

CNS 9/2020

Opinion in relation to the consultation of an educational Foundation on the need to identify and request authorization to use the image of people in order to publish a commemorative book with images of the school and of the entire educational community over the years

A letter from an educational Foundation (hereinafter, the Foundation) is submitted to the Catalan Data Protection Authority, requesting an opinion from this Authority in relation to the publication by its schools, of a commemorative book with images of the school and the entire educational community over the years.

The consultation explains that the Foundation will request specific consent authorization for this treatment from people who are currently part of the school's educational community. According to the query, it is interesting to know whether the Foundation should ask for authorization to use the image of those people who are no longer at the school and who can be from the previous year or more than fifty years ago.

Having analyzed the request, which is not accompanied by more information, and given the current applicable regulations and the report of the Legal Counsel, the following is ruled.

I

(...)

II

According to the query, the Foundation is dedicated to education and owns several educational centers in Catalonia. The consultation adds that, on the occasion of some school celebrations, they want to publish a commemorative book with images of the school and the entire educational community over the years.

The consultation explains that it will ask for specific consent authorization for this treatment from people who are currently part of the school's educational community. Having said that, the query asks "whether I should ask for authorization to use the image of those people who are no longer at school and who can be both from the previous year and more than fifty years ago."

With the consultation in these terms, it is necessary to start from the basis that, according to article 4.1) of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), they are personal data. any information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person;

It is personal information subject to the principles and guarantees of the data protection regulations (RGPD and Organic Law 3/2018, of December 5, Protection of personal data and guarantee of digital rights (LOPDGDD)), all that information that refers to living natural persons who may appear in the commemorative books referred to in the query, not only their identifying data, but other professional data

example, of school teachers), as well as the photographs to which the query specifically refers.

It must be taken into account, and this would apply both to the photographs of people who are currently part of the educational community, and to the photographs of people who are no longer part of it, of which the Foundation may have in its archives that, in order for the principles and guarantees of the RGPD to be applicable, it is essential to discern whether the images that could be part of the commemorative book refer to "identified or identifiable" physical persons (art. 4.1 RGPD, quoted).

In the event that the people who may appear in these photographs were not recognizable without disproportionate efforts, these people would not be identified or identifiable, and therefore data protection legislation would not apply. From the side of the right to data protection, there would be no problem in including these images in the commemorative book and publishing them.

It should also be noted that the data protection regulations do not apply to the protection of personal data of deceased persons (consideration 27 RGPD and art. 2.2.b) LOPDGDD), notwithstanding the provisions of article 3.1 of the LOPDGDD, according to which:

"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. (...)"

III

Regarding the legality of the treatment (art. 5.1.a RGPD), article 6 of the RGPD provides the following:

"1. The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; d) the treatment is necessary to protect the vital interests of the interested party or another natural person; e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment; f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child. (...)"

Regarding the treatment of images of natural persons who, at the time of formulating the query, are part of the educational community, the query explains that the Foundation

will request specific consent authorization for this treatment from people who are currently part of the school's educational community.

In this sense, having the consent of the natural persons who are currently part of the educational community is an appropriate and sufficient legal basis for the purpose in question, that is to say, for the publication of images and, where applicable, of other identifying data that could accompany the text of the commemorative book (names and surnames, training and educational tasks that a person can develop in the educational center, etc.), for the purposes of the provisions of article 6.1.a) RGPD.

Thus, if the Foundation, as it plans to do according to the information provided, obtains the consent (Article 4.11 RGPD) of these people, the inclusion of these photographs in the commemorative book would comply with the principle of legality.

Taking into account that some of the photographs in question may be of minors who are currently part of the school, with regard to the collection of consent that the school intends to do, it is necessary to take into account the provisions of article 7 of the LOPDGDD:

"1. The treatment of the personal data of a minor can only be based on his consent when he is over fourteen years old. The cases in which the law requires the assistance of the holders of parental authority or guardianship for the celebration of the legal act or business in whose context consent for the treatment is obtained are excepted.

2. The treatment of the data of minors under fourteen years of age, based on consent, will only be lawful if the holder of parental authority or guardianship is included, with the scope determined by the holders of parental authority or guardianship."

The collection of consent in this case must be accompanied by the information required by the RGPD. In the event that it is the interested parties themselves who bring photographs to the school for the purpose of publishing the commemorative book, they should be informed in terms of article 13 of the RGPD. In the event that these were photographs of people who are currently part of the educational community and that the school had collected through other means, and not directly of those affected, it is necessary to inform the

In any case, we note that this information must be provided to those affected "in a concise, transparent, intelligible and easily accessible form, in clear and simple language, in particular any information directed at a child. (...)" (art. 12 GDPR).

IV

Having made these considerations, we focus on what is properly the object of inquiry, that is to say, the need to collect the consent of the people who appear in photographs that could be included in the commemorative book, and who are no longer part of it the time to issue this opinion.

Starting from the basis that these photographs include the image of identified or identifiable natural persons, it is appropriate to examine the possible legal basis for the dissemination of these images.

Obviously having the consent of the people affected, who are no longer part of the educational community, could also be a legal basis enabling the inclusion of photographs of these people in the commemorative book (eg art. 6.1.a) RGPD). Now, for the information provided, this way of legitimation for the publication of the photographs

of people who at the time of formulating the query are already detached from the school, in practice it might not be feasible in general.

According to the available information, the main purpose of publishing the images is to reflect and document the history of these schools.

For this reason, it is necessary to examine the concurrence of other legal bases that enable the treatment, specifically, the provision of article 6.1.f) of the RGPD, according to which the treatment would be lawful if it is necessary for the satisfaction of legitimate interests of the controller (art. 4.7 RGPD), in this case, the Foundation.

We note that the provision of article 6.1.f) of the RGPD is not a novelty but that this same legal basis was previously provided for in article 7.f) of Directive 95/46/EC, d 'direct application in Spain, as recognized by the Judgment of the Court of Justice of the European Union of November 24, 2011.

The same exposition of reasons of the RGPD in its recital 47, gives as an example that could justify the application of the legal basis of the legitimate interest the cases in which there is a previous relationship between the person in charge and the interested party, as happens in the case at hand, in which the people who could appear in the commemorative book have or have had a work relationship (teaching staff and other staff linked to the school), or a relationship as students attending schools. In any case, recital 47 emphasizes the need to carry out a "meticulous assessment, even in those situations in which the interested party can reasonably foresee, at the time and in the context of the collection of personal data, that a treatment can take place for this purpose".

In any case, once the existence of a legitimate interest has been identified, a weighting of interests must be carried out to determine whether the legitimate interest is prevalent and, therefore, a sufficient basis for carrying out the treatment that is intended to be carried out .

In the weighting or weighing test that would require the application of article 6.1.f) the criteria defined by the Article 29 Working Group (WG 29), which analyzed the application of the 'legitimate interest in the "Opinion 06/2014 on the concept of legitimate interest of the data controller under Article 7 of Directive 95/46/EC". These criteria would be transferable to the regulation contained in article 6.1.f) of the RGPD to determine whether, in view of the specific circumstances of the case (the rights and interests involved, the reasonable expectations that those affected may have in the your relationship with the person in charge and the safeguards offered by the person in charge), it is appropriate or not to resort to this legal basis.

Thus, to carry out the weighting of interests and determine whether there is a legitimate interest that can base the processing of the data, the legitimate interest of the person in charge or of third parties must be taken into consideration; the impact of the treatment on data subjects; and finally the additional guarantees that apply to the treatments.

As provided for in the RGPD, in accordance with the principle of proactive responsibility and transparency, this entire analysis process must be properly substantiated and set out in writing, in detail, in order to provide transparency and legal certainty to those interested in the treatment in question, as well as to review and verify compliance and adequacy with what was determined, when necessary.

Likewise, in accordance with the right to information provided for in article 13 of the RGPD, it is necessary to provide the interested parties with all the information specified in that article and that, in the case of treatments based on the article 6.1.f), will also require identifying the legitimate

of the person in charge or of a third party (in the case in question, the Foundation), on which the treatment is based.

v

Legitimate interests pursued

Starting from the aforementioned scheme, first of all it is necessary to take into account what would be the legitimate interests pursued by the Foundation with the processing of the data, taking into account the information available.

According to the available information, the main purpose of the publication of the images is to reflect and document the history of these schools, on the occasion of some of the celebrations they carry out. Thus, it can be considered that the purpose of the treatment, which the Foundation intends, is a purpose of a cultural and divulgative nature of the history and trajectory of the schools that are part of the Foundation.

Specifically, the publication of the commemorative book could be understood as a treatment that "benefits from the legal or regulatory, social or cultural recognition of the affected community", which is one of the factors taken into account in the WG 29 Opinion.

Starting from this premise, for the purposes of considering its legitimacy, it must be taken into account that, according to article 85.1 of the RGPD (in connection with recital 153 RGPD): "1. Member States shall reconcile by law the right to the protection of personal data under this Regulation with the right to freedom of expression and information, including treatment for journalistic purposes and academic, artistic or literary expression."

Given that the purpose that would be involved in this case can be framed in a broad sense in an exercise of expression of an academic, cultural or historical type, by an educational institution, it must be taken into account that, according to the considering 4 of the RGPD:

"The right to the protection of personal data is not an absolute right but must be considered in relation to its function in society and maintain balance with other fundamental rights, according to the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognized in the Charter as enshrined in the Treaties, in particular the respect for private and family life, the domicile and communications, the protection of the data of personal character, freedom of thought, conscience and religion, freedom of expression and information, freedom of enterprise, the right to effective judicial protection and a fair trial, and cultural, religious and linguistic diversity."

We note, therefore, for the purposes of the proportionality analysis that must be carried out, that the purpose pursued by the processing of the information would consist of cultural or historical disclosure, the legitimacy of which is recognized, in principle, by the RGPD, if it is reconciled with the right to data protection, in the terms that we analyze below.

Consequences for the people affected

From the perspective of the necessary weighting, it is also necessary to identify the impact and consequences that the treatment could entail for the interested parties, for the purposes of considering whether the legal basis of article 6.1.f) of the GDPR applies.

In the light of the factors mentioned in WG 29, the nature of the processed data must be taken into account in the first place. In this sense, although the treatment does not directly affect data considered to be of special protection (art. 9 RGPD), without prejudice to the considerations we will make later, the publication of the book involves making available a large number of people the images of those affected and their connection (work, teaching or as former students) with a particular school institution.

This would, objectively, have a certain impact on the privacy of these people, whose association with the schools would have already ended.

It is worth taking into account another of the factors pointed out by WG 29, such as "the reasonable expectations of the interested party, especially in relation to the use and disclosure of the data in the relevant context".

Although a person linked at work with an educational institution may have the expectation that their data will be processed for everything that this work link requires, certainly the inclusion of images in a book for cultural and informative purposes (however good it may be legitimate), goes beyond what this employment relationship strictly requires.

In general, between a company and its staff (in this case, teaching staff, administrative staff, etc.), a relationship of a certain imbalance can be given by definition. This relationship should not be the basis for a processing of personal data that goes beyond what is properly the employment relationship, unless it has a sufficient legal basis.

As has been pointed out, the employment relationship of people who had provided services to the school in the past, would not necessarily justify the inclusion of their image in the book.

With regard to the former students and their families, who may appear in the photographs, bearing in mind that this link with the Foundation would have already concluded years ago, we can understand that the expectation of these people regarding their privacy does not necessarily include the treatment of their image for the intended purpose (that is, people who are already disconnected from the school, may rather have the expectation that their personal data should no longer be the subject of treatment by the school).

Despite what has just been explained, it should be remembered that the RGPD provides that the law of the States must reconcile the processing of data (in this case, photographs related to the history of schools), which is carried out with a relevant historical, scientific or cultural interest, with the right to data protection.

In this sense, the capture and publication of the graphic image of identified or identifiable persons affects the right to one's own image (Article 18.1 CE). Therefore, special reference must be made, for the purposes of the necessary weighting, to Organic Law 1/1982, of May 5, on civil protection of the right to honor, personal and family privacy and one's image.

The right to one's own image can be defined as a right that "every individual has that others do not reproduce the essential characteristics of their figure without the consent of the subject, in such a way that any act of capture, reproduction or publication by photograph , film or other procedure of a person's image in moments of their private life or outside of it constitutes a violation or attack on the fundamental right to the image, as is the use for advertising, commercial or of a similar nature" (STS of March 27, 1999).

In accordance with article 7.5 of Organic Law 1/1982, of May 5, on civil protection of the right to honor, personal and family privacy and one's image (hereinafter, LO 1/1982), is considered illegitimate interference with the right to one's own image, among other assumptions, "the capture, reproduction or publication by photograph, film or any other procedure, of the image of a person in places or moments of his private life or outside of it, except in the cases provided for in article 8.2."

According to article 8.1 of LO 1/1982:

"In general, actions authorized or agreed upon by the competent authority in accordance with the law will not be regarded as illegitimate interference, nor when a relevant historical, scientific or cultural interest prevails."

The same article 8, in its section 2, establishes that the right to one's own image will not prevent, among other cases, "its capture, reproduction or publication by any medium when it comes to persons who exercise a public office or a profession of notoriety or public projection and the image is captured during a public act or in places open to the public" (section a) nor "the graphic information about a public event or event when the image of a certain person appears as merely accessory" (section c).

Given these provisions (arts. 7 and 8 LO 1/1982), at the outset, based on the information available, it can be considered that the publication of a commemorative book by an educational Foundation, which brings together several centers in Catalonia, could have a relevant historical and cultural interest, so that a publication of this type would not imply an illegitimate interference with the rights of the people who may appear in the book.

Regarding the provision of article 8.2.c) LO 1/1982, the Supreme Court links the accessory nature of an image to the nature of the act, the recognizability of the subjects that appear in it, the greater or lesser proportion that occupy in the photograph, the public relevance of the person or the fact of occupying a profession of notoriety or public projection, or the direct relationship between the published image and the content of the information that accompanies it, among other circumstances .

For the Court, the interference would be justified to the extent that the image is captured accidentally and secondary in relation to the rest of the graphic information in which it is inserted (SSTS of February 22, 2007 and of July 20 2011).

Although the query does not detail this, due to the information available and the intended purpose (publication of a book commemorating the history of the Foundation's schools), it is possible that the photographs in question mostly refer to the 'organization of events of various nature by schools, not only educational activities, but also fun, sports, excursions, celebrations of festivals or cultural events, etc. In short, public events acts that can be considered typical and common in a school and that can be qualified as acts or public events for the purposes of what is described in LO 1/1982.

To the extent that the images selected for the commemorative book are suitable for this purpose and the people who appear in them do not do so in a main or protagonist way, it can be considered that these photographs would, in terms of LO 1/1982 , "merely accessories", in the sense that the image of the people who may appear there would be secondary or complementary to what would be the main graphic information, referring to the actual acts, celebrations or events specific to the educational and cultural function that over the years it has been carried out in schools.

In addition, depending on the nature of the public event in question, it cannot be ruled out that in some cases the graphic information captured refers to people holding a public position or a profession of public projection. According to the TS, this public projection is generally recognized for various reasons, such as, for political activity, for the profession, for the relationship with an important event, for the economic significance and for the social relationship, between of other circumstances (STS of December 17, 1997).

The provisions of LO 1/1982, cited, could enable the inclusion in the commemorative book of images of identifiable people, through photographs, who have participated in the activities of the Foundation's schools over the years, if the image of these people appears as merely accessory, in the sense of LO 1/1982 and the aforementioned jurisprudence.

Additional guarantees

In principle, and in terms of the regulations studied (mainly LO 1/1982), the dissemination in the commemorative book of images of people who, in the past, have been part of the Foundation's schools, could have an adequate legal basis (art. 6.1.f)

RGPD), provided that the weighting between the elements that have just been exposed and the additional guarantees that, in the terms of GT 29, results in a prevalence in favor of the achievement of the legitimate interest pursued.

For this reason, in order to find a balance between the different rights and interests at stake (on the one hand, the purpose of the Foundation and, on the other, the rights of those affected), the guarantees that offer the affected people.

As agreed by GT 29 in the aforementioned Opinion, the additional guarantees to prevent an undue impact on the interested parties include:

- “• data minimization (for example, strict limitations on the collection of data or its immediate removal after use);
- technical and organizational measures to ensure that the data cannot be used for the purpose of adopting measures or taking other actions in relation to the people (“functional separation”);
- extensive use of anonymization techniques, data aggregation, privacy protection technologies, privacy protection by design, data protection and privacy impact assessments;
- increased transparency, general and unconditional right of voluntary exclusion, portability of data and related measures to train those interested.”

a) The principle of minimization requires that those responsible process only personal data that is "adequate, relevant and limited to what is necessary in relation to the purposes of the treatment" (art. 5.1.c) RGPD).

Thus, the review by the Foundation, prior to the dissemination of the images, of the images that are to be disseminated, is a necessary guarantee of application from the perspective of the principle of minimization. This is an aspect that is not specified in the consultation, but which should be implemented inescapably.

The GDPR protects certain categories of data in a strengthened way. Specifically, article 9.1 RGPD provides that: "The processing of personal data that reveals ethnic or racial origin, political opinions, religious convictions or 8

philosophical, or trade union affiliation, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to health or data relating to a natural person's sexual life or sexual orientation."

It should be borne in mind that this general prohibition does not apply, among other cases provided for in Article 9.2 RGPD, when the affected party gives explicit consent to the treatment, or when the treatment refers to "data that the interested party has clearly made public", among other circumstances. Unless one of the exceptions in Article 9.2 RGPD applies, it is necessary to avoid publishing photographs where information appears that reveals any of these data.

It does not seem that the mere fact that a person attended a school with a certain religious ideology can be considered as a fact about religious convictions that prevents the publication of the image in such a work, but instead it would be necessary to exclude images in which any type of religious practice appears in a direct way, unless it can be considered that the same person has made this information manifestly public, or that one of the exceptions provided for in article 9.2 RGPD applies .

The publication of a book like the one we are dealing with would require a prior "meticulous evaluation", in the terms of the RGPD, of that photographic material that may highlight situations that may affect or provide information on special categories of data (e.g. health data) or that may reflect painful or particularly distressing moments for the people who appear there, or other types of serious or particularly intimate situations for the people affected. In any case, images captured at times when their capture was not predictable for the people who appear in them should be avoided. The publication of this type of photographs could have a significant negative impact on the privacy and rights of those affected, which, from the perspective of the criteria of the WG 29 Opinion, must be taken into account. Therefore, the application of the principle of minimization in the terms indicated would be a key guarantee to reduce this impact.

b) In application of the principle of transparency (art. 5.1.a) RGPD), it would be necessary that, prior to the processing of the information (that is, prior to the publication of the commemorative book), the Foundation informs the affected persons of said processing so that they can know that it is intended to carry out this treatment (the publication of the book).

In the event that this is not possible because the center does not have updated information, it could be done, for example, through its corporate website, through alumni associations, if any, or by any other suitable system, in order to give the affected people the option to oppose the treatment, and, therefore, that the Foundation should exclude some photograph from the commemorative book and thus reduce the impact on the privacy of the affected persons.

c) It must be ensured that the affected people will have the option to oppose the treatment and to exclude his image from the publication of the book.

At the outset, the RGPD requires that the protection of the privacy of those affected by any treatment is articulated already from the design of any treatment (art. 25 RGPD), and that the necessary guarantees are integrated in order to adequately protect this privacy, prior to the start of the treatment.

The data protection regulations provide that those affected, that is to say, the people whose image is included in photographs available to the Foundation, can exercise their rights of access, rectification, deletion or opposition, among others, in relation to the processing of your personal data (art. 15 et seq RGPD).

With regard to the cases examined, it is appropriate to refer, in particular, to the right of opposition, provided for in article 21 of the RGPD, according to which:

"1. The interested party will have the right to object at any time, for reasons related to his particular situation, to personal data concerning him being the object of a treatment based on the provisions of article 6, section 1, letters e) of), including the elaboration of profiles on the basis of these provisions. The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and liberties of the interested party, or for the formulation, exercise or defense of claims. (...)."

In the case of photographs that can be published based on the consent of the person affected (of people who are currently part of the educational community, and also of people who have been part of it in the past, in respect of which it is feasible, without disproportionate efforts, collect your consent), the provision of article 21.1 RGPD does not apply.

For cases referring to images of identified or identifiable natural persons who are no longer part of the educational community, the publication of which, as has been explained, could find a sufficient legal basis in article 6.1.f) RGPD, the Foundation will have to provide an easy channel (or several) to be able to exercise the right of opposition to the treatment of their image (inclusion of the photograph in the commemorative book).

For all that has been said, from the perspective of data protection regulations, the treatment subject to consultation could have a sufficient legal basis (art. 6.1.f) RGPD) to be able to include in the commemorative book the photographs of people who have been linked in the past to schools, without having to collect the consent of these people, in the terms indicated, and as long as, prior to processing, the Foundation applies the guarantees set out in this Legal Basis, for the purpose and effect to alleviate or avoid the impact on the rights and freedoms of the natural persons affected.

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

Conclusions

The consent of physical persons who are currently part of the educational community or who have been part of it, is an adequate and sufficient legal basis for the publication of photographs of these persons in the commemorative book (art. 6.1.a) RGPD).

With regard to photographs of identified or identifiable natural persons who are no longer part of the educational community, their publication in the commemorative book may find a sufficient legal basis in article 6.1.f) RGPD, in connection with LO 1/ 1982, without having to have the consent of those affected, as long as the Foundation applies the specific guarantees set out in Legal Basis V of this opinion.

Barcelona, April 1, 2020