Machine Translated by Google

CNS 14/2021

Opinion in relation to the inquiry made by a public transport company on the access of trade union delegates who are members of the Safety and Health Committee to the images of the accident suffered by a worker in the company's facilities captured by the video surveillance system

A letter from a public transport company is submitted to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion on the access of trade union delegates who are members of the Safety and Health Committee to the images of the accident suffered by a worker in the company's facilities captured by the video surveillance system.

Specifically, the following questions are formulated:

a) If the trade union delegates who are members of the Safety and Health Committee would have the right to access the video surveillance images in these accident situations and, if so, what would be the legal basis of Article 6.1 of the RGPD that would allow access.

b) If all the delegates who are members of the Safety and Health Committee could access it or, in change, their access would be limited to one of them.

c) Whether access to the video surveillance images of the accident would be allowed to other members of the company who could help clarify its causes such as, for example, analysts or hierarchical managers of the injured worker or members of the Committee of Safety and Health representatives of the company.

d) If it is possible to give access to the video surveillance images of the accident to prevention delegates or other members of the company when the worker has suffered the accident as a result of an aggression or dispute with another worker of the company or a third party outside of it.

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

I

(...)

II

In the consultation, the possibility of communicating or transferring the images recorded by the video surveillance system of the consulting entity, in which the accident suffered by one of its workers inside the company's facilities would be seen, to different actors : to union delegates who are members of the Safety and Health Committee, to company representatives who are also members of the Safety and Health Committee, and/or other members of the company, such as the injured worker's supervisor or analysts.

The query does not provide detailed information about the work accident in question. It is therefore necessary to bear in mind that said images could refer not only to the injured worker

Machine Translated by Google

but also to third parties. Also that the communication of these images could lead to revealing information related to the health of the injured worker, to the extent that they would make it possible to know the existence of an injury or damage to his person as a result of his professional activity.

Article 156 of the Consolidated Text of the General Social Security Law, approved by Royal Legislative Decree 8/2015, of October 30, defines the concept of work accident in the following terms:

"1. A work accident is understood as any bodily injury that the worker suffers on occasion or as a consequence of the work that he executes on behalf of another person.
2. The following will be considered work accidents:
a) Those suffered by the worker when going to or returning from the workplace.
b) Those suffered by the worker on occasion or as a consequence of the performance of elective positions of a union character, as well as those occurring when going to or returning from the place where the functions proper to said positions are exercised.
c) Those that occur with the occasion or as a consequence of the tasks that, even if they are different from those of their professional group, the worker executes in compliance with the orders of the employer or spontaneously in the interest of the good functioning of the company.
d) The events in acts of rescue and others of a similar nature, when some and others have a connection with the work.
e) Illnesses, not included in the following article, contracted by the worker in connection with the performance of his work, provided that it is proven that the illness was the exclusive cause of the execution of the same.
f) Diseases or defects, previously suffered by the worker, that are aggravated as a consequence of the constitutive injury of the accident.
g) The consequences of the accident that are modified in their nature, duration, severity or termination, by intercurrent illnesses, that constitute complications derived from the pathological process determined by the accident itself or have their origin in conditions acquired in the new environment in which there is placed the patient for his healing.

3. It will be presumed, unless proven otherwise, that the injuries suffered by the worker during the time and at the place of work are constitutive of an accident at work.
4. Notwithstanding what is established in the previous sections, the following shall not be considered a work accident:
a) Those due to force majeure outside the work, understood by this to be of such a nature that it has no relation to the work that was being carried out when the accident occurred.

In any case, insolation, lightning and other similar phenomena of nature will not be considered force majeure.
b) Those due to willful intent or reckless imprudence of the injured worker.
5. They will not prevent the classification of an accident as work-related:
a) Professional imprudence that is a consequence of the usual exercise of a job and derives from the confidence that this inspires.
b) Concurrence of civil or criminal culpability of the employer, of a co-worker of the injured person or of a third party, unless it has no relation to work."

In accordance with article 4.15) of the RGPD is understood by ""data relating to health": personal data relating to the physical or mental health of a natural person, including the provision of health care services, which they reveal information about their state of health".

The controversial images have been recorded by the video surveillance system that the company has installed in its facilities.

Machine Translated by Google

The treatment of the image of natural persons through video surveillance systems is subject to the principles and guarantees of the personal data protection regulations, that is to say, Regulation (EU) 2016/679, of the Parliament and of the European Council , of April 27, 2016, General Data Protection Regulation (RGPD), to Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD)) and, specifically, to Instruction 1/2009, of February 10, of the Catalan Data Protection Agency, on the processing of personal data through video surveillance cameras.

In this sense, it should be noted that article 22 of the LOPDGDD legitimizes the video surveillance treatments carried out by a person in charge, whether a natural or legal person, public or private, with the purpose of preserving the safety of people and goods, as well as their facilities, in the terms and conditions established by this same article.

Also that, in application of the principle of limitation of the purpose (Article 5.1.b) RGPD and Article 6.1 Instruction 1/2009), the images recorded for this purpose of guaranteeing the safety of people, goods and facilities could not be used for incompatible ulterior purposes, unless there is a sufficient legal basis (Article 6.1 RGPD).

In this sense, article 6.4 of the RGPD provides that:

> "4. When the treatment for another purpose different from that for which they were collected personal data is not based on the consent of the interested party or the Law of the Union or of the Member States that constitutes a necessary measure and proportionate in a democratic society to safeguard the objectives indicated in article 23, section 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data was initially collected, will have counts, among other things:
> a) any relationship between the purposes for which the data have been collected personnel and the purposes of the subsequent treatment provided;
> b) the context in which the personal data have been collected, in particular why respects the relationship between the interested parties and the person responsible for the treatment;
> c) the nature of the personal data, specifically when categories are concerned special personal data, in accordance with article 9, or personal data relating to convictions and criminal infractions, in accordance with article 10;
> d) the possible consequences for the interested parties of the planned subsequent treatment;
> e) the existence of adequate guarantees, which may include encryption or pseudonymization."

III

The RGPD establishes that all processing of personal data must be lawful, fair and transparent (Article 5.1.a)).

The communication (or access) of the images referred to in the query constitutes data processing which, in order to be considered lawful, requires the concurrence of one of the legal bases established in article 6.1 of the 'RGPD, whether the consent of the affected person (letter a), whether it is one 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).

As can be seen from Article 6.3 of the RGPD, the legal basis for the treatment indicated in Article 6.1.c) must be established by the Law of the European Union or by the law of the Member States that applies to the responsible for the treatment. The referral to the legitimate basis established in accordance with

Machine Translated by Google

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 development rule, as it is a fundamental right, has the status of law.

In this sense, article 8 of the LOPDGDD establishes the legal scope of the enabling rule.

In addition, when the treatment affects special categories of data, as is the case with data relating to health, 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 treatment lawful data.

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 univocal way to a natural person, data relating to health or data relating to the sexual life or the sexual orientation of a natural person.
> 2. Section 1 will not apply when one of the circumstances occurs following:
> a) the interested party gives his explicit consent for the treatment of said data personal with one or more of the specified purposes, except when the Law of the Union or member states establish that the prohibition mentioned in the section 1 cannot be raised by the interested party.
> 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 of 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 Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;
> (…)
> h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the labor capacity of the worker, medical diagnosis, provision of assistance or health or social treatment, or management of assistance systems and services health and social, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a health professional and without prejudice to the conditions and guarantees contemplated in section 3;
> (…)."

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) (…).
> b) Law 31/1995, of November 8, on the Prevention of Occupational Risks.
> (...)."

Given this, it is necessary to examine whether the provisions of Law 31/1995, of November 8, on the prevention of occupational risks (LPRL), would protect the communication of data intended in the present case.

Machine Translated

Machine Translated by Google

IV

The consultation raises, on the one hand, the possibility of communicating the recorded images of the work accident suffered by a company worker inside its facilities to the trade union delegates who are members of the Safety and Health Committee.

Article 36.1 of the LPRL attributes to the prevention delegates - representatives of the workers with specific functions in the area of occupational risk prevention (article 35 LPRL)-, among other powers, the exercise of the task of monitoring and controlling compliance with the occupational risk prevention regulations (section d).

In exercising these powers and in accordance with article 36.2 of the LPRL, the delegates of prevention are empowered to:

> "(...)
> b) **Have access,** with the limitations provided for in section 4 of article 22 of this Law, to the information and documentation relating to the working conditions that are necessary for the exercise of their functions and, in particular, to that provided in the articles 18 and 23 of this Law. When the information is subject to the limitations described, it can only be provided in a way that guarantees respect for confidentiality.
>
> c) **Be informed by the employer about the damage caused to the health of the workers** once he had known about them, **being able to show up,** even outside of his working day, **at the place of the events to know the circumstances** of them.
>
> d) Receive from the employer the information obtained by him from the persons or bodies responsible for protection and prevention activities in the company, as well as from the competent organizations for the safety and health of workers, without prejudice to what is provided in Article 40 of this Law regarding collaboration with the Labor and Social Security Inspectorate.
> (...)."

According to this precept, prevention delegates should be able to access the information on the damage to the health of workers that has its origin in a harmful event related to the working environment, solely for the purpose of control attributed to them by the LPRL (monitoring the company's compliance with the occupational risk prevention rules (article 36.1.d) LPRL)), and limited to the data strictly necessary for these purposes.

This is a requirement that derives from the principle of data minimization (article 5.1.c) RGPD), according to which "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("minimization of data")."

The LPRL obliges the employer "to notify in writing to the labor authority the damages to the health of the workers in his service that would have been produced in connection with the development of his work (therefore, work accidents and occupational diseases), in accordance with the procedure determined by regulation" (article 23.3).

In relation to what must be understood by "damages caused to health", Order TAS/2926/2002, of November 19, which establishes new models for the notification of work accidents and enables their transmission by electronic procedure, collects, for this purpose, a form in which the description of the injury suffered must be stated by the worker, the injured part of the body, with a brief literal description, the corresponding code according to the tables in Annex II of the same Order, the degree of the injury, which will be what is stated in the medical statement

Machine Translated by Google

of discharge, the doctor providing the immediate assistance and the type of hospital or ambulatory assistance with identification of the establishment.

Given that the Law uses the same concept of health damage for the notification by the employer to the labor authority (article 23.3 LPRL) as for the communication to the prevention delegates (article 36.2.c) LPRL), s 'understands that the information to be communicated should be the same in terms of its content, that is, what must be stated in the communication of the work accident or occupational disease, to which reference has been made, and that allows prevention delegates to have knowledge about the severity and nature of the damage.

It should also be borne in mind that the prevention delegates are part of the Safety and Health Committee (CSS), a joint and collegial participation body intended for regular and periodic consultation of the company's actions in terms of risk prevention (article 38 LPRL).

According to article 39.1 of the LPRL, the CSS has, among its powers, that of "promoting initiatives on methods and procedures for the effective prevention of risks, proposing to the company the improvement of the conditions or the correction of existing deficiencies".

In exercising these powers and in accordance with article 39.2 of the LPRL, the CSS is empowered to:

> "(...)
> b) Know how many documents and reports relating to working conditions are necessary for the fulfillment of their functions, as well as those coming from the activity of the prevention service, if applicable.
> c) **Know and analyze the damage caused to the health or physical integrity of the workers, in order to assess their causes and propose the appropriate preventive measures."**

In accordance with this precept, the prevention delegates, within the CSS, should be able not only to know the damage to the health of workers suffered as a result of the tasks carried out in the workplace, but also to analyze them and assess its causes, with the aim of proposing to the company the improvement of the conditions or the correction of the existing deficiencies detected with the ultimate aim of avoiding future accidents (article 39.1.b)
LPRL).

In this sense, mention should be made of the STS of February 24, 2016, in which the right of prevention delegates to access, in the same way as the labor authority, "the reports and documents **resulting** from the investigation by the company of damages to the health of the workers, since these reports are part of the overall process of evaluating labor risks, even when certain limitations may exist" derived, for the purposes that concern them, from the protection of personal data of the affected workers (FJ IV).

As the STSJ of Asturias no. 2/2019 of January 17, "the Prevention Delegates are entitled to receive information on extremes that may affect both the health of workers and working conditions, in such a way that, whether it is aggression or of incidents or altercations that may occur in workplaces, the Prevention Delegates should be informed about them" (FJ III).

Taking into account that prevention delegates can visit the scene and access information that allows them to know and analyze the circumstances in which the work accident occurred, for the purposes of monitoring compliance by the company of the occupational risk prevention rules (article 36.1.d) LPRL), a priori the possibility could be admitted

Machine Translated by Google

that they also access the images captured by the video surveillance system about the accident in question, to the extent that their knowledge is relevant to determine the corrective measures to be adopted.

However, by application of the principle of data minimization (Article 5.1.c) RGPD), this access to said images, so that the affected persons are identifiable, would only be justified in those cases in which the knowledge of this data is relevant to achieve the intended purpose of the access. This could happen in certain cases, for example, where the measures to be taken must lead to the transfer of the affected person.

From the information available, however, this does not seem to be the case we are dealing with. In other words, in order to monitor compliance by the company with the occupational risk prevention rules (article 36.1.d) LPRL), it cannot be ruled out that, in general, this can be done without accessing the identity of the people affected, so it would be necessary to provide the anonymized information.

As recognized in, for example, the STSJ of Catalonia no. 9814/2005, of December 20, in the communications of information to the prevention delegates, when they include data relating to the health of workers, it is necessary to ensure that "information that is not anonymous or generic" is not provided (FJ IV).

In addition to all this, it cannot be ignored that the LPRL itself attributes to the prevention delegates the power to appear at the scene "to know the circumstances of themselves" (article 36.2.c)), that is to say, to find out how the damage occurred.

Whether for this reason, or for other ways that allow the delegates indirect identification (within a company it may be easy to make the identification depending on the concurrent circumstances), it must be taken into account that the fact that the name of the worker is not provided injured does not imply that this person cannot end up being identified by other indirect means. Even so, this measure would be more respectful of the principle of data minimization (Article 5.1.c) RGPD).

In view of this, it would be necessary to admit the access of the prevention delegates to the investigation report of the work accident that occurred in this case in the company's facilities, which contains the conclusions on the causes of the 'accident, which should be provided anonymously, in order not to reveal data relating to the health of the person affected, given that knowledge of the worker's identity would not be necessary to achieve the intended purpose of the access to this type of information and they should also be able to access, if the circumstances of the case justify it, the recording of the events. In this case, however, if the people are identifiable, their image would have to be distorted.

This, without prejudice to the obligations of reservation and confidentiality that correspond to the prevention delegates.

In accordance with article 37.3 of the LPRL, prevention delegates are subject to the obligation of professional secrecy provided for in article 65 of the ET for company committees. Specifically, according to this precept, the prevention delegates must observe the duty of secrecy with respect to that information that, in the legitimate and objective interest of the company or the work center, has been expressly communicated to them with a reserved nature (article 65.3 ET). In any case, no type of document or information delivered by the company to the prevention delegates can be used outside the strict scope of the company and for purposes other than those that motivated its delivery (article 65.3 ET) and this duty of confidentiality continues even after their term of office expires and regardless of where they are located.

Machine Translated by Google

The fact that the work accident was the result of an attack by another colleague or a third party outside the company, as pointed out in the consultation, would not distort the conclusions made until now

The same considerations can be made in relation to company representatives members of the CSS, in view of the powers attributed to the CSS (article 39.1 LPRL) and the powers assigned to its members (article 39.2 LPRL), including the ability to know and analyze damage caused to health or physical integrity of workers in order to assess their causes and propose appropriate preventive measures (letter c).

For all that, and thus answering the specific questions raised in the consultation, it must be concluded that, in the absence of another legal basis, access could only be facilitated for members of the CSS (prevention delegates and company representatives) to the controversial images to have the consent - explicit in the case of the injured worker - of the people affected by the recording, on the basis of articles 6.1.a) and 9.2.a) of the RGPD, or, when justified, in an anonymized way by distorting the images.

v

The consultation also raises the possibility of communicating the images recorded about the work accident suffered by a worker to other members of the company "who can help clarify the causes", such as the injured worker's superior or analysts

Article 16.3 of the LPRL provides that **"when a damage has been produced to the health of workers** or when, on the occasion of the health surveillance provided for in article 22, indications appear that the prevention measures are insufficient , **the employer will carry out an investigation in this regard, in order to detect the causes of these facts."**

As part of this investigation, "the best and most information possible must be obtained not only to eliminate the causes that triggered the event and thus avoid its repetition, but also to identify those causes that, being at the genesis of the event, facilitated its development and knowledge and control of which must allow the detection of failures or omissions in the organization of prevention in the company and control of which will mean a substantial improvement in it" (document "NTP 442: Investigación de accidents-incidentes: procedure", published by the National Institute for Safety and Health at Work (INSST) on their website).

In a case such as the one under consideration, where the workplace accident of a company worker has been recorded by the cameras of the company's video surveillance system, this information should be part of the investigation of the accident in question, given its potential to offer objective information about the circumstances in which it occurred and, therefore, to help determine the causes of the damages suffered by the injured worker.

The use of these images by the company for this purpose would not be considered incompatible with the purpose that justifies their original treatment (Article 5.1.b) RGPD), given that it would fall within the purposes of preserving the safety of people .

The LPRL obliges the employer, when there has been damage to the health of the workers, to carry out an investigation into the case, in order to detect the causes of these facts (article 16.3), although not specifies the means to be used to achieve this goal.

In this sense, the provisions of the "NTP 442: Investigation of accidents-incidents: procedure", previously mentioned, can be taken into consideration.

Machine Translated by Google

In this INSST document, although it is warned that the person or persons who must investigate work accidents or incidents depends on the type and structure of the company, the participation of the direct command of the sector is considered key or area in which the accident occurred, due to its immediacy, due to the knowledge and continuous contact with the workers involved and due to their knowledge of the work processes in which the event to be investigated occurred.

In this sense, it is pointed out that "the Direct Command should in any case initiate the investigation and seek the advice and cooperation of specialists in cases where difficulties arise in the identification of the causes or in the design of the measures to be implemented".

In turn, it is pointed out, regarding the specialized investigation, that "it is carried out by the Prevention Technician, advised in his case by technical specialists from the various areas and accompanied by the direct command and other line personnel related to the case. "

And it is added that "given that, as has been said, the main and ultimate objective of any investigation is to identify the causes of the accident and these are normally multiple, of different types and interrelated, it is necessary to deepen the causal analysis in order to obtain the greatest and best possible information from the investigation. This entails a degree of complexity that makes the investigation task difficult and for this reason, the ideal to achieve would be for **all investigation to be carried out by a group or team in which the Prevention Technician, the Direct Command and other related line personnel were present with the case and with the necessary advice from technical specialists** in the matter being investigated."

In view of these considerations, it would seem clear that the injured worker's superior, as part of the investigation of the accident that occurred, should be able to access the images recorded by the company's video surveillance system, for the purposes of examine its possible causes.

The same consideration could be made in relation to the "analysts" referred to in the query, to the extent that they were part of the staff, internal or external, of the company in charge of carrying out said investigation.

From the point of view of data protection, access to the images by these persons, in the exercise of these investigative functions, would result in lawful data processing on the basis of articles 6.1.c) and 9.2 .b) of the RGPD, in relation to article 16.3 of the LPRL.

The fact that the work accident was the result of aggression by another colleague or a third party outside the company, as pointed out in the consultation, would not distort these conclusions, although, in in these cases, the said images should also be made available to the competent authorities within a maximum period of seventy-two hours after the existence of their recording is known (article 22.3 LOPDGDD).

In accordance with the considerations made so far in relation to the proposed query, they are made next,

Conclusions

Access to the images captured by the video surveillance system in relation to an occupational accident by the members of the Safety and Health Committee (prevention delegates and company representatives) could be justified, in view of the functions attributed to them by the 'LPRL, en

Machine Translated by Google

certain cases, although given the circumstances of the case analyzed, they should be provided in an anonymized way if the purpose pursued can be achieved in this way.

Beyond that, access to said images so that those affected can be identified should be limited to the people responsible for carrying out the corresponding investigation, which could include the injured worker's superior .

The fact that the work accident was the result of an assault by another colleague or a third party outside the company would not distort these conclusions.

Barcelona, March 26, 2021

Machine Translated