

CNS 16/2020

Opinion in relation to the consultation of a City Council on the dissemination of images of sporting events on the web portal and social networks

A letter from a City Council is presented to the Catalan Data Protection Authority, in which an opinion is requested from this Authority in relation to the use of images of people and their subsequent dissemination.

The consultation explains that the City Council would be digitizing photographs "of sports events, training and swimming courses, football, athletics, handball, cross country, etc., organized and directed by the City Council itself from the 1980s until approximately 2002", and that after digitizing them the City Council would like to disseminate them on the web portal and municipal social networks.

The City Council considers that, taking into account the regulatory framework, in the case of public events that took place in public spaces and facilities (swimming pool, pavilion, football field, streets, squares, etc.), it can disseminate these images.

The inquiry raises the question of "whether or not we can spread the word because in these images minors appear (in those years) who are now adults".

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 consultation, the City Council would be digitizing photographs of different sporting events that would have taken place in the municipality between the years 1980 and 2002 approximately, and subsequently would like to disseminate them through the web and municipal social networks.

The City Council considers that, taking into account the regulatory framework, in the case of public events that took place in public spaces and facilities (swimming pool, pavilion, football field, streets, squares, etc.), it can dissemination of these images. The doubt raised by the City Council "is whether or not we can spread the word because minors appear in these images (in those years) who are now adults", which is why it is asking for the advice of this Authority.

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 photographic material to which the inquiry refers. Not only the graphic image of natural persons but also, where applicable, other personal data available to the City Council and accompanying the photographs (for example, identification or professional data of teachers, monitors, or of the participants themselves in sports activities, others).

At the outset, with regard to the photographs subject to consultation, in order for the principles and guarantees of the RGPD to be applicable, it is essential to discern whether the images refer to "identified or identifiable" natural 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. In this case, from the point of view of the right to data protection, there would be no inconvenience for the City Council to disseminate these images.

Likewise, it should be noted that the data protection regulations do not apply to the protection of personal data of dead people (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

Having made these considerations, with regard to 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.

The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions.

(...).”

Having the consent of the natural persons affected would constitute an adequate and sufficient legal basis for the dissemination of images and, where appropriate, other identifying data that could accompany these photographs (names and surnames of the participants, or of the teachers or monitors of sports activities, etc.), for the purposes of article 6.1.a) RGPD.

From the information available, it is unknown whether the City Council would have the consent of these people (Article 4.11 RGPD) for the capture and subsequent dissemination of their image. Taking into account the period to which the consultation refers (approximately 1980 to 2002), it cannot be ruled out that the City Council has the consent of some of those affected, at least in relation to some of the photographs, in the terms that provided for Organic Law 15/1999, of December 13, on the protection of personal data (LOPD), repealed by the LOPDGDD (single repealing provision, section 1). However, if the dissemination were to be based on consent, this would have to meet the requirements required by the RGPD.

However, given that the inquiry refers to photographs taken over a fairly wide period of time and given the foreseeable difficulties in seeking the consent of all of them, in practice it does not seem that the legitimization route for the dissemination of the photographs consisting of the consent of those affected, may be likely or feasible in general.

Therefore, it is necessary to analyze whether there would be any other legal basis (eg art. 6.1 RGPD) for the dissemination of photographs of identified or identifiable persons on the web portal and municipal social networks.

Specifically, data processing may be lawful, among others, when "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" (art. 6.1. e) RGPD).

Therefore, at the outset, it will be necessary to examine whether in this case a mission carried out in the public interest by the City Council can be a sufficient legal basis for the processing of the data, in this case, for the dissemination of the photographs .

From the concurrence, if applicable, of this legal basis, it will be necessary to take into account the impact of the treatment on the rights concerned, especially in relation to minors, and finally the application of the principles and guarantees of the data protection regulations to this treatment.

As provided for in the RGPD, in accordance with the principle of proactive responsibility and transparency, the City Council will have to carry out this analysis, in order to provide transparency and legal certainty to those interested in the treatment subject to consultation.

IV

Although the query does not specify the purpose of the dissemination of the photographic material in question, it refers to sporting events, training and courses in different sports, which would have been organized and directed by the City Council itself during the period indicated (1980-2002), which are to be disseminated on the City Council's portal and social networks.

Therefore, in principle, it seems that the purpose of dissemination could be framed in a purpose of a cultural, divulgative or informative nature of acts and sporting events that would have been promoted or organized by the City Council.

Law 7/1985, of April 2, Regulating the Bases of the Local Regime (LRBRL), provides, in article 25.2, that:

"2. The Municipality will in any case exercise its own powers, in accordance with the legislation of the State and of the Autonomous Communities, in the following matters:

(...)

l) Promotion of sport and sports facilities and leisure activities.

m) Promotion of culture and cultural equipment.

(...)."

Likewise, article 69.1 of the LRBRL provides that: **"1. Local Corporations will provide the widest information on their activity and the participation of all citizens in local life."**

In the area of Catalonia, article 66 of Legislative Decree 2/2003, of April 28, which approves the revised Text of the Municipal and Local Government Law of Catalonia (TRLMRLC), provides the following:

"66.1 The municipality, for the management of its interests and within the scope of its competences, can promote all kinds of activities and provide all public services that contribute to meeting the needs and aspirations of the community of residents.

66.2 Local bodies have powers in the areas of citizen participation (...).

66.3 The municipality has its own powers in the following matters:

(...)

n) Cultural and sports activities and facilities, leisure activities, tourism.

(...)."

According to article 71.1 of the TRLMRLC:

"For the management of its interests, the municipality can also carry out activities complementary to those of other public administrations and, in particular, those relating to:

a) Education.

b) Culture, youth and sport. (...)."

Therefore, at the outset, and given the municipal competences in the field of cultural and sports activities, and the recognition of citizen participation in local life for which the municipality must provide them with information, it could be considered that the purpose of the City Council to disseminate the photographic material subject to consultation could be framed in the fulfillment of a public interest mission, for the purposes of considering that article 6.1.e) of the RGD (in connection with recital 153 RGD): "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."

This, as long as the principles and guarantees of the data protection regulations are complied with.

v

Apart from the legality of the treatment, it will also be necessary to take into account the rest of the principles in the field of data protection, in particular the principle of minimization (art. 5.1.c) RGD), taking into account the impact and consequences that the treatment could mean for the interested parties.

The capture and processing of the graphic image of identifiable people (as could be the dissemination planned by the City Council) affects the right to one's own image (Article 18.1 CE).

According to article 85.1 of the RGD (in connection with recital 153 RGD): "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 cultural expression, or dissemination of activities organized by the City Council, recital 4 of the RGD must be taken into account :

"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."

At this point, special reference must be made to 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) .

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 LO 1/1982, it is considered illegitimate interference with the right to one's own image, among other cases, "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 them, 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:

“Two. In particular, the right to one's own image will not prevent:

a) Its capture, reproduction or publication by any means when it concerns 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.

(...).

c) The graphic information about a public event or event when the image of a certain person appears as a mere accessory.

The exceptions contemplated in paragraphs a) and b) will not apply with respect to authorities or persons who perform functions that by their nature require the anonymity of the person who exercises them."

The dissemination of images related to sporting events organized by the City Council in the period indicated, could have a relevant historical or cultural interest, so that the dissemination of images that correspond to this purpose would not, in general, constitute a illegitimate or disproportionate interference with the rights of the affected persons whenever any of the cases provided for in the aforementioned regulations occur (art. 8.2 LO 1/1982).

At the outset, it cannot be ruled out that in some cases the graphic information available to the City Council refers in some cases to people who hold - or held, given the period when the images were taken -, a public office 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). This could legitimize the dissemination of photographs, for example, of people who carried out functions or public positions in the period when the images were captured, or professionals related to the world of sport, who have participated in the events organized by the City Council (ex. a

On the other hand, the capture of the image could also be framed in the case provided for in article 8.2.c) LO 1/1982.

In this case, it should be borne in mind that the Supreme Court links the accessory nature of an image to the nature of the act, the recognizability of the subjects that appear, the greater or lesser proportion they occupy in the photograph, the public relevance of the person or the fact of occupying a profession of notoriety or public projection, or the

between the published image and the content of the information that accompanies it, among other circumstances.

According to the Supreme 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).

In principle, to the extent that the images that the City Council wants to disseminate 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 be, in terms of the 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 events or sporting events organized by the City Council .

At this point, it should be borne in mind that the photographs subject to consultation mostly refer to minors. As can be seen from the cited regulations, as well as from the jurisprudence, with respect to the data of minors, special care must be taken for the purposes of their treatment, in this case, their dissemination. Thus, among others, it is necessary to take into account the context of the photograph, the purpose pursued, as well as the concurrence of the legal principle of the best interests of the minor.

The dissemination of images of people who were minors at the time they were taken, together with the time that has passed and the rather wide period covered by the photographs (1980 to 2002, approximately), supposes, objectively, a certain impact on the privacy of these people, whose association with the courses or sports events held in the past would have already concluded.

In addition, due to the maturity conditions of minors, who are in the process of personal training, it must be understood that in general they will probably not be aware, at the time of taking the photographs, of the consequences that the treatment of the same may have.

In addition, it must be borne in mind, for example, for the purposes of assessing foreseeability for the affected persons and the privacy expectations they may have, that at the time the images were captured, social networks and, in general, the dissemination of information through the network, was in a very incipient phase, far from having the relevance and consequences it can have today.

The expectation of the affected persons (the minors who participated in the sports activities) regarding their privacy does not necessarily include the treatment of their image for the intended purpose. On the contrary, given the time that has passed, the affected people may rather have the expectation that their personal data will no longer be the subject of treatment and dissemination by the City Council.

For all this, especially in relation to photographs of minors, a prior analysis is required by the City Council to consider whether the accessory condition required by article 8.2.c) of LO 1/1982, with more care even than if it were photographs of adults, who can understand more clearly the purpose of the treatment of their image, at the time of capture or later.

It should also be borne in mind that article 8.2.c) of LO 1/1982 not only requires this accessory to consider that there is no illegitimate interference with the rights of the people affected, but also that the photographs are 'have caught, in the case at hand, sporting events that can be classified as events or public events.

Regarding this, in principle, a sporting event carried out in municipal facilities or in public spaces (a match, a race, a tournament or a competition, for example), which is usually carried out with public assistance, is certainly can qualify as a "public event", for the purposes of article 8.2.c) of LO 1/982.

It is a different matter that any photograph of a training session in a sporting discipline, or any session of a course that has been carried out in municipal facilities, such as a swimming pool or a sports hall. In this case, it may pose greater problems to classify these events as public, given that the privacy expectations of the people who participate in a training are clearly greater.

On the other hand, and also from the point of view of the minimization principle, it must be taken into account that the RGDPD protects certain categories of data in a reinforced way. Specifically, article 9.1 RGDPD provides that: "The processing of personal data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation, and the processing of genetic data, data biometrics aimed at uniquely identifying a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person."

The dissemination of photographs by the City Council would require a review 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 moments painful or particularly distressing for the people who appear there, or other types of serious or particularly intimate situations for the people affected.

Given the information available, it does not seem that it can be considered that the circumstance provided for in article 8.2.c) of LO 1/1982 which requires that the merely accessory images have been taken in acts or public events, concur in relation to all the photographs available to the City Council. The City Council will have to take this into account when evaluating the dissemination of the photographs.

All in all, it can be concluded that in principle there would be a sufficient legal basis (e.g. art. 6.1.e) RGDPD) to be able to disseminate for informative or informative purposes images of identified or identifiable natural persons who held a public position or a profession of public projection, or of people who appear as mere accessories (having to be interpreted more strictly when it comes to images of minors), in acts or sporting events that can qualify as public , organized by the City Council during the indicated period, for an educational or cultural purpose such as that referred to in the consultation.

Otherwise, the City Council should have the consent of the people affected, or another legal basis for disseminating the images (eg art. 6.1 RGDPD).

VI

Aside from the considerations made, in application of the principle of transparency (art. 5.1.a) RGDPD), it would be advisable that, prior to the processing of the information (that is, prior to the dissemination of the photographs on the City Council's website and social networks), the City Council informs the affected persons of said treatment so that they can know that it is intended to carry out this treatment.

In the event that this is not possible because the City Council does not have updated information, it could be done, for example, through the City Council's electronic headquarters, or through the associations, clubs or municipal sports federations, if there is one, or by any other suitable system, in order to give the affected people the option to oppose the treatment, and, therefore, that the City Council must exclude any photograph from the material to be disseminated, thus reducing the impact on the privacy of the people affected, who were minors at the time their image was captured.

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, to which we refer.

In connection with this, it is necessary to ensure that the affected persons will have the option to oppose the treatment and to exclude their image from the intended dissemination.

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 City Council, 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 GDPR).

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, where applicable, can be disseminated based on the consent of the person affected (the persons photographed, with respect to whom it is feasible, without disproportionate efforts, to collect their consent), the provision of article 21.1 GDPR does not apply.

For all the above, and for the purposes of complying with the principle of transparency (art. 5.1.a) RGPD), the City Council should provide an easy channel (or several) so that the affected people can exercise the right of opposition to the processing of their image (dissemination of photographs of sporting events on the web or social networks municipal).

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

Conclusions

The dissemination of images of identified or identifiable natural persons who held a public position or a profession of public projection, or of persons who appear as mere accessories (especially in the case of images of minors), in acts or public sporting events organized by the City Council, could have a sufficient legal basis (art. 6.1.e) RGPD), as long as the City Council takes into account the considerations set out in this opinion.

Barcelona, May 15, 2020

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