

Opinion in relation to the query made by a data protection delegate about the installation of video surveillance cameras inside the classrooms of municipal kindergartens

A letter from a data protection delegate is presented to the Catalan Data Protection Authority in which he raises several questions related to the installation of video surveillance cameras inside the classrooms of the kindergartens of public ownership in municipalities of the demarcation.

Specifically, the following questions are formulated:

- *"Installation of a system of hidden cameras inside the classrooms of a kindergarten when there are suspicions of the commission of criminal offenses by workers (eg: physical abuse and/or psychological abuse of minors, theft of material, workplace harassment):*
 - *Would these purposes legitimize data processing of these characteristics?*
 - *How should the best interest of the minor (or other interests and legal assets to be protected) be balanced with the right to one's own image and the protection of data of the people who appear in the recordings and, in particular, of the workers?*
 - *Taking into account the nature of the aforementioned treatment and considering that it is a systematic observation in which data relating to people considered vulnerable is collected, is it necessary to carry out a Data Protection Impact Assessment?*

- *Installation of a camera system inside the classrooms of a kindergarten for the surveillance and control of workers in order to verify compliance with their obligations and work duties:*
 - *Do the management powers for the control and monitoring of the fulfillment of the obligations and labor duties that the regulations in the field of work confer on the employer constitute a sufficient legal basis to consider this treatment lawful?*
 - *How would the powers of surveillance and control of the employer be weighed against the rights to data protection and the self-image of minors and other people who could appear in the recordings?*
 - *Would it be necessary to have the consent of parents, guardians or representatives of minors to install cameras for this purpose?*
 - *Taking into account the nature of the aforementioned treatment and considering that it is a systematic observation in which data relating to people considered vulnerable is collected, is it necessary to carry out a Data Protection Impact Assessment?*

- *Installation of a camera system inside the classrooms of a kindergarten so that parents and guardians can exercise parental control by accessing live images of the child's activities your minor son/daughter in the classroom as part of the*

process of control, supervision and protection of the minor's interests in the process of adaptation to the school environment:

- *Does this purpose (articulated through a shared key system, which would allow parents and guardians access to the online viewing of images of minors in the classroom) legitimize a treatment of these characteristics?*
- *How would the best interests of the minor and parental control be weighed against the rights to data protection and the self-image of the minors and others who may appear in the recordings?*
- *Given that this treatment would require the explicit consent of all the parents and legal guardians of all the minors in the classroom, why would it happen if the legal representative of one of the minors in the classroom did not consent to this treatment?*
- *Taking into consideration the nature of the aforementioned treatment and considering that it is a systematic observation in which data relating to people considered vulnerable is collected, is it necessary to carry out an Impact Assessment Regarding Data Protection?"*

Having analyzed the query and the documentation that accompanies it, in view of the applicable regulations in force, and in accordance with the report of the Legal Adviser, I issue the following opinion.

I

(...)

II

In the consultation it is pointed out that, as part of the provision of the assistance and advice specific to the service plan, the entity attends to inquiries that refer to a growing interest in the installation of video surveillance cameras in inside the classrooms of publicly owned kindergartens in municipalities of the demarcation.

The installation of these video surveillance systems, as indicated in the consultation, would be considered in relation to three different objectives: for the detection of criminal offenses by the people working in the children's homes ; to verify the fulfillment of their work obligations and duties; and so that parents and/or legal guardians can, through a shared key access system, view live images of the activities carried out by their children.

Some general characteristics that would meet are also indicated in the consultation the systems Specifically, it is stated that:

- The cameras would allow image and sound capture.
- The capture of images would be in real time without the use of any technology that allows the anonymization of images.
- They would be installed inside the classrooms where the different educational activities take place, being able to be extended in areas such as corridors and other common areas

such as patios, dining rooms and recreation areas. Never in bathrooms or changing rooms.

- The system would allow the recording of images and their conservation for a short period of time: 1 month with the exceptions provided for in article 22.3 of Organic Law 3/2018, of December 5, 2018, on data protection personal data and guarantee of digital rights (hereinafter, LOPDGDD).

In view of this, certain doubts are raised about the legitimacy for the installation of these video surveillance systems, as well as about the observance of the principle relating to the proportionality of the measure, and about the need to the carrying out of an impact assessment related to data protection (hereinafter, AIPD), which is why they request to know the opinion of this Authority in this regard.

These issues are examined in the following sections of this opinion based on the information provided in the consultation and what has been mentioned.

III

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 the processing of personal data and the free movement of such data and by which repeals Directive 95/46/CE (hereinafter, RGPD), provides that the data protection regulations apply (article 2.1) to the treatments that are carried out with respect to any information *"on 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).

The installation of the video surveillance systems referred to in this inquiry, which allow the direct or indirect identification of natural persons (basically, minors and staff of kindergartens), involves data processing (article 4.2) RGPD) which would remain subject to compliance with the principles and guarantees of data protection regulations, specifically, the RGPD, the LOPDGDD and, specifically, Instruction 1/2009, of February 10 , of the Catalan Data Protection Agency, on the processing of personal data using cameras for video surveillance purposes, where it has not been affected by the RGPD and the LOPDGDD.

In this regard, it must be borne in mind that the use of cameras or video surveillance systems must respect, among others, the principles of legality (Article 5.1.a) RGPD), purpose limitation (Article 5.1.b) RGPD) and of data minimization (Article 5.1.c) RGPD), from which data can only be captured and processed through video surveillance systems under the protection of a legal basis, with specific, explicit and legitimate purposes, and - se to the data that are adequate, relevant and limited to what is necessary in relation to the intended purpose.

In relation to the principle of lawfulness, the RGPD establishes that all processing of personal data must be lawful, fair and transparent (Article 5.1.a)). And, in order to

consider the treatment lawful, the RGPD establishes the need to meet one of the legal bases of article 6.1.

As this Authority has decided on other occasions (among others, in opinions CNS 4/2022, CNS 42/2021, CNS 33/2021, CNS 21/2021, CNS 26/2019, available on the Authority's website), in the field of public administrations, the capture of images for video surveillance purposes can be authorized in the legal basis of article 6.1.e) of the RGPD, according to which data processing can be lawful if *"it 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 of the LOPDGDD, data processing can only be considered based on this legal basis of article 6.1.e) of RGPD when so established by a rule with the rank of law.

In the consultation, different purposes are identified with regard to the proposed data processing, which is why, for the purposes of establishing its legality, it is necessary to analyze them separately. Point out that for explanatory reasons the order in which these purposes are set out in the consultation has been modified.

IV

On the one hand, there is the possibility of installing a video surveillance system for the purposes of **labor control** of the workers in the kindergartens in order to verify compliance with their obligations and work duties.

Article 22 of the LOPDGDD specifies the terms in which the processing of video surveillance cameras for work purposes can have legal authorization, in connection with the aforementioned article 6.3 of the RGPD, while establishing that *"the treatment by the employer of data obtained through camera or video camera systems is subject to the provisions of article 89 of this organic law"* (section 8).

Article 89 to which this legal precept refers provides the following:

"1. Employers may treat the images obtained through camera or video camera systems for the exercise of the control functions of workers or public employees provided for, respectively, in article 20.3 of the Workers' Statute and in the public service legislation, provided that these functions are exercised within their legal framework and with the inherent limits thereof. Employers will have to inform in advance, and in an express, clear and concise manner, the workers or public employees and, where appropriate, their representatives, about this measure.

In the event that the flagrant commission of an illegal act by the workers or public employees has been caught, the duty to inform will be understood to have been fulfilled when there was at least the device referred to in article 22.4 of this organic law.

2. In no case will the installation of sound recording or video surveillance systems be admitted in places intended for the rest or recreation of workers or public employees, such as changing rooms, toilets, dining rooms and similar.

3. *The use of systems similar to those referred to in the previous sections for the **recording of sounds in the workplace will only be admitted** when the risks to the safety of the facilities, goods and people arising from the activity that is carried out are relevant the work center and always respecting the principle of proportionality, that of minimal intervention and the guarantees provided for in the previous sections. The suppression of the sounds preserved by these recording systems will be carried out in accordance with the provisions of section 3 of article 22 of this law."*

According to article 20.3 of the revised text of the Workers' Statute Law (ET), approved by Royal Legislative Decree 2/2015, of October 23, *"the employer may adopt the measures he deems most appropriate for surveillance and control to verify the fulfillment by the worker of his obligations and labor duties, keeping in his adoption and application the consideration due to his dignity and taking into account, as the case may be, the real capacity of workers with disabilities."*

It should also be noted that the thirteenth additional provision of the LOPDGDD adds a new article 20 bis to the ET, with the following content:

"Article 20 bis. Rights of workers to privacy in relation to the digital environment and disconnection.

*Workers **have the right to privacy** in the use of digital devices made available by the employer, to digital disconnection and to **privacy in the use of video surveillance** and geolocation devices in the terms established in current protection legislation of personal data and guarantee of digital rights."*

In the same sense, the fourteenth final provision of the LOPDGDD, adds a new letter j bis) to article 14 of the revised text of the Law of the Basic Statute of the Public Worker (TRLEBEP), approved by Royal Legislative Decree 5 /2015, of October 30, with the following wording:

*" **Public employees have the following** individual rights in accordance with the legal nature of their service relationship:*

(...)

*j bis) **Privacy** in the use of digital devices made available to you and **against the use of video surveillance** and geolocation devices, as well as digital disconnection in the terms established in current legislation on the protection of personal data and guarantee of digital rights."*

These regulatory provisions enable, within the framework of labor relations, the person in charge of the treatment (the municipality in question) to be able to carry out a treatment of the images captured through video surveillance systems for the purposes of labor control , as long as the privacy of working people is respected.

In addition, from the point of view of data protection, it is necessary to prove that there is a relationship of proportionality between the intended purpose and the way in which the data of the affected persons will be treated, as well as that there is no other measure most suitable (article 7.1 Instruction 1/2009).

Therefore, labor control as a legitimizing cause for the treatment of the images of people working in kindergartens does not allow the adoption of any control measures. It is necessary that the control measure adopted is proportionate to the purpose pursued.

As repeated jurisprudence has shown (for all, STC 39/2016, of March 3), and as Instruction 1/2009 also does in the future, in order to check whether a restrictive measure of a fundamental right respects the principle of proportionality, it must meet three requirements: that it is capable of achieving the proposed objective (judgment of suitability); that it is necessary, in the sense that there is no other more moderate way to achieve this purpose with the same effectiveness (judgment of necessity); and, finally, that it is weighted or balanced, by deriving more benefits or advantages for the general interest than damage to other goods or values in conflict (proportionality judgment in the strict sense), that is to say, if the interference produced for said measure in the holder of the right object of restriction is the minimum to achieve the legitimate purpose intended with its adoption.

Based on this judgment of proportionality, although in certain cases the jurisprudence considers the installation of video surveillance systems admissible in order to verify illegal conduct of which the employer may have previously suspected (among many other pronouncements, the aforementioned STC 39/2016 or the STEDH of October 5, 2010, Köpke v. Germany case), the same courts warn that video surveillance in the workplace cannot imply a disproportionate control of all working people .

Specifically, the courts consider (for example, STS of March 5, 2020 or the STSJ of March 22, 2018) that the surveillance measure using cameras continuously for the control of work activity, which covers the whole of working people, and without mentioning any particular risk, would be disproportionate, given that it would involve real monitoring of working people, a control of each and every one of their behaviors, in short, an excess of the managerial power available to the 'entrepreneur (article 20.3 ET).

Instruction 1/2009 also states that *"the use of video surveillance systems in the workplace with the sole purpose of monitoring the performance of workers" may not be adequate to the principle of proportionality (Article 7.3.b) .*

For the purposes of said judgment of proportionality, in the present case the space or area in which the video surveillance is intended to be carried out for the purposes of labor control acquires special relevance.

In the consultation it is pointed out that the installation of cameras in bathrooms and changing rooms would be excluded, an exclusion that is expressly provided for in article 89.2 of the LOPDGDD and article 7.3.a) of Instruction 1/2019 , and which must be evaluated positively.

However, the main area subject to video surveillance would include the interior of kindergarten classrooms (without ruling out that this video surveillance could be extended to other areas such as dining rooms, patios and other recreation areas).

It must be taken into consideration that this is a space where the workers of the children's homes (educators) are during their working day regularly and continuously carrying out their professional tasks.

Although exact information is not available on the location and field of view of the cameras in these spaces, nor on the angle of view of these cameras, the proposed system would involve complete monitoring of all the activity of the working person who remains in the classroom, facilitating monitoring and supervision of all their actions, both towards the children in the nursery and with other working people, and also of their behavior, even of their productivity or performance

The inquiry also does not indicate what the specific objective would be with video surveillance of workers in classrooms, that is to say, the fulfillment of which specific professional duty or obligation and by which worker it is intended to be verified.

Therefore, in the conditions described (monitoring of the activity and behavior of workers in a generalized and indefinite way in time), the proposed video surveillance system for the purposes of labor control could hardly be understood as provided on the basis of data protection regulations and the jurisprudence examined.

To this is added, as shown in the considerations that follow, the fact that the capture would not only involve the capture of images of the teachers, but also of the children in the classroom, an element that contributes decisively to consider the treatment as disproportionate.

v

Beyond the continuous monitoring of the workers mentioned, it is necessary to take into account, for the purpose of evaluating the proportionality of the measure, that the classrooms of the kindergartens are spaces where the personality of the minors and in which the capture of images can be particularly intrusive with respect to their right to privacy and, even, dignity, considering the age of the minors (for example, classrooms usually incorporate spaces to change the children in case of need, bathrooms and/or have urinals).

Instruction 1/2009 states that it may be inappropriate to the principle of proportionality *"the installation, in the educational field, of cameras inside the classrooms, gymnasiums or leisure spaces of the students for the its control"* (article 7.3.c)).

In fact, the recording of images in these spaces through a video surveillance system should only be carried out in exceptional circumstances and justified by the presence of an objective and foreseeable risk to the safety of minors, given the existence of reasonable indications of the commission of a serious illegal act by a person working at the nursery.

The consultation seems to refer to this possibility when it asks if it is possible to install a **system of hidden cameras** inside the classrooms of the children's homes *"when there are suspicions of the commission of criminal offenses on the part of working people"*, such as physical and/or mental abuse of minors.

In this case it would rather be a video surveillance system with the aim of preserving the safety of children, and not just labor control.

As we have seen, the RGPD requires the concurrence of a legal basis in order to consider the processing of data lawful, such as that relating to the fulfillment of a mission carried out in the public interest or in the exercise of public powers of the data controller (Article 6.1.e) RGPD).

In connection with this legal basis, article 22 of the LOPDGDD has come to specify the terms in which the processing of data with video surveillance cameras can have legal authorization. Specifically, section 1 provides that "*physical or legal persons, public or private, may carry out the processing of images through camera or video camera systems with the **purpose of preserving the security** of persons and property, as like its facilities.*"

It is worth noting that the Supreme Court has estimated that the installation of video surveillance cameras for security reasons, in the sense of monitoring the commission of illegal acts by workers (or by third parties), excluding any other type of labor control unrelated to safety (such as absences from the workplace, conversations with colleagues or, in general, effectiveness at work), would pass the triple test of proportionality (as an example, STS of January 31 of 2017 or STS of October 13, 2021), given that it would be a justified measure if there are reasonable indications of the commission of serious offenses (not mere irregularities) referring to specific dangers; suitable for achieving the intended purpose, by allowing potential offenders to be discovered and their conduct sanctioned, with a deterrent effect; and necessary, given the non-existence of other types of less intrusive means to achieve the purpose.

Although the cases mentioned in these judgments do not refer to video surveillance in spaces such as the one now proposed, nor are other people other than the workers themselves affected, taking into account the obligation of the person in charge (the city council) to safeguard the safety of the children who remain in the nursery and the best interests of the minor enshrined in article 2 of Organic Law 1/1996, of January 15, on the legal protection of minors, partially amending the Civil Code and of the Civil Procedure Law, which must preside over all actions related to minors, the use of cameras inside the classroom could be admitted as an exceptional measure in the face of reasonable indications of the possible commission of a serious illegal act by a working person (or several) towards one of the children.

However, if this is the case, it would be necessary to justify in the Report provided for in article 10 of Instruction 1/2009 what is the specific situation detected that is intended to be dealt with by the installation of these cameras, which should be linked to the possible commission of a serious illegal act regarding one or several specific professionals, and which specific classrooms would be affected, as well as proving that it is not possible to achieve the intended result through other, less invasive measures. Equally, it should be borne in mind that it should, in any case, be a measure temporarily limited to the period of time necessary to confirm or not the indications of the commission of the illegal act. For this reason, it would be necessary to determine the moment of putting the system into operation and of uninstalling it, without it being possible to consider its installation with an indefinite character or long periods as conforming to the principle of proportionality.

In the consultation it is pointed out that "*it would be a system of cameras that would allow the capture of image and sound.*"

Warning that the fact that certain video surveillance cameras are equipped with suitable systems to carry out voice recording does not mean that the use of this possibility is necessarily justified.

Voice recording is a treatment that can only be carried out exceptionally, given the principle of proportionality and minimal intervention (article 89.3 LOPDGDD and, in the same sense, article 7.4 of Instruction 1/2009). Therefore, in the event that, indeed, it was intended to capture and record the voice of the working people, it would also be necessary to specify the specific reasons that would justify such treatment in the Report, for the purposes of determining its legality.

With regard to the previous information about the said video surveillance system to the working people, the consultation expressly points to the fact that it would be about hidden cameras, which seems to imply that the people would not be informed affected by the installation nor, therefore, on the processing of your personal data (Article 12 RGPD).

Article 89.1 of the LOPDGDD provides that *"employers must inform in advance, and in an express, clear and concise manner, the workers or public employees and, where appropriate, their representatives, about this measure "* and adds that *"in the event that the flagrant commission of an illegal act has been caught by the workers or the public employees, the duty to inform will be understood to have been fulfilled when there was at least the device referred to in article 22.4 of this law organic."*

This "device" is the information poster referred to in article 12 of Instruction 1/2009, which must be placed in a sufficiently visible place with the identification, at least, of the existence of the treatment , the identity of the person responsible and the possibility of exercising the rights provided for in articles 15 to 22 of the RGPD (article 22.4 LOPDGDD).

This article 22.4 of the LOPDGDD seems to include the criteria of STC 39/2016, where the Court considers the obligation of prior information to workers fulfilled by the mere placement of information posters, so that it would not be necessary specify in the poster, beyond the existence of the video surveillance cameras, the specific purpose to which this surveillance responds.

Therefore, failure to inform workers in the terms indicated about the existence of the video surveillance system could lead to the requirement of the appropriate responsibilities in terms of data protection to the person in charge of the treatment.

Certainly the courts have had the opportunity to rule on the possibility of carrying out covert video surveillance as part of the employer's powers of control.

The best-known case is that of López Ribalda against Spain, among many others. Although at first the ECtHR considered, in the aforementioned case, that the business measure of covert video surveillance did not pass the proportionality test because it was carried out continuously, with respect to all the workers and they had not been informed of its existence, purpose and modality (STEDH of January 9, 2018, López Ribalda I case), subsequently considered that the measure was not excessive, given that it ceased once the persons responsible were identified, and that, having considering that the suspicions of misconduct involved several people, informing the workers could put at risk the

intended purpose, that is, discovering the possible responsible and obtaining the appropriate evidence.

Jurisprudence in the social field has endorsed the use of hidden cameras by employers in certain cases. In this sense, the STEDH of October 17, 2019, (López Ribalda II case) is significant, which endorses the probative value of the images for the purpose of justifying the dismissal of a worker following the evidence obtained with a camera recording hidden, although previously the STEDH of January 9, 2018 (López Ribalda I case) had considered this measure excessive and disproportionate.

However, it must be borne in mind that there are different elements that prevent those conclusions from being transferred to a case such as the one at hand:

At the outset, the examination of the legality of this type of video surveillance in these cases has basically been constructed by examining the incidence of the measure from the point of view of the interference that this entailed in the fundamental rights to privacy and self-image of working people, often leaving aside the right to informative self-determination or the protection of personal data.

The analysis carried out in these cases is not done from the point of view of compliance with data protection regulations but from the point of view of the evidentiary effectiveness of the images obtained in a dismissal procedure. The examination focuses on the validity of the recordings obtained through these video surveillance systems as justification for the adoption of the corresponding disciplinary measures towards the workers, specifically, as a basis for their dismissal.

Secondly, in these cases the recruitment takes place in environments (work centers) that entail a lesser intrusion for the privacy of the people affected than in the work environment proposed in the present case and did not affect groups in situation of vulnerability as is the case of kindergartens.

But in addition, the facts prosecuted in the cases examined by the courts predate the approval of the LOPDGDD and, therefore, the application of the provisions of article 89, which require workers to be informed of the system of video surveillance

Therefore, taking into account what is established in article 89 of the LOPDGDD, it must be borne in mind that, aside from passing the test of proportionality of the measure, in order to consider video surveillance legal it is essential that information be given on the installation of the video surveillance system for the workers in the kindergartens and that, although in a case such as the one examined, express and specific information cannot be demanded from each worker, nor about the specific location of the camera, at least there must be information about the existence of the system through the informative badge.

Apart from this, it would also be necessary to adopt certain precautions in relation to the conservation and access to the images, in view of the principle of minimal intervention (article 7 Instruction 1/2009).

In the consultation it is pointed out that *"the camera system installed would allow the recording (recording) and preservation of the images for a short period of time (1 month with the exceptions provided for in article 22.3 of the LOPDGDD) "*.

Article 22.3 of the LOPDGDD establishes that " *the data will be deleted within a maximum period of one month from its collection, except when it must be kept to prove the commission of acts that threaten the integrity of persons, goods or facilities . In such a case, the images must be made available to the competent authority within a maximum period of seventy-two hours from the time the existence of the recording was known. The blocking obligation provided for in article 32 of this organic law will not apply to these treatments.*"

Although this precept establishes a maximum retention period of one month, this does not mean that the possibility of keeping them for shorter periods is excluded. In fact, if the surveillance pursues the objective of safeguarding the safety of children, the concurrence of the commission of a serious conduct towards their person should be appreciated in a shorter or, at the very least, lower time period per month. And once confirmed, the images should be made available to the competent authorities within a maximum period of 72 hours. It would be necessary, therefore, to specify these forecasts in the System Report.

The consultation does not contain any specific mention regarding access to the images recorded by the video surveillance system, although it points out that the capture of images would be in real time. Point out, given this, that access should occur exclusively by the management of the kindergartens or by the person authorized for that purpose, not by any worker.

As long as the video surveillance system meets the aforementioned requirements, it could be considered appropriate for the purpose of video surveillance pursued and, consequently, we are faced with lawful data processing.

The considerations made would also be applicable in the event that it is planned to extend video surveillance in common areas of the kindergartens such as the playground and/or the dining room, in such a way that it could only be considered lawful when it obeys the protection of the best interest of the minor, given that these are spaces where actions can take place that endanger the physical, psychological and emotional integrity of children.

VI

In the event that the capture of images and sounds is admissible under the terms just set out, it is necessary to examine whether the preparation of an AIPD would be necessary, as the consultation specifically proposes.

Article 35 of the RGPD establishes the obligation of those responsible for the treatment to carry it out prior to the start of the treatment, when it is likely that due to their nature, scope, context or purpose they involve a high risk for the rights and freedoms of natural persons, a high risk which, according to the RGPD itself, is increased when the treatments are carried out using new technologies (section 1). And it expressly mentions as a case in which an impact assessment will need to be carried out, when the "*systematic and comprehensive evaluation of personal aspects of natural persons is carried out that is based on an automated treatment, such as the elaboration of profiles, and on whose basis*

decisions are taken that produce legal effects for natural persons or that significantly affect them in a similar way" (article 35.3.a)) or when a "large-scale systematic observation of a public access area" is carried out (article 35.3 .c)).

To determine what is to be understood by "large scale", it can be taken into account that the Working Group of Article 29, in the document "*Directrices sobre la designación de los delegados de protección de datos (DPD)*", considers that to assess whether the treatment is carried out on a large scale, the following must be taken into account:

- The number of people affected, either in absolute terms or as a proportion of a given population.
- The volume and variety of processed data.
- The duration or permanence of the treatment activity.
- The geographical extent of the treatment activity.

For its part, article 28.2 of the LOPDGDD lists some cases in which the existence of a high risk for the rights and freedoms of people is considered likely, among which, "*when the treatment involves an evaluation of personal aspects of those affected in order to create or use personal profiles of them, in particular through the analysis or prediction of aspects related to their performance at work, their economic situation, their health, their preferences or personal interests, its reliability or behavior, its financial solvency, its location or its movements*" (letter d) or "*when data processing is carried out for groups of affected persons in situations of special vulnerability and, in particular, for minors and persons with disability*" (letter e)).

In addition, to make it easier for data controllers to identify those treatments that require an AIPD, the RGPD provides that the control authorities must publish a list of the treatments that require an AIPD. This Authority considers that it is necessary to carry out an AIPD for the treatments included in the following [list](#), available on the Authority's website.

In the present case, it must be taken into account that the circumstances to which mention has been made would concur.

In attention to the space in which it is intended to carry out the capture of images (nurseries), the treatment, beyond affecting the workers in the nurseries, would affect a group of vulnerable people, such as minors, also included in an age range (from 4 months to 3 years), which places them in a particularly vulnerable situation, without prejudice that these minors may present, in addition, in some cases, special needs.

From the information provided, it seems that this treatment would be considered indefinitely. The continued recruitment of both minors and the staff of the children's home would make it possible to know and even evaluate the behavior of these people. In other words, it can allow the creation of profiles on the affected people.

Also, it cannot be ruled out that in some cases it could be a quantitatively high volume of people affected, given that the collection of images could cover all the kindergartens in a municipality.

It must also be taken into consideration that the intended treatment would involve an innovative use of established technologies that is not without risks for children's rights, particularly affecting their expectations of privacy.

Consequently, in this context it is clear the need to carry out an AIPD, prior to the installation of the video surveillance system, which allows to know the impact for data protection that may result from the treatment with the intended objectives. For these purposes, it may be of interest to consult the [Practical Guide on impact assessment relating to data protection](#), available on the Authority's website.

Agree that, in the event that the AIPD incorporates the different aspects that must be incorporated in the Report provided for in article 10 of Instruction 1/2009, to which we refer, it would not be necessary to prepare said Report.

VII

The consultation also mentions the possible installation of a video surveillance system of hidden cameras in the classrooms of the kindergartens in case of suspicion of the **commission of other illegal acts** by the people workers, such as material theft or workplace harassment.

In view of the considerations made in section V of this opinion on the interference that continuous video surveillance in the classroom would entail for the privacy of minors, a space where their personality must be developed freely, and their exceptional nature, it does not seem that the adoption of a measure that did not aim to guarantee the physical, psychological and/or emotional safety of the children could be considered proportionate, that is to say, not justified in the protection of the interest superior of the minors.

It could be considered the possibility that, outside school hours and in those cases where the classrooms are not occupied, video surveillance mechanisms could be activated in order to prevent damage to the facilities and theft of materials. It would be necessary, in any case, to specify this also in the System Memory.

Outside of this case, video surveillance in order to guarantee the safety of the goods should be carried out outside the classroom, in spaces such as entrances and corridors.

With regard specifically to the possibility of installing the hidden camera system inside the classrooms due to a possible case of workplace harassment, note that the consultation does not describe the situation in which in principle it would be referring, although, a priori, it does not seem to be an environment (the interior of the preschool classroom) where it seems foreseeable that the harassment of teachers will occur. In any case, there are not enough elements to examine the legality and proportionality of the intended treatment.

VII

The consultation also raises the possibility of installing a camera system inside the classrooms of the kindergartens so that **the parents and/or guardians can view live images of the activities that the his or her minor son or daughter can carry out**.

As we have seen, the legal basis of article 6.1.e) of the RGPD relating to the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge of the treatment may enable the treatment of 'images through video surveillance cameras by public administrations under the terms of article 22 of the LOPDGDD.

The purpose indicated in this case, however, differs from those regulated in this article 22, being therefore necessary to find its legitimacy in any other of the legal bases indicated in article 6.1 of the RGPD.

In this regard, the consultation points to the possibility of using the legal basis of article 6.1.a) of the RGPD relating to the consent of the persons affected.

It should be borne in mind that, although the main objective of capturing and disseminating images is the children, the proposed measure would also affect the staff of the nursery who carry out their duties as educators, for therefore, it would be necessary to count on the consent of all the people affected.

With respect to children, the LOPDGDD provides that the processing of data of children under fourteen years of age, based on consent, is only lawful if the consent of the person holding parental authority or guardianship is recorded, with the scope that this determines (article 7.2).

It is pointed out in the present case that access to the images would be carried out through a "*concerted key system*". This measure alone would not prevent the viewing of images of minors in the classroom over whom you do not have parental or guardianship. Therefore, it would be necessary to have the consent of all the children's parents or legal guardians.

It is important to remember, at this point, that consent can only be an adequate legal basis if it meets the characteristics established in article 4.11) of the RGPD, that is to say, the consent of the affected person must be informed, free, specific and must be granted through a manifestation that shows the will of the affected person to consent or through a clear affirmative action. Otherwise, the consent cannot be considered a valid legal basis, so the data processing will become illegal.

In particular, it must be borne in mind that the consent of the affected person, to be considered valid, must be free, understanding, in this sense, that this person must have real choice and control.

The RGPD provides, as a general rule, that if the affected person is not really free to choose, feels obliged to give his consent or suffers negative consequences if he does not give it, this consent cannot be considered valid (consideration 42). Nor can it be considered valid if there is an obvious imbalance between the person affected and the person responsible (recital 43).

In any case, when assessing whether consent has been given freely, it is necessary to take into account the context in which it is requested. Any inappropriate influence or

pressure exerted on the affected person (which can manifest itself in very different ways) that prevents him from freely exercising his will would invalidate the consent granted.

Faced with a proposal like the one examined in the present case and taking into account the dynamics of the school environment, especially the relationships that exist in the groups of parents, it could be at least unquestionable that we are facing a freely granted consent by the parents and/or legal guardians of minors. It does not seem reasonable to think that, in all cases, the parents can feel truly free to give their consent to the intended treatment and that no influence has been exerted on their decision.

To this it must be added that the use of this legal basis (consent) will determine the regime applicable to the treatment in question, so if the treatment of the children's images is based on the consent granted by the parents and/or legal guardians the person in charge must be prepared to respect this option.

Thus, for example, you must bear in mind that, in the event that the legal representative of one of the minors revokes their consent, they must stop processing their data (and, therefore, take the appropriate measures to guarantee this, which is not without difficulties) or that, in the event of subsequent problems with the validity of the consent granted by this person, it would not be possible, if this were the case, to resort retrospectively to another legal basis in order to justify the treatment in question.

And it must be remembered that it is in any case the responsibility of the data controller to demonstrate that he has the valid consent of the affected person (article 7.1 RGPD), when this is the legal basis used.

Aside from the difficulties in obtaining the valid consent of all the children's legal representatives, the installation of the system would also require, as noted, the consent of the teaching staff of the kindergarten. And in this case there is no doubt that this consent would not be valid, given that, from the point of view of data protection, it could hardly be understood that it was freely given.

As has been said, the RGPD provides that it cannot be considered valid if there is an obvious imbalance between the affected person and the person responsible. Specifically, Recital 43 of the RGPD states that *"this should not constitute a valid legal basis for the treatment of personal data in a specific case in which there is a clear imbalance between the interested party and the person responsible for the treatment, in particularly when said responsible person is a public authority and it is therefore improbable that consent was given freely in all the circumstances of said particular situation (...)."*

In the labor field, this situation of imbalance between the affected person (the worker) and the data controller is clear, so consent for the processing of workers' data becomes an exceptional legal basis, which has to limit to cases in which the worker can express himself completely freely and in which he has the possibility of rectifying later without being harmed by this decision. Conditions that would not occur in the present case given the context in which the treatment of the image of the working person would take place.

In addition to all of this, it should be noted that, from the point of view of the proportionality of the measure, it could hardly be understood that the intended data processing would comply with the data protection regulations. In this sense, it should be borne in mind that

carrying out continuous recording and dissemination of all activities carried out by minors in kindergarten classrooms would lead to an overexposure of the children, which is not without risks and may condition their personal development, given that minors (especially those at this educational stage, who do not exceed the age of 3) are in the process of emotional growth and development of their personality. This apart from the impact it may have on your right to privacy and dignity.

For all that, in view of the information that is available and in the absence of the concurrence of another legal basis on which to base the intended data processing, the person in charge (the municipality in question) would not have sufficient legitimacy to carry out complete the installation of the proposed camera system.

Conclusions

The installation of a video surveillance system inside the classrooms of municipal kindergartens for the purpose of labor control of working people in order to verify compliance with their obligations and labor duties, in attention to the information available would not be adequate to the data protection regulations.

The use of cameras inside the classroom could be proportionate in certain cases in the face of reasonable indications of the possible commission of a serious illegal act by a worker towards one of the children, in an exceptional and limited way in time

The use of the system in order to guarantee the safety of the goods could be carried out outside school hours in corridors and entrances or when the classrooms are not occupied.

It is necessary to inform the workers about the installation of the system in terms of article 89 of the LOPDGDD.

Based on the information available, it would not be legal to install a camera system in classrooms so that parents and/or guardians can view live images of their children's activities.

In those cases in which the legality of the treatment can be concluded, it would be necessary to carry out an impact assessment on data protection.

Barcelona, December 22, 2022

Machine translation