

Opinion in relation to the inquiry made by a private entity on the donation of a documentary fund to the National Archives of Catalonia

A letter from a private entity is submitted to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the possibility of donating an integrated documentary fund to the National Archives of Catalonia for 71,400 documents dated between 1808 and the present day, some of which include personal data.

Specifically, it considers whether:

- a) The documents that are part of this fund with a higher age can be transferred at the age of 40 without the consent of those affected.
- b) Documents that are less than 40 years old can be transferred, also without consent, without carrying out any material action and by agreeing with the transferring entity on measures to guarantee the rights of those potentially affected.

Although it is pointed out that the consultation is accompanied by a detailed list of the documents that make up the fund object of donation with a brief description of its content, it must be noted that this information has not finally been incorporated in the transmission made to this authority

Having analyzed the request, which is accompanied by a copy of the notarial powers in favor of the person who represents the entity and who presents the query to the Authority, and having seen the report of the Legal Counsel, the following is ruled.

I

In accordance with what is established in article 5, sections g) and i) of Law 32/2010, of October 1, of the Catalan Data Protection Authority, it is up to the Authority to provide information on the people's rights regarding the processing of personal data, as well as responding to queries made by the entities in their sphere of action on the protection of personal data held by public administrations.

In accordance with article 3 of Law 32/2010, the entities included in the Authority's scope of action are:

"a) Public institutions. b) The Administration of the Generalitat. c) Local bodies. d) Autonomous entities, consortia and other public law entities linked to the Administration of the Generalitat or to local bodies, or that depend on them. e) Entities governed by private law that meet at least one of the following three requirements in relation to the Generalitat, the local bodies or the bodies that depend on them: First. That their capital belongs mostly to the said public bodies.

second That their budget income comes mostly from the said public bodies.

third That in their management bodies the members appointed by said public bodies are a majority.

f) Other private law entities that provide public services through any form of direct or indirect management, if it is files and treatments linked to the provision of these services. g) The public and private universities that make up the Catalan university system, and the bodies that depend on them. h) Natural or legal persons who fulfill public functions in relation to matters that are the responsibility of the Generalitat or local bodies, if it is files or treatments intended for the exercise of these functions and the treatment is carried out in Catalonia i) Corporations under public law that fulfill their functions exclusively in the territorial area of Catalonia for the purposes of what is established in this law."

Outside of these cases - as would be the case of the present private law entity not included in the scope of action of this Authority -, the control of compliance with the data protection regulations corresponds to the Spanish Agency of Data Protection (AEPD), in accordance with articles 47 and 57 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

However, given that in the present case the donation of the documentary fund owned by the organization is addressed to the National Archives of Catalonia, attached to the Department of Culture of the Administration of the Generalitat, and that in the consultation the interest of both parties to carry out said donation is noted, it is considered appropriate to respond to the inquiry raised by this entity.

In accordance with article 17.2 of Law 32/2010, this opinion will be published on the Authority's website once the interested parties have been notified, with the prior anonymization of personal data.

II

Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD) defines data processing as "any operation or set of operations carried out on data 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 , comparison or interconnection, limitation, suppression or destruction" (article 4.2 RGPD).

In the consultation, the donation to the National Archives of Catalonia of a documentary fund made up of 71,400 documents dated between 1808 and the present day, which includes a fund of images and recordings, is proposed. The entity refers in its query that some of the documents contain personal data.

In view of the extensive period of time covered by the documents subject to donation, it should be noted that the data protection regulations do not apply to the protection of personal data of deceased persons.

This is clear from Recital 27 of the RGPD:

"This Regulation does not apply to the protection of personal data of deceased persons. Member States are competent to establish rules relating to the treatment of their personal data."

And also from article 2.2.b) of the LOPDGDD, previously cited:

"Article 2. Scope of application of Titles I to IX and Articles 89 to 94. 1. (...)

2. This organic law will not apply: a) (...)

b) To the data processing of deceased

persons, without prejudice to what is established in article 3. (...)."

Therefore, with respect to documents from the fund that incorporate personal information referring to deceased persons, it must be assumed that there would be no inconvenience, from the perspective of data protection, to proceed with their donation to the National Archives of Catalonia. This is without prejudice to the fact that this personal information, beyond the death of the person to whom it refers, may be protected by other rules.

It must also be taken into consideration that, from the perspective of data protection, there would also be no inconvenience in carrying out the donation of the documents that make up the documentary fund in question that contains information referring to legal entities, given that this information also is excluded from the scope of protection conferred by the regulations on the protection of personal data, as specified by the RGPD itself by establishing that "the protection granted by the present Regulation must be applied to natural persons, regardless of their nationality or location of residence, in relation to the processing of your personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details" (recital 14).

Therefore, the protection regime conferred by the data protection regulations will only be applicable with respect to those documents from this fund donated to the National Archives of Catalonia that contain personal data referring to living natural persons.

IV

According to the RGPD, personal data must be processed lawfully (Article 5.1.a), for which a legal basis is required, which can be the consent of the persons affected or any other of the legal bases indicated in the RGPD itself (article 6.1) or, where applicable, in the LOPDGDD.

This is clear from Recital 40 of the RGPD by establishing that "for the treatment to be lawful, personal data must be processed with the consent of the interested party or on some other legitimate basis established in accordance with law, either in the present Regulation or by virtue of another Law of the Union or of the Member States to which this Regulation refers, including the need to fulfill the legal obligation applicable to the person responsible for the treatment or the need to execute a contract to which the interested party is a party or with purpose of taking measures at the request of the interested party prior to the conclusion of a contract."

At the same time, article 9.1 of the RGPD prohibits "the treatment of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation, and the treatment of genetic data, targeted biometric data to uniquely identify a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person."

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

The RGPD also establishes, in its article 5.1.b), that "personal data will be collected for specific, explicit and legitimate purposes, and will not be subsequently processed in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose")."

Recital 50 of the RGPD specifies the following regarding the application of this purpose limitation principle:

"The processing of personal data with purposes different from those for which they were initially collected must only be allowed when it is compatible with the purposes of their initial collection. In such a case, a separate legal basis is not required, other than the one that allowed the personal data to be obtained. If 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, the tasks and purposes for which the subsequent treatment should be considered compatible and lawful can be determined and specified in accordance with the Law of the Union or of the Member States. Subsequent processing operations for archival purposes in the public interest, scientific and historical research purposes or statistical purposes must be considered compatible lawful processing operations. The legal basis established in the Law of the Union or of the Member States for the treatment of personal data can also serve as the legal basis for further treatment."

From the joint reading of these precepts, and taking into account the definition of data processing made by the RGPD itself (article 4.2), it follows, for the purposes that concern them, that the communication of personal data to a third party could be considered lawful in a case like the one proposed, insofar as it responds to archival purposes in the public interest, it is not necessary in this case to have a legal basis different from that which founded the initial processing of the data by the entity

In the event that the communication affected special categories of data - which would take place if the documents to be donated contained this type of personal data - it would also be necessary for one of the enabling circumstances provided for in article 9.2 of the RGPD, as it could be established in letter j), consisting of "the treatment is necessary for archival purposes in public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, section 1, on the basis of the Law of the Union or Member States, which must be proportional to the objective pursued, respect the right to data protection and establish appropriate and specific measures to protect fundamental interests and rights of the interested party". All this in accordance with the legislation on archives.

v

In the present case, as has been said, it is intended to carry out a donation of a documentary fund that would contain personal data to the National Archives of Catalonia.

In accordance with Law 10/2001, of 13 July, on archives and document management, the National Archives of Catalonia is part of the Archives System of Catalonia, which is the set of organs of the Administration and of files that, with rules and procedures, guarantee the correct management, conservation, protection, dissemination of Catalonia's documentation, and access to this documentation (articles 16 and 26).

The aforementioned Law 10/2001 aims to "promote the management and guarantee the preservation of Catalonia's documentation, both public and private, in accordance with its values, in order to put it at the service of general interests; establish the rights and duties of those who hold them, and also of citizens in relation to the aforementioned documentation, and regulate the Catalan Archives System" (article 1).

In accordance with article 3.1 of this Law, part of its scope of application includes, among others, "private documents that make up or can make up the Catalan documentary heritage".

Law 9/1993, of September 30, on Catalan Cultural Heritage, in its article 19.2, establishes that the documentary heritage of Catalonia includes documents that are included in any of the following cases:

"a) The documents produced or received, in the exercise of their functions and as a result of their political and administrative activity, by the Generalitat, by local bodies and by autonomous entities, public companies and other entities that depend on them . b) Documents more than forty years old produced or received, in the exercise of their functions, by legal entities of a private nature that develop their activity in Catalonia. c) Documents more than one hundred years old produced or received by any natural person and documents less old that have been produced on supports with an expiration date of less than one hundred years, as is the case of audio-visuals on photochemical support or magnetic, in accordance with what is established by regulation. d) The documents included in funds kept in archives of public ownership in Catalonia. e) The documents not included in the previous sections that are included by resolution of the Minister of Culture, with the previous report of the National Archives Council, given their historical or cultural values. (...)"

In the consultation, it is pointed out that a large part of the documents that make up the documentary fund object of donation, specifically 47,000, would be more than 40 years old, so they would form part of the documentary heritage of Catalonia (article 19.2.b) Law 9 /1993).

The sixth additional provision of Law 9/1993 provides that "applies to files and private documents included in any of the cases of article 19 of this Law, in addition to the regime that it establishes, what is provided in the chapter 2 of Title II of the Archives and Documents Act."

Law 10/2001, to which this sixth additional provision of Law 9/1993 refers, imposes on the owners of private documents that are part of the Catalan documentary heritage a series of obligations aimed at guaranteeing their conservation, dissemination and third party access

Specifically, article 13 establishes that:

"The holders of private documents that are part of the documentary heritage have, in addition to those established by Law 9/1993, on Catalan cultural heritage, the following obligations:

a) Have them ordered and inventoried. A copy of the inventory must be given to the Department of Culture. b) Preserve them in their entirety and do not dismember the funds without prior authorization from the Department of Culture. c) Allow access to people who provide documentary evidence of their status as researchers. In order to comply with this obligation, the holder of the document has the right to deposit it temporarily and free of charge in a public archive of the Catalan Archives System.

d) Notify the Department of Culture beforehand of any change in ownership or possession of the documents. e) Do not remove them without prior authorization from the National Commission for Documentary Access, Evaluation and Selection, except in the cases in which another procedure is established by regulation."

Point out that compliance with these obligations falls in any case on the holders of the documents in question. However, in order to meet these obligations more easily, the same Law 10/2001 provides that they can deposit their documentary funds in a public center of the Catalan Archives System.

On this issue, article 14 of Law 10/2001, relating to the deposit of private documents in public archives, provides that:

"1. Owners of private documents can deposit them in a public archive. If there is nothing to the contrary in the deposit agreement, the archive is authorized to: a) Process the documents archivally, while following the centre's usual processes and techniques. b) Facilitate the dissemination of documents for cultural purposes. c) Facilitate access to documents under the general conditions applicable to public documentation.

2. Public administrations can establish compensation systems for archival treatment and the deposit of private documentary funds, especially if the holder of the fund terminates the deposit.

3. In the event of non-compliance with the obligations established by article 13, the Department of Culture may agree to the temporary entry of private documents into a public archive, in order to guarantee the preservation of their values and to ensure compliance with their social function. In these cases, the archive can carry out, without the need for authorization from the owner of the fund, the actions established by section 1."

Article 27 of Law 10/2001 establishes that it corresponds to the National Archives of Catalonia, among other functions, "to enter, preserve and disseminate funds and private documents that, for their testimonial and reference value, concern Catalonia and are of special relevance" (section 1.b).

It is up to the Minister of Culture to propose to the Government of the Generalitat the acceptance of donations in favor of the Generalitat whose object is movable property that is part of the Catalan cultural heritage, among them, the documents that make up the documentary heritage of Catalonia (DA 4a Law 9/1993).

In view of these forecasts, it can be said that, by application of the archives and cultural heritage regulations, the entity effectively has the possibility of giving to the National Archives of Catalonia that documentation from its documentary fund with more than 40 years old, which is part of the documentary heritage of Catalonia, in order to ensure its correct conservation and the necessary archival treatment that allows access.

From the data protection point of view, it can be understood that this donation would in this case constitute further processing of data that would respond to archival purposes in the public interest.

Finding ourselves, therefore, before a subsequent treatment of data that the same data protection legislation considers compatible with the purpose for which they were initially collected (articles 5.1.b) and 89.1 RGPD), it can be said that it would not be necessary to have the consent of the affected persons to carry out the transfer of the documentation referred to the National Archives of Catalonia, given that this treatment - which would ultimately respond to archival purposes

public - it should be understood as legitimated by the same legal basis that founded the treatment of the data in origin.

Consent would also not be necessary in the event that the documentation contains special categories of data, under the terms of Article 9.1 of the RGPD, in conjunction with the authorization of Article 9.2.j) of the RGPD, regarding to which "the treatment is necessary for archival purposes in the public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, section 1, on the basis of the Law of the Union or of the Member States, which must be proportionate to the objective pursued, essentially respect the right to data protection and establish adequate and specific measures to protect the interests and fundamental rights of the interested party", which lifts the general prohibition to treat this type of personal data deserving of special protection

Point out, at this point, that article 26 of the LOPDGDD considers the processing of data for archival purposes in the public interest by public administrations lawful:

"It will be lawful for the Public Administrations to process data for the purpose of archiving in the public interest, which will be subject to the provisions of Regulation (EU) 2016/679 and this organic law with the specialties that derive from the provisions of Law 16/1985, of June 25, of Spanish Historical Heritage, in Royal Decree 1708/2011, of November 18, which establishes the Spanish Archives System and regulates the Archives System of the General Administration of the State and its Public Bodies and its access regime, as well as the autonomous legislation that results from application."

VI

The consultation also raises the issue of whether the rest of the documents that are part of the company's documentary fund, whose antiquity would not exceed 40 years, and which include personal data could also be given to the National Archives of Catalonia without the consent of those

As has been done in the past, from the point of view of data protection, the communication of the personal data that may be contained in these documents to the National Archives of Catalonia could be understood as lawful to the extent that the treatment would respond to the purposes of 'file in the public interest, considering an operation compatible with the initial purpose for which the data were collected (articles 5.1.b) and 89.1 RGPD), and to concur, if applicable, the enabling of the article 9.2.j) of the RGPD. Therefore, it would not be necessary to have a new legal basis that legitimizes the treatment, such as the consent of those affected.

However, without prejudice to what is established in commercial legislation on the conservation of business documents, it must be borne in mind that both the legislation on cultural heritage (article 21 Law 9/1993) and the legislation on archives (article 13 Law 10/2001) oblige exclusively to keep the documents produced by private legal entities that carry out their activity in Catalonia - as would be the case of the entity - when they acquire the seniority of 40 years, at which point they pass to form part of the national documentary heritage (article 19.2.b) Law 9/1993), with the rights and other inherent obligations that this inclusion entails.

This possibility, that is to say, the entry of a private fund into a public archive, does not seem, after examining the applicable regulations, to be also provided for in relation to those documents that are not part of the Catalan documentary heritage, as would be the case, in general, of documents less than 40 years old.

However, in accordance with the provisions of article 19.2.e) of Law 19/1993, previously cited, there is the possibility that documents less than 40 years old can form part of the documentary heritage of Catalonia, to the extent that it is agreed to be deserving of such consideration in attention to its possible historical or cultural value. A decision that would correspond, in any case, to the Minister of Culture, with the previous report of the National Archives Council.

If so, it would be necessary to bear in mind the considerations already made regarding the lawfulness of the communication of personal data contained in the documents subject to donation in accordance with articles 5.1.b) and 89.1 of the RGPD, so it would not be necessary to have of the consent of those affected.

Outside of this assumption, that is, if there is no favorable resolution for their inclusion in the Catalan documentary heritage, the donation of these documents less than 40 years old to the National Archives of Catalonia could not be carried out in attention to the regulations of archives.

In addition to all of this, it should be noted that, once the donation has been accepted by the organization, under the terms agreed by the Minister of Culture, the National Archives of Catalonia will become responsible for the treatment, falling on it to comply with the principles and obligations established in data protection legislation, such as, among others, those relating to conservation (Article 5.1.e) RGPD) and data integrity and security (Article 5.1.f) RGPD).

Also remember that access to these documents must be carried out taking into account the limitations that, with regard to the protection of personal data, are established, in accordance with the RGPD and the LOPDGDD, in the legislation on transparency and access to public information, as this is the regime applicable to access to private documents deposited in public archives (articles 14.1.1 and 34 Law 10/2001), as well as those that may derive- se of the same regulations of archives.

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

Conclusions

From the point of view of data protection, the entity has sufficient legitimacy to give the National Archives of Catalonia the documents it owns and which contain data relating to living natural persons who, in accordance with the cultural heritage legislation, are part of the documentary heritage of Catalonia, either because they have reached the age of 40 years or, in the event that this age has not been reached, if there is a favorable resolution from the Minister of Culture, considering - a subsequent processing of data that would respond to archival purposes in the public interest and, therefore, compatible with the initial purpose for which the data were processed (Article 5.1.b) RGPD). For this purpose, it would not be necessary to have the consent of the affected persons.

Barcelona, August 10, 2020