

Report in relation to the Draft Decree which establishes the criteria and procedure for the selection of temporary civil servants to cover vacant jobs in the Administration of the Generalitat de Catalunya and its autonomous bodies

The Draft Decree establishing the criteria and procedure for the selection of temporary civil servants to cover vacant jobs in the Administration of the Generalitat is presented to the Catalan Data Protection Authority Catalonia and its autonomous bodies, so that the Authority issues its opinion on the matter.

The Draft Decree consists of a preamble, fourteen articles, three additional provisions, a transitional provision, a repealing provision and a final provision.

Having analyzed the Draft Decree, which is not accompanied by any other documentation, and having seen the report of the Legal Counsel, the following is reported.

Legal foundations

I

(...)

II

The purpose of the Draft Decree being examined is to "regulate the criteria and procedure for the selection of interim civil servants to temporarily cover vacant jobs until they are covered by career civil servants" (Article 1).

To be admitted to the selection procedure, and beyond submitting the corresponding application for participation (article 5), applicants must possess the same requirements and conditions required to be admitted to the civil service selection tests career (article 6.1) and, in turn, not incur any of the causes of exclusion provided for in article 6.2 of the decree.

In terms of its development, a system of pre-selection of applicants is regulated, according to a classification into groups in accordance with a successive order of priority, and depending on what the call provides for the maximum number of people who can compete in the selection procedure (article 7).

Likewise, the selection procedure is divided into two phases: a first phase in which the merits of the preselected persons are assessed and a second phase in which the professional skills and knowledge of these persons are assessed (Article 10).

The procedure ends with the appointment of the selected candidate (Article 11), although it is possible, under certain conditions, to create waiting lists (Article 13).

The Draft Decree also regulates several measures intended to facilitate the participation of people with disabilities in the selective procedures for temporary staff under conditions of equality with the rest of the applicants (Article 8).

In view of these forecasts, it is clear that the processing and resolution of the selection procedure regulated by this Draft Decree will involve the processing of a set of personal information, even specially protected data, which will have to adapt to the provisions of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (RGPD) and Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (LOPDGDD).

In this sense, the explicit reference made to the data protection regulations in article 5.3 of the Draft Decree should be positively assessed, without prejudice to the considerations that will be made later on in this regard.

Having said that, those provisions of the Draft Decree that have a particular impact on the fundamental right to the protection of personal data are examined below, the perspective from which this report is issued.

III

Article 5.3 of the Draft Decree provides, in relation to requests to participate in the procedure for the selection of interim personnel by vacancy, the following:

"5.3 In the applications for participation, which will be formalized and submitted electronically, the applicants will declare, under their responsibility, that they meet the necessary requirements to be admitted and that the data relating to the alleged merits are true. Likewise, in the terms provided for in the current regulations on the protection of personal data, it will be necessary to obtain express consent for the processing of the personal data necessary to take part in the call and for the processing of the selection procedure, also authorizing the convening body and the Selection Committee to carry out the appropriate checks on the veracity of the data."

This precept establishes, on the one hand, the need to obtain the express consent of applicants so that the body competent to convene and process the selection procedure can process the data that, for that purpose, are necessary.

It should be noted that, in general, the legal basis for data processing in relations with the Administration, in those cases where there is a relationship in which it cannot reasonably be said that there is a situation of balance between the person responsible for treatment (the administration) and the affected person, must not be consent (Article 6.1.a) RGPD), but some other of the legal bases of Article 6.1 of the RGPD, such as compliance with a legal obligation (article 6.1.c)) or the fulfillment of a mission in the public interest or in the exercise of public powers (article 6.1.e)).

The RGPD does not consider consent as a valid legal basis for the processing of data by a public administration, since it could hardly be understood as having been given freely, as required by the RGPD itself (Article 4.11)). Recital 42 of the RGPD provides, in this sense, that "the consent must not be considered freely given when the interested

does not enjoy true or free choice or cannot refuse or withdraw his consent without suffering any prejudice”.

In a case such as the one being examined, it does not seem that only the consent of the applicant can be considered as a valid legal basis for the processing of his personal data necessary for processing the selection procedure, given that it seems clear that, if revoked, he would suffer a loss in the exercise of a right, since he would not be able to continue his participation in the procedure.

Legitimation for the processing of the data by the competent body regarding the applicants would in any case be given by the concurrence of other legal bases, as is the case of those relating to the processing being necessary for the exercise of a mission in the public interest (article 6.1.e)) or for the fulfillment of a legal obligation (article 6.1.c)), in accordance with the regulations on public service.

In the event that the processing of the selection procedure must involve the processing of special categories of data (Article 9 RGPD), as could be the case of applicants with disabilities (Article 4.15 RGPD), in which it is also necessary, to consider the legitimate treatment, the concurrence of any of the enabling circumstances provided for in article 9.2 of the RGPD, making the agreement that, in this case, could be applicable, in attention to the provisions of the function regulations public regarding the access of these people to the public function, the enabling assumption of article 9.2.b) of the RGPD relating to that "the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the responsible of the treatment or of the interested party in the field of labor law and social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the E member states that establish adequate guarantees of respect for the fundamental rights and interests of the interested party".

In view of this, in order to avoid possible confusion about the legal basis that legitimizes the processing of the data of the applicants, it could be advisable to remove from the article this provision on the need to obtain express consent.

On the other hand, in this article 5.3 it is established the need to also obtain the consent or authorization of the aspirants to make the appropriate checks on the veracity of the data declared by them in the application for participation in the procedure of selection

Point out that the possibility of checking the declared data with the data available to other public administrations would not derive from the consent of the affected persons, but from the possibility provided for in article 35.3 of Law 26/2010, of August 3 , of the legal and procedural regime of the public administrations of Catalonia and of what is foreseen in the eighth Additional Provision of the LOPDGDD.

Article 35.3 of Law 26/2010 provides that "without prejudice to the specific effects determined in each case by the sectoral legislation, the presentation of the responsible declaration within the framework of an administrative procedure empowers the competent public administration to verify the conformity of the data contained therein."

On the other hand, the eighth additional provision of the LOPDGDD provides that "when requests are made by any means in which the interested party declares personal data held by the Public Administrations, the recipient body of the request may carry out of their powers the necessary checks to verify the accuracy of the data."

Therefore, it would not be necessary to have the consent of the applicant to carry out checks on the veracity of the declared data, since said data check would be protected by the legal basis of article 6.1.e) of the RGPD, relating to the fulfillment of 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 Law 26/2010 and the LOPDGDD.

At this point, it is appropriate to refer to article 7.3 of the Draft Decree. This article provides that:

"7.3 The data relating to the people applying for inclusion in the different groups is checked ex officio in accordance with the information contained in the corresponding registers. The competent general management in the field of civil service must draw up and keep permanently updated the list of applicants who have passed without a place the last two selective processes for access to bodies, scales or specialties, together with the score obtained in each of the selective tests of the opposition phase of these selective processes."

This article provides that certain data of applicants will be verified ex officio (those that follow from what is established in article 7.2 of the decree) contained in different registers of the general directorate competent in matters of civil service, in order to include them in the group of preselected people that corresponds to them.

Point out that this data does not seem, in accordance with article 5.3 of the Draft Decree, to be part of the information previously declared by the applicant in his application for participation. Therefore, it would be necessary to modify this article in order to clarify which data will be subject to verification by the competent body in the exercise of the power conferred on it, as seen, by Law 26/2010 and the LOPDGDD .

For all this, the following wording is suggested for article 5.3 of the Draft Decree:

"5.3 In the participation requests, which will be formalized and submitted electronically, the applicants will declare, under their responsibility, that they meet the necessary requirements to be admitted and classified for the pre-selection and that the data relating to the alleged merits. The convening body and the Selection Committee will be able to verify the conformity of the declared data."

Having said that, remember that in the collection of personal information and in application of the principle of transparency (Article 12 RGPD), it will be necessary to provide the applicant with information on the conditions on the application form for participation in the selection procedure and circumstances relating to the processing of data, in a concise, transparent, intelligible and easily accessible manner.

In particular, given that the data will be collected from the applicant, it will be necessary to provide all the information referred to in article 13 of the RGPD.

It should be noted that, in order to facilitate the fulfillment of this duty of information, the LOPDGDD (article 11) has provided for the possibility of delivering this information to the affected by layers o

This method consists in presenting "basic" information (summary information) at a first level, so that you can have a general knowledge of the treatment, indicating an electronic address or other means where it can be accessed easily and immediately to the rest of the information, and, at a second level, offer the rest of the additional information (detailed information).

IV

Article 11.3 of the Draft Decree states that:

"11.3 The result of the selection procedure will be published on the web page of the department or competent autonomous body, with identification of the person who has been appointed and the scores obtained by the applicants in both phases of the selection procedure, without the identity being recorded of applicants who have not been appointed."

In relation to the publication of the result of the selection procedure with the identification of the person who has been appointed, it is necessary to take into account the provisions of the seventh additional provision of the LOPDGDD which establishes criteria at the same time as identifying those interested in the publications of administrative acts, with the data of the name, surname and four random numerical digits of the DNI, foreigner's identity number, passport or equivalent document.

The first section of this provision establishes the following:

"1. When it is necessary to publish an administrative act that contains personal data of the person affected, it will be identified by means of his name and surname, adding four random numerical digits from the national identity document, foreigner's identity number, passport or equivalent document.

When the publication refers to a plurality of those affected, these random figures must be alternated.

When it comes to notification through announcements, particularly in the cases referred to in article 44 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, the affected person will be identified exclusively through the full number of your national identity document, foreign identity number, passport or equivalent document.

When the affected person lacks any of the documents mentioned in the two previous paragraphs, the affected person will be identified solely by means of their number and last name. In no case should the number and surname be published together with the full number of the national identity document, foreign identity number, passport or equivalent document."

Provisionally, until the time when the governing bodies and competent public administrations approve provisions for the application of the aforementioned additional provision seven, the data protection authorities have jointly proposed guidance for the provisional application of safeguards to protect the disclosure of the national identity document, foreigner's identity number, passport or equivalent document of the interested parties.

For this purpose, a random selection of a group of four numerical figures has been made that will be published for the identification of those interested in the publication of administrative acts. The information relating to the procedure used in this regard is published on the Authority's website <https://apdcat.gencat.cat/ca/autoritat/normativa/disposicions/recomanacions/>

In accordance with what has been explained, it is proposed to modify the wording of article 11.3 in the following sense:

"11.3 The result of the selection procedure will be published on the web page of the department or competent autonomous body, with identification of the person who has been appointed in accordance with the criteria established in the matter of personal data protection, and the scores obtained by applicants in both phases of the selection procedure, without recording the identity of applicants who have not been appointed."

v

Throughout the text of the Draft Decree, reference is made to the electronic processing of the interim staff selection procedure for vacancies and the use of an IT tool for that purpose.

Thus, article 3.3, which has already been mentioned, provides that "the procedure for the selection of temporary staff for vacancies is processed by electronic means and the general directorate competent in matters of civil service is the responsible body of the management and maintenance of the IT tool for the electronic processing of this procedure."

Article 6.3 provides that "the convening department or autonomous body must note in the computer system the concurrence of the causes that prevent admission in the selection procedures."

Or article 14 states that "the Report (of the evaluation of the skills developed by the temporary official in the performance of his duties) must be sent to the human resources unit of the department or "autonomous body, which will record the result of the report in the computer system."

Article 5.1.f) of the RGPD, relating to the principle of integrity and confidentiality, states that:

"Personal data will be treated in such a way as to guarantee adequate security of personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical and organizational measures. "

In accordance with this principle, appropriate technical and organizational measures must be implemented to guarantee a level of security appropriate to the risk involved in the processing of personal information provided for in the Project, taking into account the state of the art, the costs of application and the nature, scope, context and purposes of the treatment, as well as the risks of variable probability and severity for the rights and freedoms of the natural persons affected (Articles 24 and 32 RGPD).

Regarding the adoption of these measures, point out that the RGPD establishes a security model that is based on the need for a prior risk assessment by the person in charge to determine what are the risks that are objectively expected to be generated by the processing and, from there, determine and implement appropriate security measures to deal with it.

Therefore, it is necessary to carry out this risk analysis prior to putting this computer tool into operation in order to establish the appropriate technical and organizational security measures to safeguard the right to the protection of people's data affected

Emphasize, among other actions in the field of security, the need to adopt appropriate mechanisms that allow the correct identification and authentication of users of the information system, in order to guarantee, as required by the RGPD, that they will not occur unauthorized treatments.

Remember, regarding the establishment of organizational measures, that a comprehensive security model also requires the adoption and implementation of training measures for the staff who must process personal data.

Also agreeing that, in the case of public administrations, the application of security measures will be marked by the criteria established in the National Security Scheme, approved by Royal Decree 3/2010, of January 8, which, currently, is being reviewed.

In this regard, the LOPDGDD provides that:

"First additional provision. Security measures in the public sector.

1. The National Security Scheme will include the measures that must be implemented in case of personal data processing, to avoid its loss, alteration or unauthorized access, adapting the criteria for determining the risk in the data processing to the established in article 32 of Regulation (EU) 2016/679.

2. The responsible persons listed in article 77.1 of this organic law must apply to the processing of personal data the security measures that correspond to those provided for in the National Security Scheme, as well as promote a degree of implementation of equivalent measures in the companies or foundations linked to them subject to private law.

In cases where a third party provides a service under a concession, management assignment or contract, the security measures will correspond to those of the public administration of origin and will be adjusted to the National Security Scheme."

Point out that, among those responsible for the processing included in article 77.1 of the LOPDGDD, to which this DA1a expressly refers, we find the administrations of the autonomous communities, as well as their public bodies and public law entities, among others. Therefore, it must be borne in mind that, in the present case, the application of the security measures established in the National Security Scheme will be mandatory.

In addition to all this, it would be advisable for the Draft Decree to include a specific mention that the body responsible for the management and maintenance of the IT tool must adopt the technical and organizational measures that guarantee its security and confidentiality, in accordance with data protection regulations.

VI

Article 14 of the Draft Decree provides that "on the occasion of the completion of the interim appointment due to vacancy, the hierarchical superior must produce an assessment report of the skills developed by the interim employee in the performance of their tasks, for the purposes exclusively provided for in article 6.2.f) of this Decree. (...)"

This evaluation report will contain "the result of pass or fail, according to whether the development of the skills required for the development of the job is achieved to a sufficient degree" and will be sent to the "human resources unit of the department or autonomous body, which will record the result of the report in the computer system."

According to article 6.2.f) of the Project, the fact of having "two evaluation reports, drawn up by different hierarchical superiors, with a qualification of not suitable" means that the person to whom these reports refer cannot participate, for a period of two

years from the issuance of the second evaluation report, in any selection procedure that is convened.

At the outset it should be noted that it is not clear in the wording of the precept whether in the case of having obtained three reports as unfit a new cycle begins (after having completed the two-year exclusion period as a consequence of the second report), in which it is necessary to obtain two new reports with a qualification of not suitable to be excluded, or if it would be sufficient with the third report to be excluded (given the existence of two previous reports with a qualification of not suitable).

On the other hand, the exclusion should operate only in relation to selection procedures for jobs in which the assessed person has to carry out the same tasks for which he/she has been considered unfit.

To point out that the preparation of these evaluation reports regarding the same person throughout their professional life in the public sector, the results of which remain grouped in a computer system or database, could be understood or give rise, since from the aspect of data protection, to the preparation of a profile on their professional capabilities.

Although in this case it seems that it would not be a profile drawn up exclusively with automated means (case referred to in article 22 RGPD), the result of this report qualifies the person's suitability based on the assessment made when occupying one or several jobs, which allows you to obtain a professional profile.

Extending the effects of this assessment or classification of the person as unfit to other jobs with different characteristics (functions, category, specialization, etc.) can produce significant negative effects on the person, without from the point of view of the principle of purpose as from the point of view of the principle of accuracy is justified.

For this reason, it is proposed to modify article 6.2.f) of the Project in the following sense:

"f) They have two evaluation reports, drawn up by different hierarchical superiors, with a qualification of not suitable under the terms of article 14 of this Decree in jobs with similar characteristics to the position to which you want to access, with hearing of the person concerned. They will be excluded for a period of two years from the issuance of the second evaluation report."

In addition to all this, it is necessary to guarantee that only the staff at the service of the competent body to process the selection procedure that requires their knowledge for the exercise of their functions will have access to the information recorded in the computer system (Article 5.1 .f) RGPD), and for the exclusive purpose of verifying the concurrence of the cause of exclusion established in article 6.2.f) of the decree, this information not being able to be used for other incompatible purposes (article 5.1.b) RGPD).

For all this the following are done,

Conclusions

Having examined the Draft Decree which establishes the criteria and procedure for the selection of temporary civil servants to cover vacant jobs in the Administration of the Generalitat de Catalunya and its autonomous bodies, it is considered

appropriate to the provisions established in the corresponding regulations on personal data protection, as long as the considerations made in this report are taken into account.

Barcelona, October 19, 2020

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