

CNS 18/2021

Opinion in relation to the query made by a City Council regarding the recordings of virtual training sessions

A query made by a City Council regarding the recording of virtual training sessions, in the field of courses subsidized by the Public Employment Service of Catalonia (SOC), is presented to the Catalan Data Protection Authority, with the aim of control of assistance, as well as the subsequent editing of this audiovisual material to develop training content that can be used in other courses.

The request is accompanied by a document with the title "Risk assessment in the collection of data", from which basic information relating to the treatment that is intended to be carried out is transferred.

In accordance with article 15.1.g) of Decree 48/2003, of February 20, which approves the statute of the Catalan Data Protection Agency, consultation requests made by the entities included in the scope of action of this Authority must be completed through the body that holds its representation. It can also be requested, if applicable, by the data protection officer (art. 39.1.e) of Regulation (EU) 2016/679, of April 27. In accordance with this provision, this Authority goes require the City Council to amend the lack of representation of the person who had requested the opinion, an amendment that occurred through the presentation of the request by the Mayor.

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

Although the terms in which the query is formulated are not entirely precise, it follows from it that the City Council wants to know about the possibility of recording and storing the training sessions carried out in virtual mode (virtual classroom) with two purposes, the first of which is the control and monitoring of the execution of the courses and, in particular, of attendance of the students, both by the local body itself and by the Public Employment Service of Catalonia (from now on, SOC) as well as, secondly, editing the audiovisual material to develop training content that can be used in other trainings.

In accordance with the provisions of articles 2.1 and 4.1 of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to

processing of personal data and the free movement of such data and which repeals Directive 95/46/EC (General Data Protection Regulation), hereinafter RGPD, the data protection regulations apply to the treatments that they are carried out on any information "about 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, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person".

So, the image and, where appropriate, the voice of physical persons, in this case, of students and of the trainers that can be recorded in the virtual trainings, is personal information subject to the principles and guarantees of the data protection regulations (RGPD and Organic Law 3/2018, of December 5, Protection of personal data and guarantee of digital rights (LOPDGDD).

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"*.

According to what can be seen from the document sent, the local entity had been carrying out face-to-face occupational training courses subsidized by the SOC, and following the publication of the Resolution TSF/2867/2020, of November 12, by which exceptional measures are adopted for the flexibility of face-to-face teaching of professional training for employment, in response to the declaration of the state of alarm of the State Government to contain the spread of infections caused by SARS-CoV-2, extraordinary measures have been established aimed mainly at establishing "[...] as an alternative measure to provide face-to-face training, the classroom virtual or teletraining modality [...]", while the effects of the pandemic last - in accordance with what is foreseen in its preamble-

Among the provisions incorporated in Resolution TSF/2867/2020 is the regulation of the activity of monitoring, verification and control of training actions carried out through the virtual classroom or in training mode. In relation to these forecasts, which will be analyzed in detail later, the City Council explains that "[...] the regulations that regulate subsidized occupational training establish the obligation to attend training actions. To be able to accredit the assistance in the actions carried out through the virtual classroom, apart from the connection log of the video conference application, an audiovisual recording is required to check the follow-up of the session by the students.

In addition, in order to develop the service and offer quality training, we must use teaching resources and methodologies adapted to current needs, which is why we consider it appropriate to record training actions and edit them to carry out contents."

Placing the query in its context, it must be agreed that in accordance with the provisions of article 5.1.a), any processing of personal data must be lawful and, in this sense, the RGPD establishes the need to agree in any of the legal bases of article 6.1, among which it appears

in letter c), when the treatment is necessary to comply with a legal obligation applicable to the person responsible for the treatment, and letter e), in the event that it is necessary to fulfill a mission carried out in the public interest or in the exercise of public powers conferred on the data controller.

In accordance with the provisions of article 6.3 of the RPGD, the legal bases of the treatment indicated in sections 1, letters c) and e), must be established by the law of the Union or of the Member States that s apply to the data controller. This same article 6.3 adds 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 conferred on the controller."

In relation to this, we refer to the provision of article 8 of the LOPDGDD, according to which the rule that enables the treatment in both cases must be a rule with the status of law.

The regulation relating to the employment system in Catalonia is regulated in our legal system a Law 13/2015, of 9 July, on the regulation of the employment system and the Public Employment Service of Catalonia, which provides that its purpose is "[...] to promote the full development of the right to dignified, stable and quality employment, and favor the configuration of a labor market that contributes efficiently to guarantee people's employability, [...] through the comprehensive management of all employment policies that may correspond to him competently" (article 2).

The employment system in Catalonia is made up of the entities, services and programs necessary to achieve this purpose, and which include local administrations (art. 14.a) Law 13/2015). Within this system, the SOC is given the function, among others, of "directing, ordering, planning, programming and executing the services and programs necessary to promote and develop the employment policy, and make the monitoring and control" (article 24.a).

Bearing in mind that in the case we are dealing with, the treatment that is intended to be carried out is to record and store the training sessions carried out virtually in order to facilitate the monitoring and control of the execution of the occupational courses and, in particular, to accredit the students' attendance, without prejudice to the fact that it is also intended to be used for the development of training content that can be used by other students or courses, and to which reference will be made later, it is necessary to mention the provision of article 40.1 of Law 13/2015 by which the SOC "[...] must carry out monitoring and control actions to guarantee compliance with the obligations of the users of the employment policies and the entities of the employment system of Catalonia, with the possibility of exercising the sanctioning power in the terms established by the applicable legislation, without prejudice to the competences of the Labor Inspectorate".

For this purpose, article 21 of Law 13/2015 foresees the obligations of the entities that are part of the employment system of Catalonia -remember that the City Council is part of it-, of which the following should be highlighted:

"[...] b) Provide monitoring, auditing and control systems that are established to guarantee the effectiveness, efficiency, productivity and impact of resources.

- c) Submit to the periodic and random controls and inspections required to verify the compliance with the occupational, administrative, economic and structural rules that apply to them.
- d) Submit the services they provide and the programs they carry out to the instruments of coordination, cooperation and evaluation of the employment system in Catalonia.
- [...] g) Respect what is established by the regulations on the protection of personal data.
- h) Ensure the rights of users established in article 18. [...].”

In relation to this, article 33 of Decree 71/2015, of May 12, restructuring the Service de Ocupació de Catalunya, states that the Inspection and Quality Control Service is responsible, among others, for the function of "carrying out inspections and the corresponding reports and proposing actions to the competent bodies" (letter a), "carrying out the control of quality on the management of programs with community funding" (letter e), as well as "collaborate and support the audits and controls carried out by the competent bodies of the regional, state and community administration, in order to check the regularity of the co-financed actions as well as compliance with the applicable regulations" (letter f).

It is also necessary to bear in mind the provision of the fifth additional provision of Law 13/2015 from which "The entities that make up the employment system of Catalonia are obliged to provide the Public Employment Service of Catalonia with the data that They request them in relation to the fulfillment of the purposes of this law, respecting what is established by the regulations on the protection of personal data".

On the other hand, with regard to the users of the services of the employment system of Catalonia, article 18 of Law 13/2015 recognizes, among other things, the right to access and participate, free of charge, in all services and programs of the Catalan employment system that are of public competence and financed with public funds (letter a), and the right to confidentiality of data "that must be transferred and used with knowledge and consent of the affected person" (letter g).

It should be borne in mind that although article 18.g) of Law 13/2015 foresees as a general rule the need to obtain the consent of users to carry out the processing of their data, the fifth additional provision obliges -in the sense of the legal authorization of article 6.1.c) of the RGPD- to the entities that make up the employment system of Catalonia that communicate to the SOC all the data that is requested of them in relation with compliance with the purposes of Law 13/2015.

This provision implies that, in any case, to the extent that the treatments carried out by the entities that make up the Catalan employment system on user data are enabled on the basis of one of the legal bases provided for in the article 6.1, and in their case, article 9.2 of the RGPD, these will be obliged to provide them to the SOC if they are requested in relation to the fulfillment of the purposes of Law 13/2015.

On the other hand, with respect to the obligations they acquire as users of the services of the Catalan employment system, article 20 of Law 13/2015 provides that they are obliged to collaborate with the Public Employment Service of Catalonia, providing the documentation, data and information requested, and to appear when required in relation to the services and programs that can be offered.

From another perspective, it is also clear that the City Council, being part of the employment system in Catalonia, has a series of obligations such as providing mechanisms from which the SOC can monitor, audit and control that are required to guarantee the effectiveness, efficiency, productivity and impact of resources, or the submission of the City Council to its controls and inspections in order to verify compliance with the regulations, including the general assessment of Catalonia's employment system.

In accordance with this, the processing of data for the monitoring and control of the execution of the training courses, including the permanence or attendance of the students, is lawful under the protection of article 6.1.c) of RGPD, that is to say, the treatment would be legitimated in the obligations that Law 13/2015 foresees with respect to the City Council, as an integrating entity of the employment system of Catalonia, in particular, with regard to the need to provide se of monitoring, auditing and control systems aimed at guaranteeing the effectiveness, efficiency, productivity and impact of resources, as well as submitting to controls and inspections in order to verify compliance with the rules of an occupational, administrative nature, economic and structural, and submit the services they provide and the programs they carry out to the evaluation of the system, the control of the permanence or attendance of the students.

However, the fact that there is a legal basis that excludes the need for the consent of the interested parties does not exclude the necessary compliance with the rest of the principles or obligations of the data protection regulations.

III

The principle of minimization requires that those responsible process only personal data that is "adequate, relevant and limited to what is necessary in relation to the purposes of the treatment" (art. 5.1.c) RGPD).

The City Council, in the documentation sent, relates its inquiry to the publication of Resolution TSF/2867/2020 which, in addition to establishing as an alternative measure to provide face-to-face training, the virtual classroom, during the effects of the pandemic, it also foresees measures aimed at guaranteeing the monitoring and control of the formations that follow this system.

Prior to the analysis of the provisions of Resolution TSF/2867/2020, it should be noted that it is clear that the recording of the training actions, including the continuous capture of its participants, or the mere viewing, in any case involves data processing that in certain circumstances can be highly intrusive.

Beyond the fact that the mere capture of the student's image or voice already entails data processing that must be provided in each case, it must be taken into account that often those attending the courses may not have a exclusive space, individualized and suitable for the purpose, from which to follow up but they may have to use a space in the family area initially intended for other purposes and in which activities can be deployed by other members of the coexistence unit, which could therefore also be affected by the treatment. This would be even more evident in the case that the sound was maintained continuously (although in this case the effects could be minimized by establishing the use of headphones with a microphone).

In the same way, from the point of view of the principle of minimization, it must also be taken into consideration the fact that the proposed treatment does not involve mere live viewing, but involves its recording, for a period of three months after the end of the execution period of each training program, as can be seen from the documentation sent by the 'Town hall.

For these purposes, it is also necessary to take into account the fact that users of the public occupational system are not necessarily adults, to the extent that article 6 of the Workers' Statute could also allow access to adults sixteen years old

Focusing on Resolution TSF/2867/2020 it is appropriate to take into account its forecasts regarding the regime of monitoring, verification and control of training actions. For this purpose, article 8 states the following:

"1. The carrying out of the monitoring, verification and control of the professional training actions for employment regulated in this Resolution will take into account the following:

a) In the case of training, the learning process of which is developed through a virtual classroom, the control bodies must be provided with the information and technical instruments necessary for the exercise of follow-up actions, verification and control of the training activity, both in real time and ex post.

When face-to-face training takes place through a virtual classroom, it must have a log of connections generated by the virtual classroom application that identifies, for each training action developed through this medium, the people participants in the classroom, as well as their connection dates and times, as well as having a mechanism that enables the connection during the classroom holding time by the control bodies, for the purpose of the actions of verification and control. When this is not possible, participation can be verified through a responsible declaration of the participating person.

In any case, student attendance at training through the virtual classroom must be reported to the course management computer application.

In all cases, the entities will have available for review in the verification and quality control processes of these actions, the documentation that certifies compliance with the requirements and obligations established in the applicable regulations.

[...]

2. In all cases, the technical team of the Public Employment Service of Catalonia will be able to carry out follow-up and control visits to check the measures that the entity is carrying out. Between these actions, the documentation of the specific course will be requested and calls and/or e-mails may be made to the entity, training staff and participants.

The technical staff of the Public Employment Service of Catalonia will ask for a user and access key to access the created virtual classrooms and teletraining platforms to be able to verify the training action.

3. In any case, access to the teletraining platforms and virtual classrooms must be kept operational for up to 3 months after the end of the execution period (taking into account extensions) established for the Program.

4. In the event that during the administrative or on-site verification of the subsidized actions, non-compliance is revealed by the training entities in the application of the exceptional measures included in this Resolution, these may lead to the initiation of a partial or total revocation procedure of the subsidies granted to the beneficiary entities, in accordance with articles 99 and 100 of the revised text of the Public Finances Act of Catalonia.[...]"

In accordance with this, the entities that make up the employment system of Catalonia that carry out training through the virtual classroom must provide the control bodies with the information and technical instruments necessary to carry out the actions monitoring, verification and control of the training activity, both in real time and ex post. To this end, it is expressly foreseen that the measures to be adopted would be, on the one hand, to have a log of connections that identifies, for each training action, the data of the participants and the connection time; and on the other hand, have a mechanism that enables the connection of the control bodies while the training is carried out. However, it provides that, in the event that this is not possible, participation can be verified through a responsible declaration by the participating person.

A priori, taking into consideration Resolution TSF/2867/2020, it is not required the continuous recruitment of students or the recording and storage of the training carried out by the integrating entities of the public employment system, but the verification that participants have been connected to the formations throughout the learning process (or the minimum that corresponds depending on each case) and the added possibility of carrying out a live verification, while the training action is being carried out. In this sense, it could be sufficient to activate the image at specific moments when the trainer or the bodies in charge of control require it for control purposes, without the need to keep the camera activated for the rest of the session.

In fact, the resolution foresees that in case these measures are not possible to apply, the participation can be accredited through a responsible declaration of the participating person, therefore, it would not seem that access was necessary either to the recorded images in order to carry out monitoring and control activities.

Taking into account all these circumstances, from the perspective of data protection and, specifically, of the principle of minimization, it does not seem to be proportionate to the continuous capture and the recording and storage of the training actions with the aim of being able to accredit assistance to training actions, within the monitoring, verification and control process of SOC control bodies.

IV

The City Council also proposes in its consultation that the recorded images also want to be used in order to "[...] develop the service and offer quality training, we must use teaching resources and methodologies adapted to current needs , which is why we think it's appropriate to record training sessions and edit them to create content."

According to what the City Council sets out, once the training activities have been recorded, each file would be subjected to an audiovisual editing process from which the image of the students would be extracted. A priori, it seems that the edited file would only contain data relating to the trainer (image and/or sound).

Without prejudice to the implications that this treatment may have in other areas of law, such as the intellectual property of the content of the trainings, it must be noted that this also requires compliance with the provisions contained in the article 6 of the RGPD regarding the legality of treatment.

For this purpose, ruling out the possibility of recording students based on article 6.1.c RGPD, for the reasons that have already been explained, it is necessary to see if this other treatment - capture of the teachers' images for use in later editions - conforms to one of the legal bases provided for in article 6.1 of the RGPD.

As a starting point, it must be said that to the extent that the legal relationship between the City Council and the teachers has a contractual nature, the processing of their data could be enabled in accordance with the provision of article 6.1.b) of the RGPD, that is to say, being a treatment necessary for the execution of a contract in which the interested party is a party or for the application to his request for pre-contractual measures.

However, it should be borne in mind that the legal basis referred to in article 6.1.b) of the RGPD requires that the treatment is necessary for the execution of the contract.

However, based on the information available, it cannot be ruled out that, depending on how the object of the contract is defined, the contractual relationship between the City Council and the teachers does not cover the recording of the image (and) of the teacher to be used later for the purposes described in the consultation. In these cases, it would be necessary to resort to another legal basis from those provided for in article 6.1 of the RGPD, such as the provision of section a), which provides for the authorization when "the interested party gives his consent for the treatment of your personal data for one or several specific purposes".

To this end, it should be borne in mind that article 4.11) of the RGPD, as well as article 6 of the LOPDGDD, define consent as "any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either by means of a declaration or a clear affirmative action, the treatment of personal data concerning him".

At the same time, the City Council as responsible for the treatment should also ensure that it complies with the conditions provided for in article 7 of the RGPD, and article 6 of the LOPDGDD. In this regard, article 7 of the RGPD provides for the following:

"1. When the treatment is based on the consent of the person concerned, the person responsible must be able to demonstrate that he consented to the treatment of his personal data.

2. If the interested party's consent is given in the context of a written statement that also refers to other matters, the request for consent will be presented in such a way that it is clearly distinguished from the other matters, in an intelligible and easily accessible form and using a language

clear and simple No part of the statement that constitutes an infringement of this Regulation will be binding.

3. The interested party will have the right to withdraw their consent at any time. The withdrawal of consent will not affect the legality of the treatment based on consent prior to its withdrawal. Before giving consent, the interested party will be informed of this. It will be as easy to withdraw consent as to give it.

4. When evaluating whether the consent has been freely given, it will be taken into account to the greatest extent possible the fact of whether, among other things, the execution of a contract, including the provision of a service, is subject to the consent to the treatment of personal data that are not necessary for the execution of said contract”.

In turn, article 6 of the LOPDGDD, especially in the second and third sections, provides for the following:

"[...] 2. When it is intended to base the treatment of the data on the consent of the affected person for a plurality of purposes it will be necessary to state specifically and unequivocally that said consent is granted for all of them.

3. The execution of the contract cannot be made subject to the affected person consenting to the processing of personal data for purposes that are not related to the maintenance, development or control of the contractual relationship.”.

Based on what has been analyzed, a priori it seems that the legal basis provided for in article 6.1.b) of the RGPD could be enabling in those cases in which the recording and dissemination of the training action carried out for the teacher to be part of the contractual relationship that unites him with the City Council, in the sense that the execution of the contract is necessarily linked not only to carrying out the training, but also to its recording and subsequent dissemination. Otherwise, in the event that this is not the case, the treatment could be protected by the legal basis of the teachers' consent in the terms set out.

In any of the cases, it must be reiterated that the fact that the treatment may be lawful also requires compliance with the principles contained in article 5 of the RGPD, as well as the other obligations emanating from the data protection regulations.

In accordance with the provisions of article 32 of the RGPD, the City Council must apply the appropriate technical and organizational measures to guarantee a level of security appropriate to the risk, which in its case include the pseudonymization and encryption of personal data, the ability to guarantee the confidentiality, integrity, availability and permanent resilience of the processing systems and services, among others. In this sense, when assessing the adequacy of the security level, it is necessary to take into account the risks that the treatment may entail, such as in those cases where the recording is carried out with respect to training actions that are of a nature participatory, that is to say, those trainings in which the participants can interrupt the teaching discourse in order to raise doubts, provide information, or generate a debate, among others, in such a way that without prejudice to the recording of the image either with respect to the teaching person, the data relating to the voice of the participants may be affected. In these cases, it is clear that measures should be implemented in order to minimize the risk of capturing this data, such as the establishment of one or different rounds of questions or

comments that were excluded from the recording, or set the students' microphones to be deactivated by default and use the virtual classroom chat to raise queries, doubts or contributions, so that the teacher can give an answer while maintaining the confidentiality of the student without their data being recorded.

Conclusions

In accordance with the provisions of Law 13/2015, in relation to the data protection regulations, the continuous recording of the images of the students in the virtual training actions for the purpose of accrediting before the Service d'Ocupation of Catalonia the attendance of the students in the training actions carried out within the framework of the employment system of Catalonia.

The recording of images and voices of teachers in training actions with the purpose of having teaching materials with the aim of disseminating them and taking advantage of them in other trainings, could find qualification in article 6.1.b) of the RGPD if it was a treatment necessary for the execution of the contract they have signed. Otherwise, it will be necessary to have the specific consent of the teachers, or another of the legal bases established in article 6.1 of the RGPD. In any case, it will be necessary to adopt the appropriate technical and organizational measures taking into account the risks arising from the treatment.

Barcelona, April 28, 2021