

Legal report in relation to the Draft Order approving, modifying and repealing access tables and document evaluation

Background

A letter from the Commission is presented to the Catalan Data Protection Authority National Committee for Documentary Access, Evaluation and Selection (hereafter, the Commission), in which the Authority is requested to issue a report on the Draft order by which access tables are approved, modified and repealed and documentary evaluation.

Having examined the Project, which is accompanied by the General Report, taking into account the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue the following report:

Legal Foundations

I

(...)

II

The document access and evaluation tables (TAAD) incorporate, in accordance with the provisions of article 9 of Law 10/2001, of July 13, on archives and document management, the evaluation and the deadline conservation of each documentary series.

According to article 9, cited, once the active and semi-active phases have been concluded, the evaluation regulations must be applied to all public documents, and conservation must be determined, due to their cultural, informational or legal value or, where appropriate, its removal.

From the perspective of the right to the protection of personal data, it is necessary to take into account Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to processing of personal data (RGPD).

According to article 5.1 of the RGPD, personal data must be:

"a) treated in a lawful, fair and transparent manner in relation to the interested party ("lawfulness, loyalty and transparency"); b) collected for specific, explicit and legitimate purposes, and will not be subsequently treated in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose");

c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated ("data minimization"); (...)

e) maintained in a way that allows the identification of the interested parties for no longer than necessary for the purposes of the treatment of personal data; personal data may be kept for longer periods as long as they are treated exclusively for archival purposes in the public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, section 1, without prejudice to the application of the measures appropriate technical and organizational techniques that this Regulation imposes in order to protect the rights and freedoms of the interested party ("limitation of the conservation period");

f) processed in such a way as to guarantee an adequate security of personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality").

According to article 89 of the RGPD:

"1. The treatment for archival purposes in the public interest, scientific or historical research purposes or statistical purposes will be subject to adequate guarantees, in accordance with this Regulation, for the rights and liberties of the interested parties. These guarantees will require that technical and organizational measures are available, in particular to guarantee respect for the principle of minimization of personal data. Such measures may include pseudonymization, provided that in that way said ends can be achieved. As long as those goals can be achieved through further processing that does not allow or no longer allows the identification of the interested parties, those goals will be achieved in that way."

It is also necessary to take into account the provisions of Organic Law 3/2018, of December 5, on Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD).

Specifically, according to article 26 of the LOPDGDD:

"It will be lawful for the Public Administrations to process data for the purpose of archiving in the public interest, which will be subject to the provisions of Regulation (EU) 2016/679 and this organic law with the specialties that derive from the provisions of Law 16/1985, of June 25, of Spanish Historical Heritage, in Royal Decree 1708/2011, of November 18, which establishes the Spanish Archives System and regulates the Archives System of the General Administration of the State and its Public Bodies and its access regime, as well as the autonomous legislation that results from application."

In short, the conservation and access to documentation containing personal data constitutes data processing (Article 4.2 RGPD), which must be subject to the principles and guarantees of data protection regulations, among others, the principles of purpose, limitation of the retention period, minimization and confidentiality (art. 5.1 RGPD).

Annex 1 of the Draft Order (unlike Annex 2, relating to modified tables), does not include the code numbers that correspond to each table that is created. Therefore, we will refer to the file number. In any case, some of the forecasts included in the

TAADs referred to in this report are repeated in identical terms in other TAADs, so the reference to the file number in each case is not exhaustive and does not necessarily cover all TAADs that include a particular mention.

III

From the perspective of the protection of personal data, it is necessary to know the specific information treated in each table, to determine, among others, the possible compatibility of the initial treatment with a subsequent treatment for archiving purposes (art. 5.1. b) RGPD).

Likewise, as can be seen from the provisions of article 89 of the RGPD, a subsequent treatment - and detached from the initial purpose of the treatment - for archival purposes, requires the application of adequate guarantees in protection of the rights of affected, which make this subsequent treatment compatible. It is based on the information contained in each table, that it can be determined whether the guarantees that have been established are adequate, and whether the measures provided protect the confidentiality of the data.

The processed information also determines the proportionality of the subsequent treatment for archival purposes and the retention period that may be considered appropriate in each case (even, where appropriate, permanent retention).

The Project refers, in different TAADs, to the fact that the documentation may contain personal data, using formulas similar to the following: "Mostly (or occasionally) they may contain personal data that are neither merely identifying nor of special categories" (for example, Exp. 68/2019, Exp. 44/2021, among others).

In other cases the formula is also used: "Occasionally it may contain personal data that are not of special categories" (Exp. 3/2022, Exp. 60/2021, among others), or formulas similar

In other cases, such as Exp. 42/2021, of the series "management of temporary interventions of objects, effects or instruments, it is foreseen that it "contains data on matters limited or restricted by investigation or the sanction of criminal, administrative or disciplinary infractions", without specifying whether identification data or data of special categories, among others, are processed. The same comment is made for Exp. 98/2021, of the "modifications of taxpayer registers" series, in which it is only indicated that it contains data on matters limited or restricted by economic and commercial interests. Likewise with regard to Exp. 99/2021, and regarding the Exp. 108/2021, of the series "Census of archives of Catalonia."

As this Authority has done on previous occasions (Reports PD 6/2017, PD 3/2018, PD 6/2019, or PD 4/2021), although specifying which categories of data are not treated in each table would already give a certain information (especially when it is ruled out that the information may contain data of special categories, in the terms of Article 9 of the RGPD), it would be advisable, as far as possible, to specify which categories are the ones that are treated .

As has been pointed out on previous occasions, this would make it possible to specify not only the conservation of the information, and to consider its belonging (above all, but not only, in those cases in which the permanent conservation of information of special categories is foreseen), but also

the access regime in each case - to which we will refer later - as well as other issues related to compliance with the principles of Article 5.1 of the RGPD, among others, what could be the appropriate guarantees that the regulations require for the processing of data for archival purposes.

As has been pointed out, in a large part of the Project's TAAD, reference is made to the fact that the table contains personal data "merely identifying information related to the organization, operation or public activity of the Administration (...)".

Regarding this, as this Authority has also agreed, without prejudice to the fact that the mention of "merely identifying" data may respond to the provision of article 24.1 of Law 19/2014, of December 29, on transparency, access to the public information and good governance (LTC) and, where applicable, of article 70.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, from the perspective of protection of data, the processing of identifying data or any other type of data (economic-financial data, professional or academic profile data, health data, etc.), is not harmless, in the sense that a disproportionate treatment (for example, the conservation of data for an excessive period of time or without sufficient guarantees), may result in damage to the rights and interests of the affected person, whatever the category or typology of the data processed, even if the documentation in question contains exclusively identifying data is.

It should be borne in mind that from the perspective of data protection, even if it is foreseen that only identifying data will be processed, taking into account the matter discussed in each table, it will in fact involve the processing of other personal information linked to the actions that the persons holding the identifying data have done, or suffered. This information goes beyond merely identifying information.

In other cases, in some TAAD there is no reference to the processing of identifying data, when from the information available it seems that such data would be processed. As an example, Exp. 20/2021, of the "prior due diligence" series, in which the processing of special categories of data is only indicated, when it seems obvious that identifying data is being processed. Although it is indicated that these data are "mostly" processed, it must be stressed that this does not allow us to deduce whether other categories of data are processed and, in this case, what they would be. The same comment is extended to Exp. 21/2021, of the series: "Register of preliminary proceedings", in which there is also no reference to the processing of identifying data.

On the contrary, in the TAAD Exp. 9/2021, of the "architectural heritage inspection activity files" series, indicates the treatment of only identifying data related to the organization, operation and public activity of the Administration, although it would seem, from the object of the table, that other categories of data could also be treated (taking into account that these are inspection files). If this were the case, it does not seem that access should be "free", at least initially, as indicated in the File.

The same comment is extended to the TAAD Exp. 26/2021, of the "management of complaints and food complaints" series.

Also in line with these considerations, we note that in different tables, it is indicated that the data may be "occasionally" in some cases, or "mostly" in others. It should be noted that in some cases, these mentions would not provide much information either

clarifying Thus, in the TAAD 78/2021, of the series "authorization of access control personnel for public entertainment activities..." only the treatment, mostly, of data from Article 9.1 RGPD is foreseen. Taking into account the object of the TAAD, it seems that a lot of other personal information would be processed (identifying data and other categories, such as employment data, etc.), and it is not clear that "mostly" sensitive information would be processed.

Regarding the Exp. 79/2020, "limited-stay residential care and accommodation", also indicates the "majority" treatment of data from special categories, without it being clear whether identifying data or other categories are being treated.

In the same way, the Exp. 21/2021, "Register of previous proceedings". And in relation to this, with regard to Exp. 20/2021, "preliminary proceedings", the provision to permanently retain information of special categories (of crimes of sexual assault, among others), is also not clear, in terms of its necessity, if we take into account that the aforementioned Exp. 21/2021 already provides for permanent conservation in the Register of previous proceedings. Therefore, as we have done in the past on other occasions, if the data that must be kept definitively are incorporated into the corresponding Register, there would be no need to maintain, also, permanently, the information of the TAAD 20/ 2021

This last consideration is extended to Exp. 50/2021, "management of registrations, modifications and deregistrations in the Official Register of pesticide establishments and services", in which the need to permanently retain the information is not clear, being that the Exp. 49/2021, referring specifically to the "Official Register of Pesticide Establishments and Services", already provides for permanent conservation. Once the establishments have been incorporated into the Register, and the relevant changes have been made (for example, due to a deregistration), it does not appear that the information on the management of this change should be kept indefinitely.

Apart from the special categories of data (art. 9.1 RGPD) and identifying data, there is a wide range of data categories (economic and financial data, data on personal characteristics, social circumstances, academic and professional data, employment...) which, if contained in the TAAD documentation, may condition its treatment for archival purposes (technical or organizational measures to be applied, retention period, access...). The assessment of this treatment, from the perspective of data protection principles, would require knowing which categories of data are effectively treated in each case, and not just knowing whether identifying data or special categories of data are treated.

For all this, it must be concluded that the information available does not in some cases allow us to know with clarity and precision which categories of personal data are being treated, a question that is key, from the perspective of data protection, for the purposes of the principles of the data protection regulations (art. 5.1 RGPD).

On the other hand, it should be borne in mind that article 89 of the RGPD establishes pseudonymization (art. 4.5 RGPD) as one of the guarantees to be taken into account when processing data for public archive purposes.

The RGPD configures pseudonymization as an adequate guarantee for data protection (art. 6.4.e), 25.1, and 32.1.a) RGPD, among others), without excluding from the scope of the protection regulations of data the pseudonymised personal information (consideration 26

RGPD). Therefore, whenever the purpose of archiving in the public interest can be achieved through pseudonymisation, or anonymisation, this measure will have to be opted for.

Thus, for example, in the TAAD Exp. 82/2021 and Exp. 84/2021, relating to the T-CAT and IdCat digital certificate management registers, respectively, the permanent conservation with the anonymization of data is foreseen, once the period of 15 years has passed since the certificate's expiration or completion of the service provided, a forecast that is positively valued.

It should not be ruled out that this measure may be applicable to other TAADs, especially with respect to that information that must be kept permanently.

Thus, in the Exp. 99/2021, of the "taxpayer registers" series, foresees the permanent conservation of registers from certain years, and the total elimination of the rest. Given that, in this case, it seems that a random selection is made of the patterns to keep, the anonymization of the information could be a mechanism to apply in this case.

In any case, remember that the retention period for the information does not necessarily have to be the same for all the documents that make up the same documentary series. The principle of minimization (art. 5.1.c) RGPD), which is expressly referred to in article 89 of the RGPD, must lead to the retention of only those parts of the documentary series in respect of which their retention is justified.

Finally, we note that the TAAD: Exp. 5/2021, of the "Public register of equality plans" series; Ex. 35/2021, of the series "Process of certification of compliance with the European framework of the set of calls programmed by the facilitating bodies"; Ex. 107/2021, of the "Catalogue of the festive heritage of Catalonia" series; Ex. 34/2021, of the series "programming of the frameworks for the selection of European structural funds..."; Ex. 109/2021, of the series "Census of promotion entities (...)", do not include the sections of "Motivation" - which details the information dealt with in each case -, "validity of restriction" or "Legal Foundation". In these cases, the personal data contained in these tables is not known, nor can the pertinence of the forecasts on the permanent conservation foreseen in them be assessed.

IV

More detailed reference will be made below to the forecasts relating to the **retention period** of certain TAAD of the Project, without prejudice to the general considerations that have already been made.

1. At the outset, mention should be made of Exp. 102/2021, of the "Registry and Custody of Detainees" series, which provides for the permanent conservation, without further details (therefore, it must be understood, of all the information contained in the TAAD). With regard to this information, the "Motivation" section includes the following: *"mostly they may contain personal data that are not merely identifying information related to the organization, operation or public activity of the Administration or categories special They may also contain data from special art categories. 9.1 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016. Likewise, access to information could harm public security, the investigation or punishment of criminal, administrative or disciplinary, or the rights of minors."*

Apart from what has already been said in this report regarding the description of the categories of data, it is clear that this TAAD contains particularly protected data, including of minors (for whom the TAAD already exposes the risk in case of access improper).

Article 8 of Organic Law 7/2021, of 26 May, on the protection of personal data processed for the purposes of prevention, detection, investigation and prosecution of criminal offenses and the execution of criminal sanctions, provides the following:

"1. The person responsible for the treatment will determine that the conservation of personal data takes place only for the time necessary to fulfill the purposes provided for in article 1.

2. The person responsible for the treatment must review the need to preserve, limit or delete the set of personal data contained in each of the treatment activities under his responsibility, at most every three years, paying special attention in each review to the age of affected, the character of the data and the conclusion of an investigation or criminal procedure. If possible, this will be done through the appropriate automated processing.

*3. In general, **the maximum period for the deletion of data will be twenty years**, unless factors such as the existence of open investigations or crimes that have not been prescribed, the non-completion of the execution of the penalty, recidivism, necessity for the protection of victims or other motivated circumstances that make it necessary to process the data for the fulfillment of the purposes of article 1."*

Taking into account the information processed in the TAAD, the impact on particularly vulnerable groups, and the amended forecasts, this Authority considers that the conservation of all the processed information is not sufficiently justified, not only for a period exceeding 20 years, but permanently.

2. Regarding the Exp. 6/2021, of the "registration files of equality plans" series, we note that the permanent conservation of data information that could be of specially protected categories is foreseen (art. 9.1 RGPD). In this case, it is not clear what this data would be, and which people it would affect (taking into account that we are talking about registration of equality plans, without the reason why sensitive data of specific people should be processed). Accordingly, it cannot be determined whether the permanent retention of such protected information would be justified.

This comment is extended regarding the Exp. 14/2021, of the series "Register of qualification files for access control personnel of public shows...", which also provides for the permanent conservation of special categories of data. Again, it is not clear why sensitive data of the skilled personnel contained in this Registry should be retained indefinitely, and what that data would be.

3. The Exp. 68/2021, of the series "authorization files for competition as supervisors of the mining sector", foresees the total elimination within a period of fifty years, but does not indicate when the calculation for the elimination of the data. Regardless of whether the period indicated is adequate, it would be useful to clarify when the calculation of this period begins.

The same consideration is made regarding Exp. 61/2021, of the "stoppage of work activity due to serious and imminent risk" series, in which a period of 5 years is indicated for the total elimination of the information, without indicating the fact that determines the start of the computer

Likewise, in the Exp. 57/2021, of the "Financial inspection files of the Savings Banks..." series, the total elimination of certain files is foreseen within a period of 10 years, without indicating the fact that determines the start of the computer. This, apart from the fact that it would be clarifying to specify in the TAAD itself the information contained in file A and file B of this series, given that only the first is kept permanently.

4. Finally, we refer to several TAADs included in Annex 2 of the Draft Order, relating to the modified TAADs, specifically, the TAADs relating to T-CAT certificate management files (code 694), issuance of digital certificates T-CAT (code 695), suspensions, authorizations or revocations of these certificates (codes 696, 697 and 698, respectively), as well as several TAADs relating to IdCAT digital certificates, all from the same annex 2.

These provide for the total elimination of the information, within 20 years from the date of issue of the certificate.

The General Report that accompanies the Project mentions these tables presented by the Open Administration Consortium of Catalonia, which would have been modified to adapt them to Law 6/2020, of November 11, regulating certain aspects of trusted electronic services.

Article 4 of Law 6/2020 provides that:

"1. The electronic certificates are extinguished by expiration at the expiration of their period of validity, or by means of revocation by the providers of trusted electronic services in the cases provided for in the following article.

2. The period of validity of the qualified certificates will not exceed five years."

Article 9 of Law 6/2020 provides that:

"3. Qualified providers of trusted electronic services must comply with the following additional obligations:

a) The period of time during which they must keep the information related to the services provided in accordance with article 24.2.h) of Regulation (EU) 910/2014, will be 15 years from the expiration of the certificate or the end of the service borrowed (...)."

Therefore, it is understood that the general period provided for in these TAADs, for the elimination after 20 years from the issuance of the certificate, would conform to these forecasts.

V

The TAAD of the Order Project include the **access regime** that is considered applicable in each case

According to article 34.1 of Law 10/2001:

"1. People have the right to access public documents under the terms and conditions established by Law 19/2014, of December 29, on transparency, access to public information and good governance, and the rest of the regulations that are applicable. "

As this Authority has agreed on previous occasions, the provision for access made in the Draft order for each TAAD is a guideline, given that in accordance with the regime established in state and Catalan transparency legislation, access to public information and good governance (Law 19/2013, of December 9 (LT), and Law 19/2014, of December 29 (LTC), respectively), the possibility of giving access or not to a document it will not depend on the way it is collected in this section of each TAAD, but on the existence of any applicable limit of those provided for by the transparency legislation, mentioned, or by other rules with the rank of law.

Article 5.1.a) RGPD establishes that all processing of personal data (art. 4.2 RGPD) must be lawful, loyal and transparent in relation to the interested party. In order for the treatment, in particular, the access by third parties to the personal data contained in the documentation referred to in the TAAD, to be lawful, one of the conditions provided for in article 6 RGPD must be met and also, if applicable, Article 9 RGPD, in the case of special categories of personal data.

Thus, the TAADs contain initial guidance which, without prejudice to the fact that the resolution of specific access requests requires analyzing the concurrent circumstances in each case, offers initial information on the applicable regime.

Having said that, it is necessary to refer to some issues that affect some of the TAADs included in the Draft Order:

1. In several TAADs of the Draft Order, the following formula is incorporated: *"free access unless there is a limit that must prevail, partial access."* (as an example we cite Exp. 94/2021; 92/2021; 87/2021; 84/2021, among others).

As has been done on previous occasions, in accordance with the regime established in the transparency legislation (LT and LTC), which is based on the existence of a general rule, such as access to all information public, and of some limits that may lead to a limitation of access, the consequence of the concurrence of some limit must not always and necessarily be partial access, but could also be the total denial of access, in those cases where partial access does not allow safeguarding the limit that must prevail.

For this reason, this Authority has considered an expression similar to *"free access unless there is a limit that must prevail"* to be more in line with the transparency regulations, since *this* formula does not presuppose whether the limit will lead to partial access or denial of access. It is worth saying that in the majority of cases, this formula has been incorporated in relation to the different TAADs that are the subject of the Project examined, a matter that is positively assessed. In any case, the formula used in some of the TAADs could be revised, in the terms indicated.

2. In different TAAD of the Project (as an example and among others, Exp. 102/2021; Exp. 78/2021; Ex. 20/2021), which provides for the treatment of special categories of information, the formula *"restricted access, without prejudice to partial access"* is used, which seems to refer to the guidelines that article 25 of 'LTC provides for partial access to public information and documentation.

Regarding this, we reiterate that the resolution of specific access requests will require analyzing the concurrent circumstances in each case, to determine access to information.

With regard to TAAD 102/2021, from the "Registry and custody of detainees" series (which also provides for this access formula), we note that the information on the processed data is contradictory, since it is expected that "mostly they may contain personal data that are neither merely identifying information related to the organization, operation or public activity of the Administration nor of special categories. They may also contain data from special art categories. 9.1 of Regulation (EU) 2016/679 (...)". It is therefore appropriate to clarify this contradiction.

In other cases (Exp. 98/2021, from the series "modifications of taxpayer registers"; or Exp. 42/2021, from the series "management of temporary interventions of objects, effects or instruments"), it is used this same formula ("restricted access, without prejudice to partial access"). In both cases, the TAAD does not indicate whether personal data is processed, and of which category (if data from special categories could be processed), a possibility that cannot be ruled out. Therefore, in these cases it cannot be determined whether the provision on access would be appropriate.

3. Still in relation to the access regime provided for in the transparency legislation, we note that in several TAAD of the Project mention is made of: "Validity of the restriction: (...) for specially protected data, this exclusion has no effect 25 years after the death of the person concerned and, if the date is unknown, 50 years after the production of the document. For the rest of the personal data, this exclusion ceases to have effect 30 years after the production of the document". In other TAAD of the Project, it is provided, simply, that "this exclusion ceases to have effect 30 years after the production of the document."

In other cases, such as Exp. 14/2021, of the series "Register of qualification files for access control personnel of public shows...", although the (occasional) processing of data under art. 9.1 GDPR, only the 30-year period is mentioned, and not the 25/50-year periods.

Having said that, in the Exp. 7/2021 of the series "files of declarations of cultural assets of national interest of movable property" (also in Exp. 8/2021, Exp. 9/2021, or in Exp. 60/2020, among others), which only contain identifying data related to the organization, operation or public activity of the Administration, it does not seem necessary to remember the lifting of the exclusion at 30 years, precisely because in accordance with the article 24.1 of the LTC can no longer be considered that access is excluded before this term.

In any case, the temporary restrictions on access, foreseen in the Project, respond to the provision of article 36.1 of Law 10/2001, according to which:

"1. In a general way, the legally established exclusions regarding the consultation of public documents cease to have effect thirty years after the production of the document, unless specific legislation provides otherwise. If these are documents that contain personal data that may affect the security, honor, privacy or image of people, as a general rule, and unless specific legislation provides otherwise, they may be subject to public consultation with the consent of those affected or when twenty-five years have passed before their death or, if the date is not known, fifty years before the production of the document."

As has been mentioned on previous occasions, it should be taken into account that article 22.2 of the LTC provides that:

"2. The limits of the right of access to public information are temporary if so established by the law that regulates them, and they remain as long as the reasons that justify their application last.

Thus, we remind you that, in accordance with the transparency legislation, the limits are only temporary *"if the law that regulates them so establishes"*. And in the specific case of personal data, the regulations that regulate the limit extend their protection until the death of the person.

conclusion

Having examined the draft order approving, modifying and repealing access tables and document evaluation, it is considered adequate to the provisions established in the regulations on personal data protection, as long as the considerations are taken into account made in this report.

Barcelona, July 22, 2022

Machine Translated