

## Legal report in relation to the proposed Order by which awards are created by a Department and the regulatory bases are approved

### Background

A letter from a Department is submitted to the Catalan Data Protection Authority in which it is requested that the Authority issue a report on the proposed Order creating awards and approving their regulatory bases .

Having analyzed the Project, given the current applicable regulations and in accordance with the report of the Legal Counsel, the following is reported.

### Legal Foundations

I  
(...)

II

Article 3.2 of Decree 184/2022, of October 10, naming and determining the scope of competence of the departments in which the Government and Administration of the Generalitat of Catalonia is organized establishes that it corresponds to Department I 'exercise of the powers of the Government of the Generalitat in the field of innovation and entrepreneurship, among others.

In the scope of these attributions, the Department approved the Catalunya Emprèn+1 Program, for the period 2021-2023 (Agreement GOV/189/2021, of November 30), which has among its main purposes the empowerment of "*[...] creativity, entrepreneurial culture and the perception of opportunities, which derive from science, innovation and technology, in the schools and universities of the country and in society in general, and apply them to entrepreneurship* ", as well as the purpose of "*promoting training in entrepreneurship, innovation and technology, to consolidate collaboration in the educational field; promote talent among young people and the ecosystem of scientific and university entrepreneurship; and provide tools to improve technology transfer by promoting the creation of spin-offs and deep tech companies*".

On the basis of these attributions, as can be seen from the documentation sent, the Department proposes to create awards and approve their regulatory bases.

According to the regulatory bases, the awards "*[...] offer support in entrepreneurship and innovation to young people to promote their talent and encourage the creation of solutions in*

*society that come from science, technology and disruption . [...] In short, the awards are a commitment from the Government of the Generalitat of Catalonia towards our young people in terms of entrepreneurship and innovation to encourage global thinking and a guarantee that those most committed can enjoy formulas of 'acceleration and mentoring.*

*[...]*

*The strategic objectives [...] are:*

- 1. Arouse young people's interest in the world of entrepreneurship.*
- 2. Make them aware that the time has come to contribute to society and that they have the talent to do so.*
- 3. To empower the future leaders of our society to apply exponential technologies to humanity's great challenges.*
- 4. Develop new business models based on sustainability, social impact and economic value.*
- 5. Retain and promote Catalan talent and attract international talent as a key factor in competitiveness, as a reflection and knowledge of the different entrepreneurial ecosystems in the world.*
- 6. Accompany those projects and those solutions to challenges that are at a point of advanced maturation to go on the market ".*

In advance, it should be noted that this report is issued exclusively with regard to the assessment of the incidence that the Draft Order may have from the point of view of the protection of personal data. For these purposes, personal data is considered "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 name, an identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of this person" (article 4.1 RGPD).

Therefore, the personal data protection regulations will be applicable to the data of all entrepreneurs who are natural persons.

### III

The regulatory bases of the awards contain several provisions relating to the publicity and transparency of the administrative acts corresponding to the concession procedure.

In particular, in the current wording, the bases contain provisions relating to the publication of the full text of the call (base 3), the publication of the resolution of non-admission or withdrawal of interested persons (base 11) and the resolution and publication of the prizes awarded (base 12), among others.

Article 2 of Law 38/2003, of November 17, General of Subsidies establishes that any monetary provision made by any of the subjects referred to in its article 3 in favor of public persons must be understood as a subsidy or private, as long as the following requirements are met:

*" [...] a) That the delivery is made without direct compensation from the beneficiaries.*

*b) That the delivery is subject to the fulfillment of a certain objective, the execution of a project, the performance of an activity, the adoption of a singular behavior, already realized or por desarrollar, or the concurrence of a situation, the beneficiary must fulfill the material and formal obligations that had been established.*

*c) That the project, action, conduct or situation financed has as its object the promotion of an activity of public utility or social interest or the promotion of a public purpose. [...]"*

In relation to the management of subsidies, article 8.3 of the LGS provides that it must be carried out, among others, in accordance with the principles of publicity and transparency.

And, article 18 of the LGS, when to these principles, establishes the following:

*" 1. The National Subsidy Database will operate as a national subsidy advertising system.*

*2. For these purposes, the granting administrations must send to the National Subsidies Database information on the calls and the concession resolutions falling within the terms established in article 20.*

*3. The beneficiaries must publicize the subsidies and aid received in the terms and conditions established in Law 19/2013, of December 9, on transparency, access to public information and good governance. In the event that use is made of the provision contained in article 5.4 of the aforementioned Law, the National Subsidies Database will serve as an electronic medium for fulfilling the obligations of publicity.*

*4. Beneficiaries must give adequate publicity of the public nature of the financing of programs, activities, investments or actions of any type that are the object of subsidy, in the terms established by regulation ."*

And, article 20 of the LGS, on the other hand, provides for the following:

*" 1. The National Subsidy Database aims to promote transparency, serve as an instrument for public policy planning, improve management and collaborate in the fight against subsidy and public aid fraud.*

*[...]"*

*8. In application of the principles set out in Law 19/2013, of December 9, on transparency, access to public information and good governance, the BDNS will operate as a national subsidy advertising system. For these purposes, and to guarantee the right of citizens to know all the subsidies called for at any time and to contribute to the principles of publicity and transparency, the General Intervention of the State Administration will publish on its website the following contents:*

*a) calls for grants; to such effects, in all calls subject to this Law, the granting administrations will communicate to the National Subsidies Database the text of the call and the information required by the Database. The BDNS will transfer to the corresponding official journal the extract of the call for publication, which will be free of charge. The call for a grant without following the indicated procedure will cause the call to be annulled.*

*b) the subsidies granted; for publication, the awarding administrations must send the grants awarded to the National Subsidy Database with indication in each case of the call, the*

*program and budgetary credit to which they are attributed, the beneficiary, the amount granted and the objective or purpose of the subsidy with expression of the different subsidized programs or projects. You must also be informed, when appropriate, about the commitment assumed by the members referred to in section 2 and in the second paragraph of section 3 of article 11 and, in the case of multi-year subsidies, about the distribution by annuals. Grants granted will not be published when the publication of the beneficiary's data due to the purpose of the grant may be contrary to the respect and safeguarding of the honor, personal or family privacy of individuals pursuant to the provisions of the Organic Law 1/1982, of May 5, on civil protection of the right to honor, to personal and family privacy and to one's image, and has been provided for in its regulatory regulations. The treatment of personal data can only be carried out if it is necessary to satisfy the legitimate interest pursued by the person responsible for the treatment or by the third party or third parties to whom the data is communicated, provided that the interest or rights do not prevail and fundamental freedoms of the interested party that require protection in accordance with article 1.1 of Directive 95/46/CE.*

*[...]*

*Those responsible for providing the information in accordance with section 4 of this article must communicate to the BDNS the information necessary to comply with the provisions of this section [...]."*

In similar terms, article 90.1 of Legislative Decree 3/2002, of December 24, by which the revised Text of the Public Finances Act of Catalonia ( TRLFPC) is approved , which provides that the granting of subsidies it must be subject to the criteria of publicity, competition and objectivity.

And article 94.6 of the TRLFPC establishes that *"granting bodies must publicize the grants awarded in accordance with the applicable regulations on transparency."*

To this end, article 96 bis of the TRLFPC provides for the following:

*"1. The Registry of Subsidies and Aids of Catalonia is created with the aim of promoting transparency, improving the planning and management of the policies of the Catalan public administrations and collaborating in the fight against fraud in relation to subsidies and aids.*

*[...]*

*2 bis. The Catalan Grants and Aids Register must include information on all dispositions of public funds made without consideration in favor of physical or legal persons due to their state, situation or fact in which they are or that they support for the purpose to cover their needs and basic rights, or other reasons of general interest, in accordance with the applicable sectoral regulations, and also the economic promotion measures, granted by the subjects included in section 2, regardless of the legal regime applicable and of its denomination.*

*[...]*

*4. The obligation established by article 15.c of Law 19/2014, of December 29, on transparency, access to public information and good governance, becomes effective with the submission of the required information to the Register of subsidies and aid from Catalonia."*

Regarding the transparency regulations, to which both the LGS and the TRLFPC refer, Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC) establishes in the article 15.1.c) that, in relation to the transparency of the subsidy activity, must be made public, among others, *"Subsidies and public aid granted, with*

*an indication of the amount, the object and the beneficiaries. This information must include grants and aid, must be up-to-date and must refer to the last five years. It must also include subsidies and grants awarded without advertising and competition if these requirements have been exempted, in the cases established by law. In the case of subsidies and public aid granted for reasons of social vulnerability, the identity of the beneficiaries must be preserved".*

At the same time, article 45.2 of Decree 8/2021, of February 9, on transparency and the right of access to public information, provides for the following:

*"2. The fulfillment of the duty to publish the information related to grants and aid granted, established in letter c) of article 15 of Law 19/2014, of December 29, becomes effective, for the subjects who are obliged, by sending this information to the Register of Subsidies and Aids of Catalonia, which must be accessible from the Transparency Portal of Catalonia.*

*The Transparency Portal of Catalonia must provide access, through a link to the Register of Subsidies and Aids of Catalonia, to the regulations governing the subsidy or aid, to its regulatory bases, to the resolution approving the call, to its eventual modifications, and the information on the amount, the object and the beneficiaries of the subsidies and public aid granted with or without advertising and competitive competition."*

Exposed the application regulations regarding advertising and transparency that affect the subsidized activity of public administrations, in accordance with what we have explained, different regulatory bases of the awards are identified which contain forecasts that refer to advertising of certain administrative acts, such as the publication of the resolution of non-admission or withdrawal of the interested persons (base 11) and the resolution and publication of the prizes awarded (base 12).

It is clear that to the extent that the regulation of the general legal regime of subsidies and the transparency regulations contain provisions relating to the publicity of the administrative acts that govern the processes of granting subsidies or aid, the data protection regulations must not be an impediment to its publication. This, in particular with respect to the publication of the full text of the call (base 3), and the publication of the resolution and publication of the prizes awarded (base 12).

However, a different analysis must be carried out regarding the publication of the resolution of non-admission or withdrawal of the interested persons to which base 11 refers.

Base 11.3 of the text sent provides the following:

*" 11.3 Prior to the awarding of the prizes, [...] and **must notify the decision of non-admission or withdrawal to the interested persons through its publication on the Electronic Board of the Administration of the Generalitat of Catalonia** (<https://tauler.seu.cat/inici.do?idens=1>), notwithstanding that it may additionally use other electronic means. This publication replaces the individual notification and has the same effects, in accordance with article 45.1.b) of Law 39/2015, of October 1."*

It should be noted that the analyzed regulations do not contain any provision regarding the obligation to publish the resolution of non-admission or withdrawal of interested persons in the terms referred to in base 11.3.

From the point of view of the data protection regulations, regarding the publication of the resolution of non-admission or withdrawal of the interested persons referred to in base 11.3, it is necessary to analyze it from the perspective of the principle of minimization of data from article 5.1.c) of the RGPD, whereby the data must be adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed.

It should be borne in mind that, in accordance with what follows from article 20 of the LGS and article 96 bis of the TRLFPC, by which the National Subsidies Database and the Registry of subsidies and aid from Catalonia, the purpose of its creation, in addition to promoting transparency, improving the planning and management of policies in subsidy material, is to collaborate in the fight against fraud in relation to subsidies and aid

Taking into consideration the purpose of the regulations, in particular, of transparency and collaboration in the fight against fraud, a priori, and without prejudice to the recognized right of interested persons to request access to public information in accordance with article 18 et seq. of the LTC, the public interest in the disclosure of the identity of interested persons who have given up the request to participate in the concession process is not appreciated, or in respect of which the inadmissibility has been agreed.

For this reason, it is considered that from the perspective of data protection regulations, personal notification of the resolution of non-admission or withdrawal is more guaranteeing the rights of the persons concerned, and not in the terms referred to in base 11.3 of the text sent.

With all this, the competent body can appreciate that there are reasons of public interest that motivate the publication of the resolution of non-admission and withdrawal referred to in base 11.3 of the regulated bases, or, where appropriate, taking into consideration which is a competitive competition procedure that could affect a large number of people, appreciate that the personal notification of the resolution may involve a disproportionate effort.

In this case, it will be necessary to be in the considerations set out in the following legal basis.

#### IV

In any case, the publication of administrative acts must be subject to the provisions of the seventh Additional Provision of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (LOPDGDD).

The Seventh Additional Provision (DA 7) of the LOPDGDD has come to specify, under the prism of proportionality, or minimization, a criterion that makes it possible to reduce the impact that the provision has on the right to the protection of personal data legal to publish certain information that contains personal data.

The Seventh Additional Provision of the LOPDGDD establishes the following criteria:

*" 1. When it is necessary to publish an administrative act that contains personal data of the person affected, it will be identified by means of his name and surname, adding four random numerical digits from the national identity document, foreigner's identity number, passport or equivalent document . When the publication refers to a plurality of those affected, these random figures must be alternated.*

*When it comes to notification through announcements, particularly in the cases referred to in article 44 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, the affected person will be identified exclusively through the full number of your national identity document, foreign identity number, passport or equivalent document.*

*When the affected person lacks any of the documents mentioned in the two previous paragraphs, the affected person will be identified solely by means of their number and last name. In no case should the number and surname be published together with the full number of the national identity document, foreign identity number, passport or equivalent document.*

*2. In order to prevent risks for victims of gender-based violence, the Government will encourage the development of a collaboration protocol that defines safe procedures for the publication and notification of administrative acts, with the participation of the bodies with competence in the matter."*

This provision differentiates the mechanism of identification of interested parties according to whether the need to make the data public derives from an obligation to publish an administrative act or is a consequence of the need to make a notification through announcements, to one or several interested parties, of an administrative act and, in particular, as a result of an "unsuccessful" notification provided for in article 44 of the LPACAP.

Therefore, it will be necessary to distinguish between:

a) When the publication of the administrative act that contains personal data that must be published for the purpose of publicity, of general knowledge by any person. In this case, the identification of the affected persons must be done in accordance with what is established in the first paragraph of the first section of DA 7, that is, by means of the name and surname of the affected person adding four digits random numbers from the number of your national identity document, foreigner's identity number, passport or an equivalent document.

For the determination of these four figures, as a provisional criterion until there is a regulatory deployment of this aspect that allows the provisions of this paragraph to be applied with full guarantees for the right to data protection, this Authority considers that the right can be guaranteed by applying the guidance that, jointly, have been adopted by the Spanish Data Protection Agency, the Basque Data Protection Agency, the Transparency and Data Protection Council of Andalusia and this Authority.

This guidance can be consulted on the Authority's website at the following link:  
<http://apdcat.gencat.cat/web/.content/01-autoritat/normativa/documentos/VAR-9-2019-orientacio-disposicio-addicional -7-cat.pdf>.

The joint adoption of this guiding criterion aims to prevent the adoption of different formulas in application of the aforementioned provision from giving rise to the publication of numerical figures of the identification documents in different positions in each case, enabling the complete recomposition of 'these documents.

b) When the purpose of the publication is only the notification of the administrative act to the interested person (for example, case of unsuccessful notifications of article 44 LPAC), the second paragraph of the first section of DA 7 has planned for the identification mechanism of the affected persons to contain the minimum data necessary to allow them to know that the communication is addressed to them. Consequently, in these cases the identification of the interested party must be done through the full number of his national identity document, the foreigner's identity number, the passport or an equivalent document. Only with respect to those interested who do not have any of these documents, they can be identified by their first and last names.

c) Cases in which the publication of the administrative act has a double purpose: on the one hand, the purpose of notification, of knowledge by those affected that an administrative act has been issued that affects them and, likewise, a purpose of knowledge general by the entire population: in these cases the identification criterion must be that established in the first paragraph of the first section of DA 7, in order to guarantee that any person can be aware of it. Therefore, it will be carried out by means of the name and surname of the person affected by adding four random numerical digits of the number of the national identity document, the foreigner's identity number, the passport or an equivalent document, taking into account, for to the determination of the four random numerical figures, the Orientation we referred to above.

In short, the determining element for the application of one or another of the mechanisms provided for by section 1 of DA7 of the LOPDGDD is the purpose pursued by the publication of the act, depending on the publication as a means of communication to those affected by the administrative act and integration of its effectiveness or other public purposes different from the previous one, in which the ultimate objective of the publication is to publicize the act by to the general knowledge of citizens.

Having transferred everything that has been set out in the regulatory bases sent, it will be necessary to take into account for example the following:

a) In the case of amendments to submitted applications (base 7.6), it must be taken into account that in this case the purpose of the publication is to notify the interested parties, which applications are incomplete or incorrect, the corresponding requirement of amendment of the request. Therefore, in this case, the publication is a means of communication to those affected by the administrative act and integration of its effectiveness. There is therefore no purpose of general knowledge.

Consequently, it will be necessary to apply what is established in the second paragraph of the first section of DA7 of the LOPDGDD, in such a way that it would be sufficient to publish the number of the national identity document, the foreigner's identity number, the passport or an equivalent document of the person concerned.

b) When the resolution and publication of the prizes awarded (base 12), on the basis that it is a process of competitive competition, has a dual purpose, both notification to the interested parties and general knowledge.

Therefore, in this case, it will be necessary to apply the provision of the first paragraph of the first section of DA 7 of the LOPDGDD, that is, the identification of the interested parties based on their first and last names together with the 4 digits of the document national identity number, alien identity number, passport or an equivalent document meet the criteria of the provisional recommendation of the data protection authorities referred to.

c) And, with regard to denied, excluded or withdrawn applications (base 11), and without prejudice to what has been set out in the previous legal basis, in the event that it is decided to publish them, it must be taken into consideration that, to the extent that the purpose of this publication occurs exclusively so that the affected person can be aware of the existence of an administrative act that affects him, we would find ourselves with a publication whose sole purpose is to notification to interested parties, and not a general knowledge purpose. Consequently, in this case the provision of the second paragraph of the first section of DA7 of the LOPDGDD would apply, so that it would be sufficient to publish the number of the national identity document, the identity number of foreigner, the passport or an equivalent document of the person concerned, in the same terms as we have set out in the case of amendments to the submitted applications.

v

The regulatory bases of the awards contain two bases that refer to the personal data protection regulations, in particular, base 9 and base 19.

Base 9 provides for the following:

*"Personal data protection and data policy*

*In accordance with Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights; and with what is established by 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, personal data will be treated in accordance with the principles of security and confidentiality established by the regulations on data protection."*

And Base 19 establishes the following:

*" Protection of personal data*

*19.1 In accordance with Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), and what is established by Regulation (EU) 2016/679, personal data s 'must deal with the purpose of managing and processing the calls that regulate these bases in accordance with the principles of security and confidentiality established by the regulations on data protection.*

*19.2 In the event that the object of the award includes the processing of personal data, the beneficiaries and, where applicable, collaborating entities must comply with the provisions of current regulations on data protection, and must 'adopt and implement the appropriate*

*technical and organizational security measures to guarantee a level of protection appropriate to the risk. "*

At the outset, it should be pointed out that both the data protection regulations and the regulations relating to subsidies do not oblige this provision to be included in the regulatory rules of the bases. However, this does not prevent it from being included.

Regardless of what we have just explained, on the basis of the provisions of article 12 of the RGPD, it must be taken into account that the person responsible for the treatment must adopt the appropriate measures in order to provide the interested party with all the information relating to the treatment, in a concise, transparent, intelligible and easily accessible form, with clear and simple language, in particular if the information is addressed to a child.

And, in accordance with the provisions of article 13 of the RGPD, the information relating to the treatment to which it refers that must be offered to the interested parties, when personal data is collected directly from the interested party himself, is must facilitate at the time of collection.

For this reason, in any case, it must be taken into account that regardless of whether the regulatory bases contain information relating to the regime provided for in the data protection regulations, including the information referred to in article 13 of RGPD, this does not exempt the interested parties from the obligation to provide information at the time of data collection.

Beyond this appreciation, if it is considered appropriate to keep the information related to the treatment in the regulatory bases, we must also refer to the following issues.

At the outset, it is unnecessary for the regulatory bases to include two separate bases to provide for similar provisions - base 19 replicates the content of base 9, and incorporates more information regarding treatment.

For this reason, it is proposed to recast the information in a single regulatory basis.

Regarding the specific content of the bases to which we refer, first of all, it must be taken into account that, to the extent that the RGPD enjoys direct effectiveness and primacy over the LOPDGDD, it is considered that the reference to both norms must be written in reverse. In other words, citing the GDPR in the first place.

Secondly, to point out that the name used in the bases to refer to security ("principle of security and confidentiality") does not coincide with the name provided for in article 5.1.f) of the RGPD. For this reason, although the name used is clear enough, it would be convenient to refer to the "principle of integrity and confidentiality".

In any case, it should be borne in mind that the principle of integrity and confidentiality is not the only principle referred to in article 5 of the RGPD. In other words, the processing of personal data must be subject to all the principles relating to the processing referred to in article 5 of the RGPD, which include the principle of integrity and confidentiality.

With regard to section 2 of base 19, the information it provides is redundant with respect to the first section, given that it affects the fact of the need to comply with data protection

regulations and, in particular , reinforces the need to comply with the principle of integrity and confidentiality, which involves guaranteeing adequate security of personal data, including protection against unauthorized or unlawful processing and against its loss, destruction or accidental damage , through the adoption of appropriate technical and organizational measures.

For this reason, the content of this section is considered unnecessary and, consequently, its deletion is proposed.

On the basis of everything that has been presented , it is proposed to recast both bases with wording similar to the following:

*"In accordance with the provisions of Regulation 2016/679, 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 (General Data Protection Regulation), and Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights, personal data must be treated "in accordance with the principles established by the regulations on data protection, in particular, the principle of integrity and confidentiality."*

## **conclusion**

Having examined the Draft order by which the Department's awards are created and the regulatory bases are approved, it is considered adequate to the provisions established in the regulations on the protection of personal data, as long as the considerations made in this report.

Barcelona, November 9, 2022