CNS 26/2020

Opinion in relation to the query made by a town council about the query of personal data held by other public administrations

A letter from a city council is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on several doubts that are raised related to the possibility of consulting data held by the public administrations.

Specifically, it proposes:

- **If it is necessary to include a box or other mechanism in the application form linked to a specific procedure, for the purposes of allowing the affected persons to object to the possibility of consulting documents held by the public administration.**
- **If, in view of what is established in the seventh final provision of Law 2/2014, of January 27, on fiscal, administrative, financial and public sector measures, the data indicated therein can be consulted, some deserving of special protection, without the consent of the affected person.**
- **If the prior authorization of the interested party is necessary for the consultation of data with tax implications and, therefore, a box to this effect must be included in the request in question.**

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

In attention to the terms of the consultation, it is convenient to remember the provisions contained in article 28.2 of Law 39/2015, of October 1, on common administrative procedure of public administrations (hereinafter LPAC), relating to the consultation of data held by public administrations.

This article, in the wording given by the twelfth final provision of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD), establishes the following:

> **"2. Those interested have the right not to provide documents that are already in the possession of the current Administration or have been prepared by any other Administration. The acting administration may consult or collect said documents unless the interested party opposes it. There will be no opposition when the provision of the document is required in the framework of the exercise of sanctioning or inspection powers.**

> **The Public Administrations must collect the documents electronically through their corporate networks or by consulting data brokerage platforms or other electronic systems enabled for this purpose.**
>
> **When it comes to mandatory reports already drawn up by an administrative body other than the one processing the procedure, these must be sent within ten days of the request. Once this deadline is met, the interested party will be informed that they can submit this report or wait for it to be sent by the competent body."**

For its part, article 6.1 of Regulation (EU) 2016/679, of the Parliament and of the Council, of April 27, 2016, General Data Protection (hereafter RGPD) establishes:

> **"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; (...) 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; (...)"**

Article 8 of the LOPDGDD establishes that the processing of personal data can only be protected on the legal basis provided for in article 6.1.e) of the RGPD, relating to the fulfillment of a mission in the public interest or the exercise of public powers, when it comes to the exercise of a competence attributed by a norm with the rank of law.

In accordance with this, and as this Authority has already held in other opinions (among others, CNS 56/2016, CNS 35/2017, CNS 69/2017 or CNS 23/2019, available on the website https:// apdcat.gencat.cat), the legal basis for the exchange of information provided for in article 28.2 of the LPAC is not the consent of the affected persons (article 6.1.a) RGPD) but the fulfillment of a mission in the public interest or the exercise of public powers, established in a rule with the rank of law (articles 6.1.e) RGPD and 8.2 LOPDGDD), in this case the LPA

Therefore, the application of article 28.2 of the LPAC makes it unnecessary to articulate the treatment referred to in this article (consulting or collecting documents held by the administration) through the consent of the affected person, being protected by article 6.1.e) of the RGP

It should be noted, at this point, that this article 6.1.e) of the RGPD, in the context in which we find ourselves, must be understood as an authorization for the processing of all the data that are necessary for the fulfillment of a mission in the public interest or the exercise of public powers, unless it concerns special categories of data.

Article 9.1 of the RGPD prohibits the processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions or trade union affiliation, and the processing of genetic data, biometric data intended to identify unequivocally a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person.

In turn, article 9.2 of the RGPD establishes different assumptions that, if met, would lift this prohibition to treat special categories of data.

So, in the event that the consultation to be carried out by the administration acting in the exercise of the powers attributed by law affects special categories of data would also be necessary, to consider the legitimate treatment, the concurrence of any of the circumstances enablers provided for in article 9.2 of the RGPD, such as, for example, the express consent of the persons affected (letter a) or that the consultation responded to reasons of ess

in accordance with a rule with the rank of law, which must be proportional to the objective pursued, respect the right to data protection in the essential and establish appropriate and specific measures to protect the interests and fundamental rights of the 'affected (letter g).

Point out that article 28.2 of the LPAC does not only apply to procedures initiated at the request of the person concerned, but also refers to other procedures, such as sanctioning procedures or inspection actions, such as it is clear from the last indent of the first paragraph. However, given the terms of the consultation, in this opinion we will refer to procedures initiated at the request of the person concerned.

III

It is also considered appropriate, for the purposes of this opinion, to refer to the provisions contained in article 28.3 of the LPAC, despite the fact that the consultation does not expressly mention it.

This article, in the wording given by the twelfth final provision of the LOPDGDD, establishes the following:

> "3. The Administrations will not require the interested parties to present original documents, unless, exceptionally, the applicable regulatory regulations establish otherwise.
>
> Likewise, the Public Administrations will not require data or documents from the interested parties that are not required by the applicable regulations or that have been provided previously by the interested party to any Administration. To this effect, the interested party must indicate at what time and before which administrative body he presented the aforementioned documents, and the Public Administrations must collect them electronically through its corporate networks or by consulting data brokerage platforms or other electronic systems enabled for the purpose, unless the procedure states the express opposition of the interested party or the applicable special law requires their express consent. Exceptionally, if the Public Administrations could not collect the aforementioned documents, they may ask the interested party again for their contribution."

The precept regulates access or consultation by the administration acting on the documents already provided by the interested party and which are in the possession of the same or another administration (case different from that established in section 2, previously examined). In the event that a special applicable law requires express consent, in this case the legal basis should be consent.

Apart from this assumption, the legal basis of this treatment (the consultation) will not be the consent of the affected person but the fulfillment of a mission in the public interest or the exercise of public powers, established in a rule with the rank of law (articles 6.1.e) RGPD and 8.2 LOPDGDD), in this case the LPAC, unless the affected party expressly opposes it.

IV

In the consultation, it is considered whether it is necessary to include a box or other mechanism in the application form linked to a specific administrative procedure, for the purposes of allowing the affected persons to object to the possibility of consulting or collecting documents held by another public administration.

This issue, it must be said, is related to the considerations made in opinion CNS 23/2019, issued by this Authority in relation to a query made about the possibility of consulting data of the members of the family unit without the consent of all of them in a grant awarding procedure.

In the aforementioned opinion, it is concluded that article 28.2 of the LPAC allows public administrations to consult, without the consent of the persons affected, the data relating to the members of the family or cohabitation unit, as required by the sectoral regulations, except that any of the members opposes it or that it deals with special categories of data, which is why it is necessary to guarantee the information to the people affected about this query, as well as about the possibility of opposing it.

In this sense, the Authority recalls, in the aforementioned opinion, that, in compliance with the principle of transparency (Article 12 RGPD), the person responsible (in this case, the administration) is obliged to provide the affected person with information about the conditions and circumstances relating to the processing of data, in a concise, transparent, intelligible and easily accessible manner.

Specifically, when the data is collected from the interested person - the case to which, in principle, the query refers - it would be necessary to provide all the information referred to in article 13 of the RGPD. In addition, given that certain data would not be obtained from the person concerned, but from other files or administrative records of the same or another administration, with regard to this data it would be necessary to inform more about (Article 14 RGPD):

a) The categories of data subject to treatment. b) The source from which these personal data come and, where applicable, whether they come from publicly accessible sources.

And also, in view of what is established in article 28.2 of the LPAC, it would be necessary to inform about the possibility of opposing this consultation.

Hence the Authority agrees in the aforementioned opinion the need to establish mechanisms to make it possible for the applicant and, when appropriate, other affected persons (as would be, in the case examined there, the case of the members of the family or cohabitation unit) can access the information to which reference has just been made and, in view of this, decide whether they oppose said consultation (if so it would be necessary to provide the required documents by the applicable regulations).

In this regard, the Authority has been recommending - and recommends - including in the corresponding application form a box that the interested person can check if they wish to object to this inquiry being made.

In the event that there are also other affected persons, as is the case, in certain cases, of the other members of the family unit, the Authority considers that a possible way of articulating this obligation could be to include in the form request a clause in which the requesting person declares that the rest of the affected persons are aware of the aforementioned information and that they have not objected to the possibility of making the consultation or, where appropriate, whether they have objected .

Remember, in this regard, that the person in charge of the treatment has the obligation to take the appropriate measures to provide the interested party with all the necessary information and, in these cases, it could be said that there would not be a single interested person but a plurality of interested persons in the sense provided for in article 4.1 of the RGPD.

In this sense, it is considered that this way of articulating compliance with the duty to inform (the inclusion of said clause) could be compatible with the provisions of article 14.5.c) of the RGPD, which make compliance more flexible of the obligation to inform when the obtaining or communication is provided for by a law that applies to the person in charge and appropriate measures are establi

However, nothing would prevent the administration, as responsible, from deciding to opt for other mechanisms, different from the one described, that it considers more convenient for the purposes of complying with the aforementioned duty of information to the affected persons.

These considerations would be equally applicable with regard to the treatment referred to in article 28.3 of the LPAC, since it would also be necessary to inform about the possibility of opposing the consultation of the data or documents already provided to the administration public

v

The consultation also considers whether, in view of the provisions of Law 58/2003, of December 17, general taxation (hereafter, LGT), for the consultation of tax data, prior authorization from the 'affected and, therefore, if it would be necessary to foresee, in the appropriate request, mechanisms to collect this authorization.

Article 95 of the LGT, in establishing the reserved nature of data with tax implications, states that:

> "1. The data, reports or antecedents obtained by the tax administration in the performance of its functions are reserved and may only be used for the effective application of the taxes or resources whose management is entrusted to it and for the imposition of the penalties that apply, without they may be transferred or communicated to third parties, unless the transfer is for the purpose of: (...) k) Collaboration with public administrations for the development of their functions, prior authorization of the taxpayers to whom the data provided refers. (...)."

This precept of the LGT conditions any communication of data with tax significance to other public administrations that require it for the exercise of their functions to the fact of having the consent of the affected person, legal basis provided for in article 6.1 .a) of the RGPD.

This, in a case like the one we are dealing with, would entail having to include a clause or box in the corresponding form that would allow the interested party to authorize or give their consent for the consultation by the administration acting on these data with tax significance to the transferor administration.

As agreed in the opinion CNS 23/2019 (FJ II), already cited, articulating the possibility of direct consultation of the data based on the consent of the affected person would not be contrary to the data protection regulations. Normally, consent cannot operate in relations between citizens and the administration due to the inequality of the position from which the citizen relates to the administration, which prevents consent from being qualified as free in the sense of the Article 4.11 of the RGPD. However, as highlighted by the Article 29 Working Group in the "Guidelines on consent in the sense of Regulation (EU) 2016/679", consent can form the basis of the treatment carried out by the public administrations when the citizen really has the ability not to give it without negative consequences. This would happen in a case like the one raised because the citizen who does not

wanted to authorize the direct consultation of the data with tax significance, he would have a proportionate alternative consisting in the possibility of providing himself the documentation required by the administration in this regard.

This does not mean, however, that said query of data with tax significance could also be articulated on the basis of the authorization conferred by article 28.2 of the LPAC.

As has been seen, the treatment referred to in this article of the LPAC is lawful on the legal basis of article 6.1.e) of the RGPD, which would legitimize the treatment - without consent - of all that data personal data that are necessary for the fulfillment of a mission in the public interest or the exercise of public powers, except for the special categories of data, in respect of which it would also be necessary to have one of the enabling circumstances established in article 9.2 of the 'RGPD.

Data with tax significance, even if the special legislation provides for its reserved nature, are not part of the data considered deserving of special protection under the terms of article 9 of the RGPD. Therefore, its treatment could be based on the legal basis of article 6.1.e) of the RGPD, without requiring at the same time the concurrence of any of the enabling circumstances established in article 9.2 of the RGPD .

Therefore, in a case like the one proposed, article 28.2 of the LPAC would be applicable as a basis for the consultation by the acting administration of the tax data that is in the possession or has been prepared by the transferor administration. If so, it would not be necessary to obtain the consent of the affected person or, therefore, to include a box to this effect in the corresponding request. However, it would be necessary to establish mechanisms so that, where appropriate, the affected people could oppose the consultation, as has bee

It therefore does not seem that the provisions of the LGT, or other laws that provide for the reserved nature of the information in question, should prevail over a law, the LPAC, later and of general scope, which allows the direct consultation by other administrations without consent. In this sense, the prevalence of article 28.2 of the LPAC would be similar to that derived from the eighth additional provision of the LOPDGDD that allows administrations to verify the accuracy of the data that has been declared to them, including taxes

It should be noted that the original wording of article 28.2 of the LPAC did expressly provide that the authorization derived from this section would not apply in those cases in which the special law required consent express:

> "The interested parties will not be obliged to provide documents that have been prepared by any Administration, regardless of whether the presentation of said documents is mandatory or optional in the procedure in question, provided that the interested party has expressed his consent to that these documents are consulted or collected. It will be presumed that the consultation or obtaining is authorized by the interested parties unless their express opposition is stated in the procedure or the applicable special law requires express consent."

But, as we have seen, the current wording of this section, given by the twelfth final provision of the LOPDGDD, does not provide that this regime must be excepted in the event that a special law provides for express consent. This, of course, in those cases in which Community law provides for it, as is the case of the RGPD, because in this case the requirements derived from Article 9 RGPD for the data of special categories would prevail.

It should also be borne in mind that section 3 of article 28 LPAC expressly refers to the case in which a special law foresees the need for express consent and foresees that in this case it would be necessary to obtain it. On the other hand, article 28.2 LPAC does not provide for it

so a systematic interpretation of both sections leads to the conclusion that in the case of article 28.2 consent would not be required.

On the other hand, from the point of view of the intrusion that this entails for the rights of the affected person, it must be taken into account that the citizen always has the right to provide the information required by the current regulations. So, in short, it would be him who would end up deciding whether to provide the information or, if he does not, the authorization comes into play so that the administration can make a direct inquiry.

It would be a different matter if the documentation or data with tax significance to be consulted by the acting administration referred to information already provided by the interested person, as could be the case, for example, of requiring the consultation of the specific document of a certain self-assessment provided by the interested person himself. This type of consultation, which should be articulated on the basis of article 28.3 of the LPAC, would require, in the present case, the express consent of the affected person, as is apparent from the same precept of the LPAC, according to which, remember, "the Public Administrations will not require data or documents from the interested parties (...) that have been provided previously by the interested party (...) having to (...) collect them (...) unless (...) the applicable special law requires your express consent".

**As we have seen, the LGT requires the "prior authorization of the taxpayers" to communicate data with tax significance to other administrations that need it for the exercise of their functions (article 95.1.k), equivalent expression to "express consent"
referred to in article 28.3 of the LPAC.**

Therefore, in relation to this type of consultation, when it comes to documents or data provided by the interested party in a procedure (assumption of article 28.3 LPAC), consent would be required and the acting administration should include a clause or box in the corresponding form that would allow the person concerned to authorize or give his consent for the consultation of documents or data with tax implications previously provided by him to the public administration.

VI

On the other hand, the consultation raises whether, in view of what is established in the seventh final provision, paragraph one, of Law 2/2014, of January 27, on fiscal, administrative, financial and public sector measures , the data referred to can be consulted without the consent of the person concerned.

Said seventh final provision of Law 2/2014 provides the following:

> **"Seventh**
> **Authorization for public administrations in relation to access to personal data**
>
> **1. Authorization of the competent public administrations in the field of social services 1.1. The competent public administrations in matters of social protection are empowered to verify, ex officio and without the prior consent of the persons concerned, the data declared by the applicants for the benefits for which they are legally or by regulation competent and , if applicable, the identification data, residence and kinship, disability or dependency status, assets and income of the members of the economic cohabitation unit, in order to check whether the conditions are met at all times necessary for the perception of benefits and in the recognized amount, with the aim of serving people in an integral way, and addressing their social needs in a coordinated manner.**

(...).”

This provision establishes an authorization in favor of the competent public administrations in the field of social protection to be able to access the information declared by the persons applying for benefits in the field of social protection, in order to verify compliance with the necessary conditions to be able to receive such benefits and in the amount legally recognized.

It should be noted that the LOPDGDD itself contains a similar qualification in its eighth additional provision, which states that:

> **"When requests are made by any means in which the interested party declares personal data held by the Public Administrations, the body receiving the request may, in the exercise of its powers, carry out the necessary checks to verify the accuracy of the data. "**

It should be noted that the treatment referred to in this provision of Law 2/2014 does not exactly coincide with the case provided for in article 28.2 of the LPAC because it does not refer to the provision of documents required by the applicable regulations but to the possibility of verifying the data that have previously been declared by the applicant himself.

In any case, it is clear that, to the extent that the circumstances established in said final provision seven, that is to say that the consultation is carried out by an administration with powers in matters of social protection, it is always about previously declared data by the applicant - which should be limited to those established in this provision - and it is necessary to verify their accuracy for the processing and verification of the application, it would not be necessary to have the consent of the 'affected (nor, if applicable, of the members of their economic unit of coexistence), given that said data check would be protected by the legal basis of article 6.1.e) of the RGPD, relating to compliance with 'a mission in the public interest or in the exercise of public powers established in a rule with the rank of law, in this case in Law 2/2014 in connection with Law 12/2007, of 11 October, on social serv

In the consultation it is pointed out that some of the data referred to in the seventh final provision of Law 2/2014 are specially protected data.

Certainly, this provision, in specifying the data that can be the subject of consultation, includes a specific provision that expressly contemplates that, when necessary to achieve the purpose of verification pursued, the competent public administration will be able to access, where appropriate, the data relating to the "situation of disability or dependency" (section 1.1).

As we have seen, the processing of special categories of data requires, apart from a legal basis that legitimizes it (as in this case it would be the one established in article 6.1.e) RGPD), the concurrence of some of the enabling circumstances provided for in article 9.2 of the RGPD.

In accordance with letter g) of article 9.2 of the RGPD, previously cited, in order for the prohibition contained in paragraph 1 of the cited article not to apply, the treatment must be necessary for reasons of 'an essential public interest, on the basis of a rule with the rank of law, which is proportional to the objective pursued and that appropriate and specific measures are established to protect the interests and fundamental rights of the persons conce

In the case at hand, the actions to verify the veracity of the data previously declared would have the ultimate purpose of controlling the use of public funds intended for services or social benefits, in order to guarantee their good use and allow these services or benefits to continue to support the situations that require it. Therefore, the treatment

may be considered necessary for reasons of essential public interest. In addition, in line with the requirements that the law must have, as set out in the doctrine established for example in STC 76/2019, the forecasts of the final provision analyzed are quite precise.

The seventh final provision expressly specifies the data that could be the object of treatment, which would be the minimum indispensable for checking the conditions necessary for the perception of the benefit by the applicant and in the legally recognized amount, by the which the treatment would be proportional to the objective pursued.

Given the terms in which Law 2/2014 regulates the processing of data, which specifically provides for both the purpose of the communication and the specially protected data that must be checked, it can be said that the legislator has estimated that in this case reasons of general interest that justify the treatment of this type of information, so the law would enable the treatment of this data by the competent administrations in matters of social protection.

That is to say, in relation to the verification of the veracity of the special categories of data declared by the person requesting the benefit, the treatment by the competent administration would be legitimate on the basis of articles 6.1.e) and 9.2. g) of the RGPD, so it would not be necessary to have the express consent of the affected persons.

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

It is necessary to establish mechanisms to guarantee information to the people affected about the consultation of documents held by public administrations, as well as about the possibility of opposing them. When the consultation affects third parties, a possible option in this regard could be to include a clause in the application form in which the applicant declares that the other affected persons have accessed this information and that they have not objected to the possibility of making the inquiry or, where appropriate, if they have c

With regard to the applicable legislation, it could be considered the possibility of articulating the consultation by the acting administration of data with tax significance held or prepared by the tax administration on the basis of the authorization conferred by article 28.2 of the LPAC, which would make it unnecessary to obtain the consent of the affected person. The consultation, however, of documents or data with tax implications previously provided by the interested person would require their express consent, in accordance with articles 28.3

The verification of the veracity of the data declared by applicants for social benefits by the competent administrations would not require the consent of the affected persons, as this treatment is legitimized by articles 6.1.e) of the RGPD and, when applicable, 9.2.g) of the RGPD, as long as it complies with the provisions established in the seventh final provision of Law 2/2014.

Barcelona, July 21, 2020