

Note on the possibility of requesting a certificate or medical report to justify the non-use of a mask when accessing public and/or private facilities

The Catalan Data Protection Authority is asked to ask whether people who access public and/or private facilities who do not wear a mask can be asked to provide documentation certifying the presence of the cause that exempts them from wearing one .

In relation to the question raised, the following must be taken into account:

1. Article 5.1.a) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (RGPD), establishes that all processing of personal data must to be lawful, loyal and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, either the consent of the affected person (letter a), or any of the other bases provided for in the same precept , such as when the treatment *"is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment"* (letter c), it being necessary to have a rule with the rank of law in this respect (article 6.3 RGPD and article 8 LOPDGDD).

In addition, when the treatment affects special categories of data, as is the case of data relating to health (article 4.15) RGPD), it is also necessary to count on one of the exceptions established in article 9.2 of the RGPD, in order to be able to consider this data processing lawful

Article 9 of the RGPD provides that:

"1. The processing of personal data revealing the ethnic origin or racial, political opinions, religious or philosophical convictions, or affiliation trade union, and the treatment of genetic data, biometric data aimed at identifying unambiguously to a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person.

2. Section 1 will not apply when one of the circumstances occurs following:

(...)

i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or sanitary products, on the basis of the Law of the Union or Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy.

(...)."

At the same time, the seventeenth additional provision of the LOPDGDD states that:

"1. The treatments of health-related data and genetic data that are regulated in the following laws and their provisions are covered by letters g), h), i) and j) of article 9.2 of Regulation (EU) 2016/679 development:

a) Law 14/1986, of April 25, General Health.

(...)

g) Law 33/2011, of October 4, General Public Health.

(...)."

In accordance with Organic Law 3/1986, of April 14, on special health measures public, *"the health authorities of the different Public Administrations may, within the scope of their powers, adopt the measures provided for in this Law when so required by health reasons of urgency or necessity" (article 1).*

Specifically, the competent authorities in the field of public health can *"adopt measures of recognition, treatment, hospitalization or control when they appreciate rational indications that allow us to assume the existence of danger to the health of the population due to the situation specific health of a person or group of people or for the health conditions in which an activity is carried out" (article 2)* and, in order to control communicable diseases, they can *"adopt the appropriate measures for the control of the sick, of the people who are or have been in contact with them and of the immediate environment, as well as those that are considered necessary in case of risk of a transmissible nature" (article 3) .*

These forecasts are collected in terms similar to Law 18/2009, of October 22, on health public (LSP), which aims to organize actions, benefits and services in matters of public health in the territorial scope of Catalonia established by Law 15/1990, of July 9, on health regulations in Catalonia, to guarantee the surveillance of public health, the promotion of individual and collective health, disease prevention and health protection (article 1).

Specifically, article 55 of the LSP, in the wording given by Decree-law 27/2020, of July 13, amending Law 18/2009, of October 22, on public health, and adoption of urgent measures to deal with the risk of outbreaks of COVID-19, provides that:

"1. The health authority, through the competent bodies, can intervene in public and private activities to protect the health of the population and prevent disease. To this end, you can:

(...)

j) Adopt measures of medical examination, treatment, hospitalization or control if there are rational indications of the existence of danger to the health of people due to a specific circumstance of a person or a group of people or by the conditions in which an activity is carried out. Measures can also be adopted for the control of people who are or have been in contact with the sick or the carriers. These measures must be adopted within the framework of Organic Law 3/1986, of April 14, on special measures in the field of public health, and State Law 29/1998, of July 13 , regulating administrative contentious jurisdiction, and the legal provisions that modify or repeal them.

k) In pandemic or epidemic situations declared by the competent authorities, the competent health authorities may adopt measures to limit the activity, the displacement of people and the provision of services in certain territorial areas provided for in annex 3, in accordance with the provisions of article 55 bis.

2. The measures referred to in section 1 must be adopted respecting the rights that the Constitution recognizes citizens, especially the right to personal privacy, agree with what is established in the regulations for the protection of personal data and with the procedures that these regulations and the other applicable regulations have established, i having the mandatory authorizations."

For its part, Law 33/2011, of October 4, general public health (LGSP) establishes that *"without prejudice to the measures provided for in Organic Law 3/1986, of April 14, on Measures Specials in Public Health Matters, with an exceptional character and when required*

reasons of extraordinary gravity or urgency, the General Administration of the State and those of the autonomous communities and cities of Ceuta and Melilla, within the scope of their respective competences, may adopt whatever measures are necessary to ensure compliance with the law" (article 54.1).

In accordance with these precepts, from the point of view of the processing of personal data, it is the responsibility of the competent public health authorities of the various public administrations to safeguard the essential interests in the field of public health and, to that end, the adoption of the necessary measures provided for in these laws to, in the face of a public health emergency, protect the health of the population and prevent its contagion.

That being the case, the different data processors (both public and private) must follow these measures, including when this involves the processing of data relating to the health of natural persons.

2. Under the protection of the aforementioned health and public health legislation, the competent authorities have been adopting a series of measures and general guidelines for prevention, containment and coordination to deal with the current international health crisis due to coronavirus SARS-CoV-2 (COVID 19), including the widespread use of the mask as a protective measure (barrier).

Thus by means of the "Order SND/422/2020, of May 19, by which the conditions for the mandatory use of masks are regulated during the health crisis situation caused by the COVID-19" the use was regulated Mandatory wearing of masks by the population.

Subsequently, this protection measure was regulated in Royal Decree-Law 21/2020, of June 9, on urgent prevention, containment and coordination measures to deal with the health crisis caused by COVID-19.

In the area of Catalonia, the successive resolutions that have been adopted under the protection of the applicable health and public health legislation contemplate various measures in the field of public health to deal with the health emergency situation caused by the COVID -19, including also, the mandatory use of the mask.

Thus, in Resolution SLT/1429/2020, of June 18, by which basic protective and organizational measures are adopted to prevent the risk of transmission and favor the containment of SARS-CoV-2 infection, establishes that:

"2.2. Mask use

*1. **People aged six and over are required to wear a mask in the following cases:***

*a) On the public road, in outdoor spaces and **in any enclosed space for public use or that is open to the public, provided that, between people who do not maintain a close relationship and contact on a very regular basis, it is not possible to maintain a safe interpersonal physical distance of 1.5 m.***

b) In all means of passenger transport by road, by rail and by cable under the competence of the Generalitat, except if all the occupants of the tourist vehicle are people who maintain a close relationship and contact on a very regular basis. In the case of passengers on ships and boats, it is not necessary to wear a mask when they are inside their cabin and when it is possible to maintain a safe interpersonal physical distance of 1.5 m while on their decks or outside spaces .

*2. **The obligation contained in the previous section will not be enforceable** for people who have any type of illness or respiratory difficulty that may be aggravated by the use of the mask or who, due to their disability or dependency,*

do not have the autonomy to remove the mask or have behavioral changes that make its use unfeasible. (...)."

It should be noted that Resolution SLT/1648/2020, of July 8, which establishes new measures in the use of the mask to contain the epidemic outbreak of the COVID 19 pandemic, modified the forecasts on the mandatory use of the mask contemplated in the Resolution SLT/1429/2020, to which reference has been made, in the following terms:

"-1 People aged six and over are required to wear a mask on public roads, in outdoor spaces and in any closed space for public use or that is open to the public, regardless of maintenance of safe interpersonal physical distance.

This forecast is established without prejudice to the maintenance of the regulation of the use of the mask in the means of transport in everything that does not oppose it.

The exemptions, for personal reasons and the nature of the activity, of the mandatory use of a mask established in section 2.2.2 of the Resolution are maintained **SLT/1429/2020, of June 18**, by which basic protection and organizational measures are adopted to prevent the risk of transmission and favor the containment of SARS-CoV-2 infection, and in section 3.2.4 of Resolution SLT/1608/2020, of July 4, by which special public health measures are adopted to contain the epidemic outbreak of the COVID-19 pandemic in the Segrià region.
(...)."

Currently, the aforementioned measure is contemplated in Law 2/2021, of March 29, on urgent prevention, containment and coordination measures to deal with the health crisis caused by COVID-19 (which comes from processing as to bill RDL 21/2020), applicable throughout the national territory (article 2.1).

Specifically, article 6 of Law 2/2021 provides that:

"1. People aged six and over are required to wear masks
in the following cases:

- a) On the public road, in open air spaces and in any closed space of public use or that is open to the public.*
- b) In the means of air, sea, bus or rail transport, as well as in public and private complementary passenger transport in vehicles with up to nine seats, including the driver, if the occupants of the tourist vehicles do not live together at the same address. In the case of passengers on ships and boats, it will not be necessary to use masks when they are inside their cabin.*

2. The obligation contained in the previous section will not be required for people who have some type of illness or respiratory difficulty that may be aggravated by the use of the mask or who, due to their disability or dependency, do not have the autonomy to take off the mask, or have behavioral changes that make its use unfeasible.

Nor will it be required in the case of individual outdoor sports, nor in cases of force majeure or situation of necessity or **when**, due to the nature of the activities, **the use of the mask is incompatible, according to the indications of the health authorities.**

(...)."

With regard to the control of compliance with the measure relating to the use of the mask, as well as the rest of the established measures, article 31 of Law 2/2021 provides that:

"1. Failure to comply with the prevention measures and the obligations established in this Law, when they constitute administrative infractions in public health, will be sanctioned in the terms provided for in title VI of Law 33/2011, of October 4, General Public Health .

The monitoring, inspection and control of the fulfillment of said measures, as well as the instruction and resolution of the sanctioning procedures that proceed, will correspond to the competent bodies of the State, of the autonomous communities and of the local entities in the scope of their respective powers.

2. Failure to comply with the obligation to use masks established in article 6 will be considered a minor infraction for the purposes of article 57 of Law 33/2011, of October 4, General Public Health and sanctioned with a fine of up to a hundred euros (...)."

Along these lines, Resolution SLT/1429/2020 provides, in section 3, that:

*"1. It corresponds to the town councils and the Administration of the Generalitat of Catalonia, within the scope of their respective competences, the functions of monitoring, inspection and control of the measures established in this Resolution and in the sectoral plans referred to in the section 1.2 of this Resolution. **They will especially ensure compliance with the measures aimed at avoiding crowds and guaranteeing minimum safety distances and the use of masks.***

2. (...).

3. Failure to comply with the measures contained in this Resolution and in the sectoral plans will be the subject of a sanctioning regime in accordance with the applicable sectoral legislation.

4. The inspection staff of the Administration of the Generalitat in the areas of health, work, commerce, consumption and education are empowered, within the framework of their respective powers, to carry out the actions established in this section, as well as the surveillance, inspection and control of those other measures established to deal with the health crisis caused by COVID-19 by virtue of the applicable state regulations."

Point out that failure to comply with the obligation to use the mask or its inappropriate use, in the terms established by the competent authorities, constitutes a minor infraction that must be sanctioned with a fine of 100 euros (articles 5 and 8 Decree-law 30/2020, of August 4, which establishes the specific sanctioning regime for non-compliance with health prevention and containment measures to deal with the health crisis caused by COVID-19) .

Also that the Supreme Court has admitted the legality of the adoption of this protection measure as contained in STS 1569/2020, of November 20 and more recently in STS 1796/2020, of December 17, considering that *"the provision ordering the use of a mask is considered legitimate because, in the current state of knowledge of the spread of the Covid 19 virus, is necessary and appropriate to achieve the general interest goal of health protection, by constituting a measure that can contain the progression of the pandemic."*

3. In view of these forecasts and for the purposes they concern, it is clear the obligation to wear a mask in closed spaces of public use or that are open to the public, regardless of the maintenance of the interpersonal physical safety distance, for people aged six years and over, as well as those who, in the event of presenting any type of illness or respiratory difficulty that may be aggravated by its use or who, due to their disability or dependency, do not have autonomy to remove the mask or present behavioral changes that make its use unfeasible, these people are exempt from this obligation.

Although the regulations examined do not specify the way in which it is necessary to prove the concurrence of these circumstances, given that they respond in any case to health reasons, it can be assumed

that the affected persons must have a medical certificate or similar document in which it is expressly specified which of the aforementioned circumstances apply to them.

The consultation considers whether those in charge of public facilities, without being more specific about what type of equipment or activity takes place there, and/or those in charge of private facilities, such as commercial establishments, can apply to the people who access it and who do not wear a mask this medical certificate or similar document. Attached, in this sense, is a copy of the official complaint form presented by a citizen before a commercial establishment for having denied her access to said establishment for not showing this type of documentation to the person in charge.

Point out that the competence on the adequacy of the data processing referred to in the query by responsible persons not included in the scope of action of this Authority, in accordance with article 3 of Law 32/2010, as would be the case for owners of commercial establishments, would correspond to the Spanish Data Protection Agency (AEPD), in accordance with articles 47 and 57 of the LOPDGD.

However, it does not seem that the answer to the question posed should be significantly different in one case or another (responsible within or outside the Authority's scope of action), in view of the regulations that result from application

Article 4 of Law 2/2021, previously cited, provides that:

"All citizens must take the necessary measures to prevent the generation of risks of spreading the disease COVID-19, as well as the exposure itself said risks, according to what is established in this Law. Said duty of caution and protection will also be required of the holders of any activity regulated in this Law."

Point out that the activities regulated in Law 2/2021 include both public areas of activity as private (work centers, health centers, educational centers, social services, commercial establishments, hotels and tourist accommodations, restaurants, etc.).

The aforementioned general duty of caution and protection is also contained in Resolution SLT/1429/2020, according to which citizens must adopt the necessary measures to avoid the generation of risks of spreading the infection of the COVID-19, as well as their own exposure to these risks, and must adopt the protective measures individual and collective established (section 1.1.1), among them, the use of the mask. Duty of caution and protection that *"is equally enforceable, under the terms of this Resolution, to the holders of any economic activity, business or establishment for public use or that is open to the public"* (section 1.1.2).

Said Resolution SLT/1429/2020 also establishes that *"the persons holding the different activities are responsible for adapting the conditions of exercise to the measures and forecasts that are contained in the corresponding sectoral plan"* (section 1.2.4).

The sectoral plans adopted so far can be consulted on the website of the Department of the Interior (https://interior.gencat.cat/ca/arees_dactuacio/proteccio_civil/consells_autoproteccio_emergencia/emergent-communicable-diseases-with-high-risk-potential-/sectoral-plans/) and, as indicated in section 1.2.1 of Resolution SLT/1429/2020, the measures that contemplated must complete the measures provided for in the same and subsequent resolutions.

To emphasize, for the purposes of interest, that in these sectoral plans it is expressly established that the owner of the activity referred to in the plan in question must adopt the organizational measures that are necessary to guarantee the maintenance of the protection measures

individual in the equipment, premises, installation or similar, for the purposes of preventing the risks of contagion both for workers and third parties (users, customers, suppliers, etc.).

In this last sense and among other measures, it is established the obligation to warn at all times the people who access it about the mandatory and correct use of the mask, through the placement of posters in indicating the preventive and hygienic measures implemented in the establishment, premises, installation or similar and the duty of self-protection of the client/user in relation to to compliance with these prevention measures to avoid contagion.

This can be seen, taking into account the general terms in which the consultation is formulated and as an example, in the plans for the resumption of day center services for the elderly, deconfinement of equipment and services in the area of social affairs and families, also in the residential area, in the plans for the resumption of the cultural sector (libraries, archives, museums, exhibition halls, etc.), in the plans for the deconfinement of sports and use of sports facilities, in the action plans of retail and wholesale commercial establishments, and of the restaurant sector, etc.

In addition to all this, section 1.4.2 of Resolution SLT/1429/2020 provides that:

"The persons who own the premises, establishments or spaces where activities are carried out that are open to the public, as well as the service provision activities or, where appropriate, the persons responsible for their organization, must identify a responsible person of the application of the organizational measures that are necessary to guarantee the maintenance of individual protection measures, as established in this Resolution and the different sectoral plans, and that it is the interlocutor with the health authority in case it is required in the framework of the control of an eventual epidemic outbreak affecting these premises, establishments or spaces."

In view of these forecasts, it can be said that it is the responsibility of the owner of the equipment or establishment (public or private) and, consequently, its workers, to ensure compliance with the measure adopted by the health authorities consisting of the mandatory use of the mask within your equipment or establishment, that is to say, control that the users, customers, suppliers, etc. they wear a mask - or wear it correctly - when accessing the equipment or establishment in question and while they stay there.

The effective fulfillment of this control function would, when appropriate, require the said people the documentation that accredits the concurrence in person of one of the causes of exemption from the obligation to wear a mask referred to in section 2.2.2 of Resolution SLT/1429/2020 and article 6.2 of Law 2/2021.

From the point of view of data protection, the knowledge of this sensitive information is an inevitable consequence of the exercise of said surveillance or control function, which is carried out in compliance with an obligation imposed by the competent health authorities, and therefore it would result in lawful data processing on the basis of articles 6.1.c) and 9.2.i) of the RGPD, in view of the health and public health regulations examined.

4. On the other hand, it is appropriate to make some considerations in relation to the exercise of the right of admission by the owners of establishments open to the public to which the provisions of Law 11/2009, of July 6, of regulation apply administrative management of public shows and recreational activities, an issue that is also mentioned in this consultation.

Article 5 of Law 11/2009 relating to the rights and obligations of viewers and users provides that:

"1. Spectators, participants and users of public shows and recreational activities have the following rights:

(...)

c) Be admitted to the establishment or the space open to the public under the same objective conditions for all attendees, as long as the capacity allows and that none of the causes of exclusion, which have to be established by regulation, for security reasons, to avoid the alteration of public order or in application of the right of admission.

(...)

2. Spectators, participants and users of public shows and recreational activities have the following obligations:

(...)

f) Comply with the requirements and rules for access and admission generally established by the owners of the establishments open to the public or by the organizers of the activities. The access and admission criteria must be made known by means of visible signs placed at the access points and by other means determined by regulation.

(...)."

In turn, article 6.2.d) of Law 11/2009 establishes, among other obligations, that the organizers and holders must *"allow entry to the public, except in the cases established by law or by regulation , including the right of admission."*

Article 10 of Law 11/2009 regulates the right of admission in the following terms:

"The exercise of the right of admission may not, under any circumstances, lead to discrimination based on birth, race, sex, religion, opinion, disability, sexual orientation, gender identity or any other condition or personal or social circumstance of the users of the establishments and spaces open to the public, both in terms of access conditions and permanence in the establishments and the use and enjoyment of the services provided there."

As has been seen, from the point of view of data protection the owners, in this case, of establishments open to the public (and, therefore, also their access control and/or surveillance service personnel) remain legitimate to require from those people who intend to access the premises without a mask the documentation that certifies the concurrence in person of one of the causes of exemption from the obligation to wear it.

Not allowing entry to the establishment to those people who refuse to show this documentation on the basis of the right of admission cannot be understood as leading to discrimination against said people, given that they remain obliged to comply with the requirements and rules of 'access and admission established, including those adopted by the competent health authorities, such as the use of a mask in any closed space for public use or that is open to the public, regardless of the maintenance of the distance interpersonal safety physics. Remember the obligation to inform through the placement of the corresponding posters at the entrance of the establishment.

Barcelona, April 21, 2021