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CNS 10/2020

Opinion in relation to the query formulated by a City Council in relation to the publicity of personnel selection processes and on the recording of oral tests.

A request for an opinion from a City Council is presented to the Catalan Data Protection Authority in relation to the publicity of personnel selection processes and the recording of oral tests.

Specifically, the consultation raises the following questions:

"This City Council, in anticipation of personnel selection processes, raises the following doubts regarding the transparency of oral tests and the limitations relating to personal data:

1. The oral tests of the opposition phase are public, but in order to avoid any incident, is it necessary to inform the opponents of the possibility that there will be an audience in their exhibition? Is it necessary to regulate it in the selection bases?

2. Can the court record the oral evidence, without any regulation, or on the contrary must it be regulated, for example in the selection bases? In the event that the evidence is recorded by the court, can any other applicant, as interested, obtain a copy of the recording? And a third party that has not submitted to the selection process, as a right of access to public information in accordance with the transparency regulations?

3. Can the public attending the oral tests record them freely, or on the contrary must the court or the City Council establish some limitation?"

Having analyzed the consultation, which is not accompanied by other documentation, in accordance with the report of the Legal Counsel, the following is ruled:

I

(...)

II

In order to answer the questions raised, it is necessary to take into account that the personnel selection procedures of the public administrations are competitive procedures, based on the principles of legality, equality, merit and capacity, transparency and publicity.

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This is established by Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law on the Basic Statute of the Public Employee (EBEP), applicable to civil servants and, to the extent appropriate, to the labor staff in the service of the Administrations of the local entities (art. 2.1.c) EBEP), when it provides in article 55.1 that: "Todos los ciudadanos tienen derecho al acceso al empleo público de acuerdo with the constitutional principles of equality, merit and capacity, and in accordance with the provisions of this Statute and the rest of the legal system."

According to the same article 55, paragraph 2, of the EBEP:

> **"2. The Public Administrations, entities and organisms referred to in article 2 of this Statute will select their official and labor personnel through procedures that guarantee the constitutional principles expressed above, as well as those established below:**
>
> **a) Publicity of calls and their bases. b) Transparency.**
> **(...).”**

For its part, article 91 of Law 7/1985, of April 2, Regulating the Bases of Local Regime (LRBRL), establishes:

> **"1. Local corporations must publicly formulate their employment offer, conforming to the criteria set by the basic state regulations.**
>
> **2. The selection of all personnel, whether civil or labor, must be made in accordance with the public employment offer, through a public call and through the system of competition, opposition or free opposition competition in which must guarantee, in any case, the constitutional principles of equality, merit and capacity, as well as that of publicity."**

In the same sense, the Municipal and Local Regime Law of Catalonia (Legislative Decree 2/2003, of April 28), provides in article 287.2 that:

> **"According to their public employment offers, local entities must select staff by means of a public call and the competition, opposition and free opposition competition systems, in which the principles of equality must be guaranteed, of merit, ability and publicity."**

The principle of publicity in personnel selection procedures, in accordance with these provisions, requires the body in charge of carrying it out to publicize the process and its regulatory bases, of the lists of people admitted to the selection process, the score obtained in the different phases of the process, the final qualification of all the participants and the final result of the process, among others.

These legal obligations must be specified in the regulatory bases that must determine how the selection process will be carried out.

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The bases of the calls for access are the mechanism through which the principle of legality and the rest of the principles that must govern these procedures become effective.

In this sense, article 21 of the LRBRL attributes to the mayor the competence to approve "the bases for the selection of personnel and for the tenders for the provision of work positions", and article 102, regarding the selection of personnel in the service of local administrations who are not state-qualified officials, establishes: 1. The selection tests and

the competitions for the provision of jobs, to which this Chapter refers, will be governed by the bases approved by the President of the Corporation, to whom his call will correspond.

As the jurisprudence of the Supreme Court has reiterated, the bases of the call "constitute the law of the procedure", the STS of May 27, 2010 can be cited for all, which recalls:

"(...)the uniform jurisprudential criterion that the bases for the call for a competition or selective tests constitute the law to which the procedure and resolution thereof must be subject, in such a way that, once signed and consented to , bind equally the participants and the Administration, as well as the Courts and Commissions responsible for the assessment of the merits (...)".

In the same sense the STSJ of Catalonia no. 156/2010, also includes:

"It must be remembered in a generic way that the bases of the call constitute the Competition Law, as hasta la ciedad has come repitiendo nuestro Supremo Tribunal. This Chamber, likewise, has been pointing this out in various resolutions, whose particulars relating to this end can be summarized in the doctrine that the parties and the Qualifying Tribunals or the Selection Committee are bound by what the rules of the call provide , since it is a basic principle in our legal system that according to which the basis of a call for a selection process binds the Administration, the Courts or Selection Committees that must judge the tests and, finally, those who participate in the same In other words, the old axiom rules in our law, according to which, the bases of a call constitute the Competition Law".

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD) establishes in article 5.1.a) RGPD that all data processing personal data must be lawful, loyal and transparent in relation to the interested party. In order for this treatment to be lawful, one of the conditions provided for in article 6 RGPD must be met, and in the case of special categories of data, the provisions of article 9 RGPD must also be taken into account.

Article 6.1 RGPD provides that in order to carry out a treatment there must be a legal basis that legitimizes this treatment, which provides for the same precept:

"a) The interested party has given consent for the processing of their personal data, for one or several specific purposes. b) The treatment is necessary to execute a contract in which the interested party is a party or to apply pre-contractual measures at their request.

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c) The treatment is necessary to fulfill a legal obligation applicable to the person responsible for the treatment. d) The treatment is necessary to protect the vital interests of the person concerned or of another natural person. e) The treatment is necessary to fulfill 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 to satisfy legitimate interests pursued by the person in charge of the treatment or by a third party, as long as the interests or fundamental rights and freedoms of the interested party that require the protection of personal data do not prevail, especially if the interested is a child.

What is provided in letter f) of the first paragraph does not apply to the treatment carried out by public authorities in the exercise of their functions.

Section 3 of this precept provides:

"3. The basis of the treatment mentioned in section 1, letters c) and e), must be established by: a) The law of the Union, or b) The law of the member states to which the person in charge of the treatment is subject.

The purpose of the treatment must be determined on this legal basis or, with regard to the treatment referred to in section 1, letter e), it must be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the data controller. (...)"

The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of law. In this sense, the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD) refers to the range of the rule necessary to establish these limitations:

"Article 8. Treatment of data protected by legal obligation, public interest or exercise of public powers.
1. The processing 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 so provided 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."

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In short, and given the nature of the oral tests, the principle of publicity that governs personnel selection procedures would enable the public to attend the phases of the procedure that were considered appropriate in view of the nature of the test that had been held to carry out and its feasibility.

From the point of view of data protection regulations, the legal basis that would allow the disclosure of personal data that would entail public assistance would be the same, or the same, as for carrying out the selection process itself (articles 6.1.c) and 6.1.e) RGPD in relation to the aforementioned legal precisions of the EBEP, the LRBRL and the TRLMRLC). However, this qualification would not be sufficient to carry out publicly psychological tests or others where special categories of data may be dealt with, such as an interview. In this case, it would also be necessary for one of the exceptions provided for in article 9 RGPD to apply. Competition that, a priori, seems to have to be ruled out.

The bases of the call, which as we have seen are the regulatory norm of the process, must specify with respect to which tests public assistance is considered viable and the terms in which this assistance must occur.

The participants in the selection process accept, with their participation in the process, the basis of the call and the terms in which it must be developed.

Therefore, with respect to the first question raised, if the basis of the call for the personnel selection process provides that the oral test will take place in the presence of the public, it is not necessary to make an additional warning in this regard to the participants in the selection process . In any case, when providing the information provided for in article 13 RGPD to the people who participate in the process, it is appropriate to warn them that certain evidence of the process is public.

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III

The second of the questions raised refers to the possibility that the qualifying body can record the oral tests. Regarding this matter, the following considerations must be made.

The RGPD, establishes in its Considerand 26:

> "The principles of data protection must be applied to all information relating to an identified or identifiable natural person. (…) To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available in the moment of treatment like technological advances."

Article 4.1 of the RGPD defines "personal data" broadly, as any information about an identified or identifiable natural person "the data subject"; "an identifiable natural person must be considered any person whose identity can be determined, directly or

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indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements of physical, physiological, genetic, psychological, economic, cultural or social identity of this person" (Article 4.1 GDPR).

Consequently, a person's image and voice are personal data, as is any information that allows their identity to be identified directly or indirectly, such as a registration number, an IP address, etc.

The RGPD defines treatment 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 or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, sharing or interconnection, limitation, deletion or destruction" (Article 4.2 RGPD) .

In short, the capture of people's image and voice constitutes data processing that is subject to the principles and guarantees of the personal data protection regulations. But the content of the presentation of a certain topic or question developed as part of the selection process is also considered personal data, given that this information also provides us with information about the person who carried it out.

Regarding the nature of this data, it does not seem that in principle the development of oral tests - as long as they are not psychological tests or interviews - does not seem to have to contain data of special categories (art. 9 RGPD). And even if the image of the people who appear is captured, this fact alone does not imply that it should be considered a processing of biometric data, as long as these data are not processed with specific technical means in order to identify or authenticate univocal way the participants. In these cases the image and voice data could be considered merely identifying data.

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The recording of oral examinations may be necessary as a means of guaranteeing the principles that must govern personnel selection processes, and in particular the principles of merit and ability and transparency. The recording of the exams can constitute both a means of proof to the qualifying body in the event of an appeal, and in their case, for the exercise of their rights by the person participating in the process.

Consequently, the treatment of the data of the people who participate in the selective processes as a result of the recording of the oral tests, will be based on what is foreseen in the articles article 6.1.c) and 6.1.e) of the RGPD, in the same way as the rest of the treatments that are part of the selection process, especially those aimed at recording the performance and content of the same, as an instrument at the service of the qualifying court and the people that they contest their result.

However, it must be taken into account that in order for this treatment to be in accordance with the provisions of the RGPD it must be respectful, not only with the lawfulness of the treatment but also with the rest of the principles of article 5 of the RGPD , especially with the principle of limitation of the conservation period, so that once the deadline for the possible

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contesting the test results without any appeal, these recordings should be deleted and blocked.

IV

In the consultation, a third question is raised about whether "can any other applicant, as interested, obtain a copy of the recording?". To answer this question, it is necessary to determine, first of all, what is the legal regime applicable to access to the information contained in the administrative files, when the person requesting access is a participant in that procedure.

The first additional provision of Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC) establishes that "the access of the interested parties to the documents of the administrative procedures in process is governed by what determines the legislation on legal regime and administrative procedure".

In accordance with this provision, when the access request is made by a person interested in an administrative procedure that is pending, the administrative procedure regulations will apply.

In this regard, article 53.1.a) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (LPAC) recognizes the persons interested in an administrative procedure, among others, the right to access and obtain a copy of the documents contained in the procedures in which they have this condition.

And, in the same sense, article 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, recognizes that citizens who have the status of persons interested in a administrative procedure in progress have the right to access the file and obtain a copy of the documents that are part of it.

The right of access that regulates the administrative procedure regulations is directly linked to the right of defense of the interested person and, as we have seen, is formulated in quite broad terms, however, this does not mean, that this right of access is an absolute right but what, when it conflicts with other rights, such as the fundamental right to the protection of personal data (Article 18 EC), it will be necessary to weigh the different rights at stake, in order to decide which to prevail and to what extent.

In fact, the LPAC itself establishes that it is necessary to apply the limitations provided for in the transparency legislation when it regulates the obtaining of copies or access to the file of the persons interested in the hearing procedure provided for in article 82.1, or when it regulates the right of interested persons to request the issuance of authentic copies of public administrative documents issued by the public administrations provided for in article 27.4.

In the event that an interested party in the procedure requests a copy of the recording of the oral evidence of another participant in the process, given that this access would entail the communication of data from third parties, the limits provided for by legislation should be applied of transpa

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It must be taken into account that the recording could contain the data, in the form of images or voice, of the people who are part of the qualifying panel. According to article 24.1.a) of the LTC, access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data (unless exceptionally, in the specific case, the protection of personal data must prevail, which should be highlighted by the affected person).

Therefore, in principle, from the point of view of data protection regulations there would be no problem in accessing the data of the qualifying court contained in the requested information.

With regard to the data referred to the participant in the selective process in respect of which access to their test is requested, the criterion maintained by this Authority previously (CNS Opinion 25/2019) can be applied which can be consulted on the website www.apcdcat.cat and which provide

"In the weighing between the principle of publicity and transparency that must govern personnel selection processes and the right to the protection of the personal data of the persons affected, the jurisprudence is unanimous in the sense that it must the principle of publicity and transparency prevail.

As an example, we can cite the Judgment of the National Court, of April 26, 2012, which, in accordance with this criterion, states that:

"(...) In the present case, since it is a competitive competition procedure, we must attend to what is indicated in article 103 of the Constitution when it states that the Public Administration serves objectively the general interests and acts in accordance with the principles of effectiveness, hierarchy, decentralization, deconcentration and coordination, with full submission to the law and the Law (paragraph 1) and when it states in paragraph 3 that "The law will regulate the status of public officials, access to public office according to the principles of merit and capacity. (...)

From this point of view, we must conclude that the consent of those people who participate in a competitive competition procedure is not required for the treatment of the qualifications obtained in said procedure and it as a guarantee and requirement of the other participants to ensure the cleanness and impartiality of the procedure in which they participate. (...)"

In this same sense, Judgment 623/2018 of the Superior Court of Justice of Madrid, includes the following criteria:

"(...)it is affirmed that in the processes of competitive competition, the principle of publicity and transparency becomes essential, as a guarantor of the principle of equality. Thus, the National Court has weighed the principle of publicity with the protection of personal data, reaching the conclusion that during the processing of the selective process the former must prevail, because one of the exceptions to the requirement of consent for the treatment of data is that of the collision with general interests or with other rights of higher value that cause data protection to decline due to the preference that must be granted to that other interest. As it is a concurrent procedure

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competitive, the National Court considered that in accordance with Article 103 of the EC, the guarantees required by the processing of personal data cannot be used to obscure or nullify these general requirements that force the processes to be conducted in compliance with minimum requirements of transparency and publicity . The superiority of these other values advises that in this case it is understood that the consent of those people who participate in a competitive competition procedure was not required for the treatment of the qualifications obtained in said procedure and it as a guarantee and requirement of the other participants to ensure the cleanliness and impartiality of the procedure in which they participate.

Therefore, the Defender concludes that the Administration must provide the applicant with access to that information relevant to the selection process that allows him to verify the cleanliness and impartiality of the procedure in which he participated, including the personal data of third parties also participating in the same processes selective with which the applicant competed for the same places."

In the evaluation of the tests carried out and the merits accredited by the candidates, which must be carried out in every selection process, there is undoubtedly a margin of technical discretion that corresponds to the qualifying body. The control of this margin of discretion, to avoid arbitrariness, can only be carried out if the subject harmed by the administrative decision (the candidate not selected) has the possibility of knowing the factual elements from which the assessment carried out in this respect by the selection body.

Thus, in exercise of the right of defense and for the purposes of being able to verify any arbitrary actions of the qualifying body contrary to the principles of equality, merit, capacity and transparency that must govern in any procedure of this type, it would be justified that the applicant can have information on the different aspects that have been assessed in the selection process, that is the knowledge and abilities (through access to the exams carried out), the merits (both academic and experience) and the score obtained, however the question lies in determining whether this information must be exclusively for the candidate finally selected or can also include other candidates who have passed any of the phases of the procedure (in the query reference is made to "all people who have passed the practical test including their file").

The cited jurisprudence resolves the issue in the sense that it should be possible to access the aforementioned information relating to candidates who have obtained a better score than the applicant, but not to those who have obtained a worse score, nor to personal data unnecessary for the defense of the interested party such as address, telephone number, email, etc.

Having information about non-selected candidates would not be justified, since they would have been left out of the selection process and, in principle, their position with respect to the person requesting access would not prejudge their rights and interests .

A different question would be the access to the exams of other candidates who have not been selected but who have obtained a higher score than requested. In this case, access to their evidence may be necessary, for example, for the purposes of checking that the assessment criteria established by the qualifying court have been correctly applied

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but it does not seem that in this case knowing their identity can have significance for the purposes of their right of defence.

In principle, it can be concluded that, unless the need to access information relating to candidates who have not been selected is duly justified, it would only be justified, by the situation with respect to the claimant and in the exercise of his right of defence, to access to this information (exams and other tests carried out, excluding psychotechnical tests or other tests that may contain health data) relating to the candidate who has finally been selected, since despite the fact that there may be personal information that allows the preparation of a profile of the selected, and consequently a strong impact on their right to the protection of personal data, their knowledge along with their identity, is essential to be able to check the legality of the selective process."

According to this criterion, it can be concluded that a person who has the status of an interested party in a selective process in progress, could access the recordings of the tests carried out by candidates who have finally been selected since their knowledge would be justified for the defense of the interests of the applicant candidate.

The same criterion would be applicable when the access made by an interested person with respect to completed procedures, since in this case the directly applicable legal regime would be that of the transparency legislation. And in this case, in the weighting of the interests at stake provided for in article 24.2 of the LTC should prevail, also the right of access with respect to the candidates finally selected given their status as an interested person. This condition would grant him a reinforced or privileged right of access, unlike other potential applicants for information who have not participated in said selective process. In this sense, as this Authority has done on previous occasions (Report IAI 44/2017, Report IAI 49/2918, IAI 32/2019, or Opinion CNS 25/2019, among others, available on the web: www.apdcat .cat), in the event that the person requesting access to information has participated in the selection process, this may be decisive for the weighting effects of article 24.2

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Regarding the question of whether "a third party who has not submitted to the selection process, as a right of access to public information in accordance with the transparency regulations?" could access it, the following considerations are made:

Article 18 of Law 19/2014 establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any legal entity constituted" (section 1).

The mentioned article 2.b) defines "public information" as "the information prepared by the Administration and that which it has in its power as a result of its activity or the exercise of its functions, including the which are supplied by the other obliged subjects in accordance with the provisions of this law”.

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State Law 19/2013, of December 9, on transparency, access to public information and good governance, is pronounced in similar terms, in its articles 12 (right of access to public information) and 13 (definition of public information).

In accordance with article 20 et seq. of the LTC, the right of access to public information may be denied or restricted for the reasons expressly established in the laws. Specifically, and with regard to information that contains personal data, it is necessary to assess whether or not the right to data protection of the affected person justifies the limitation of the right of access to public information regulated in the LTC .

In the case of the query raised, access to the recordings of the oral exams carried out by the people who have participated in the selection process, therefore requires a prior weighting between the different rights and interests at stake, in the terms of what is provided by the article 24.2 LTC:

"2. If it is other information that contains personal data not included in article 23, access to the information can be given, with prior weighting of the public interest in disclosure and the rights of the affected persons.

To carry out this weighting, the following circumstances must be taken into account, among others: a) The elapsed time. b) The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people."

As established in article 18.2 of the LTC, the exercise of the right of access "is not conditional on the concurrence of a personal interest, does not remain subject to motivation and does not require the invocation of any rule", however, the purpose of the access is configured as one of the elements to be taken into consideration for the purpose of carrying out the weighting provided for in article 24.2 of the LTC.

Therefore, for the purposes of weighing an access request such as the one raised in the consultation, it will be necessary to analyze whether the person making the request has expressed a specific interest in their access.

It should be borne in mind that, for purposes of transparency, it may be relevant to know the score obtained by each participant in each phase of the selection process, as well as the final result of each phase of the procedure. In this sense, the regulations that regulate the procedures for access to the civil service prevail the public interest in access to the identity of the selected persons, compared to the right to privacy of these participants.

However, beyond this, participants may also have a certain expectation of privacy regarding the rest of the personal information that affects their participation in the selection process that goes beyond what the principle of advertising, which governs these procedures, would require making public. And this even in the event that the presentation of the oral evidence is public.

In this sense, from the perspective of the rights and interests of the people affected, access to the recording of the tests carried out would be a rather invasive measure of their privacy, given that it would not only allow a certain amount of publicity at the time of developing - there

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test, but rather, the possibility of obtaining recordings of the unfolding of the tests, can condition not only the same participation in the selective process and can end up affecting both the unfolding of their life in the personal sphere, as in the social sphere or professional It must be borne in mind that the oral presentation of the content of a test in a selective process is a moment of great pressure for the people affected in which the development or the result cannot be foreseen in advance, and that in certain circumstances it can be particularly distressing for participants.

For this reason, given the serious consequences it can have for the people participating, the weighting between the different elements at stake, on the one hand a diffuse interest in having a copy; and on the other hand, the consequences that this may have for the participating person when deciding their participation, also during the performance of the test and finally the consequences that may have on their future personal deployment, seems reasonable admit the possibility of witnessing the completion of the tests, in the terms established by the basis of the call, and limit the possibility that any person may have a copy.

For all the above, if the person requesting access to this personal information has not participated in the selection process, nor specifies any other reason that may be relevant for the purposes of the weighting (art. 24.2 LTC), from from the perspective of data protection regulations, it does not seem sufficiently justified to give access to copies of the recordings of the oral tests of the participants in a selective process.

VI

Finally, with respect to the question of whether "The public attending the oral tests can record them freely, or on the contrary the court or the City Council must establish some limitation?", it is necessary to analyze, first of all, whether the recording made by the attending public could be considered included in the so-called domestic exception.

Article 2.2.f) of the RGPD establishes that this Regulation does not apply to the processing of personal data "carried out by a natural person in the exercise of exclusively personal or domestic activities".

In this regard, recital 18 of the RGPD establishes:

"This Regulation does not apply to the processing of personal data carried out by a natural person in the course of an exclusively personal or domestic activity, that is to say without any connection with a professional or commercial activity. Personal or domestic activities may include correspondence and the management of an address book, or social networks and online activities carried out in the context of said activities. However, this Regulation applies to those in charge or those in charge of the processing that provide the means to process personal data related to these personal or domestic activities."

In accordance with these forecasts, the application of data protection regulations to treatments carried out by individuals would be ruled out when the treatment derives from an exclusively personal activity without any connection with a professional or commercial activity.

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The delimitation of the domestic exception has been the subject of extensive jurisprudence that has emphasized this exclusively personal nature, as can be seen from the Judgment of the Court of Justice of the European Union of December 11, 2014, which recalls: "in this regard, it should be noted that, according to repeated case law, the protection of the fundamental right to private life, which is guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, requires that the exceptions to the protection of personal data and the restrictions on said protection are established without exceeding the limits of what is strictly necessary"(...). Such a strict interpretation is also based on the text of the provision just quoted, according to which Directive 95/46 does not limit itself to providing that its provisions will not apply to the processing of personal data in the exercise of personal or domestic activities , but requires that it be the exercise of personal or domestic activities".

It can also be cited in the National Court that in the Judgment of June 15, 2006 it stated:

"What is relevant for subjection to the data protection regime will not be because there has been treatment, but if said treatment has been carried out in a scope or purpose that is not exclusively personal or domestic. What is meant by personal or domestic is not an easy task. (...) That data processing activity that, even if it is carried out by several physical persons, does not go beyond their most intimate or familiar sphere, such as the preparation of a file by several members of a family for the purposes of be able to send wedding invitations. And a treatment of personal data carried out by a single individual with a professional, commercial or industrial purpose will be clearly included in the scope of application of law 15/1999.
It will be personal when the data processed affect the most intimate sphere of the person, their family and friendship relationships and that the purpose of the treatment is not other than to have effects in those areas"

In short, the domestic exception must be subject to a restrictive interpretation that cannot be applied to treatments that exceed the scope of private, family or friendship relationships, and which, therefore, cannot be applied to treatments carried out for a purpose unrelated to this area.

In the case at hand, it would only seem applicable if it is the same person participating in the process who makes the recording for their personal use (for example, to have a memory, to have a record of the content of the test , or to improve in future selective processes, etc.). Outside of this assumption, the application of this exception would have to be ruled out since the treatment would go beyond this purely domestic scope and would be subject to the principles and guarantees of the personal data protection regulations. In any case, the non-applicability of the regulations on the protection of personal data does not exempt from the possible limitations that have been established in this regard by the basis of the call, by the qualifying court or by the rest of the applicable regulations.

Article 5.1.a) RGPD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party. In order for this treatment to be lawful, one of the conditions provided for in article 6.1 of the RGPD must be met.

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In the case of the attending public, a legal basis could be the consent of the people participating in the selection process and, where appropriate, of the members of the tribunal (Article 6.1.a) of the RGPD). It should be taken into account that the collection of consent should be carried out in accordance with Article 7 of the GDPR. However, since it does not seem that this legal basis is easily applied, it is necessary to analyze the possibility that some other legal basis can be appealed to, such as legitimate interest (Article 6.1.f) of the RGPD). In any case, the legality of the treatment would also require that the basis of the call and ultimately the criteria of the qualifying court allow this recruitment to be carried out.

With regard to legitimate interest, the RGPD foresees the need for the application of this legal basis to overcome the weighting rule, that is to say, it will be necessary to assess whether in the specific case there is a legitimate interest pursued by the data controller or a third party that prevails over the interest or the fundamental rights and freedoms of the data subject that require protection in accordance with Article 1 of the RGPD, or if, on the contrary, the fundamental rights or interests of the data subject referred to the processing of the data must prevail over the legitimate interest of the person in charge or the third party who wants to carry out the pr

Therefore, for the purposes of carrying out the required weighting, it would be necessary, taking into account the specific circumstances that would occur in the case of the recording by the public, the interest of the latter must prevail over the right to data protection of the participants in the selection procedure which data would be recorded.

In this case, the criterion for weighting would be similar to that used with regard to access to the content of the recordings by any person who does not have the status of an interested party in the selective process.

Thus, it must be taken into account that from the perspective of the rights and interests of the people affected, the recording of their image and voice in the oral phase, by a third party who is not a party to the selection process, would be a measure force invasive of their privacy, which could affect both the unfolding of their life in the personal sphere, as well as in the social or professional sphere.

With respect to the attending public, unless they have the status of interested parties or some other circumstance is brought to light that would allow the weighting judgment to be decided in their favor, it could be concluded that, in general, the recording of the evidence by the attending public would not exceed the weighting rule provided for in article 6.1.f) of the RGP.

Conclusions

If the rules provide for public attendance at any of the phases of the process, it is not considered mandatory to additionally inform the participants about this eventuality, without prejudice to the provision of the information provided for in article 13 RGPD to the people who participate in the process, it is appropriate to warn them that certain evidence of the process is publi

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The recording of oral examinations by the qualifying body can be justified as a means of guaranteeing the principles that must govern personnel selection processes, and specifically the principles of merit and capacity and transparency.

It would only be justified to obtain a copy of the recording of the oral test if the person requesting it has the status of an interested party in a selective process regarding candidates who have finally been selected.

If the person requesting a copy of the recording has not participated in the selection process or specified any other reason that may be relevant for the purposes of the weighting, from the perspective of data protection regulations it does not seem sufficiently justified to give - access to a copy of the recordings of the oral tests of the participants in a selective

The regulations for the protection of personal data do not prevent the capture of personal recordings by the applicants themselves. For the recording of the oral tests by the attending public, the express consent of the participants in the selection process and, where appropriate, the members of the court, would be necessary. In either case, the possibility of recording is subject to the conditions of the call, the criteria of the qualifying court and other applicable regulations not preventing it.

Barcelona, March 27, 2020

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