regarding this, article 84 of the LOPDGDD provides that:

> "1. Parents, guardians, curators or legal representatives will ensure that minors make a balanced and responsible use of digital devices and information society services in order to guarantee the adequate development of their personality and preserve their dignity and its fundamental rights.
> 2. The use or dissemination of images or personal information of minors in social networks and equivalent information society services that may imply an illegitimate interference with their fundamental rights will determine the intervention of the Public Prosecutor, who will initiate precautionary measures and protection provided for in Organic Law 1/1996, of January 15, on the Legal Protection of Minors."

In the same way, article 12.3 of the Project is appropriate, which, with respect to the right to communicate and receive information and the confidentiality of communications of children and adolescents in the protection system, provides that "the person who has custody of the child or adolescent, in the exercise of this function and in a manner similar to parental control, may limit, for educational, protective or therapeutic reasons, the use of certain technical means or telecommunications computer programs, and may also request explanations from the child or adolescent about the content of communications that could endanger their integral development or their physical or mental integrity."

This provision would come to specify what is established in article 32 of Law 14/2010, which establishes the obligation of parents, guardians or guardians and public authorities to ensure that the information that children and adolescents receive is truthful, plural and respectful of constitutional principles (section 2), and to protect them from harmful information and material, especially when they can access it through information technology and communication (section 3).

Returning to article 9 of the Project, section 3 should be particularly highlighted, which states that "persons who participate in the procedures for the protection of children and adolescents cared for in the protection system are obliged to respect the confidentiality of all the data contained in the corresponding files, especially those relating to personal and family history."

Beyond valuing this provision positively, make it clear that the obligation to maintain secrecy regarding personal data imposed by the data protection regulations on any person who has access to it remains even after the end of the relationship they maintain with the administrations public bodies involved in the protection of children and adolescents (Article 5.1.f) RGPD and Article 5 LOPDGDD). It could, therefore, be convenient to incorporate a provision in this regard.

IV

Section 2 of Chapter 2 of Title 1 of the Project regulates the right of children and adolescents in the protection system to submit requests and complaints to any of the bodies with competence in matters of protection, without prejudice to being able to also submit them in front of the Ombudsman and the Public Prosecutor's Office.

For these purposes, it is established that the administrative body and administrative services competent in matters of childhood and adolescence, including residential centers, have, electronically and in person, a standardized, accessible and simplified application form and complaint, easy to understand and fill in by any child or adolescent with sufficient knowledge (article 22.1).

Make it clear that in the collection of personal information through this standardized request and complaint model it is important to respect the principles of transparency (articles 5.1.a) RGPD) and data minimization (Article 5.1.c) RGPD).

Thus, it must be taken into consideration that, in application of the principle of transparency, it will be necessary to provide children and adolescents with information on the conditions and circumstances relating to the processing of the data, in a concise manner, in the form of request and/or complaint. transparent, intelligible and easily accessible, with clear and simple language, i.e. appropriate to the level of understanding of minors (Article 12.1 RGPD).

Specifically, it will be necessary to provide all the information referred to in article 13 of the RGPD, that is:

a) The identity and contact details of the person in charge and, where appropriate, of their representative. b) The contact details of the data protection representative, if applicable. c) The purposes of the treatment for which the personal data are intended and the legal basis of the treatment.

d) The legitimate interest pursued by the person in charge or by a third party, when the treatment is based on this legitimate interest. e) The recipients or the categories of recipients of the personal data, if applicable. f) 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.

g) The term during which the personal data will be kept or, when it is not possible, the criteria used to determine this. h) 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. i) 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.

j) The right to present a claim before a control authority. k) If the communication of personal data is a legal or contractual requirement, or a necessary requirement 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. l) The existence of automated decisions, including the creation of profiles. m) If it produces legal effects on the interested party or affects him significantly, 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 interested party.

It should be noted that, in order to facilitate the fulfillment of this duty of information, the LOPDGDD (article 11) has provided for the possibility of delivering this information to the affected by layers or levels.

This method consists in presenting "basic" information (summary information) at a first level, so that you can have a general knowledge of the treatment, indicating an electronic address or other means where it can be accessed easily and immediately to the rest of the information, and, at a second level, offer the rest of the additional information (detailed information).

If you opt for this route, you must take into account that the said "basic" information in the present case must include the identity of the person responsible for the treatment, the purpose of the treatment and the possibility of exercising the rights of informative self-determination established in articles 15 to 22 RGPD (article 11.2 LOPDGDD).

Regarding the principle of data minimization (Article 5.1.c) RGPD), it should be borne in mind that the personal data collected from these standardized request and/or complaint forms must be adequate, relevant and limited to what is necessary to achieve the purposes that justify its treatment, this is the processing of the corresponding request or complaint.

v

The considerations made above regarding the need to respect the principles of transparency (Article 5.1.a) RGPD) and data minimization (Article 5.1.c) RGPD) in the collection of personal information are extended to those other precepts of the Project in which also establishes the collection of personal information (through other forms, requests, documentation, interviews, etc.) from minors subject to protection or from parents, guardians, custodians or ex-guarded youth.

This would be the case, for example, of the submission of claims, complaints and suggestions by parents, guardians and custodians (article 41.1.f)), of requests for termination of destitution due to change of circumstances (article 100), in matters of relationship and visits (article 160) or in matters of protective custody (article 166), requests for transitional measures to adult life and personal autonomy (article 150) or requests for initiation of the assistance measures procedure (article 178), among others.

VI

Throughout its text, the Draft Decree contains several precepts relating to cooperation and collaboration between the various agents involved in the protection of children and adolescents.

For example, article 6, relating to institutional coordination, establishes that "the Generalitat of Catalonia, through various Departments, the municipalities and the rest of the local bodies act in the scope of their powers in a coordinated manner in order to protect and prevent children and adolescents and develop protection policies."

Article 35 refers to collaboration between autonomous communities, article 36 to collaboration with other states, both of the European Union and non-EU states, and article 37 to collaboration between territorial bodies of Catalonia

On the other hand, the articles that regulate each of the procedures for the protection of children and adolescents (procedure in situations of risk, procedure for helplessness and procedure for custody) and other types of actions on these (Title 2) specify the intervention of the organs , services and teams that are competent in each case, as well as, when appropriate, communications with the Public Prosecutor's Office and/or the judicial body.

From the set of these forecasts it is inferred, for the purposes that concern them, that the exercise or development of the functions by each of these agents involved in the protection of children and adolescents will necessarily involve the communication between them of personal information of these minors, even of third parties (parents, guardians, foster carers and last custodians).

From the point of view of the protection of personal data, it is necessary to ensure that any of these communications of information, apart from having legitimacy

sufficient, it is adapted, among others, to the principles of purpose limitation (Article 5.1.b) RGPD) and data minimization (Article 5.1.c) RGPD).

According to these principles, personal data must be collected for specific, explicit and legitimate purposes, their subsequent treatment not being possible in a way incompatible with these purposes (limitation of the purpose), and must be adequate, relevant and limited to what is necessary to achieve these until they justify their treatment (data minimization).

It must be taken into account, therefore, that these communications can only be considered appropriate to the data protection regulations to the extent that they are limited to the personal data that in each case are required for the fulfillment of the functions attributed to them, in accordance with Law 14/2010 (and, where applicable, with Law 12/2007, of 11 October, on social services or other current legislation on the protection of minors), each of these bodies or services of the public administrations involved in the protection of minors

Likewise, it must be taken into account that the personal information to which you have access may not be used for other purposes incompatible with that which justifies its access in each case.

Point out, at this point, that the RGPD establishes, in its article 6.4, and aside from the cases in which the change of purpose can be based on the consent of the interested party or in a rule with the rank of law, a series of aspects to be taken into consideration when assessing the possible compatibility between different purposes. In particular, you must bear in mind:

> **"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."**

VII

Section 4 of Chapter 1 of Title 2 of the Project regulates the single file of the child or adolescent.

In accordance with article 53 of the Project, the single file of the child or adolescent must be integrated by all the documentation derived from the public protection activity, classified in separate parts according to the type of procedure or action to be carried out (section 3).

In attention to the precepts that regulate each of these procedures and actions in the matter of child and adolescent protection (in particular, those relating to the evaluation of children and adolescents, the preparation of the corresponding technical reports or the adoption of proposed reports, among others), the single file of the child or adolescent will include a large volume of personal information, including specially protected data or deserving of special protection (Article 9 RGPD), to which the Project only refer to as data relating to privacy (eg articles 55, 89 or 110).

The Project provides, in this same article 53, that the single file of the child or adolescent must be integrated within the system of information and management in childhood and adolescence (section 1), and that this system of information is also the technical tool for communication and information between the administrative bodies and the competent technical teams (se

It should be noted, at this point, that the RGPD sets up a security system that is not based on the basic, medium and high security levels provided for in the Implementing Regulation of Organic Law 15/1999, of December 13, of personal data protection, approved by Royal Decree 1720/2007, of December 21, but by determining, following a prior risk assessment, which security measures are necessary in each case (Recital 83 and Article 32) .

Therefore, it is necessary to carry out this risk analysis in order to establish the appropriate technical and organizational security measures to safeguard the right to data protection of children and adolescents, and of any other person involved in the protection procedure of the child or adolescent (parents, guardians, foster carers, guardians).

In view of these forecasts, it is appropriate to consider the need to, among other security measures, adopt appropriate mechanisms that allow the correct identification and authentication of the users of this information and management system, for the purposes of guarantee, as required by the GDPR, that no unauthorized processing will occur (Article 5.1.f)).

To this end, point out that, although, in general, the use of a user and a password is considered an adequate security measure, it could be convenient in the present case to establish more robust mechanisms (for example , based on electronic certificates), in attention to the risks that may arise from the processing of the personal information necessary to assess the situation of the child or adolescent and agree on the most appropriate measure - which, remember, includes data deserving of special reservation or confidentiality and special categories of data- through this information system.

Point out, regarding the establishment of organizational measures, that a comprehensive security model also requires the adoption and implementation of training measures for the staff who must process personal data.

Also agreeing that, in the case of public administrations, the application of security measures will be marked by the criteria established in the National Security Scheme, approved by Royal Decree 3/2010, of January 8, which, currently , is being reviewed.

In this regard, the LOPDGDD provides that:

"First additional provision. Security measures in the public sector.

1. The National Security Scheme will include the measures that must be implemented in case of personal data processing, to avoid its loss, alteration or unauthorized access, adapting the criteria for determining the risk in the data processing to the established in article 32 of Regulation (EU) 2016/679.

2. The responsible persons listed in article 77.1 of this organic law must apply to the processing of personal data the security measures that correspond to those provided for in the National Security Scheme, as well as promote a degree of implementation of equivalent measures in the companies or foundations linked to them subject to private law.

In cases where a third party provides a service under a concession, management assignment or contract, the security measures will correspond to

those of the public administration of origin and will conform to the National Security Scheme."

Point out that, among those responsible for the processing included in article 77.1 of the LOPDGDD, to which this DA1a expressly refers, we find the administrations of the autonomous communities, as well as their public bodies and public law entities, among others Therefore, it must be borne in mind that, in the present case, the application of the security measures established in the National Security Scheme will be mandatory.

VIII

The Project also contains, throughout its articulation, several references to the confidentiality of the data subject to treatment, which are positively assessed.

Apart from the already mentioned article 9.3 of the Project, it is appropriate to make, among all of them, special reference to article 55 of the Project, relating to confidentiality and reservation of actions. This precept establishes that:

> **"55.1 The data and documentation contained in the records of children and adolescents are confidential and, consequently, can only be seen by authorized persons and cannot be the subject of public dissemination.**
> **55.2 In particular, the data and documentation that affect the privacy of any person involved in the procedure for the protection of children and adolescents are reserved, without prejudice to their referral to the judicial body, when expressly required. Therefore, the aforementioned data and documents are not accessible during the hearing and review of the file.**
> **55.3 The personal data of the professionals involved in the file of the child or adolescent may be reserved, if their intervention in the corresponding protection file has led or may lead, objectively, to a situation of danger for their physical or mental integrity, which must be assessed by their superior.**
>
> **55.4 The breach of the duty of confidentiality and the violation of the reserved nature of the actions may be subject to the corresponding sanctioning or disciplinary procedures, in accordance with the specific legislation."**

It is also considered pertinent to make reference to article 54 of the Project, relating to the "confidentiality of identity in the duty of communication".

This article specifies what is established in article 100.2 of Law 14/2010, according to which "the Administration must guarantee the confidentiality of the identity of the person who carries out the communication referred to in section 1" , this is for the person who brings to the attention of the basic, specialized social services or the competent department for the protection of children and adolescents the situation of risk or helplessness in which a child or adolescent finds himself.

Specifically, article 54.1 of the Project establishes that "the identity of the people who bring to the attention of the competent public administrations the existence of possible situations of risk or helplessness is confidential. This includes not only the removal of the identifying data of the person who made the communication, but also the restriction of access to other information that can make them directly identifiable."

Noting that, in accordance with the RGPD, an identifiable natural person is considered "any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, data of

location, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person" (article 4.1)).

Therefore, it should be added in this article of the Project that access is also restricted "to other information that can make it directly identifiable and, whenever possible, to information that can make it indirectly identifiable".

On the other hand, it must be said that talking about the "elimination" of the identifying data of the person who made the communication is not the most appropriate in this case, taking into account that, as provided below in the same article , it's about restricting access to that person's personal information. Not to remove it from the original documents.

It would be convenient, therefore, to modify paragraph 1 of this article 54. In this sense, it could be indicated that "This includes the restriction of access to both the identification data of the person who made the communication and the other information that can make it directly identifiable or, whenever possible, to the information that can make it indirectly identifiable" or something similar.

IX

Finally, reference should be made to article 56 of the Draft Decree.

This precept contains, in its section 1, an express reference to the regulations on data protection, a fact that is positively valued, although it would be necessary to modify the mention in Organic Law 15/1999, of December 13, of protection of personal data, having been repealed by the LOPDGDD (without prejudice to the provisions established in DA14 and DT4 of this Organic Law).

In this sense, it would be more appropriate to incorporate a reference to the current regulations on the protection of personal data, as is done, in fact, in section 2 (or in other articles of the Project, for example, in 'article 38.2, among others) or, at the very least, the RGPD and the LOPDGDD.

At the same time, agree that the processing of personal data must be governed by the set of principles established in article 5 of the RGPD, not only by the principles relating to security and confidentiality (article 5.1.f) RGPD) to which mentions this article 56.1 of the Project.

For its part, section 2 of this article 56 provides that "the rights derived from the personal data protection legislation can be exercised before the competent body of the Generalitat."

In this regard, it should be remembered that the rights of informative self-determination, recognized in articles 15 to 22 of the RGPD, must always be exercised before the data controller (article 4.7) RGPD).

In the present case, as we have seen, the child and adolescent protection system includes the participation and intervention of organs and services from different public administrations (local bodies and Generalitat). Each of these bodies and/or services will become responsible for the processing of the personal data on children or adolescents collected and processed for the exercise of the functions that the applicable legislation attributes to them in the matter of the protection of minors. An example of this is that the Project itself establishes, in article 53.4, that each entity or service is responsible for the custody of the documentation that has been generated as a result of their intervention until the time of transferring it to the corresponding archive. Therefore, the affected people should exercise their rights of informative self-determination before the body or service of the public administration that, in each case, i

Having said that, it should be taken into consideration that article 101.1 of Law 14/2010 establishes that "basic social services and specialized social services for child care must inform the competent body in matters of child protection and adolescents from situations of risk or helplessness that they know about through the information and management system in childhood and adolescence" and that "the body must incorporate this information into the single file of the child or adolescent".

In accordance with this precept, article 53.1 of the Project provides that the single file of the child or adolescent - which must be integrated by all the documentation derived from the public protection activity - must be integrated within the information and management system in childhood and adolescence.

Article 25.2 of Law 14/2010 establishes that the management of the aforementioned system of information and management in childhood and adolescence corresponds to the competent department in matters of protection of children and adolescents.

This department is responsible for the treatment of the set of personal information incorporated into said information system, which makes up the child's or adolescent's unique file.
With respect to this information, the affected persons could exercise their rights of informative self-determination before this body of the Generalitat.

This seems to be the situation referred to in article 56.2 of the Project, establishing, as we have seen, that "the rights derived from the legislation on the protection of personal data can be exercised before the competent body of the Generalitat."

However, in order to avoid possible confusion, it would be advisable to modify this precept of the Project. In this sense, it should be indicated that "the rights derived from the personal data protection legislation regarding the personal data included in the single file of the child or adolescent can be exercised before the competent body of the Generalitat ."

Point out, at this point, that, in order to guarantee adequate attention to these rights, it would be necessary that, if applicable, once the request to exercise rights has been resolved, the competent body of the Generalitat communicates the decision taken to the entity or service that has the personal data of the affected person in origin so that it can carry out the appropriate actions.

Having said that, as has been done in section III of this report, it could be appropriate to provide in this article 56 that those affected have the right to submit a claim to this Authority in the event of non-compliance with the provisions established in the data protection regulations.

For all this the following are done,

Conclusions

Having examined the Draft Decree on the rights and duties of children and adolescents in the protection system, and on the procedure and protection measures for children and adolescents, it is considered adequate to the provisions established in the corresponding regulations on protection of personal data, as long as the considerations made in this report are taken into account.

Barcelona, 30 April 2019