

CNS 7/2020

Opinion in relation to the query made by a City Council regarding the obligation to carry out the Data Protection Impact Assessment (AIPD) of the human resources management treatment carried out by the City Council.

A letter from the City Council is presented to the Catalan Data Protection Authority in which a query is formulated on the need or not to carry out the Impact Assessment relating to the data protection of human resources management treatment carried out by this City Council.

Having analyzed the query, which is not accompanied by any document, in view of the current applicable regulations, and in view of the report of this Legal Advice, I issue the following opinion.

I

(...)

II

In the consultation letter, the City Council states that in order to manage the City Council's human resources, they process the personal data of municipal employees, including health data, criminal record certificate and biometric data (fingerprint).

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD) applies "to the total or partially automated processing of personal data, as well as the non-automated processing of personal data contained or intended to be included in a file" (article 2.1), they mean by personal data "all information about an identified or identifiable natural person ("the interested party").

In this sense, the RGPD specifies that identifiable is "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 a or various elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person" (article 4.1).

The RGPD defines data processing as "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation, modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction" (article 4.2).

Thus, the data processing of City Council employees, insofar as they refer to identifiable natural persons, are subject to the personal data protection regulations.

III

The City Council requests the Authority's opinion on whether it is necessary to carry out an impact assessment relating to the data protection of the human resources management treatment it carries out. It also specifies "to be carrying out a very detailed treatment risk analysis."

Article 35 of the RGPD foresees the obligation to carry out an impact assessment related to data protection, when it is likely that a certain treatment, especially if it involves the use of new technologies, entails a high risk for rights and freedoms of people. This assessment should be carried out before the start of treatment. This forecast is applicable from 25 May 2018 (art. 99 RGPD).

Based on the history of the City Council and the information provided in the consultation, it seems that the treatment of the personal data of City Council employees would have started before May 25, 2018. On the other hand, no data is provided with the query that would allow us to conclude that a significant change in treatment has occurred after this date.

Taking into account that the treatment had started before May 25, 2018, it does not seem that the fulfillment of an obligation applicable only to treatments started after that date can be required.

In this sense, the Working Group of article 29 in the guide WP248 "Guidelines on the impact assessment relating to data protection (AIPD) and to determine if the treatment "probably involves a high risk" for purposes of Regulation (EU) 2016/679" (approved by the European Committee for Data Protection (ECPD) in its first session) states that a Data Protection Impact Assessment is not required when the processing operations have been verified by a control authority before May 2018 and that they are carried out in a way that has not changed since the previous check.

To the extent that, prior to May 25, 2018, the City Council had already created the corresponding file and had notified it to the Data Protection Register, the impact assessment would not be required, regardless of whether it meets or does not meet any of the circumstances provided for in the RGPD to carry it out.

On the other hand, and also following the aforementioned Guidelines at this point, the treatment should also undergo an Impact Assessment if the treatment operations have changed since the previous check carried out, so that they currently present a high probability risk to the rights and freedoms of the persons concerned. But from the available information, this circumstance does not seem to occur either.

Therefore, in the terms in which the consultation is carried out, it does not appear necessary to carry out a data protection impact assessment as part of its general proactive liability obligations.

IV

Without prejudice to what has just been explained, and given that the City Council wants to know if it is necessary to carry out an impact assessment regarding the processing of data carried out in the management of the Corporation's human resources, since it deals with 'others, health data, criminal record certificates and biometric data of municipal employees, this opinion will also analyze whether the assessment should be carried out, in the event that this obligation was temporarily applicable or that a change had occurred significant in treatment.

The RGPD incorporates the obligation of the data controller to assess the data protection impact of the processing operations that are carried out, when it is likely that the processing entails a significant risk for the rights and freedoms of individuals (Considerations 76 and 84 RGPD). In this sense, article 35.1 of the RGPD establishes:

"When it is likely that a type of treatment, in particular if it uses new technologies, by its nature, scope, context or purposes, entails a high risk for the rights and liberties of physical persons, the person responsible for the treatment shall, before the treatment , an evaluation of the impact of the processing operations on the protection of personal data. A single evaluation will be able to address a series of similar treatment operations that involve similar high risks."

The same article 35.3 of the RGPD specifies that, among other cases in which it derives from the provisions of the first section, an impact assessment relating to data protection must be carried out in the following cases:

- a) systematic and comprehensive evaluation of personal aspects of natural persons that is based on automated processing, such as the creation of profiles, and on the basis of which decisions are taken that produce legal effects for natural persons or that significantly affect them in a similar way;
- b) large-scale processing of the special categories of data referred to in article 9, paragraph 1, or of personal data relating to convictions and criminal offenses referred to in article 10, or
- c) large-scale systematic observation of a public access area."

The data processing of the case at hand does not seem to be able to fit into any of the cases referred to.

Thus, with regard to the first assumption, it does not respond to a systematic and comprehensive evaluation of personal aspects of natural persons based on automated processing, such as profiling.

With regard to the second and third assumptions, to delimit what is to be understood by "large-scale processing", the Article 29 Group can serve as a reference, in the document WP 243 "Guidelines on data protection delegates (DPD)" (also approved by the ECPD in its first session

considers that the following must be taken into account: the number of interested parties affected, either in absolute terms or as a proportion of a certain population, the volume and variety of data processed, the duration or permanence of treatment activity, the geographical extent of the treatment activity. Thus, according to the guidelines of WG 29, and regardless of what we will say later about the special categories of data that are treated, taking into account that the processing of data affects a small number of people (according to the information available, eleven City Hall employees), it does not seem that one can speak of large-scale treatment even if the elective offices of the corporation are added.

It should be borne in mind that article 35.4 of the same RGPD establishes that "the control authority will establish and publish a list of the types of treatment operations that require an impact assessment related to data protection in accordance with section 1. "

In accordance with this, this Authority, following the Guidelines established by the Working Group of article 29 in the aforementioned document WP 248, and the criteria for the assessment of the greatest risk provided for in article 28.2 of Organic Law 3 /2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD), has been prepared and published at the following address https://apdcat.gencat.cat/web/.content/02-drets_i_obligacions/obligacions of this Authority's website, an indicative list of types of data processing that require an impact assessment related to data protection. Thus, when analyzing data treatments, it will be necessary to carry out an impact assessment related to data protection in most cases where this treatment complies with two or more criteria from the list, unless the treatment is in the list of treatments that do not require impact assessment referred to in article 35.5 of the RGPD (so far this Authority has not published any list with exclusions for the purposes of article 35.5). These criteria are the following:

- Treatments that involve assessment or scoring, including the development of profiles and predictions.
- Treatments that involve the making of automated decisions with legal effects or that similarly and significantly affect the natural person.
- Treatments that involve the systematic observation of a public access area.
- Treatments that involve the use of sensitive data.
- Treatments that involve the use of data on a large scale.
- Treatments involving the association, combination or link of database records.
- Data processing of vulnerable subjects.
- Treatments that involve the use of new technologies or an innovative use of established technologies.
- Data processing that prevents interested parties from exercising their rights, using a service or executing a contract.

For the information provided by the City Council, the City Council would process, among other things, health data, criminal record certificates and biometric data of municipal employees.

With regard to health data, the City Council states that it processes data "relating to workers' ILT". It should be noted that the proof of ILT, in the copy of the form intended for the City Council (to send to the INSS, ISM or Mútua), contains identification data and other data related to the worker's health, such as the fact that the worker is on medical leave (it includes the date of the leave and the medical discharge, the probable duration of the leave, and marks in the corresponding boxes if there is a relapse, and if common illness or non-occupational accident). However, the specific information about the diagnosis or the description of the functional capacity limitation is not included. In this case, the City Council collects this data by virtue of the employment relationship that unites it with its workers provided for in the employment regulations. Therefore, in principle if the treatment carried out only involves the collection of this health data, or even if it also included the treatment of data necessary to comply with the obligations imposed by the occupational risk prevention regulations or accessibility, it does not seem that a data protection impact assessment is required for this fact when it comes to data collected in compliance with legal obligations and affecting a limited number of people.

With regard to the data of "certificates of criminal records, necessary for working with minors", it is understood that the City Council refers to the Certificate of Offenses of a Sexual Nature provided for in Organic Law 1/1996 on the Legal Protection of Minors, modified by Law 26/2015 and Law 45/2015. This rule establishes the obligation to provide a negative certificate from the Central Registry of Sex Offenders for professionals and volunteers who work in regular contact with minors. In this sense, it is necessary that the workplace involves, by its very nature and essence, a regular contact with minors, these minors being the main recipients of the service provided. Therefore, those professions that have regular contact with the general public, among whom may be minors, will not need to present this certificate, but are not by their nature exclusively intended for a minor public. Thus, in this case, their contribution obeys a legal obligation, and it would not affect the eleven municipal workers but, in any case, it would only affect those people who, through their work, have regular contact with minors. Therefore, in principle it does not seem to represent a high risk for the rights and freedoms of these workers, also taking into account that only the information from the negative certificates will need to be kept.

With regard to the use of fingerprints for time control, the City Council states in the consultation document that it affects eight employees and specifies that "we consider the registration system proportional due to the fact that the City Council does not have of any other system for controlling workers' schedules".

This treatment entails the treatment of your personal data, specifically, data qualified as biometric data (article 4.14 RGPD) which is part of the special categories of data (art. 9 RGPD). This means that its use requires that one of the exceptions provided for in Article 9.2 RGPD is met so that the treatment can be considered legitimate.

It should be borne in mind that if letter b) of article 9.2 allows the processing of data of special categories for the fulfillment of the obligations and the exercise of specific rights of the data controller (in this case the City Council, this authorization is conditional on the rights of the member states (a rule with legal status) or a collective agreement provide for it expressly and with appropriate guarantees.

On the other hand, in accordance with the principle of data minimization (Article 5.1.c) RGPD) biometric data can only be used if they are adequate, relevant and not excessive. This implies a strict assessment of the necessity and proportionality of the treatment carried out. If the purpose (hourly control) can be achieved in a less intrusive way, it will be necessary to opt for this other system. In this sense, the mere mention that "the City Council does not have any other system for controlling workers' schedules" does not seem to be able to justify the proportionality of the system.

On these issues, relating to the legality or proportionality of biometric labor control systems, we refer to what this Authority already stated in opinion CNS 63/2018, which can be consulted on the website of this Authority.

In any case, with regard to the treatment of biometric data, despite the fact that it does not affect a large number of people, it is necessary to ensure that several of the criteria provided for in the list published by this Authority are met: special categories of data are treated (which have to be considered as sensitive), it involves the use of new technologies and affects a collective, that of workers, which is in a position of vulnerability with respect to the employer, given that unlike what we have explained regarding the data of health, in this case there is no legal rule that imposes the treatment of these types of data. It must also be taken into account that neither the legality nor the proportionality of the system is clear in this case.

For all this, in the event that the use of biometric data is to be initiated or has been initiated after May 25, 2018, it would be necessary to carry out an impact assessment relating to data protection regarding this part of the treatment, and in the event that the result of the evaluation results in a high-risk situation, a prior consultation with this Authority should be considered in accordance with article 36 RGPD.

In the event that this treatment had started before the mentioned date, although not mandatory it would be recommended.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

The processing of health data and criminal records described in the consultation, for the purpose of processing the City's human resources data, does not require a data protection impact assessment. However, if the use of biometric data is to be started or has been started after 25 May 2018, it would be necessary to carry out an impact assessment relating to data protection regarding this part of the treatment.

Barcelona, April 15, 2020