CNS 8/2021

Opinion in relation to the query made by a university in relation to the Protocol for the prevention, detection and management of Covid-19 cases in universities

A query from a university is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on certain aspects of the *"Protocol for the prevention, detection and management of Covid-19 cases in universities" ,* prepared jointly by the Interuniversity Council of Catalonia and the Catalan universities.

Attached to the application is the *"Protocol for the prevention, detection and management of Covid-19 cases in universities" (hereinafter,* the Protocol), in the version dated January 28, 2021.

In particular, the consultation states that the protocol foresees the communication to the Department of Health, through the Interuniversity Council of Catalonia, of a file with the data of students, teaching and research staff and service administration staff to guarantee effective traceability of Covid-19 cases. The University states that it has *"[...] doubts about the legal basis that protects this transfer of data and about compliance with the principle of proportionality of the measure taking into account the data that is required",* which is why it requests the issuance of an opinion.

Having analyzed the request, which is not accompanied by more information, in view of the current applicable regulations and in accordance with the report of the Legal Counsel, the following is ruled.

I

(...)

II

Prior to the analysis of the substantive issues raised in the consultation, it is considered necessary to make a point about the content and purpose of the *"Protocol for the prevention, detection and management of Covid-19 cases in universities",* or protocol.

The purpose of the protocol, according to the introductory part, " ... *is to provide the universities of the Catalan university system with the instruments that allow them to take swift and preventive action with reference to the spread of the pandemic, with the return progressive face-to-face academic activity, when this is possible, emphasizing the detection of close contacts of confirmed and suspected cases in the university environment, regardless of where they originated, to break the chain of transmission of the virus and the possible contagions in university centers".*

Regarding the scope of application, although it is stated that it focuses mainly on the detection and management of cases among students, justifying this in the fact that it is the group that is not included in the scope of action of the occupational risk prevention services, as well as being the most numerous and the most difficult to detect, the processing of data from other groups in the university community is also planned.

According to the definition annex of the Protocol, the university community is made up of *"any person who belongs to the student body, the teaching and research staff (PDI), the research staff (PI) or the staff of administration and services (PAS)".*

The protocol adapts and categorizes the security measures and procedures for detection and management of cases regulated in current regulations, or other documents issued by the health authorities, such as for example the *Public Health Action Procedure against cases of infection by the new SARS-CoV-2 coronavirus* updated on 18/10/2020, or the Universities Sectoral Plan. But it also foresees other measures aimed at the detection and management of cases of infection such as the preparation of a university census (or file) and its communication to the Department of Health through the Interuniversity Council of Catalonia (or CIC). It is this last aspect that the consultation focuses on and will therefore be the issue on which this report will focus.

In relation to the preparation and communication of this file, the protocol foresees that *"[...] universities, through the Interuniversity Council of Catalonia, must provide the Department of Health with a file with affiliation data (CIP/ DNI) and contact of the members of the different collectives of the university: student body, PAS and PDI, so that the health authority can cross the new cases of infection detected with the university census, and identify at the same time, which is of a member of the university community and be able to start the processes to prevent the transmission of the virus between members of this community".*

The file will also contain the following data regarding each person: name, surname, NIF or NIE, email address, contact telephone number, date of birth, CIP, Sex, University, Centre, Group (student, PAS or PDI). In the case of students, it will also specify the studies they take and the subjects they are enrolled in, and in the case of teachers, the studies and subjects they teach.

Regarding the right to information, the protocol foresees that each university informs students of the fact that their data will be communicated to the Department of Health. In particular, it foresees that the fact *that "[...] will be shared with the Department of Health identifying data and the results of the tests carried out, in accordance with the data protection regulations, in order to carry out the traceability of possible contagions in relation to case management".*

III

The data protection regulations, in accordance with what is established in articles 2.1 and 4.1) of the RGPD, apply to the treatments that are carried out on any information *"on 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, will be considered an identifiable natural person.*

location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person".

Article 4.2) of the RGPD considers *"treatment": any operation or set of operations carried out on personal data or sets of personal data, either 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, deletion or destruction".*

The RGPD provides that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing data processing based on the need for one of the legal bases to be met established in its article 6.1.

In the case at hand, it should be borne in mind that the content of the file or university census that would be communicated to the Department of Health includes different categories of data including those relating to *"[...] test results practiced".* Although it is not clearly defined in the protocol which tests are referred to, or the circumstances thereof (who is responsible for performing them, who is responsible for the treatment, who communicates or receives them...), taking into consideration the 'objective and scope of application of the protocol it is deduced that it refers to the result of the diagnostic tests for positive or negative cases for COVID-19.

Article 4.15 of the RGPD considers that data relating to health refer to *"[...] the physical health [...] of a natural person, including the provision of health care services, which they reveal information about their state of health".*

Consequently, the results of the tests carried out referred to in the protocol are data relating to health, which remain subject to the regime provided for in article 9.1 of the RGPD:

"The processing of personal data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person , data relating to health or data relating to the sexual life or sexual orientation of a physical person."

It should be noted, however, that this prohibition will not apply to the extent that any of the circumstances provided for in article 9.2 of the RGPD occur.

It should be noted that in the drafting of the protocol it is not clearly defined what would be the legal basis from which the communication of the file or university census to the Department of Health is based. Only, within the *"Compilation of the university census"* section of the protocol, you can intuit what the legal bases would be on which the treatment is based:

"The treatment of these personal data (the compilation of the university census and subsequent communication to the Department of Health) *must be protected by the General Data Protection Regulation (RGPD) and the report issued by the Spanish Agency for Data Protection (AEPD), of 12/03/2020, which determines the limits of this processing of personal data in situations of health emergency of general scope, such as the pandemic due to COVID-19 and grants the*

the greatest possible freedom to those responsible for data processing in case of necessity to safeguard the vital interests of the interested parties or of third physical persons, the essential public interests in the field of public health or the fulfillment of legal obligations, in the legal framework corresponding to the Member State of the European Union in each applicable case.

Despite this, the AEPD emphasizes that the processing of personal data, despite being in health emergency situations, must continue to be processed in accordance with the personal data protection regulations (RGPD and Organic Law 3/2018) and, therefore, its principles apply, and among them that of treating data with lawfulness, loyalty and transparency, limitation of the purpose (in this case, safeguarding the interests of people in a pandemic situation), principle of accuracy and the principle of data minimization. Regarding the latter, there is express reference to the fact that the data processed must be exclusively limited to those necessary for the intended purpose.

It is therefore necessary that all parties involved in this data processing ensure at all times that these principles of loyalty, transparency and purpose limitation are respected."

The legal bases that legitimize the processing of personal data are regulated in article 6.1 of the RGPD and, in the case of special categories of data, in addition, in article 9.2 of the RGPD, therefore, it is necessary that the treatments are protected in one of the cases provided for by law,
without a generic reference to the regulations that regulate them being sufficient. In this sense, it is necessary to refer to recital 41 of the RGPD, according to which *"said legal basis or legislative measure must be clear and precise and its application foreseeable for its recipients, in accordance with the jurisprudence of the Court of Justice of the European Union [...] and the European Court of Human Rights."*

On the other hand, it is also necessary to warn that the reports or opinions issued by any control authority do not constitute any enabling assumption, or legal basis, from which the processing of personal data can be legitimized.

In any case, from the terms in which the protocol is expressed, it can be inferred that the treatment subject to analysis would be based on the following legal bases: (1) *"[...] safeguard the vital interests of the interested parties or of third physical persons",* (2) *"[...] essential public interests in the field of public health* (3) *or the fulfillment of legal obligations, in the legal framework corresponding to the Member State of the Union European in each applicable case".*

IV

It does not seem that in a case like the one we are dealing with, the treatment can be based on the need to safeguard the vital interests of the interested parties or third natural persons (arts. 6.1.d) and 9.2.c) RGPD).

Article 6.1.d of the RGPD provides that the treatment will be lawful in cases where it is necessary to protect the vital interests of the interested party or another person. In the case of special categories of data, article 9.2.c) of the RGPD also adds that for the use of this legal basis it will be necessary that the interested party is not physically or legally able to give the

your consent This does not seem to be the case with us, given that the people affected are in a position to give their consent.

It should also be borne in mind that this exception would be focused on extraordinary situations from which the data controller faces a situation from which, if it does not carry out personal data processing, the vital interests of this may certainly be affected person

In the case at hand, it seems that the protocol has been designed from a preventive perspective insofar as the objective is to ensure that the health authorities can carry out subsequently, and in the face of the suspicion or a confirmed case of contagion for COVID-19, the traceability of cases, so as to facilitate the early detection of signs of an outbreak and act accordingly. In this sense, it does not seem that the purpose is to act directly on the health of the members of the university community, but to anticipate in the detection of close contacts, to contribute to cutting the chains of transmission and *"[...] to be able to maintain maximum presence in the classrooms".*

For this reason, it is considered that the legal basis referred to the protection of the vital interests of the interested parties does not conform to the intended purpose of the analyzed protocol, since the persons affected are in a position to give their consent and the communication is not given carried out in a reactive context, in which the vital interests of the university community are certainly compromised, but within a preventive context.

v

The other two legal bases included in the protocol are the need to safeguard *"essential public interests in the field of public health"* and *"the fulfillment of legal obligations, in the legal framework corresponding to the Member State of the Union European in each applicable case".*

Although the protocol does not use the nomenclature of the RGPD, it is understood that the legal basis to which it refers is that provided for in article 6.1.e) of the RGPD *("the treatment is necessary for the fulfillment of a mission carried out in public interest or in the exercise of public powers conferred on the person responsible for the treatment"),* as well as that provided for in article 6.1.c) of the RGPD, according to which the treatment is lawful when it is necessary for to the fulfillment of a legal obligation applicable to the data controller.

And with regard to the treatment of special categories of data, it seems that reference would be made to several sections of article 9 of the RGPD, specifically to that provided for in letters b), g) ii) of the section 2:

> "b) *"the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of Labor law and security and social protection, to the extent that this is authorized by the Law of the Union of Member States or a collective agreement in accordance with*

Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;
[...]
g) *the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party");*

[...]
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 of the Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular the professional secret."*

It should be noted that article 6.3 of the RGPD, and in similar terms also article 9.2.g) ii), provides that the legal basis based on a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment, must be established by the law of the Union, or the law of the member state. In this sense, it foresees that:

"The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers given to the person in charge of the treatment. Said legal basis may contain specific provisions to adapt the application of the rules of this Regulation, among others: the general conditions that govern the legality of the treatment by the person in charge; the types of data object of treatment; the interested parties affected; the entities to which personal data can be communicated and the purposes of such communication; the limitation of the purpose; the periods of data conservation, as well as the operations and procedures of treatment, including the measures to guarantee legal and equitable treatment, as well as those relating to other specific situations of treatment in accordance with chapter IX. The Law of the Union or of the Member States will fulfill an objective of public interest and will be proportional to the legitimate aim pursued".

Regarding the scope of the internal law rule, Recital 41 establishes that *"[…] does not necessarily require a legislative act adopted by a parliament, without prejudice to the requirements of conformity of the constitutional order of the Member State in question" .*

It should be taken into account in this respect that, in Spanish law, the rule that establishes the treatment must be a rule with the rank of law, as it follows from Article 53 EC to the extent that it entails the limitation of a right fundamental, and as constitutional jurisprudence has come to recognize (SSTC 292/2000 and 76/2019, among others), of the Court of Justice of the Union European (STJUE 08.04.2014, Digital Rights Ireland, among others) and the European Court of Human Rights (STEDH 07.06.2012, Cetro Europa 7 and Di Stefano vs. Italy, among others).

In this sense, article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD) establishes the following:

"1. The processing of personal data can only be considered based on the fulfillment of a legal obligation required of the person in charge, in the terms provided for in article 6.1.c) of Regulation (EU) 2016/679, when this is provided for by a law of the European Union or a rule with the rank of law, which may determine the general conditions of the treatment and the types of data subject to it as well as the assignments that proceed as a consequence of the fulfillment of the legal obligation. Said rule may also impose special conditions on treatment, such as the adoption of additional security measures or others established in Chapter IV of Regulation (EU) 2016/679.

2. The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679 , when it derives from a competence attributed by a rule with the rank of law."

Article 9 LOPDGDD is pronounced in similar terms regarding the processing of data from special categories of data, such as health data.

Having said that, administrative action in matters of public health is regulated in our legal system fundamentally in Organic Law 3/1986, of April 14, on special measures in matters of public health, in Law 33/2011, of 4 October, General of Public Health (LGSP), and with regard to the organization of actions, benefits and services in the field of public health in the territorial area of Catalonia, in Law 18/2009, of October 22 of public health (LSP).

Article 3.c) of the LGSP provides that the actions carried out on public health and actions on collective health remain subject, among others, to the principle of relevance from which *"The actions of public health will attend to the magnitude of the health problems they seek to correct, justifying their need in accordance with the criteria of proportionality, efficiency and sustainability".*

According to article 9 of the LGSP, *"[...] Persons who know facts, data or circumstances that could constitute a serious risk or danger to the health of the population will bring them to the attention of the health authorities , which will ensure the protection due to personal data. [...] The provisions in the previous section are understood without prejudice to the obligations of communication and information that the laws impose on health professionals."*

In accordance with article 33 of the same law, this duty of communication also affects employers who, in accordance with the legislation on occupational risk prevention, have knowledge of any of this data. In this regard, article 33.2.h) provides, among other issues, that the health authority, in coordination with the labor authority, must *"establish coordination mechanisms in the event of pandemics or other health crises , especially to carry out preventive and vaccination actions".*

In turn, article 3.i) of the LSP provides that the organization and execution of actions and services in the field of public health requires interdepartmental and inter-administrative coordination and cooperation in the execution of actions, public health benefits and services.

On the other hand, article 57 of the LSP, and in similar terms art. 8 of the LGSP, foresees that the *"Public administrations, within the framework of their competences, and also the institutions and entities private companies and individuals, have the duty to collaborate with the health authorities and their agents if necessary for the effectiveness of the measures adopted."*

Article 58 of the LSP establishes that *"if the owners of facilities, establishments, services or industries detect the existence of health risks arising from the respective activity or products, they must immediately inform the relevant health authority..."*

And articles 55.k) and 55.bis 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, provide determined measures to control the pandemic, among which the need to carry out contact identification is established (annex 3). In particular, Annex 3 of the Decree Law provides that the health authorities can carry out the *"Identification of contacts in progress for all new and confirmed cases of COVID-19, with quarantines/ isolation measures in accordance with the protocols current epidemiological surveillance. Expand the identification of contacts and isolation of suspected cases if it is decided to consider a case without a test according to the availability of tests and the epidemiological situation.".*

In relation to the field of occupational health, article 14 of the LPRL provides for the right of workers to effective protection in matters of safety and health at work which is embodied in the employer's duty to protect - them against occupational risks. At the same time, the worker has the duty to inform the direct hierarchical superior, and the workers designated to carry out the protection and prevention activity or, where appropriate, the prevention service, about any situation that in their judgment could reasonably pose a risk to the safety and health of workers.

In accordance with this, in application of the regulations regulating public health and prevention of occupational risks, it is necessary to conclude the existence of a duty of collaboration of any person, institution, private entity, or the public administrations in the framework of their powers, with the health authorities in case it is necessary for the effectiveness of the measures adopted in favor of public health, which include the identification of contacts, as well as the duty to make the circumstances known which could put public health at risk.

In some cases, the concretization of this duty has been done through rules with the rank of law, as would be the case of article 8 of Decree Law 41/2020, of November 10, on extraordinary measures of a social nature in educational centers and in the field of leisure education and extracurricular activities to deal with the consequences of the COVID-19, from which the communication from the Department of Education to the Department of Health is foreseen, in terms similar to the case at hand. However, and in accordance with what is established in article 51 of Law 12/2009, of 10 July, on education, universities are not part of the educational system of Catalonia.

The communication of data from students or university workers could be enabled by public health regulations in the event that there is a specific risk situation (for example if there has been an infection, identification data can be communicated and contact of the infected person and also of the other people who may have been in contact), but this regulation does not allow generalized preventive communication as described in the protocol. On the other hand, it is not known that any law has been approved to enable this generalized communication with regard to universities, there is no requirement

concrete formulated by the health authorities. That being the case, it must be concluded that the communication described would not have sufficient authorization.

In fact, and apart from the fact that the purported communication does not have sufficient authorization in the public health regulations, the fact that the communication is carried out prior to the detection of a contagion situation raises problems from the point of view of the principle of 'accuracy of the data given that it would not allow knowing precisely which are the people who have been in contact with the person who has tested positive. The information may not be sufficiently up-to-date by not having taken into account other circumstances specific to the dynamics of universities, for example, the performance of activities unrelated to teaching that are validated as free choice credits and that may entail the interrelation of numerous students from different studies and courses, resignations and replacements of staff at the service of the university, coexistence on campus or university residences.

On the other hand, in accordance with what is foreseen in *the Public Health Action Protocol against cases of infection by the new SARS-COV-2 coronavirus,* the Department of Health already has other less intrusive ways for the right to data protection through the questionnaire that the COVID Managers carry out in the face of suspected or confirmed cases and which can fulfill, at the time when this circumstance occurs, the purpose intended by the protocol.

For these purposes, it could be of interest, to facilitate a quick and up-to-date response, for the university to maintain internally the university census with the circumstances recorded for the purposes of controlling possible contagions (contact groups, activities in which the students have participated, interactions between different groups, teacher substitutions, etc.). In this way, in cases where the regulations directly provide for the duty of communication or when the health authorities require the collaboration of the university, it could respond to the request in an agile way and with updated information, communicating the data of the affected people and avoiding
massively communicate the identification and location data of all students and workers, including those of many students or workers who have no connection to any episode of contagion.

Finally, it is necessary to take into account the fact that although the protocol foresees that the communication of the university census is carried out to the Department of Health, this communication will be carried out *"[...] through the Interuniversity Council of Catalonia".* Thus, the heading "Data processing and monitoring indicators" of the protocol alludes to the authorization of the General Secretary of the CIC, *"[...] both by the department competent in health matters and by the universities, to carry out the necessary actions for the processing of the personal data of the members of the university community relevant to the preparation of the monitoring indicators of the COVID-19 in the university area by the Department of Health".*

Article 121 of Law 1/2003, of February 19, on the Universities of Catalonia, provides that the CIC is the coordinating body of the university system of Catalonia and of consultation and advice of the Government of the Generalitat in matters of 'universities. Throughout this rule, different functions entrusted to the CIC are collected, among which is the coordination of the validation and student mobility regime (art. 11), as well as the promotion and coordination of measures aimed at the harmonization of study cycles and naming of universities' own degrees in the European system of degrees (art. 13). However, there is none among its functions that can enable the intended communication, so that, in the event that the communication is intended

do through this institution should be through the person in charge of the treatment (arts. 4.8 and 28 RGPD). In this sense, the CIC would act as the person in charge of the treatment with respect to the universities that had formalized the contract referred to in article 28 RGPD.

VI

The consultation also raised doubts regarding *"[...] compliance with the principle of proportionality of the measure taking into account the data that is required".*

The considerations that have just been made about the lack of legal basis to carry out the communication, would make it unnecessary to analyze this question. However, and even if it is only for illustrative purposes, some considerations should be made in this regard, given that the information that was planned to be communicated may not respect the principle of minimization (proportionality).

This principle, contained in article 5.c) of the RGPD, establishes that the processed data must be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed.

The protocol provides that the file or university census *"[...] must contain affiliation data (CIP/DNI) and contact details of members of the university groups and the following data for each person:*

- *Name*
- *Surname 1*
- *Surname 2*
- *NIF (for foreign students passport number or NIE)*
- *Email*
- *Contact number • Date of birth • CIP (if available)*
- *Sex (if available) • University • Center*

- *Collective (Student, PAS or PDI)*

Only for students

- *Studies you are taking (for students only)*
- *Enrolled subjects*

Only for PDI •

Studies taught (only for teachers) • Subjects taught (only for teachers) "

Likewise, the university must inform students that in order to manage the control and management of cases and close contacts of their university, the identifying data and results of the tests carried out will be shared with the Department of Health [...]"

The treatment provided for in the protocol would be justified from the perspective of the principle of data minimization to the extent that these data were adequate, relevant and limited to achieve the purpose relating to the traceability of possible contagions within the university community, by the Department of Health, so as to facilitate the early detection of signs of outbreaks and act accordingly.

It should be taken into account that the General Sub-Directorate for Surveillance and Response to Public Health Emergencies has approved a Public Health Action Protocol against cases of infection by the new SARS-COV-2 coronavirus, updated on October 18, 2020, in which, among other issues, the data to be communicated for contagion control is specified.

This protocol of the Department of Health provides that, in relation to suspected and confirmed cases, the information that must be collected is the data relating to the identification of the interested party (name and surname, sex, date of birth, age, CIP , DNI/NIE/passport, address, telephone, e-mail, place of residence), as well as other aspects related to the type of residence, number of people with whom he shares the address, circumstances relating to linguistic or cultural difficulties, relative clinical data to COVID-19, etc. in accordance with the provisions of Annex 2.

In relation to close contacts, on the other hand, it foresees the need to collect data relating to the name and surname, telephone, date of last contact, time of contact, place and context or area (health center, socio-health center, residence, home, work, school...), in order to be able to contact him and start or check to what extent he may be dealing with a positive case, or even signs of an outbreak.

Taking into account, then, the information required by the health authorities when they have to carry out the follow-up of cases, with regard to close contacts, the communication of data relating to the date of birth, sex, or the CIP would not seem justified and the DNI, NIE or passport, since in principle these are not requested data, in accordance with the aforementioned protocol of the Department of Health.

Conclusions

Based on the information available, the processing of data relating to the communication of a university census to the Department of Health, through the Interuniversity Council of Catalonia, is not authorized from the point of view of the regulations of data protection, not being protected by public health regulations.

Barcelona, February 19, 2021