

CNS 2/2020

Opinion in relation to the consultation formulated by a city council on the use of data from the Register for a participatory process

A request for an opinion from the data protection delegate of a town hall is submitted to the Catalan Data Protection Authority, on the use of data from the Municipal Register of Inhabitants in a participatory budgeting process.

Specifically, it states that the city council has contracted the services of a company to carry out a process of citizen participation in the selection of part of the investments in the municipal budget. As indicated, the process has a series of phases that end in a popular vote and the preparation of a report. The popular vote is carried out through in-person and virtual voting, through an electronic platform, of all the population registered in the municipality and over 16 years of age, who must identify themselves with their ID.

The delegate states that the City Council's Citizen Participation Regulations do not provide for any modality on participatory budgets or voting procedures that develop those provided for in the regulations.

It is also noted that the awarding company has submitted a proposal for a document of conditions for the processing of personal data for the purposes of the transfer of the data of the register, which is not accompanied by the request for report presented. Faced with this situation, the data protection delegate expresses his doubts about the legality of the use of the register for that purpose.

Analyzed the query, which is not accompanied by other documentation, seen the report of the Advisory I issue the following legal opinion:

I

(...)

II

In accordance with the query formulated, it is then analysed, whether the data available to the city council for the management of the Municipal Register of Inhabitants can be used to carry out a citizen participation process.

First of all, it should be borne in mind that Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD), establishes that all data processing personal must be lawful, loyal and transparent (article 5.1.a)).

In order for a treatment to be lawful, it is necessary to have, at least, a legal basis of those provided for in article 6.1 of the RGPD that legitimizes this treatment, either the consent of the person

affected, be it any of the other circumstances provided for in the same precept. In the field of public administrations, as in the case at hand, the legal bases provided for in letters c) and e) of article 6.1 of the RGPD are of particular interest, according to which the treatment will be lawful when it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment (letter c), or when the treatment is necessary for the fulfillment of a public interest or in the exercise of public powers conferred on the person responsible for the treatment (letter e).

However, as can be seen from Article 6.3 of the RGPD, the legal basis for the treatment indicated in both cases must be established by European Union Law or by the law of the Member States that applies to the person responsible for treatment, which in the case of the Spanish State, must be a norm with the rank of law (Article 53 EC).

In this sense, article 8 of Organic Law 3/2018, of December 5, (hereinafter LOPDGDD) refers to the legal range of the enabling norm in the following terms:

"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."

In the case of the municipal register of inhabitants, it is Law 7/1985, of April 2, regulating the bases of the local regime (hereafter, LRBRL) the norm with the rank of law that regulates the definition, content and obligations in relation to this administrative record.

Thus, article 16.1 of this law defines the Municipal Register in the following terms:

"1. The municipal register is the administrative register containing the residents of a municipality. Your data constitutes proof of residence in the municipality and of habitual residence in the same. The certifications that are issued of said data will have the character of a public and binding document for all administrative purposes. (...)"

The LRBRL (and, in the same sense, the revised Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28) establishes the obligation of all residents to register in the Register of the municipality where you have established your residence with a triple purpose: to determine the population of a municipality, to be required to acquire the status of resident and to serve as proof of residence and habitual residence (articles 15 and 16 LRBRL).

Likewise, it establishes that the registration in the Municipal Register will contain the following data as mandatory: first and last name, sex, usual address, nationality, date and place of birth, number of the identity document (or, for foreigners, the card residence or identity document number), certificate or school or academic degree, and, finally, those data that may be necessary for the preparation of electoral censuses, as long as fundamental rights are respected (article 16.2 LRBRL).

And also that "the formation, maintenance, review and custody of the municipal Register corresponds to the City Council, in accordance with what is established by State legislation. (...)" (article 17.1 LRBRL).

So, from the point of view of the data protection regulations, the processing of data from the Municipal Register of Inhabitants by the town councils exercising the functions established in the LRBRL and the TRLMRLC would be a legitimate processing to meet the conditions provided for in letter e) of article 6.1 of the RGPD.

III

Beyond what we have just explained, it must be borne in mind that this data processing, like any other, must also comply with the rest of the principles established in the RGPD, especially for the purposes that are of interest in the present case , to the principle of purpose limitation.

Article 5.1.b) of the RGPD establishes that:

"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") ; (...)".

Regarding this, recital 50 of the RGPD provides that:

"The processing of personal data with purposes different from those for which they were initially collected must only be allowed when it is compatible with the purposes of their initial collection. In such a case, a separate legal basis is not required, other than the one that allowed the personal data to be obtained. If 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, the tasks and purposes for which the subsequent treatment should be considered compatible and lawful can be determined and specified in accordance with the Law of the Union or of the Member States. Subsequent processing operations for archival purposes in the public interest, scientific and historical research purposes or statistical purposes must be considered compatible lawful processing operations. The legal basis established in Union Law or

of the Member States for the treatment of personal data can also serve as a legal basis for further treatment. In order to determine whether the purpose of the subsequent treatment is compatible with the purpose of the initial collection of personal data, the person responsible for the treatment, after having fulfilled all the requirements for the authorization of the original treatment, must take into account, among other things, any relationship between these purposes and the purposes of the intended subsequent treatment, the context in which the data were collected, in particular the reasonable expectations of the interested party based on their relationship with the person responsible for their subsequent use, the nature of the data personal, the consequences for the interested parties of the planned subsequent treatment and the existence of adequate guarantees both in the original treatment operation and in the planned subsequent treatment operation. (...).”

As we have seen before, the Municipal Register is a type of file with a very specific purpose: to determine the population of the municipality, to be required to acquire the status of resident and serve to certify residence and habitual address (article 15 LRBRL).

In accordance with the aforementioned principle of purpose limitation (Article 5.1.b) RGPD), the data of the Municipal Register may only be used for other purposes to the extent that they are not incompatible with this triple purpose that justifies it the initial collection.

On this issue, it must be said that this Authority, in previous opinions (among others, CNS 9/2013, CNS 67/2015, CNS 46/2016, CNS 12/2017, CNS 47/2017, CNS 39/2018 or CNS 19/2019 available on the website www.apdcat.cat), has considered that, in view of the type of personal data that must be included in the Register (article 16.2 LRBRL), it is understood that there may be municipal purposes that could enable the processing of these data to the extent that they are not incompatible with the purposes of the Register, previously described. Specifically, we are referring to the exercise of the powers that the local regime legislation attributes to the town councils, mainly following the provisions of articles 25 and 26 of the LRBRL (and, in similar terms, articles 66 and 67 of TRLMRLC), which require being able to identify the people resident in the municipality.

It has also been pointed out in the aforementioned opinions that, given that the LRBRL itself (article 16.3) admits the communication of data from the Municipal Register to other public administrations that request them when they are necessary for the exercise of their powers and exclusively for matters in which residence or domicile are relevant data - a possibility also endorsed by the Constitutional Court (STC 17/2013, of January 31, cited) -, with greater reason it can be admitted that the different units or administrative bodies of the same municipality can access these data when they are necessary for the exercise of their functions and when the given residence or address is relevant.

IV

In the present case, the question is whether the City Council can use the data from the Register to carry out a participatory budgeting process which, as described, is made up of several phases in which the residents of the municipality can participate. It must be seen, therefore, whether this new purpose is compatible with the Padró's own.

It should be taken into account that article 6.4 of the RGPD establishes the following:

"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."

As explained, the initial collection of data from the Register is carried out in compliance with a requirement of the LRBRL. It remains to be seen whether this legal provision could act as a legal basis for the intended change of purpose.

Article 18 of the LRBRL (and, in similar terms, article 43 of the TRLMRLC) lists the rights of residents, among others:

"b) Participate in the municipal management in accordance with the provisions of the laws and, as the case may be, when the voluntary collaboration of the neighbors is interested in the governing bodies and municipal administration. (...) f) Request the popular consultation in the terms provided for in the law."

Article 69.1 of this same law (and, in similar terms, article 154 of the TRLMRLC) provides that "local corporations will facilitate the most extensive information on their activity and the participation of all citizens in local life."

Article 70.bis of the LRBRL adds, for the purposes that are now relevant, that:

"1. The town councils must establish and regulate in organic norms the procedures and bodies suitable for the effective participation of the neighbors in the affairs of local public life, both in the scope of the municipality as a whole and in that of the districts, in the event that these territorial divisions exist in the municipality. (...)

3. Likewise, local entities and, especially, municipalities must promote the interactive use of information and communication technologies to facilitate participation and communication with neighbors, for the presentation of documents and for the completion of procedures administrative, surveys and, where appropriate, citizen consultations. (...).”

These precepts of the LRBRL attribute powers to councils in the matter of promoting citizen participation and expressly empowers them to carry out citizen participation processes, in accordance with the procedure established in each case.

For the purposes of implementing these forms of citizen participation, the data relating to the address may be relevant, given that the status of neighbor may be a necessary requirement to allow participation. And, as we have seen, the status of neighbor is acquired by registration in the Register (article 15 LRBRL).

In the present case the City Council intends to promote and develop the right of participation of the municipality's residents in the context of determining the application of part of the municipality's investment budget.

It can be said, therefore, that the purposes for which the subsequent processing of the data of the Register by the City Council (to facilitate the exercise of the right to citizen participation) will be related to the purposes for which they were initially collect the data (Article 6.4.a) RGPD).

In addition, it must be taken into account that it would, in any case, be merely identifying personal data (name, surname and address) and personal characteristics (age), in such a way that its treatment for these ulterior purposes should not lead to a special impact on the right to data protection of those affected (Article 6.4.c) RGPD) or serious consequences for them (Article 6.4.d) RGPD), particularly taking into account that it will be the affected who, in the last instance, will decide whether it wants to participate in the participatory process carried out by the City Council.

All in all, it can be said that the use of data from the Register to inform residents of the participatory budgeting process, as well as to compile the corresponding census of people with the right to vote, could be considered legitimate, as for purposes compatible with that of the Register (Article 5.1.b) RGPD) covered by the LRBRL itself (Article 6.4 RGPD).

Therefore, the treatment of the data of the people called to participate in the participatory process, would find protection in the legal basis of article 6.1.e) of the RGPD, being necessary "for the fulfillment of a mission carried out in public interest or in the exercise of public powers conferred on the person responsible for the treatment", and would be compatible with the initial purpose for which they were collected.

Also, by application of the principle of data minimization (Article 5.1.c) RGPD), only the minimum data from the Register may be used to fulfill the stated purposes.

All this, as long as the regulations governing the form of citizen participation chosen by the City Council do not provide for a specific instrument to select the people called to participate.

v

As stated in the consultation, the City Council's Citizen Participation Regulations do not provide for any modality on participatory budgets or voting procedures that develop the current regulations. Therefore, the provisions of Law 10/2014, of September 26, on non-referendum popular consultations and other forms of citizen participation will apply.

Law 10/2014, of September 26, on non-referendum popular consultations and other forms of citizen participation establishes the legal regime and the procedure for calling non-referendum popular consultations and other participation mechanisms, as instruments aimed at finding out the position or opinions of citizens in relation to any aspect of public life in Catalonia and in the area of competence of the Generalitat and local bodies.

Title II of the law aims to regulate non-referendum popular consultations, while Title III regulates the different types of citizen participation processes.

Non-referendum popular consultations are defined as the call, made by the competent authorities to the legitimated persons in each case (according to what is determined by the convening decree) for them to express their opinion on a certain action, decision or public policy, by voting (article 3).

In this case, the same law provides for the creation of a register of participation in non-referendum popular consultations, which must include all the people who may be called to participate in a consultation (article 6). In these processes, the body responsible for managing the participation register is responsible for drawing up the list of people called to participate, at the request of the convening body (article 6.5).

Therefore, in the event that the City Council wanted to carry out this type of consultation, the personal data to which it could have access, for the purposes of forming the participation census, would be that of the participation register in non-referendum popular consultations, not as well as those of the Municipal Register of Inhabitants.

For its part, article 40 of Law 10/2014 includes the definition of citizen participation processes in the following terms:

"1. Citizen participation processes are institutionalized actions intended to facilitate and promote citizen intervention in the orientation or definition of public policies.

2. Citizen participation processes aim to guarantee debate and deliberation between citizens and public institutions to collect the opinion of citizens regarding a specific public action in the phases of proposal, decision, application or evaluation .

3. The participation processes can consist of the modalities established by this title or similar ones, existing or that may be created, and must always respect the principles established in article 2."

The law provides for different types of citizen participation processes (surveys, public citizen hearings, participation forums, and specific participation processes in articles 53 to 56. In addition, section 3 of article 1 of Law 10/2014 provides that the local bodies "within the scope of their powers, may regulate the other instruments of participation, which are governed by their own rules of organization and operation, of which this law is supplementary, except as determined by the articles 41.1 and 4, 42, 46, 51 and 52, which are of direct application. All this is understood without prejudice to the other participatory mechanisms that may be created."

According to the information published on the City Council's website and in view of the aforementioned regulations, it would seem that the participatory budgeting process that is the subject of the consultation would be a process of citizen participation in one of the modalities provided for in Titl

We do not know, through which specific instrument the city council has articulated the participative process that is the subject of the consultation. However, in any case, it must be taken into consideration that only with respect to participation forums (article 55) does the law require that the accreditation for participation be carried out through a specific register.

In these cases the City Council could use the data from the municipal register of inhabitants either to directly determine the natural persons who can participate in the process, or to determine the persons who can be registered in the register provided for in article 55.

VI

Given these considerations, reference should be made to the fact that the use of electronic means is envisaged in the final voting phase of the proposals.

Specifically, in the consultation letter it is stated that the participatory budgeting process culminates with the voting of the proposals, which will be carried out by combining face-to-face and virtual voting through an electronic platform. It is specified that "the entire population of the city registered and over the age of 16 will be able to vote by identifying themselves through the DNI".

With regard to the use of the DNI as an identification system, it is necessary to take into account the recent modification introduced by Royal Decree-Law 14/2019, of October 31, by which urgent measures are adopted for reasons of public security in matter of digital administration, public sector contracting and telecommunications, in accordance with which article 8 of Organic Law 4/2015, of March 30, on the protection of public security, has been drafted as follows :

"1. Spaniards have the right to be issued with a national identity document. The national identity document is a public and official document and has the protection that these types of documents are granted by law. It is the only document with sufficient value on its own to accredit, for all intents and purposes, the identity and personal data of its holder."

Therefore, in the case of in-person voting, the DNI would be a suitable document to prove the identity of people with Spanish nationality but not of foreigners.

Apart from this, in a remote electronic voting system identification cannot be carried out by means of the DNI, unless it is the electronic DNI. It is worth saying that systems that consist of the introduction of the ID number or the provision of a copy of it would not provide sufficient guarantees.

It is worth remembering that article 9.2 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations, regulates electronic identification systems that allow citizens to identify themselves before public administrations. The City Council could opt, in addition to the electronic ID, for one of these identification systems to verify the identity of voters in the participatory process.

Finally, it must be taken into account that, as stated in the consultation, the process has been entrusted to an external company. This company will process the data necessary to carry out the citizen participation process as the data controller.

The City Council must take into account that in accordance with article 28.1 of the RGPD, when processing is to be carried out on behalf of a person in charge of the treatment, that person must select only a person in charge who offers sufficient guarantees to apply appropriate technical and organizational measures in accordance with the RGPD.

It is necessary to agree that it will be necessary to sign with this company the corresponding processing contract that binds the person in charge with respect to the person in charge and establishes the object, duration, nature and purpose of the processing, the type of personal data and the category of interested parties, as well as the obligations and rights of the person in charge, under the terms of article 28.2 of the RGPD.

In addition, when contracting the service, the City Council must take into account the modifications introduced to Law 9/2017, of November 8, on Public Sector Contracts, by Royal Decree-Law 14/2019, of October 31, relating to those contracts that involve the processing of data on behalf of the person in charge.

Thus, the new wording of article 116.1 LCSP establishes that it will be necessary for the contracting body to specify in the motivation of the contract what will be the purpose of the processing of the data that must be transferred.

Likewise, the specifications must contain what is foreseen in article 122.2 of the LCSP when it establishes that:

"(...)

Without prejudice to the provisions of article 28.2 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, relating to the protection of individuals with regard to the processing of personal data and the free circulation of these data and for which Directive 95/46/CE is repealed, in those contracts whose execution requires the processing of personal data by the contractor on behalf of the person in charge of the processing, the application will additionally state:

a) The purpose for which said data will be transferred.

b) The obligation of the future contractor to submit in any case to the national and European Union regulations on data protection, without prejudice to what is established in the last paragraph of section 1 of article 202.

c) The obligation of the awarded company to present before the formalization of the contract a declaration in which it makes clear where the servers will be located and from where the services associated with them will be provided.

d) The obligation to communicate any change that occurs, throughout the life of the contract, of the information provided in the statement referred to in letter c) above.

e) The obligation of the bidders to indicate in their offer, if they intend to subcontract the servers or the services associated with them, the number or the business profile, defined by reference to the conditions of professional or technical solvency, of the subcontractors to those that are going to be entrusted with their implementation.

In the documents corresponding to the contracts referred to in the previous paragraph, the obligations listed in letters a) and e) above must in any case be qualified as essential for the purposes of what is provided for in letter f) of section 1 of article 211 .”

And, finally, the provision of article 202.1 LCSP, according to which it is necessary to establish a special condition of execution that refers to the contractor's obligation to submit to national and European Union regulations in the field of data protection, with the warning to the contractor that this obligation has the character of an essential contractual obligation, when the execution of the contract involves the transfer of data by public sector entities to the contractor.

In addition, when dealing with data from the register, it is necessary to take into account the obligations provided for in article 46.bis of Law 40/2015, of October 1, on the Legal Regime of the Public Sector, (introduced by the aforementioned Royal Decree Law 14/2019, of October 31), according to which:

"The information and communication systems for the collection, storage, processing and management of the electoral census, the municipal registers of inhabitants and other population registers, fiscal data related to own or transferred taxes and data of users of the national health system, as well as the corresponding personal data processing, must be located and provided within the territory of the European Union.

The data referred to in the previous section may not be transferred to a third country or international organization, with the exception of those that have been the subject of an adequacy decision by the European Commission or when the fulfillment of obligations so requires international assumed by the Kingdom of Spain."

On the person in charge of the treatment, this Authority published the "Guide on the person in charge of the treatment in the RGPD" (which also incorporates a model of contractual clauses) which can be consulted at the following link www.apdcat.cat 

Conclusions

The City Council can access the data of the Municipal Register of Inhabitants in order to notify the residents of the municipality of the implementation of a participatory budgeting process as well as to draw up the corresponding census of the people with the right to participate, given that it deals with a purpose compatible with that of the Register and protected by the exercise of the powers that, in the matter of promoting citizen participation, it is entrusted with.

All this, as long as the regulations governing the form of citizen participation chosen by the City Council do not provide for a specific instrument to select the people called to participate.

Barcelona, January 27, 2020

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