

CNS 32/2020

Opinion in relation to the query made by a town council on the use of data from the municipal register of inhabitants to send communications via SMS to the population in emergency situations.

A request for an opinion from a town hall is submitted to the Catalan Data Protection Authority in relation to the possibility of using data from the municipal register of inhabitants to send communications via SMS to the population in situations of emergency, specifically for carrying out PCR tests.

In the consultation it is stated that "(...) through its Emergency Committee, the possibility of using the database of the municipal register for which it is responsible has been considered in these emergency situations of the treatment in order to inform in this case the population of the affected neighborhoods of the city of the performance of mass screenings using the PCR test in order to prevent and control the spread of Covid-19 and, therefore, to protect public health .

The element that will determine whether a citizen is susceptible to the test will be the address listed in the municipal register and the notice will be sent by SMS to the mobile phone listed in the same database of the register."

In the consultation, an analysis is also made of the application of the principle of purpose limitation and of the possible legitimizing bases for the treatment that is to be carried out (consent of the interested party, fulfillment of a mission carried out in the public interest or in the 'exercise of public powers conferred on the person in charge of the treatment) and of the regulations that regulate the municipal powers that would be exercised in the specific case described.

As a result of this analysis, the Authority has the following doubts:

- "1. It could be considered that the City Council (...), would have obtained the consent of the interested party at the time of data collection from the municipal register, in order to be able to send SMS messages to the citizen for the indicated purpose, based on the acceptance clause of the data protection policy indicated above?**
- 2. Based on the above, if the answer is positive, could SMS messages be sent to the citizens of the affected neighborhoods taking the consent of the interested party as a legitimate basis?**
- 3. In the event that it was considered that the City Council (...) did not have the consent of the interested parties for the above purpose, it could take into consideration as a legitimizing basis the one provided for in article 6.1 e) of the RGPD take into account consideration of what is provided for in LRBRL and TRLMRLC and in particular the powers for the protection of public health?**
- 4. In the event that the rules indicated in the previous question were not sufficient to carry out the stated purpose, it could be taken into consideration as a legitimizing basis**

in the same article 6.1 e) of the RGPD as provided for in article 52 i) of law 18/2009 on public health and in article 47.1 of law 4/1997, on civil protection, taking into account in addition that the City Council has recently approved the DUPROCIM, (unique municipal civil protection document) in which it is expressly provided that SMS notifications can be made to the population?

5. In accordance with the above, the City Council (...), can use the database of the municipal register to send SMS messages to the citizens of the population in matters of public health and civil protection, in situations of emergency?"

Having analyzed the query, which is not accompanied by other documentation, in accordance with the report of the Legal Counsel I issue the following opinion:

I

(...)

II

The City Council requests an opinion regarding different issues related to the possibility of using data from the Municipal Register of Inhabitants, in certain emergency situations, to send SMS messages to the population of the municipality, specifically, as consequence of the covid-19 pandemic situation for mass screening and communication to people living in the neighborhoods affected by the performance of PCR tests.

In order to focus the answer to the questions raised, it is necessary, in the first place, to mention the legal bases that underpin the treatment of the population register data by the councils.

The Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), establishes that all processing of personal data must be lawful, loyal and transparent (article 5.1.a)), and also that in order for a treatment to be lawful it is necessary to have, at least, a legal basis of those provided for in article 6.1 of the RGPD that legitimizes this treatment, either the consent of the affected person, whether it is any of the other circumstances provided for in the same precept.

In the field of public administrations, the legal bases provided for in letters c) and e) of article 6.1 of the RGPD are of particular interest, according to which the treatment will be lawful when it is necessary for the fulfillment of 'a legal obligation applicable to the controller (letter c), or when the treatment is necessary for the fulfillment of a public interest or in the exercise of public powers conferred on the controller (letter e).

As can be seen from Article 6.3 of the RGPD, the legal basis of the treatment indicated in both cases must be established by European Union Law or by the law of the Member States that applies to the person responsible for the treatment, which in the case of the Spanish State, it must be a rule with the rank of law as it follows from article 53 CE and article 8 of Organic Law 3/2018, of

December 5, protection of personal data and guarantee of digital rights (hereinafter LOPDGDD).

Therefore, to consider the data treatments covered by the legal bases of article 6.1.c) i) of the RGPD there must be a regulatory provision with the rank of law.

In the case of the municipal register of inhabitants, Law 7/1985, of April 2, regulating the bases of the local regime (hereafter, LRBRL) is the norm with the rank of law that regulates the definition, content and the obligations in relation to this administrative record.

Thus, article 16.1 of this law defines the Municipal Register in the following terms:

"1. The municipal register is the administrative register containing the residents of a municipality. Your data constitutes proof of residence in the municipality and of habitual residence in the same. The certifications that are issued of said data will have the character of a public and binding document for all administrative purposes. (...)"

The LRBRL (and, in the same sense, the revised Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28, hereinafter TRLMRLC) establishes the obligation of all residents to be registered in the Register of the municipality where he has established his residence with a triple purpose: to determine the population of a municipality, to be required to acquire the status of resident and to serve to accredit residence and habitual residence (articles 15 and 16 LRBRL).

Likewise, it establishes that the registration in the Municipal Register will contain the following data as mandatory: first and last name, sex, usual address, nationality, date and place of birth, number of the identity document (or, for foreigners, the card residence or identity document number), certificate or school or academic degree, and, finally, those data that may be necessary for the preparation of electoral censuses, as long as fundamental rights are respected (article 16.2 LRBRL). With regard to the data that can be contained in the register, article 57.2 of the Reglamento de Población y Demarcación Territorial de las Entidades Locales establishes the data that can be collected voluntarily, and specifically in section b) of this article it is possible to collect the telephone number. On the other hand, and for the purposes of articles 14.1 and 41 (sections 1 and 6) of Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations, for the communications and notices of electronic notifications, e-mail can also be requested, when the citizen has chosen to communicate with the City Council by electronic means.

The LRBRL attributes to the city council the powers to manage the municipal register, in this sense article 17.1 establishes that "the formation, maintenance, review and custody of the municipal register corresponds to the City Council, in accordance with what the State legislation. (...)"

So, from the point of view of the data protection regulations, the treatment of data from the Municipal Register of Inhabitants by the councils exercising the functions established in the LRBRL and the TRLMRLC would in principle be a legitimate treatment for meet the conditions provided for in letter e) of article 6.1 of the RGPD.

III

In the case we are dealing with, the data from the municipal register is intended to be used for a different ulterior purpose than the one for which it was collected. It should be borne in mind that this data processing, like any other, must also comply with the rest of the principles established in the RGPD, especially, for the purposes that are of interest in the present case, the principle of limitation of the collected purpose in article 5.1.b) of the RGPD which establishes:

"1. The personal data will be:

(...) b) collected with 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") ; (...)"

Regarding this, recital 50 of the RGPD provides that:

"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 the subsequent treatment. In order to determine whether the purpose of the subsequent treatment is compatible with the purpose of the initial collection of personal data, the person responsible for the treatment, after having fulfilled all the requirements for the authorization of the original treatment, must take into account, among other things , any relationship between these purposes and the purposes of the intended subsequent treatment, the context in which the data were collected, in particular the reasonable expectations of the interested party based on their relationship with the person responsible for their subsequent use, the nature of the data personal, the consequences for the interested parties of the planned subsequent treatment and the existence of adequate guarantees both in the original treatment operation and in the planned subsequent treatment operation. (...)"

As we have seen before, the Municipal Register is a type of file with a very specific purpose: to determine the population of the municipality, to be required to acquire the status of resident and serve to certify residence and habitual address (article 15 LRBRL).

In accordance with the aforementioned principle of purpose limitation (Article 5.1.b) RGPD), the data of the Municipal Register may only be used for other purposes to the extent that they are not incompatible with this triple purpose that justifies it the initial collection.

The compatibility analysis must be carried out taking into account the criteria provided for in article 6.4 of the RGPD which establishes that:

"4. When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives indicated in article 23, paragraph 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data were initially collected, will take into account, among other things:

a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided;

b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller;

c) the nature of personal data, in particular when special categories of personal data are treated, in accordance with article 9, or personal data relating to criminal convictions and infractions, in accordance with article 10;

d) the possible consequences for the interested parties of the planned subsequent treatment;

e) the existence of adequate guarantees, which may include encryption or pseudonymization."

In accordance with the provisions of article 6.4 reproduced, the processing of data for a different ulterior purpose is considered lawful in the cases in which the consent of the interested party is available or there is a rule with the rank of law that equates the treatment to achieve the objectives of article 23.1 of the RGPD and in those cases in which it is considered that the subsequent treatment is compatible by application of the criteria listed in the same article.

On this issue, this Authority has considered, in different opinions (among others, CNS 9/2013, CNS 67/2015, CNS 46/2016, CNS 12/2017, CNS 47/2017, CNS 39/2018, CNS 19 /2019 CNS 2/2020, available on the website www.apdcat.cat) that, in view of the type of personal data that must be included in the Register (article 16.2 LRBRL), it is understood that there may be municipal purposes that could enable the processing of these data to the extent that they are not incompatible with the purpose of the Register, described above. Specifically, compatibility has been determined for the exercise of the powers that the local regime legislation attributes to the town councils, mainly following the provisions of articles 25 and 26 of the LRBRL (and, in similar terms, the articles 66 and 67 of the TRLMRLC), which require being able to identify the people resident in the municipality.

It has also been pointed out in the aforementioned opinions that, since the LRBRL itself (article 16.3) admits the communication of data from the Municipal Register to other public administrations that

they request them when they are necessary for the exercise of their powers and exclusively for matters in which the residence or domicile are relevant data - a possibility also endorsed by the Constitutional Court (STC 17/2013, of January 31, cited)-, with greater reason it can be admitted that the different units or administrative bodies of the same municipality can access these data when they are necessary for the exercise of their functions and when the given residence or address is relevant.

IV

In the case raised in the consultation, the processing of the data from the register would have the purpose of identifying the people who reside in a certain district of the municipality that is considered affected and to notify them through an SMS message of the completion of the tests PCR, that is to say a purpose related to matters of public health and civil protection.

As we have seen, article 6.4 of the RGDPD establishes that further processing can be considered compatible if the consent of the interested party is available.

With regard to consent, the City Council considers whether "It could be considered that the City Council of (...), would have obtained the consent of the interested party at the time of data collection from the municipal register, in order to be able send SMS messages to the citizen for the purpose indicated, based on the acceptance clause of the data protection policy indicated above?"

As indicated in the same text of the consultation, during the collection of data in the registration process in the municipal register, citizens are offered the option of accepting a clause with the following text:

"I have read and accept the information clause on Data Protection and authorize the processing of my data to notify me and receive information by electronic means in all my procedures from the City Council (...) and its bodies autonomous".

And it is informed, as stated in the consultation, of the following purpose:

"Management of contact data to notify me electronically and to use this data in order to be informed in all my procedures."

Article 4.11 of the RGDPD defines the consent of the interested party as "any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a declaration or a clear affirmative action, the treatment of data personal that concern him".

In addition to this definition, the GDPR incorporates some additional provisions on the main elements of consent in article 7 and recitals 32, 33, 42 and 43.

Article 7 establishes:

"1. When the treatment is based on the consent of the person concerned, the person responsible must be able to demonstrate that he consented to the treatment of his personal data.

2. If the interested party's consent is given in the context of a written statement that also refers to other matters, the request for consent will be presented in such a way that it is clearly distinguished from the other matters, in an intelligible and easily accessible form and using clear and simple language. No part of the statement that constitutes an infringement of this Regulation will be binding.

3. The interested party will have the right to withdraw their consent at any time. The withdrawal of consent will not affect the legality of the treatment based on consent prior to its withdrawal. Before giving consent, the interested party will be informed of this. It will be as easy to withdraw consent as to give it.

4. When evaluating whether the consent has been freely given, it will be taken into account to the greatest extent possible the fact of whether, among other things, the execution of a contract, including the provision of a service, is subject to the consent to the treatment of personal data that are not necessary for the execution of said contract."

Recital 32 highlights that "(...)The consent must be given for all the processing activities carried out with the same or the same purposes. When the treatment has several purposes, consent must be given to all of them. (...)".

In this same sense, recital 42 includes "(...) For consent to be informed, the interested party must know at least the identity of the person responsible for the treatment and the purposes of the treatment to which the personal data is intended. Consent must not be considered freely given when the interested party does not enjoy true or free choice or cannot deny or withdraw their consent without suffering any harm.(...)".

Finally, recital 43 emphasizes the relationship that exists between the interested party and the data controller so that "(...) To guarantee that consent has been given freely, this should not constitute a valid legal basis for the treatment of personal data in a concrete case in which there is a clear imbalance between the interested party and the person responsible for the treatment, in particular when said person responsible is a public authority and it is therefore improbable that consent has been given freely in all the circumstances of that particular situation. It is presumed that the consent has not been freely given when it does not allow the separate authorization of the different personal data processing operations despite being adequate in the specific case (...)".

In this regard, the European Data Protection Committee in Directives 05/2020 on consent in Regulation 2016/679, adopted on May 4, 2020, states:

"(...) it is unlikely that public authorities can rely on consent for treatment, since when the person in charge is a public authority, there is often a clear imbalance of power in the relationship between the person in charge and the interested party. It is also clear in most cases that the interested party will not have realistic alternatives to accept the treatment (terms) of this controller. The BDE considers that there are other legal bases that, in principle, are more appropriate for the activity of public authorities."

Despite this, it is not ruled out that in certain cases consent can be a legitimate basis for treatment by public administrations, as long as it is guaranteed that consent is given freely and no harm is caused to the citizen who does not grants

In the case at hand, although the complete form is not available, the clause reproduced in the consultation refers to the reading and acceptance of the information clause on data protection, and incorporates the citizen's consent to so that the City Council can process your data "to notify me and receive information by electronic means in all my procedures of the City Council (...) and its autonomous bodies". With this clause and as long as the citizen can freely refuse it, the right to communicate electronically with the public administrations provided for in articles 14.1 and 41 (sections 1 and 6) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations.

It is therefore a matter of consent granted for a specific purpose such as the notification and communication by electronic means of procedures or procedures in which the person granting the consent has the status of interested party. This authorization does not enable the municipality to use the data for a different purpose, such as in this case the communication of the need to carry out tests in an emergency or public health risk situation that are not part of of any administrative procedure.

Beyond that, as has been explained, although consent as a legitimate basis for the processing of data by public authorities is not totally excluded in the legal framework of the RGPD, the citizen must have the ability to decide on their data in such a way that in the event of not giving consent this does not entail a detriment or deprive them of any basic service of the public entity, nor prevent them from exercising any right. In the case at hand, in order for the city council to be able to base the treatment on the consent of the citizens expressly collected for the purpose to which the consultation refers, it should enable an alternative mechanism that guarantees communication with those citizens that they did not give their consent to the processing of the data since, otherwise, this consent could not be considered valid because it would deprive them of the possibility of receiving a service with the relevance of the aforementioned notices.

Consequently, in response to the first and second of the questions raised by the city council, and based on the elements available, it can be concluded that the consent referred to would only be a legitimate basis for the change of purpose of the register data, if registration in the register is not conditioned on the provision of this consent and if citizens who do not consent have alternatives that are not substantially more burdensome for them, to access the information in the notices.

v

In the absence of consent, it is necessary to analyze whether the ulterior purpose can be compatible from other elements other than consent.

As stated in ground III of this opinion, in view of the type of personal data that must be included in the Register (article 16.2 LRBRL), it can be understood that there is

compatibility for the exercise of the powers that the local regime legislation attributes to the municipalities, mainly as a result of the provisions of articles 25 and 26 of the LRBRL.

At the outset, as it has already admitted in other opinions to which we have referred above, article 16.3 LRBRL, which admits the communication of data from the Municipal Register to other public administrations that request them when they are necessary for the exercise of its powers exclusively for matters in which the residence or domicile is relevant data, would also allow the use of these data to be considered compatible for the different units or administrative bodies of the same municipality to access these data when are necessary for the exercise of their powers and when the given residence or address is relevant.

Specifically, with respect to the treatment proposed in the consultation, it is necessary to take into consideration article 25.1 of the LRBRL (and, in the same terms, article 66.1 TRLMRLC) when it establishes that "the Municipality, for the management of its interests and within the scope of its competences, it can promote all kinds of activities and provide public services that contribute to satisfying the needs and aspirations of the neighborhood community".

And, likewise, article 25.2 which provides that "The Municipality will in any case exercise its own competences, in the terms of the legislation of the State and of the Communities among which that Autonomous, in the following We deal with the matter to provide for consideration of the effects of civil protection and protection of public health. And in the same sense the TRLMRLC in article 66.3 letters c) ih) and letter i) which also foresees functions in the matter of "participation in the management of primary health care".

These precepts must be put in connection, on the other hand, with articles 69.1 of the LRBRL and 154 of the TRLMRLC, which impose on local corporations the duty to provide the most extensive information about their activity, and also the participation of all citizens in local life, which would include the possibility of informing residents about matters of public interest and relevance for citizens, such as in this case the carrying out of PCR tests for residents in certain neighborhoods of the municipality.

More specifically, in matters of civil protection, Law 4/1997, of 20 May, on civil protection of Catalonia, whose purpose is "civil protection in Catalonia, which includes actions intended to protect people, goods and the environment in situations of serious collective risk, catastrophes and public calamities", recognizes the mayors as civil protection authorities (article 40) and the municipalities as basic entities of civil protection in Catalonia and with general capacity of action and planning in this matter (article 47).

The aforementioned precepts of the LRBRL, as well as the aforementioned sectoral regulations, attribute to the town councils competences in matters of actions in situations of risk for the population can enable them to carry out the actions described in the consultation.

In accordance with this attribution of powers, the processing of data from the register for the identification of residents in a certain district of the municipality and for the communication to the population of emergency situations can be considered necessary for the fulfillment of a mission in the public interest or for the exercise of public powers conferred on the data controller (article 6.1 RGPD). Therefore, this could constitute the legal basis of the treatment.

For the purposes of implementing these actions, the data relating to the address is relevant, given that the condition of being a resident of a certain neighborhood will determine the need to carry out the PCR tests necessary for the control of the pandemic. And, as we have seen, the status of neighbor is acquired by registration in the Register (article 15 LRBRL).

Beyond the enablement offered by this article 16.3 LRBRL, we should reach the same conclusion if we do the compatibility analysis according to the criteria provided for in article 6.4 RGPD.

In this sense, and with regard to letter a) of article 6.4, it must be taken into consideration that the data subject to treatment, according to the query, would be merely identifying personal data (name, surname, address and telephone number) in such a way that its treatment for these ulterior purposes should not lead to a special impact on the right to data protection of those affected (Article 6.4.c) RGPD) or serious consequences for them (Article 6.4.d) RGPD). On the other hand, it is within the expectations that any citizen can have the possibility that, in the absence of a specifically planned communication channel, the data declared in the municipal register, especially that relating to the telephone that is declared voluntarily, may be used by the City Council to contact them for the purpose of exercising municipal powers.

For all that, and in response to questions numbers 3 to 5 of the consultation carried out by the city council, which are reproduced in the antecedents of this opinion, it can be concluded that the use of data from the Register for the actions indicated in the consultation, it can be considered legitimate, as it concerns purposes compatible with that of the Register (Article 5.1.b) RGPD) protected by the LRBRL itself, the TRLMRLC and the aforementioned sectoral regulations (Article 6.4 RGPD).

Conclusions

The consent collected by the City Council in accordance with the clause that is reproduced in the text of the consultation would enable the City Council to notify by electronic means and the communication of the procedures in which the person who facilitated it has the condition of interested party under the terms of the LPAC, but not for the sending of notices about the performance of PCR tests through SMS messages to the citizens of the affected neighborhoods.

The use of data from the Register for the actions indicated in the consultation has as its legal basis the fulfillment of a mission in the public interest or the exercise of public powers conferred on the data controller (Article 6.1.e) RGPD), and it would be a treatment compatible with the purposes of the Register protected in the LRBRL itself, the TRLMRLC and the aforementioned sectoral regulations (Article 6.4 RGPD).

Barcelona, September 18, 2020