

Opinion in relation to the query made by a public company on the possibility of requesting a medical certificate or similar document that allows justifying the non-use of a mask on trains and in stations

A letter from the data protection representative of (...) is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the possibility of asking people who use the railway to they do not wear a mask - or their companions - the documentation certifying the concurrence of the cause that exempts them from wearing it.

Specifically, the following questions are formulated:

- a) The request to display and consult the medical certificate (or any other supporting document) that the company staff or the security agents who provide service at our facilities make to the users or accompanying persons of users who do not wear a mask constitutes lawful data processing?
- b) If so, what would be the legality of the treatment provided for in article 6 of the RGPD? In particular, what would be the cause of legality other than the explicit consent that the interested person could provide?
- c) Since the data relating to health are special category data, what would be the cause that would allow lifting the prohibition of treatment provided for in article 9 of the RGPD? In particular, what would be the cause of legality other than the explicit consent that the interested person could provide?

Having analyzed the request, and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

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 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), or when "it is necessary for the fulfillment of a mission carried out in public interest or in the exercise of conferred public powers to the person responsible for the treatment" (letter e).

As can be seen from Article 6.3 of the RGPD, the legal basis for the treatment indicated in Article 6.1.c) and e) must be established by European Union Law or by the law of the Member States that apply to the person in charge of the 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 (hereinafter LOPDGDD) establishes the legal scope of the enabling rule.

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, for in order to be able to consider this data processing lawful.

Article 9 of the RGPD provides that:

"1. The processing of personal data that reveal 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 the 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 following circumstances applies: a) the interested party gives his explicit consent to the treatment of said personal data with one or more of the purposes specified, except when the Law of the Union or The member states establish that the prohibition mentioned in section 1 cannot be lifted by 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 security of health care and medicines or health products, on the basis of the Law of the Union or of the Member States that establishes adequate 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 of Health. (...) g) Law 33/2011, of October 4, General Public Health. (...)"

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

Specifically, the competent authorities in matters 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 specific health situation of a person or group of people or because of 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 the same and the immediate environment, as well as those considered necessary in the case of risk of a transmissible nature" (article 3).

These forecasts are set out in similar terms to Law 18/2009, of October 22, on public health (LSP), which aims to organize actions, benefits and services in the field of public health in the territorial area of Catalonia established by Law 15/1990, of July 9, on health regulations in Catalonia, to guarantee the monitoring of public health, the promotion of individual and collective health, the prevention of illness 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, it can: (...) j) Adopt measures of medical examination, treatment, hospitalization or control if there are rational indications of the existence of danger to people's health 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 activity, the movement of people and the provision of services in certain territorial areas provided for in annex 3, d in accordance with the provisions of article 55 bis.

2. The measures referred to in paragraph 1 must be adopted respecting the rights that the Constitution recognizes for citizens, especially the right to personal privacy, in accordance with what is established in the data protection regulations of personal nature and with the procedures that these regulations and the other applicable regulations have established, and 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 Special Measures in Matters of Public Health, with an exceptional character and when so required by 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 any number of measures 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 different public administrations to safeguard 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 contagion.

That being the case, the various persons responsible for data processing must follow these measures, even when this involves the processing of data relating to the health of natural persons.

III

Under the auspices of the previously mentioned 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 the SARS coronavirus CoV-2 (COVID-19), including the widespread use of the mask as a protective measure (barrier).

Thus, by means of "Order TMA/384/2020, of May 3, by which instructions are given on the use of masks in the different means of transport and requirements are set to guarantee safe mobility in accordance with the plan para la transition hacia una nueva normalidad", the use of the mask in the different means of transport was regulated.

Also by means of the "Order SND/422/2020, of May 19, by which the conditions for the mandatory use of a mask are regulated during the health crisis situation caused by the COVID-19", the compulsory use of the mask by the population.

This protection measure is currently contemplated 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, applicable throughout the national territory (article 2.1).

Specifically, article 6 of RDL 21/2020 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, provided that it is not possible to guarantee the maintenance of an interpersonal safety distance of, to less, 1.5 meters. 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 or on their decks or exterior spaces when it is possible to guarantee the maintenance of an interpersonal safety distance of at least 1 .5 meters.

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. (...)."

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

Point out that the provisions on the mandatory use of the mask in means of transport and on the reasons for exemption from its use established in Resolution SLT/1429/2020 remain unchanged in Resolution SLT/1648/2020, of July 8, by which new measures are established in the use of the mask for the containment of the epidemic outbreak of the COVID 19 pandemic.

Also note that the Supreme Court has admitted the legality of the adoption of this protection measure as set out 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, it is necessary and proportionate to achieve the general interest goal of health protection, to constitute a measure that can contain the progression of the pandemic."

IV

So, in view of these forecasts, the obligation to wear a mask on public transport (in this case, on the railways) is clear for those people aged six years and over who use it, as well as that, in the case of presenting any type of illness or respiratory difficulty that may be aggravated by its use or that, due to their disability or dependency, do not have the autonomy to remove the mask or present alterations of behavior that make it unviable their use, are exempt from such 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 people will have to have a medical certificate or document similar in which it is expressly specified which of the aforementioned circumstances occur in his person.

In the consultation, it is considered whether station agents and security guards who provide services in the mentioned stations can request this medical certificate or document from people using the railways who do not wear a mask (or if applicable to their companions) analogue

In accordance with article 31 of RDL 21/2020, previously cited:

"1. Failure to comply with the prevention measures and the obligations established in this Royal Decree-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 of 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, and sanctioned with a fine of up to one 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) .

For its part, article 38 of Law 4/2006, of March 31, railways, which regulates the regime applicable to railway personnel, states that:

"2. It is the responsibility of the owner of the infrastructure, the railway infrastructure administrator, if applicable, or the company operating the service, through its staff, in the terms established by regulation, to exercise the power of police in relation to: (...) c) Control of compliance with obligations that tend to avoid any kind of damage, deterioration of roads and facilities, risk or danger to people. (...).

3. The employees of the owner of the infrastructure, of the railway companies and of the operating companies that provide the service have, in the acts of service and in the

motivated by these, the consideration of agents of the authority in the exercise of their functions, especially those of immediate monitoring of the observance, by users and by third parties in general, of the rules established by laws and regulations and the general conditions of use. Said employees must perform the corresponding inspection functions and must report the detected violations to the competent administrative bodies, which must supervise, in all cases, the inspection, the processing of the complaints presented and the imposition of the corresponding sanctions, if applicable."

Likewise, article 32 of Law 5/2014, of April 4, on private security, which regulates the duties of security guards, provides that:

"1. The security guards will carry out the following functions: a) Exercise surveillance and protection of goods, establishments, places and events, both private and public, as well as the protection of people who may be found in them, carrying out checks, records and preventions necessary for the fulfillment of its mission. b) Carry out identity checks, of personal objects, packages, merchandise or vehicles, including their interior, at the entrance or inside buildings or properties where they provide services, without, in any case, being able to retain personal documentation, but do prevent access to said buildings or properties. The refusal to show identification or to allow the control of personal objects, packages, merchandise or the vehicle will entitle individuals to prevent access or to order them to leave the building or property subject to its protection. c) Avoid the commission of criminal acts or administrative infractions in relation to the object of their protection, making the necessary checks to prevent them or prevent their consummation, having to oppose them and intervene when they witness the commission of some type of infraction or it is necessary su ayuda for humanitarian or emergency reasons. (...)"

In view of these precepts, it can be said that it is up to the station officers and security guards, among other duties, to ensure compliance with the measure adopted by the health authorities consisting of the mandatory use of the mask in public passenger transport (as is the case with the railway), that is to say, control that the people using the railways are wearing a mask - or that they are wearing it correctly - when they access the railway stations, while they remain there and /or on the trains.

The effective fulfillment of this control function would include, when appropriate, requiring the user (or his companion) the documentation that accredits the concurrence in his person of one of the causes of exemption from the obligation to mask referred to in section 2.2.2 of Resolution SLT/1429/2020 and article 6.2 of RDL 21/2020.

From the point of view of data protection, the knowledge of this sensitive information by station agents and security guards is an inevitable consequence of the exercise of the surveillance or control function attributed to them and, therefore, it would result in lawful data processing on the basis of articles 6.1.e) and 9.2.i) of the RGPD, in view of the sanitary, public health and sectoral regulations examined.

Therefore, agreeing that it would not be necessary to resort to another legal basis to legitimize this treatment, such as the explicit consent of the affected person.

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

The station agents and security guards can request, in the exercise of their function of monitoring compliance with the measure adopted by the health authorities consisting of the mandatory use of the mask in public transport, the documentation that accredits the concurrence of one of the causes of exemption from the obligation to wear a mask to those users of the railways who do not wear it (or if applicable to their companions), given that, in view of the health regulations, health public and sectoral application, would result in lawful data processing, on the basis of articles 6.1.e) and 9.2.i) of the RGPD.

Barcelona, March 2, 2021

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