CNS 47/2021

Opinion in relation to the query made by the legal representative of a water concession company on whether the communication to the City Council, at its request, of its users' data complies with data protection regulations

A query is presented to the Catalan Data Protection Authority by the legal representative of a water concession company, on whether the communication to the City Council, at its request, of its users' data for the purposes of " collect indications of unoccupied homes" is in line with data protection regulations.

The consultation states that:

> **"The City Council (...) is addressing the company through the attached request, interesting that information is communicated to it, on a regular basis, about the homes where there is no water consumption in the last 2 years, or when this consumption is abnormally low, for the purposes of 'collecting indications of vacant homes'.**
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> **The request is based on:**
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> **(1) Article 72.4 of the Revised Text of the Law Governing Local Finances, which establishes the possibility for councils to apply a surcharge on the liquid portion of the Property Tax, for permanently vacant homes, which enters with article 42.5 of Law 18/2007, of September 28, on the right to housing, also invoked by the City Council, which foresees the possibility of adopting fiscal measures to encourage the employment of 'homes and penalize their unjustified unemployment.**
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> **(2) Article 41 of this last Law establishes that once an anomalous use or situation has been detected, for verification purposes, the administration may request information on the abnormal consumption of water, gas and electricity, which supply companies will have to provide under section 6 of the same article.**
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> **As relevant elements in the case, it is worth highlighting, first of all, the declaration of unconstitutionality of 'permanent unemployment' as 'abnormal use', which was contained in section 1.a) of the aforementioned article 41, of Law 18 /2007, in the wording given by article 2.7 of Decree-Law 17/2019, of December 23, by judgment of the TC of 16/2021 [BOE-A-2021-2835] and, secondly, the nuance of section 5 of article 41, where the authorized communication of data is limited to the purposes of 'checking' situations 'already detected', compared to the compilation of evidence for part (...). that interests the City Council (...), in its request."**

Analyzed the query that accompanies the request of a city council so that the water concessionaire company. provide you with the information referred to in the query, in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

The consultation is made by the concessionary company of the drinking water supply service of a municipality. The legal representative of this company requests from this Authority an opinion in which the adequacy of the data protection regulations for the communication, at the request of the city council, of the information relating to housing with respect to the in which there is evidence that there has been no water consumption in the last 2 years, or when this consumption is abnormally low, on a periodic basis for the purposes of "collecting indications of unoccupied

From the perspective of data protection regulations, it is necessary to start from the basis that Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), in accordance with its articles 2 and 4.1 results from application to the treatments that are carried out on personal data understood as 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". (Article 4.1 RGPD).

The data of legal entities are excluded from the scope of protection of the RGPD, as specified by the RGPD itself, by establishing that "The protection granted by the present Regulation must apply to natural persons, regardless of their nationality or of your place of residence, in relation to the processing of your personal data. This Regulation does not regulate the processing of personal data relating to legal entities and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details. (Recital 14)

Therefore, it should be pointed out that information on the water consumption of a home does not always constitute personal data subject to the principles and obligations of the RGPD, as well as information on the consumption of a home owned by a legal entity , if it cannot be associated or related without disproportionate efforts to identified or identifiable natural persons, it would not, in principle, be personal information protected by data protection regulations.

On the other hand, the information on water consumption that may refer directly or indirectly to natural persons (owners, tenants), available to the water supply company, is personal data that is protected by the RGPD.

Article 4.2) of the RGPD considers "treatment": any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation , adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction".

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, sections c) and e) of article 6.1 of the RGPD provide respectively, that the treatment will be lawful if "it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment", and "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".

As can be seen from article 6.3 of the RGPD and expressly included in article 8 Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on the legal bases of article 6.1.c) i) of the RGPD when this is established by a rule with the rank of law.

In the case at hand, it must be taken into account that the domestic potable water supply service is publicly owned (66.3 of Legislative Decree 2/2003, of April 28, which approves the revised text of the Municipal law and local regime 4 of Catalonia (hereinafter, TRLMRLC).

In accordance with articles 67.a) of the TRLMRLC and 26.1.a) Law 7/1985, of April 2, Regulating the Bases of the Local Government, the supply of drinking water is one of the minimum public services that have to lend all the municipalities. The City Council, as owner of the service, is responsible for guaranteeing users the correct functioning of the same, is obliged to ensure that its management is carried out in the most sustainable and efficient way possible, directly or indirectly (Article 249 TRLMRLC) and is legitimizing for the processing of the data necessary for the provision of the service in accordance with article 6.1.e) of the RGPD in relation to the aforementioned a

The city council can opt for a system of direct or indirect management of the drinking water supply service. If you opt for a direct management model, from the point of view of data protection regulations, the City Council will have the status of responsible for the treatment (article 4.7 RGPD) of the user data necessary for the provision of the service.

If it opts for an indirect management model, the City Council could retain the status of responsible for the treatment and the concessionary company act as the person in charge of the treatment on behalf of the City Council (art. 4.8) RGPD) with the corresponding document order of the treatment in the terms established in article 28.3 of RGPD. This is the model that results from the application of additional provision 25 of Law 9/2017, of November 8, on Public Sector Contracts, which establishes "For the case that the contract involves the contractor's access to data of a personal nature whose treatment the contracting entity is responsible for, that person will be considered the person in charge of the treatment."

In this case, it should be borne in mind that the person in charge of the treatment is subject to the documented instructions of the person in charge (art. 28.3.a) of the RGPD. Therefore, in the case at hand, the person in charge should provide the requested information to the person in charge.

However, there could also be a situation in which the company providing the service has the status of responsible for the processing of the data necessary for the provision of the service.

Regardless of the organizational model that the City Council has established in relation to the provision of the water supply service, the processing of personal data (either by the person in charge, whether this is the City Council or the 'company, whether by the person in charge of the treatment, if applicable following the instructions received for that purpose from the person in charge), must be what is necessary, at the outset, for the purpose of providing the supply service of drinking water

Also, the City Council, as responsible for the treatment and the concessionary company that acts on its behalf, are subject, among others, to the principle of limitation of purpose provided for in article 5.1c) of the 'RGPD according to which the data must be collected for "specified, explicit and legitimate purposes, and will not be subsequently treated in a manner incompatible with said purposes (...)".

Therefore, although the City Council, as the person responsible for the processing, would already have the information relating to the owners and other personal information necessary to comply with the purpose of providing the drinking water supply service to the homes of the municipality, directly or through the concessionary company as the person in charge of the treatment, could not use this information for a different subsequent purpose, unless one of the circumstances provided for in article 6.4 of the RGPD were to be considered compatible (the consent of the interested party, a measure provided for in the Law of the Union or of the States that constitutes a necessary and proportional measure for the safeguarding of the interests of article 23.1, or the compatibility is determined by the controller of the ulterior purpose). In the same way, if the data is in the possession of the concessionary company that acts as the person in charge of the treatment, this is linked to compliance with the instructions of the person in charge of the treatment (the City Council) in accordance with article 28.3.a) RGPD, but the City Council may only use this data for another purpose if it is compatible with the initial purpose.

III

Article 6.4 of the RGPD establishes:

"When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society for to safeguard the objectives indicated in article 23, paragraph 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 were initially collected, will take into account, among other things:

a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided;

b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller;

c) the nature of personal data, in particular when special categories of personal data are treated, in accordance with article 9, or personal data relating to criminal convictions and 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."

For the purposes of article 6.4 RGPD, it is necessary to take into account the existence of a rule with the rank of law that could provide cover for the use of data for a new purpose.

The council's request refers to article 72.4 of Royal Legislative Decree 2/2004, of March 5, which approves the revised text of the Local Finances Regulatory Law, hereinafter TRLRHL. Therefore, it must be understood that the information requested is for the collection of IBI, which regulation is established in articles 60 to 77 of the TRLRHL.

Article 60 of the TRLRHL defines the IBI as "a direct tax of real character that taxes the value of immovable property in the terms established in this law" whose taxable event is the ownership of certain rights over immovable property, either rustic, urban or so-called properties with special characteristics (article 61).

The liable subjects as taxpayers are the holders of the right to the property, whether natural or legal persons or entities without personality referred to in article 35.4 of Law 58/2003, of December 17, general taxation (article 63).

The taxable base of the IBI is the cadastral value set in accordance with the provisions of Royal Legislative Decree 1/2004, of March 5, which approves the revised text of the Real Estate Cadastre Law. On the liquidated base (which is the result of applying to the taxable base the reduction provided for in article 67 TRLRHL) the type of assessment established by the respective municipality within the limits of article 72 is applied. Articles 73 and 74 of the TRLRHL provide for the mandatory and optional bonuses respectively that are applied to the full quota to determine the liquid quota.

Article 72.4 of the TRLRHL (in the wording given by Royal Decree-Law 7/2019, of March 1, on urgent measures in matters of housing and rent) regulates a surcharge for unoccupied urban properties for residential use permanent and establishes the procedure for its application, in the following terms:

"Within the limits resulting from what is laid down in the previous sections, the municipalities may establish, for urban real estate, excluding those for use

residential, differentiated types attending to the uses established in the cadastral regulations for the valuation of constructions. When the buildings are assigned various uses, the rate corresponding to the use of the main building or outbuilding will be applied.

These types can only be applied, at most, to the 10 percent of urban immovable property in the municipal area that, for each use, has the highest cadastral value, to which effect the tax ordinance will indicate the corresponding value threshold for all or each one of the uses, from which the increased types will be applied.

In the case of residential buildings that are permanently vacant, the councils may demand a surcharge of up to 50 percent of the net tax rate. Within this limit, the town councils may determine by fiscal ordinance a single surcharge or several depending on the duration of the period of vacancy of the property.

The surcharge, which will be required from the subjects liable for this tax, will be due on December 31 and will be settled annually by the municipalities, once the vacancy of the building has been verified on that date, together with the administrative act by which it is declared .

For these purposes, permanent vacant property will be considered to be that which remains vacant in accordance with what is established in the corresponding sectoral housing regulations, regional or state, with legal status, and in accordance with the requirements, means of proof and procedure established by the tax ordinance. In any case, the municipal declaration as a permanently vacant property will require the previous hearing of the passive subject and the accreditation by the City Council of the indications of vacancy, to be regulated in said ordinance, within which those relating to the data of the municipal register, as well as consumption of supply services."

For the determination of what is to be understood by permanently vacant property, the transcribed article makes a reference to what is established by the regional or state housing sectoral regulations with the rank of law, with the requirements and means of proof and the procedure to be established by the corresponding tax ordinance.

This article also foresees the need for a municipal declaration of the property as permanently vacant and, for this purpose, requires the prior hearing of the liable subject and the accreditation by the City Council of the signs of vacancy. For the accreditation of the indicators of unemployment, it is expressly provided that they can appear "those related to the data of the municipal register, as well as the consumption of services of supply".

The referral of article 72.4 of the TRLHL to the autonomous sectoral regulations with the rank of law for the determination of what is to be understood by permanently vacant housing, leads us to take into consideration what the Law establishes in this regard 18/2007, of September 28, on the right to housing, hereinafter LDH.

Article 3.d) of the LDH defines empty housing as that which "remains permanently unoccupied, without justifiable cause, for a period of more than two years. For this purpose, they are cau

justified the transfer for work reasons, the change of address due to a dependency situation, the abandonment of the home in a rural area in the process of population loss and the fact that the property of the home is the subject of a litigation judicial pending resolution. Occupancy without a legitimate title does not prevent a home from being considered empty".

The vacancy of a building is considered by article 41 of the LDH, as a use or anomalous situation of the homes, regarding which a procedure is established for its detection and verification, in the following terms:

(...)
3. The department responsible for housing and the municipalities are responsible for:

a) Instruct the procedures to check if a house or a building of houses is used in an abnormal way or is in an abnormal situation and, with the prior hearing of the interested persons, declare the use or abnormal situation and require the person responsible to adopt the necessary measures to correct this use or situation within the period established. In the request, the person responsible must be warned of the possible measures to be taken in the event of non-compliance, including the imposition of the coercive fines provided for in this Law.

b) Order the forced execution of the necessary measures to correct the use or anomalous situation and determine the means of execution.

c) Sanction the person responsible when the abnormal use or situation constitutes an infraction in terms of housing in accordance with this Law.

The aforementioned procedures expire, once the maximum period of six months has passed for issuing the resolution, if it has not been issued and notified. This period remains interrupted in the cases referred to in the common administrative procedure legislation, and for all the time required to make the notifications by means of edicts, if applicable.

Unless a municipality expresses its will to exercise, on a general and preferential basis, the aforementioned competences, the exercise of competence by the aforementioned administrations is specified and coordinated in a concerted manner.

4. In the detection of the uses and anomalous situations of the homes, the following must be taken into account:

a) The declarations or acts of the owner of the home or property.

b) The declarations and checks of the personnel in the service of the public administrations that have been assigned the functions of inspection in this matter and of the agents of the authority in general.

c) The unjustified refusal of the owner of the home or property to facilitate the checks of the Administration if there is no probable cause to justify it and if, in addition, there are other indications of lack of occupation

d) Advertisements.

5. Once the use or anomalous situation has been detected, for verification purposes, in a justified manner and applying weighting criteria in the choice of the evidentiary means, the competent administration may request information relating to:

a) Data from the register of inhabitants and other public registers of residents or occupants.

b) Abnormal consumption of water, gas and electricity.

6. For the purpose referred to in section 5, those responsible for public records and the supply companies must provide the required data.

This Authority has previously had the opportunity to analyze the provisions of article 41.5 of the LDH, among others CNS Opinion 19/2017, which can be consulted on the Authority's website www.apdcat.cat . This opinion analyzed the use of data from the register, the cadastre and supply companies for the detection of empty homes with the aim of implementing rent promotion policies. In that context, the following considerations were made in the opinion:

"In any case, it should be borne in mind that the order of the procedure established in the LDH cannot be reversed, since the regulations do not establish that data on abnormal consumption of water, gas or electricity be requested in a "preventive ", in order to detect anomalous situations, but it is based on the previous detection of these situations by the Administration, that the consumption data of these resources can be processed to confirm that situation.

Therefore, when the City Council detects the existence of certain unoccupied homes in the municipality through the systems explained in article 41.4 LDH, or through other mechanisms that may be established (such as the inspections provided for in article 12.6 LDH), and not before, the communication of water, gas or electricity consumption data by the corresponding supply company could be enabled, for the sole purpose of verifying or confirming the vacancy situation of certain homes (article 41.5 .b) LDH)."

In the case that is now being analyzed, however, the city council requires the information as part of the procedure in order to apply the surcharge to the IBI provided for in article 72.4 of the TRLRHL. The provisions of this article already establish (based on the concept of unoccupied housing that derives from the sectoral housing regulations), and without prejudice to the procedure established by the corresponding fiscal ordinance, that in the municipal procedure for the declaration municipal as a permanently vacant property, must necessarily be carried out based on the accreditation by the City Council of the indications it may have regarding the property's vacancy. To this end, article 72.4 of the TRLRHL expressly provides as indicators of unemployment both those related to the data in the register and the consumption of supply services.

It should be noted that, unlike the Catalan housing sectoral regulations, which would only enable the use of information relating to abnormal consumption of water, gas and electricity in order to verify afterwards, once the abnormal situation has been detected by others ways, in the regulation

contained in article 72.4 of the TRLRHL, consumption of supply services can directly be the indications that allow the city council to certify the unemployment situation.

Therefore, article 72.4 TRLRHL would be the enabling legal rule, in the terms set out, both in the case that the city council is responsible for the treatment, and a change of purpose of the data is made, and in the case that the supplying company is responsible for the treatment and must communicate the data to the town hall.

The information flow of data for the purposes of accrediting situations of permanent unemployment, which has qualification in a standard with legal status in the terms indicated, must also respect the principle of minimization, according to which the data have of being adequate, relevant and limited data to what is necessary in relation to the intended purpose (art. 5.1.c) RGPD). Taking this into account, it does not seem that the information on properties in which there is no water consumption in the last 2 years or with an abnormally low consumption, without including other consumptions that do not meet this requirement, can be considered excessive, the whose communication would not be justified for the intended purpose.

Conclusions

The city council can access the information available from the water supply concessionary company regarding homes for which there is no water consumption in the last 2 years or when this consumption is abnormally low, with the purpose of 'apply the IBI surcharge provided for in the TRLRHL regarding these homes.

Barcelona October 29, 2021