

Opinion in relation to the inquiry made by a Foundation about the possibility of sending information about a training program to its former students by email

A letter from a Foundation is presented to the Catalan Data Protection Authority, in which it asks if it can send by email information about the training it will carry out during the summer months and next year to its former students of the cycles professional training of the last ten/fifteen years.

Having analyzed the query, in view of the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue the following opinion.

I

(...)

II

According to the consultation, the Foundation is dedicated to education and owns several educational centers in Catalonia.

In the consultation it is explained that, due to the award of a grant to carry out a training program for experts in digital transformation, it is in the Foundation's interest to inform by email about the training that will be carried out during the summer months and next year to its former students from the professional training cycles of the last ten/fifteen years.

It then points out that it does not have the consent of these people to carry out the sending of communications, so it considers whether it can carry out this treatment on the legal basis of the legitimate interest pursued by the Foundation, which specifies in "*completing the training of its former students*".

Having said that, he also points out that, with respect to the students who are currently part of the schools and who at the end of the school year will be considered ex-students, they will be asked to consent to this type of treatment.

III

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

which repeals Directive 95/46/CE (RGPD) , defines personal data as *"all information about an identified or identifiable natural person ("the interested party"). Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, will be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "* (article 4.1)).

In turn, the RGPD defines data processing as *"any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, query, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction"* (article 4.2).

The use of the personal data available to the Foundation - and the schools that are part of it - in relation, in the present case, to its former students in order to send them information about a training program that it teaches constitutes processing of data that must conform to the principles and guarantees established by the RGPD.

Specifically, and among others, it must respect the principle of data lawfulness (Article 5.1.a) RGPD), according to which all processing of personal data must be lawful, fair and transparent in the relationship with the affected person.

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, in the following terms:

"1. The treatment will only be lawful if at least one of the following conditions is met:

- a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;*
- b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;*
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;*
- d) the treatment is necessary to protect the vital interests of the interested party or another natural person;*
- e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;*
- f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.*

The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions."

Point out, at this point, that these legal bases do not maintain any relationship of priority or precedence. Therefore, it must be taken into consideration that the processing of personal data must have, to be lawful, a legal basis, which can be the consent of the persons affected or any other of the legal bases indicated in this article 6.1 of the 'RGPD.

This is clear from Recital 40 of the RGPD establishing that *"for the treatment to be lawful, personal data must be processed with the consent of the interested party or on some other legitimate basis established in accordance with the law, either in the present Regulation or by virtue of another Law of the Union or of the Member States referred to in this Regulation, including the need to fulfill the legal obligation applicable to the person responsible for the treatment or the need to execute a contract to which the interested party is a party or with the aim of taking measures at the request of the interested party prior to the conclusion of a contract ."*

For this reason, to point out that having the consent of the affected people (former students), on the part of the Foundation, to send by email information about the training program it teaches or wants to teach would be an appropriate and sufficient legal basis for the purpose object of consultation, for the purposes of article 6.1.a) RGPD, as long as said consent meets the requirements established in the same RGPD (article 7).

Without prejudice to this possibility, the consultation refers specifically to the possibility of basing the treatment in question on the legal basis of article 6.1.f) of the RGPD, to which we refer below.

IV

The RGPD provides that the processing of data can be considered lawful if it is *"necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that the interests or fundamental rights and freedoms do not prevail over said interests of the interested party who require the protection of personal data, in particular when the interested party is a child"* (article 6.1.f)).

Recital 47 of the RGPD gives as an example that could justify the application of this legal basis the cases in which there is a previous relationship between the person responsible for the treatment and the affected person, as could be understood to happen in the case that we occupation, in which the recipients of the information would be people who have had a connection as students enrolled in the professional training cycles taught by the educational centers of the Foundation (or part of them), which is responsible for treatment (Article 4.7 RGPD).

The same recital emphasizes the need to always carry out a *"meticulous evaluation, including whether an interested party can reasonably foresee, at the time and in the context of the collection of personal data, that the treatment with to that end."*

Therefore , once the existence of a legitimate interest pursued by the person in charge or by third parties has been identified, a weighting of interests should be carried out to

determine whether said legitimate interest is prevalent and, therefore, a sufficient basis for carrying out the treatment in question.

It is worth saying that in this weighting that requires the application of Article 6.1.f) of the RGPD, the criteria defined by the Article 29 Working Group (WG 29), which analyzed the application of the legitimate interest in the "*Opinion 06/2014 on the concept of the legitimate interest of the data controller under Article 7 of Directive 95/46/EC*".

To point out that the provision of article 6.1.f) of the RGPD is not a novelty but that this same legal basis was already provided for in article 7.f) of Directive 95/46/EC, of application directly in Spain, as recognized by the Judgment of the Court of Justice of the European Union of November 24, 2011. In this way, the criteria mentioned in WG 29 would be transferable to the regulation contained in article 6.1.f) of the RGPD to determine whether, in view of the specific circumstances of the case, it is appropriate or not to resort to this legal basis.

Specifically, the legitimate interest of the person in charge (or of third parties), the impact of the treatment on the affected persons and, finally, the additional guarantees that apply to the treatment should be taken into consideration.

This process of analysis or weighting should be carried out by the Foundation itself, as responsible for the treatment, which should be duly substantiated and set out in writing, in detail, in order to provide transparency and legal certainty to the affected persons (data holders), as well as to review and verify compliance and adequacy with what was determined, when necessary (article 5.2 RGPD, relating to the principle of proactive responsibility).

However, in order to answer the question raised, the following considerations are made in this regard.

v

Starting from the previous scheme, first of all it would be necessary to take into account what would be the **legitimate interests pursued** by the Foundation with the processing of the data, taking into account the information available.

As stated, the Foundation is dedicated to education and owns several educational centers. As a training entity, it has been able to opt for a subsidy to carry out a *free "training program for experts in digital transformation"*.

According to the information available on the Foundation's website itself, it seems that the aim of this program would be to help young people acquire key skills that will allow them to succeed in today's labor market, which is increasingly oriented towards digital technologies and innovation. Those who participate are offered the possibility of accessing different training courses and workshops in areas such as business management, innovation, customer processes, technology, etc. Ultimately, it is about training professionals in digital transformation.

The final recipients of the training program in question, according to the information provided by the entity and more specifically the School of Industrial Organization of the Ministry of Economic Affairs and Digital Transformation (EOI), are the young 35 years old with a profile of studies and previous professional experience that enables them to join the labor market as digital transformation agents of a small or medium-sized company.

The Foundation has different educational centers where, among other studies, professional training cycles are taught and the purpose of the examined treatment is to be able to inform its former students of these cycles of the last 10/15 years of existence this program and the training that the Foundation itself, through its centers, will carry out during the summer months and next year.

As a training entity and in view of the content of the program, it could be admitted that the Foundation has a legitimate interest in disseminating this program among those people who at some point have been part of its educational community and who have specifically attended one of the professional training cycles of which has benefited from it and the training offer that accompanies it, following the objectives set out in its educational project of constant support and continuous training.

Having identified the concurrence of a legitimate interest on the part of the Foundation, from the perspective of the necessary weighting, it would also be necessary to identify **the impact and consequences** that the treatment could entail for the **people affected**.

In view of the factors mentioned by WG 29, the nature of the processed data should be taken into account at the outset. In this sense, the processing would affect identification and contact data of former students of professional training cycles who can directly receive information about the training program. It would not, therefore, affect data of special categories referred to in Article 9.1 of the RGPD.

WG 29 also takes into account *"the way in which the data is treated, for example, if the data has been disclosed to the public or otherwise made available to a large number of people (...)"*, circumstances that would not occur in the present case.

Likewise, it is appropriate to take into account another of the factors pointed out by WG 29, such as *"the reasonable expectations of the interested party, especially in relation to the use and disclosure of data in the relevant context"*.

For the purposes of weighting, it would be necessary to assess whether the treatment may amount to an intrusion unnecessary in the rights or privacy of those affected.

In this sense, it should be taken into consideration that the people affected would be former students of the Foundation's educational centers. Although a person currently linked to the educational community could have a reasonable expectation regarding the fact that their identifying and contact data, which the educational center legitimately has, will be subject to treatment within the limits of the regulations and that this treatment should not affect their privacy, in the case of former students this could be at least unquestionable in the present case, taking into account that the link with the

Foundation would have already concluded years ago (the query points to former students of the last 10 or 15 years) and, therefore, these people could rather have the expectation that this data (at least the contact data) should no longer be processed by the educational center in question.

Despite this, it should be borne in mind that, due to the information available, it is not considered sending information to all former students that the Foundation can count on, but only to those former students who have completed professional training studies, being precisely this student profile the most optimal to receive the training that would be the subject of information from the Foundation, if we adhere to the requirements defined by the EOI. The concurrence of these circumstances in the specific case could lead to think that these specific people (former students of professional training courses), despite the time that has passed, could have certain expectations regarding the processing of their data by the educational center where they attended the professional training cycles.

Apart from this, it should also be taken into consideration that the information that is intended to be communicated is very specific (the training program) and would not cover other types of services or information from other entities disassociated from the Foundation's own schools, nor would it respond for commercial or advertising purposes, etc. This possibility would clearly go beyond the reasonable expectations of the affected person regarding the processing of their data and would require another legal basis, such as that relating to consent (Article 6.1.a) RGPD).

GT 29 also takes into account, in this section, the position of the person in charge of treatment and of the affected person, including the balance of power between the two, or if the affected person is a minor or belongs to a vulnerable group.

It does not seem that the fact that an educational center provides information to former students of legal age who have attended vocational training courses there about a specific training program aimed at their professional profile, in which the recipients can decide to participate or not, should lead to an imbalance, in the terms indicated by GT 29, which could make the processing of the data considered disproportionate.

Although the intended treatment could in a certain way force the expectations of the affected persons regarding the treatment of their data by the Foundation, it does not seem that these expectations cannot after all be qualified as reasonable in the case examined or that the risk that could be derived from it was of sufficient magnitude to have a significant impact or serious consequences on the privacy of the affected persons, acquiring, in this sense, special relevance to the guarantees offered to the affected persons .

And it is that the concurrence, as an adequate legal basis, of the legitimate interest of the Foundation would require that, from the weighting between the elements that have just been exposed and the **additional guarantees** that are foreseen - in the terms of GT 29 -, resulting in a prevalence in favor of the achievement of the legitimate interest pursued.

As proposed by WG 29, additional safeguards to prevent undue impact on affected persons include:

*"- the minimization of data (for example, strict limitations on the collection of data or its immediate elimination after use);
- technical and organizational measures to ensure that the data cannot be used in order to adopt measures or undertake other actions in relation to the persons ("functional separation");
- extensive use of anonymization techniques, data aggregation, privacy protection technologies, privacy protection by design, impact assessments related to data protection and privacy;
- increased transparency, general and unconditional right of voluntary exclusion, data portability and related measures to empower those interested."*

As we have seen, the training program being disseminated is aimed at young people up to 35 years of age and the Foundation's aim is to be able to disseminate it among its former students of professional training cycles of the last 10 or 15 years. Taking into account the access requirement to take these studies in terms of the age of the students (who can even be over 25 years old), it cannot be ruled out that among the group of alumni that the Foundation has in relation to these professional training cycles, there may currently be people over 35 years of age, who, according to the information available, could not benefit from the training offered by the Foundation.

In order to avoid the impact on the privacy of these people as a result of the intended treatment, the review by the Foundation, prior to sending the email with the information about the program, of the age of the its former students, in such a way that it is only addressed to those people who could carry out the training if they so wish, would mean a necessary guarantee of application from the perspective of data protection. This is an aspect that is not specified in the consultation, but in view of the concurrent circumstances it should be implemented inescapably.

According to the terms of the consultation, in the present case the intended treatment would be limited to informing the ex-students (who should not exceed the age limit of 35) of a very specific training program and of the training that will be carried out to comply to said program, not providing for the usual sending by email of information about other courses or activities that may be carried out in the future by the Foundation.

In any case, it would be of particular importance to ensure that the people affected will have the option to oppose the treatment and to express, easily and free of charge, that they do not want to receive information of this type.

In the case we are dealing with, the concurrence of a legitimate interest in communicating information about the training program to certain ex-students cannot be ruled out, even, given the specificity of the training, there could be an interest of the ex-students themselves in being able have this information but, regardless of this or, precisely, in those cases where former students consider that, even so, the information is not of interest to them, from the perspective of data protection there is no d 'there should be no obstacle for these people to exercise the right of opposition recognized by the regulations.

In this sense, article 21.1 of the RGPD provides that *"the interested party will have the right to object at any time, for reasons related to his particular situation, to personal data concerning him being the object of a treatment based on the provisions of article 6, section 1, letters e) of), including the elaboration of profiles on the basis of said provisions. The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and freedoms of the interested party, or for the formulation, exercise or defense of claims."*

For all the above, from the perspective of data protection, the treatment subject to consultation could have a sufficient legal basis in the provisions of article 6.1.f) of the RGPD, relating to the legitimate interest pursued by the Foundation, as long as the information communicated is limited to the mentioned training program and is addressed exclusively to former students of professional training courses who do not exceed the age of 35, prior to the adoption of the aforementioned guarantees, in order to alleviate or avoid the impact on the rights and freedoms of the potentially affected persons.

To warn that this legal basis of the legitimate interest which, in the present case given the concurrent circumstances, could be admissible could hardly be understood as adequate to justify, if this were the case, the sending of e-mails about courses or training that could be of interest to the Foundation's alumni group. As has been evidenced in the weighting, the extensive time that has passed since the end of the association with the Foundation of the affected persons would be an element that would force the reasonable expectations of these persons regarding the processing of their personal data (in greater lower disengagement times are the expectations of receiving such mail). This would require a more guarantor attitude on the part of the Foundation, as responsible. In this sense, the legitimate interest in a specific case cannot become an individualized authorization of singular shipments that become, in practice, a periodic shipment. It would therefore be necessary, in this case, to articulate this type of treatment on the legal basis of the prior consent of the persons affected (Article 6.1.a) RGPD), without prejudice to their right to object.

To all this, remember, when it comes to sending an email to a plurality of recipients, the need to adopt the appropriate mechanisms (such as the option of hidden carbon copy (CCO) or hidden copy (C/O)) to ensure that the address or identity of each recipient remains hidden from all other recipients.

conclusion

In view of the information available, the treatment subject to consultation could have a sufficient legal basis in the provisions of article 6.1.f) of the RGPD, relating to the legitimate interest pursued by the Foundation, as long as the information subject to communication is limited to the training program examined and is addressed exclusively to ex-students of professional training cycles up to 35 years old, who should be given the option to oppose receiving communications from this guy

Barcelona, June 6, 2023

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