

CNS 30/2021

Opinion in relation to the query made by a professional association regarding the adequacy of data protection regulations when a representative of an association accompanies a citizen in the interview with the social services.

A query from a professional association (henceforth, the Association) is submitted to the Catalan Data Protection Authority in which it requests to know whether data protection regulations are breached when a representative of an association accompanies a citizen in the interview with the social services.

In particular, the College requests "[...] to know if the fact that there are representatives of (the association) in the interviews (that) are carried out in the social services with the citizens does not comply with the Law organic law 3/2018, on protection of personal data and guarantee of digital rights."

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

The consultation raises a situation that, as explained, has recently been detected in the social services, from which some citizens go to the interviews with the social services accompanied by a representative of an association. In this context, the College considers whether the presence of this third party in the interview that is carried out between the citizen and the social services may lead to a breach of Organic Law 3/2018, on data protection personal data and guarantee of digital rights (from now on, LOPDGDD).

It should be noted that although the consultation is aimed at finding out if the situation that has been described can lead to non-compliance with the LOPDGDD, European law enjoys direct effectiveness and primacy over domestic law, reason for that the analysis of the substantive issue must be based on the provisions of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons by regarding the processing of personal data and the free movement of such data and which repeals Directive 95/46/CE (General Data Protection Regulation), hereinafter RGPD.

The origin of the consultation is related to the provision of social services to citizens, sectoral regulation headed by Law 12/2007, of 11 October, on social services. However, the purpose of the consultation is not to carry out the analysis from the point of view of the legitimacy of

social services to process the data of citizens who come to their services in order to ensure "[...] the right of people to live with dignity during all stages of life by covering their basic personal needs and social needs, within the framework of social justice and people's well-being" (art. 3.1 Law 12/2007), but in relation to the intervention of a third party outside the Catalan social services system in the interviews that are they carry out between the citizen and the professionals. In particular, the College refers to the situation where the citizen is accompanied by a representative of an association to the interview, or interviews, that he carries out with the social services.

The data protection regulations, in accordance with the provisions of articles 2.1 and 4.1) of the RGPD, apply to the treatments carried out on any information relating to an identified or identifiable natural person. For this purpose, article 4.2 of the RGPD provides that a treatment is equivalent to "any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as the 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".

At the same time, 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, relating to when:

"a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;

d) the treatment is necessary to protect the vital interests of the interested party or another natural person;

e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child. [...]"

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of the LOPDGDD, data processing can only be considered based on the legal bases of article 6.1. c) and e) of the RGPD when so established by a rule with the rank of law.

In accordance with what has been explained, the intervention of a representative of an association in the interviews carried out between the citizen and the social services involves carrying out

relating to the communication or disclosure of information that affects the citizen to a third party (the person representing the association). Although the treatment of the interviewee's data may be covered by Article 6.1.e) RGPD in relation to social services legislation, the legality of this new treatment (the communication to the representative of the association) it does not find coverage in the provisions of the social services legislation. For this reason, the possibility of carrying out this communication will depend on the concurrence of another of the bases provided for in article 6.1 of the RGPD, such as that provided for in section a), in the event that "the interested party gives his consent for the treatment of his personal data

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".

As this Authority has recalled in other opinions, consent may not constitute a valid legal basis in certain treatments carried out by public administrations in which citizens do not have a true capacity to choose. Recitals 42 and 43 of the RGPD are stated in this sense:

"(42) When the treatment is carried out with the consent of the interested party, the person responsible for the treatment must be able to demonstrate that he has given his consent to the treatment operation. In particular in the context of a written statement made on another matter, there must be guarantees that the interested party is aware of the fact that he gives his consent and the extent to which he does so. [...] a form of declaration of consent prepared previously by the person responsible for the treatment must be provided with an intelligible and easily accessible formulation that uses clear and simple language, and that does not contain abusive clauses. For the consent to be informed, the interested party must know at least the identity of the person responsible for the treatment and the purposes of the treatment for which the personal data is intended. Consent should not be considered freely given when the interested party does not enjoy true or free choice or cannot refuse or withdraw their consent without suffering any harm.

(43) To guarantee that the consent has been given freely, this must not constitute a valid legal basis for the treatment of personal data in a concrete case in which there is a clear imbalance between the interested party and the person responsible for the treatment, in particular when said responsible person is a public authority and it is therefore improbable that consent has been given freely in all the circumstances of said particular situation. Consent is presumed not to have been freely given when it does not allow the separate authorization of the different personal data processing operations despite being adequate in the specific case, or when the fulfillment of a contract, including the provision of a service, is dependent of consent, even when this is not necessary for said compliance."

It is also appropriate to take into account the considerations of the European Data Protection Committee (EDPD) in "Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679", adopted on May 4, 2020 and which can be consulted through the following address: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052020-consent-under-regulation-2016679_es in which it considers that although not it is likely

that the public authorities can base the processing of personal data on the consent of the interested party, due to the fact that a priori there will always be an obvious imbalance of power between both parties, since the interested party in most cases will not have realistic alternatives to accept treatment, the use of consent as a legal basis by public administrations must not be totally excluded in certain circumstances.

To this end, it considers that "24. [...] As GT29 has emphasized in several opinions, consent can only be valid if the interested party can really choose and there is no risk of deception, intimidation, coercion or significant negative consequences (for example, substantial additional costs) if he does not give his consent. Consent will not be free in those cases where there is an element of compulsion, pressure or inability to exercise free will."

In the particular case under analysis, it seems that the citizen can freely decide whether he wants to let a person representing an association access the interview or not, without one option or another having negative consequences for him in terms of access to the service you are entitled to receive from the Catalan Social Services System. Therefore, it can be considered that the consent would be free and could constitute the legal basis of the treatment.

Initially, it can be considered that there is consent if the same citizen attends accompanied. This decision would constitute a clear affirmative action or a statement from which, as an interested party, the citizen expresses his acceptance of the participation of that third party in the interview and, consequently, making him part of the information that may be disclosed in its course, in the terms of article 4.11) of the RGPD in relation to article 6.1.a).

However, it should be borne in mind that in the absence of information on the minimum content of the interviews, which on the other hand will probably be different according to each particular case, it is not possible to rule out the possibility that in the course of them, relative information may be revealed to special categories of data in article 9.1 of the RGPD, i.e. "personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation, and data processing genetic, 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 natural person", especially with regard to health data, given that the The state of health of a person who goes to the social services for a problem related to their home can be a clearly relevant circumstance to attend to them properly.

In cases where special categories of personal data may be affected, it should be borne in mind that article 9.1 of the RGPD prohibits its treatment unless one of the circumstances provided for in its second section occurs, among which the section a) provides for those cases in which "the interested party has given his explicit consent for the treatment of said personal data with one or more of the purposes specified, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be raised by the interested party".

Taken to the case of the consultation, to the extent that in the course of the interview categories of special data may be affected, it would not be sufficient for the citizen to attend the interview

accompanied but that their explicit consent should be collected so that this information can be communicated or revealed in the presence of the representative of the association.

It is clear, however, that, prior to the interviews with the citizen, and especially if it is the first contact with him, social services professionals cannot deduce the content or scope of the information that, by reason of the provision of the public service, may be revealed during the interview. This circumstance leads to consider that, by virtue of the principle of proactive responsibility (art. 5.2 RGPD) in relation to the need to comply with the principle of legality (art. 5.1.a RGPD) in the terms that have been set forth, it is it is advisable to adopt the explicit consent formula of article 9.2.a) of the RGPD in all cases where a representative of the association (or a third person not linked to the person) is present at the interview interviewed).

In any of the cases, it will be necessary to comply with the conditions provided for in article 7 of the RGPD, and article 6 of the LOPDGDD, in order to be able to apply the legal basis of consent. 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 clear and simple language. 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 party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship".

III

To the extent that the treatment referred to in the query could be legitimated based on the provisions of article 6.1.a) of the RGD, as well as in cases where special categories of data may be affected, the article 9.2.a) of the RGD, in the terms set out in the previous legal basis, it is also necessary to take into account the need to adopt appropriate measures to facilitate the interested party - in this case, the citizen who goes to social services - all the information referred to in article 13 of the RGD, in a concise, transparent, intelligible and easily accessible way, with clear and simple language.

In accordance with the provisions of article 13 of the RGD, when the personal data that refer to the interested party are obtained from him/herself, at the time of collecting them, the person in charge of the treatment must provide him/her with certain information related to the treatment, such as the purpose for which the personal data will be used and the legal basis; the recipients or categories of recipients of the personal data, where applicable; the right to request access to your data, rectification or deletion, or the limitation of the treatment, or to oppose the treatment, as well as the right to the portability of your data; the right to withdraw consent, when this is the legal basis of the treatment, at any time, without affecting the legality of the treatment prior to its withdrawal.

This information must be provided in writing or through other means, including, where appropriate, by electronic means, or, if the interested party so requests, also verbally if he proves his identity (art. 12.1 of GDPR).

Based on what has been presented, brought to the context that is analyzed in this opinion, prior to the interviews, in addition to the need to obtain the citizen's consent in the terms that have been previously presented, it is necessary to be informed in advance of the information referred to in article 13 of the RGD, especially with the fact that the granting of consent will entail, due to the fact of being present during the interview, the communication or disclosure of your personal data of any nature necessary to carry out the interview and process the file.

Conclusions

In the absence of another legal basis that enables the treatment, the presence of a representative of an association in the interview of a citizen with the social services requires his consent. To the extent that it may involve the processing of special categories of data, it must be explicit. In any case, it is necessary to inform the citizen beforehand about the aspects provided for in article 13 of the RGD, especially with regard to the communication or disclosure of the citizen's personal data to the companion, due to being present in the interview

Barcelona, June 2, 2021