

CNS 35/2020

**Opinion in relation to the query made by a city council on access to dissociated data of the employees of a concessionary company for the municipal gardening service, road cleaning and waste collection.**

**A request for an opinion from a city council is submitted to the Catalan Data Protection Authority in relation to the request for access to dissociated data of the employees of a concessionary company for the municipal gardening service, road cleaning and waste collection, in order to study the economic data for the purposes of assessing a possible subrogation of the service.**

**In the consultation it is stated that the City Council requested from the concessionaire company information on the "date of birth, professional category and type of contract and date of termination of the contract in the event that it is temporary" of the workers of the company, without first and last name, for the purposes of evaluating the different possible alternatives for the management of the service, including the current indirect management of the service.**

**According to him, the concessionaire company gave a negative response to the request, arguing that "the delivery of this data violates the regulations on Data Protection".**

**Based on all this, the City Council requests an opinion regarding the following inquiries:**

- "1) Determine if the dissociated data on date of birth, professional category and type of contract and contract end date in the event that it is temporary, of the workers are personal data.**
- 2) Determine whether the City Council has the right of access to this information, in accordance with its powers in the municipal service."**

**Having analyzed the consultation, which is not accompanied by other documentation, in view of the current applicable regulations and in accordance with the report of the Legal Adviser, I issue the following opinion:**

**I**

**(...)**

**II**

**In its consultation, the city council states that in order to analyze the different possible alternatives for the management of the municipal service of gardening, road cleaning and waste collection, including the current indirect management of the service, it requires information on the "date of birth, professional category and type of contract and date of termination of the contract in the event that it is temporary" of the workers of the concessionary company, without their first and last names.**

In order to answer the first of the questions raised by the city council regarding whether this data is considered personal data, it must be taken into account that Regulation (EU) 2016/679, of the Parliament and of the European Council, of 27 of April 2016, General Data Protection Regulation (hereinafter, RGPD) defines personal data as: "all 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; (Article 4.1 GDPR).

Regarding the concept of personal data, recital 26 of the RGPD specifies that:

"The principles of data protection must be applied to all information relating to an identified or identifiable natural person. Pseudonymized personal data, which could be attributed to a natural person through the use of additional information, must be considered information about an identifiable natural person. To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the data controller or any other person to directly or indirectly identify the natural person must be taken into account. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances. Therefore, the principles of data protection should not be applied to anonymous information, that is, information that is not related to an identified or identifiable natural person, nor to data converted into anonymous data in such a way that the interested party is not identifiable, or to be Consequently, this Regulation does not affect the treatment of said anonymous information, including for statistical or research purposes."

Therefore, according to the RGPD a personal data is any information about an identified or identifiable natural person. For this purpose, an identifiable natural person must be considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as, for example, their first and last name, an identification number, data from location, an online identifier or one or more elements of that person's physical, physiological, genetic, psychological, economic, cultural or social identity.

Thus, both the data that directly identify a person (name and surname, ID, etc.), as well as those other data that allow them to be identified indirectly (information that, although it is not directly linked to a specific person if it is associated with other data would allow it to be identified without disproportionate effort), are personal data and are protected by data protection regulations.

In the case of the workers of the concessionary company of the municipal garden service, road cleaning and waste collection, the name and surname or the number. of DNI allow the affected person to be directly identified.

In the case of data on date of birth, professional category, type of contract, end date, etc., these are data that, taking into account the context in which they would be provided (number

of affected workers, dimensions of the City Council) cannot be ruled out that they may also allow the identification of the affected persons, especially if, as in the case at hand, all this information can be combined.

Therefore, the set of information that is requested must be considered personal information of the affected workers and, consequently, the personal data protection regulations will apply to them, given that, as we have seen, in accordance with Recital 26 of the RGPD, establishes the applicability of data protection regulations, even if the information has been pseudonymized.

### III

The second question raised refers to whether the city council can access the information of the workers of the concessionary company in accordance with their competences in the municipal service of gardening, road cleaning and waste collection.

From the point of view of the data protection regulations, the access by the city council to the data of the workers of the concessionary company of the municipal gardening service, road cleaning and waste collection is data processing, understood as "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction." (Article 4.2 RGPD), which has been subject to the principles and guarantees established by that Regulation.

Article 5.1.a) of the RGPD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

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:

"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. (...)"

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).

However, as can be seen from Article 6.3 of the RGPD, the legal basis for 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 treatment.

The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundamental right, has the status of law.

In this sense, article 8 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights establishes the legal scope of the enabling rule.

In order to answer the question raised, it will be necessary to analyze whether there is a legitimate basis for this data processing.

#### IV

The City Council states that it needs the information from the workers of the concessionary company for the municipal road cleaning and waste collection service in order to carry out a study on the different alternatives for the management of the service, including the current indirect management model . No additional information regarding the service concession contract has been

In this context, it should be taken into account that article 66.3 of Legislative Decree 2/2003, of April 28, which approves the revised text of the Municipal and Local Regime Law of Catalonia (hereinafter, TRLMRLC), determines the specific competences of the municipalities, among which it is worth noting, for the purposes of interest in this opinion, "road cleaning, waste collection and treatment services, sewers and waste water treatment" (letter l) .

In accordance with articles 67.a) of the TRLMRLC and 26.1.a) Law 7/1985, of April 2, Regulating the Bases of the Local Government, the road cleaning service and the collection and treatment of waste is one of the minimum public services that all municipalities must provide.

The municipality as owner of the service is responsible for guaranteeing users the correct operation of the same, and is obliged to ensure that its management is carried out in the most sustainable and efficient way possible, directly or indirectly (article 249 TRLMRLC).

With respect to these services, the same local regime regulations provide for a management and control capacity, contained in article 251 of TRLMRLC, "Local bodies have the power to manage and control the public service, which entails the exercise of the power of modification and the implicit inclusion of the clause to update the service in accordance with economic and social standards".

Regarding the indirect management of public services, article 249.5 of the TRLMRLC provides that "The indirect management of public services can be carried out through any of the forms established by the public sector contract regulations for the management contract of public services".

In the same sense, article 85 of the LBRL establishes:

"1. Local public services are those provided by local entities within the scope of their powers.

2. Local public services must be managed in the most sustainable and efficient way among those listed below:

A) Direct management:

a) Management by the Local Entity itself.

b) Local autonomous body.

c) Local business public entity.

d) Local mercantile company, whose share capital is publicly owned.

The forms provided for in letters c) and d) may only be used when it is proven by means of a supporting memorandum drawn up to that effect that they are more sustainable and efficient than the forms provided for in letters a) and b), for which they must be taken into account the criteria of economic profitability and recovery of the investment. In addition, the file must contain the supporting report of the advice received that will be presented to the Plenary for its approval, where the reports on the cost of the service will be included, as well as the technical support received, which must be publicized. For these purposes, a report will be obtained from the local auditor who will assess the financial sustainability of the proposals raised, in accordance with the provisions of article 4 of Organic Law 2/2012, of April 27, on Budgetary Stability and Financial Sustainability.

B) Indirect management, through the different forms provided for the public services management contract in the revised text of the Public Sector Contracts Law, approved by Royal Legislative Decree 3/2011, of November 14.

The form of management that is chosen must take into account the provisions of article 9 of the Basic Statute of Public Employees, approved by Law 7/2007, of April 12, with regard to the exercise of functions that correspond exclusively to public officials."

Therefore, the local regulations, which allow the municipality to opt for different forms of management of municipal public services, require the provision of services under the criteria of efficiency and sustainability and the preparation of the corresponding studies and reports that justify compliance of these requirements. These studies will have to analyze the cost of the service for the determination of which it seems necessary to have data on the current wo

On the other hand, Law 9/2017, of November 8, on Public Sector Contracts (hereinafter, LCSP), regulates the service concession contract and introduces numerous control mechanisms in order to guarantee the quality of the execution of the provision of the services contracted by the public sector, but also mechanisms to determine the economic efficiency of

Specifically, article 285.2 of the LCSP provides " In service concession contracts that the processing of the file will be preceded by the completion and approval of a viability study of the same or, in its case, of an economic-financial viability study, which will have a binding character in the suppositions in which they conclude that the project is unviable."

When it comes to a service that is already being provided by a concessionary company, it is clear that part of the information necessary to carry out the studies referred to in the contract regulations will be that which is linked to the working conditions of the working people from its workforce who are attached to the aforementioned service.

The forecasts analyzed would be sufficient authorization so that the city council can request the necessary information to prepare the necessary efficiency studies from the company that is providing the service at that time.

It cannot be overlooked, moreover, that the same public procurement legislation provides the administration with different control mechanisms for the provision of the service, which must allow it to monitor and control and have the necessary information to guarantee the proper functioning of the same. Thus, in the case of the contracting of public services, the Administration retains the necessary police powers to ensure the smooth running of the contracted services in accordance with the provisions of article 287.2 of the LCSP and must be able to access the accounting of all revenues and expenses of the concession (289.2 of LCSP).

Likewise, article 62 LCSP, in addition to providing for the appointment of a person in charge of the contract, regardless of the ordinary monitoring and execution unit of the contract, provides specifically for cases of concessions of public works and services, the appointment of a person to act in defense of the general interest, to obtain and to verify compliance with the obligations of the concessionaire, especially with regard to the quality of the provision of services.

In any case, taking into account, on the one hand, the aforementioned local regulations, which require the municipality to manage public services in the most sustainable and efficient way possible and to document this through the corresponding studies and reports, and , in the same sense as the regulations on public sector contracts that require the completion of economic and financial feasibility studies prior to contracting, and the accreditation of the efficiency of the contracting of the service, the communication of labor information is justified of the workers/res of the concessionary company attached to the service, necessary for the completion of the corresponding studies and reports.

Therefore, the processing of this data could be considered legitimate in accordance with article 6.1.c) and e) of the RGPD, in relation to the aforementioned regulations.

However, the principle of data minimization (Article 5.1 d) RGPD) requires that the data subjected to treatment are adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated.

In the case analyzed, there is no doubt that it may be relevant to have the individualized information on the date of birth (for the purposes of determining the possible retirement date of that worker), professional category, type of contract and date of completion, of each worker for the purposes of carrying out a study on the cost of the service and analyzing the alternatives to the service model. On the other hand, it does not seem necessary to have the first and last names of the workers, or another identifier that allows them to be identified directly.

For this reason, the alternative proposed by the City Council to request the information dissociated from the first and last names of the working people is appropriate.

A different assumption would be that once the studies have been carried out on the service delivery model, the city council decides to provide it directly, and is obliged by the regulations applicable to the sector to subrogate the personnel providing the service, as established article 130.3 of LCSP:

"In the event that a Public Administration decides to directly provide a service that until now had been provided by an economic operator, it will be obliged to subrogate the personnel who provided it if this is established by a legal norm, a collective agreement or an agreement of collective bargaining of general effectiveness."

In this case the treatment would be lawful in accordance with article 6.1.c) of the RGPD as there is a legal obligation (article 130 LCSP) whose compliance would require the communication of all the information about the workers with respect to the administration has a subrogation obligation.

## Conclusions

Data on the date of birth, professional category, type of contract and date of termination of the contract of the employees of the concessionary company referred to in the inquiry shall be considered personal data, even if provided separately of the first and last names of the working people.

The city council has an authorization or legal basis to receive this information from the concessionaire given the provisions derived from both the local regime regulations and the public procurement regulations. However, the delivery must comply with the rest of the principles of the data protection regulations, in particular the principle of minimization, so it is not justified to include the first and last names of the working people affected

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