apdcat
Autoritat Catalana de Protecció de Dades

Opinion in relation to the query made by a federation with the use of biometric data for the control of presence in the workplace

A consultation is presented to the Catalan Data Protection Authority by the Data Protection Delegate of a federation in which it is requested that this Authority "[...] *express itself on the viability of EIPDs in turn to the use of the worker's biometrics (fingerprint or face) as a system to carry out the registration of the workers' working hours. Well, we do not understand why EIPD is requested if there is no legitimate basis for this treatment and given that there is currently no collective agreement or any law that contains biometrics for this purpose".*

In particular, the Federation refers to the opinion CNS 2/2022 of this Authority in which the query formulated by a City Council regarding compliance with the data protection regulations of the use of presence control devices was analyzed in the workplace using facial recognition. The Federation explains that according to the criteria established by the control authorities, consent cannot be an adequate legal basis and that, it continues, when it comes to specially protected data, "[...] only *this legitimate basis can be found in a legal provision or in a collective agreement, and today there is no law that provides for biometrics to carry out the registration of working hours and neither is it negotiated in a collective agreement. Therefore, as much as an EIPD of this treatment is carried out (as requested by the Control Authorities) [...] we understand that there is no legitimate basis, and therefore the EIPD cannot be viable. We consider that we are faced with an important problem [...]",* since *"This fact creates confusion both for professionals in the sector and for entities [...], since they think that by making an EIPD they have already solved it ".*

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

The Federation requests from this Authority the clarification of certain issues that affect the processing of biometric data for the purpose of time control. Regarding this Authority, the Federation refers to the opinion CNS 2/2022 (which can be consulted on the website www.apdcat.cat).

In particular, in accordance with what has been stated in the background, the Federation states that the control authorities agree that consent cannot be an adequate legal basis for carrying out this treatment, and that the the only legal basis that can enable the processing of biometric data for the purpose of time control is, in the case of special categories of data, that provided for in article 9.2.b) of 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 which repeals Directive 95/46/EC (General Regulation of data protection), henceforth RGPD, which refers to when *"the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;*

The Federation points out that there is currently no standard with legal status or collective agreement that regulates this treatment and, taking this into consideration, considers it confusing that this Authority, as well as other control authorities, refers to the need to carry out an impact assessment related to the protection of personal data (from now on, AIPD) because, in summary, the Federation understands that if there is no legal basis that legitimizes the treatment, the AIPD would no longer be viable. And, he continues, this situation generates that there are professionals and entities that understand that the completion of an AIPD is sufficient to consider the treatment skillful.

The Federation asks this Authority to clarify why the need to carry out an AIPD is established if, in practice, there is no legal basis to legitimize this treatment.

Once the terms of the consultation have been established, it means that this Authority cannot share the interpretation that the consultation points to, and the conclusion that derives from it, in accordance with the grounds set out below.

At the outset, without prejudice to reproducing the considerations reached in the opinion CNS 2/2022, to which we refer, it is necessary to highlight some of the pronouncements of this opinion that justify the fact that this Authority does not share the assessment raised by the inquiry.

Before, but it must be agreed that the opinions that resolve the queries raised to this Authority are pronounced on the basis of the information that the consulting entity transfers, information that constitutes the object of analysis in accordance with the regulations for the protection of data

With regard to the principle of legality (art. 5.1.a of the RGPD), extensively analyzed in the legal basis (FJ) III of opinion CNS 2/2022, it must be said that in said opinion it is analyzed which legal basis can enable the treatment proposed by the City Council in relation to the use of presence control devices in the workplace through facial recognition, taking into consideration the circumstances expressed in the query formulated.

The FJ III of the CNS opinion 2/2022 analyzes the possibility of carrying out the treatment from the perspective of two different categories of affected persons, the working staff and the staff subject to an administrative legal relationship.

In both cases, the possibility of resorting to the legal basis of article 6.1.b) of the RGPD is analyzed (*"the treatment is necessary for the execution of a contract in which the interested party is a party or for the application on request of this pre-contractual measures")* and also on the basis of article 6.1.c) of the RGPD (*"when the treatment is necessary for the*

fulfillment of a legal obligation applicable to the person responsible for the treatment") and, to the extent that special categories of data are affected, in the case provided for in letter b) of article 9.2 of the RGPD, relating to the case for which the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and social security and protection, to the extent authorized by the law of the Union or the Member States or a collective agreement in accordance with the law of the member states that establishes adequate guarantees with respect to the fundamental rights and interests of the interested party.

The conclusion reached by the FJ III, in summary, is that in the absence of regulatory provision in the terms analyzed in the opinion, it does not seem that the time control treatment through facial recognition can be based on a rule with rank of law However, in the absence of legal provision, it is recalled that in accordance with article 9.2.b) of the RGPD, the authorization may be provided for in the framework of a collective agreement.

However, the Federation states that at the time of the consultation, there is no law or collective agreement that could enable the processing of biometric data for the purpose of time registration of the day And, according to their interpretation, it would also not be possible to enable said treatment on the basis of consent, since the authorities have determined that it is not appropriate because it can be considered flawed.

However, FJ IV of the CNS opinion 2/2022 analyzes the possibility of resorting to the legal basis of consent, which must meet certain circumstances which, a priori, did not exist in the case that was considered.

III

Consent is one of the legal bases referred to in article 6.1 of the RGPD and, in the case of special categories of data, article 9.2.a) of the RGPD, which provides that this is also explicit

It should be remembered that consent is defined in article 4.11) of the RGPD as *" any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data concerning you".*

And, article 7 of the RGPD, foresees the conditions that must be met:

" 1. When the treatment is based on the consent of the interested party, the person responsible must be able to demonstrate that he consented to the treatment of his personal data.

2. If the consent of the interested party is given in the context of a written statement that also refers to other matters, the request for consent will be presented in such a way that it is clearly distinguished from the other matters, in an intelligible and easily accessible form and using clear and simple language. No part of the statement that constitutes an infringement of this Regulation will be binding.

3. The interested party will have the right to withdraw their consent at any time. The withdrawal of consent will not affect the legality of the treatment based on consent prior to its withdrawal. Before giving consent, the interested party will be informed of this. It will be as easy to withdraw consent as to give it.

4. When evaluating whether the consent has been freely given, it will be taken into account to the greatest extent possible the fact of whether, among other things, the execution of a contract, including the provision of a service, is subject to the consent to the treatment of personal data that are not necessary for the execution of said contract."

FJ IV of the CNS opinion 2/2022 concludes that the data protection regulations do not generally accept consent as a legitimizing legal basis for the treatments carried out by public administrations or employers for control in the work environment, given the imbalance of power that tends to occur between the relationships of those with the interested parties, which prevents consent from being considered free.

However, it is necessary to take into account the considerations that precede this conclusion, in particular:

" On the basis of what has been presented, and other issues that are also included in Guidelines 5/2020 of the CEPD, to which we refer, it does not seem that the legal basis of consent is suitable to legitimize the processing of data of the staff for the purpose of time control of the staff, given that it cannot be considered that in the case raised there could be truly free consent . In this sense ***, it could be considered that free consent exists if the interested party has an alternative to comply with the time control or to control his presence or execution of the schedule, and he is the one who chooses and gives his consent to processing of biometric data through facial recognition systems, but this does not seem to be the case in a case such as the one described in the inquiry".***

And, following the conclusion, the following paragraph is added::

" To this end, it must be taken into account that, in accordance with the principle of proactive responsibility (art. 5.2 of the RGPD), the person responsible for the treatment, in the case we are dealing with the City Council, must be able to demonstrate that the consent is valid and that the treatment is lawful".

Based on what has just been explained, it should be borne in mind that these considerations only affect the issues included in Directives *5/2020 on consent in the sense of Regulation (EU) 2016/679 of the European Committee of Data Protection* (CEPD), in particular in the idea that:

" Consent is still one of the six legal bases for the processing of personal data, as listed in article 6 of the RGPD" and, he continues, *"When activities involving the processing of personal data are initiated, a person responsible for the treatment must always stop to consider what will be the legal basis of the planned treatment. [...]*

In general, consent can only be an adequate legal basis if the interested party is offered control and a real capacity to choose with respect to whether he wishes to accept or reject the conditions offered or reject them without suffering any harm. When requesting consent, the person responsible for the treatment has the obligation to evaluate whether said consent

will fulfill all the requirements for obtaining a valid consent. If it is obtained in full compliance with the RGPD, consent is a tool that gives the interested parties control over whether the personal data that concerns them will be processed or not. If this is not the case, the control of the interested party will be merely illusory and the consent will not be a valid legal basis for the treatment, which will turn said treatment activity into an illegal activity .

On the basis of what has been set out, this Authority does not share the conclusion reached by the consulting Federation in relation to the fact that, in absolute terms, consent cannot be an adequate basis because it would be a vitiated consent. Of course, the data controller who intends to carry out the treatment on the legal basis of consent (art. 6.1.a of the RGPD and, in the case of special categories of data, art. 9.2.a) of the RGPD) must have taking into account beforehand the necessary requirements that the consent must meet for it to be valid according to what is provided for in the regulations, taking into consideration Directives 5/2020 of the CEPD, and be able to demonstrate this on the basis of the principle of proactive responsibility.

IV

Precisely because consent can be a legitimating legal basis for the proposed treatment, or because at any other time the treatment can be enabled on another legal basis, in FJ V, among other issues that are analyzed, the need to take into account the provision of article 35 of the RGPD, which foresees the need to carry out an AIPD in those treatments, especially if they use new technologies, which entail a high risk for the rights and freedoms of people.

On the basis of article 35 of the RGPD, and the *List of types of data processing that require an impact assessment related to data protection* published by this Authority (available here), it is concluded that the processing proposed by the The City Council requires an AIPD to be carried out in which, among other issues, the legitimacy of the treatment and the determination of existing risks and the measures to mitigate them must be assessed.

In other words, legal basis V should not be interpreted in the sense that an AIPD is a legal basis enabling the processing of personal data when it is not justified in one of the cases of article 6 of the RGPD and , if special categories of data are affected, in one of the conditions referred to in article 9.2 of the RGPD. In short, the person responsible for the treatment must first analyze whether the treatment they intend to carry out requires an AIPD and, in this case, must take into account that the assessment of the legitimacy of the treatment, and the due justification, constitutes one of the integral parts of the AIPD itself. But, obviously, in the event that the data controller does not find a suitable legal basis that legitimizes the intended treatment, the AIPD cannot in any case constitute the legal instrument enabling the processing of personal data.

conclusion

Consent can be a legal basis enabling the processing of biometric data for the purpose of time control as long as this constitutes a free, specific, informed and unequivocal manifestation of will on the part of the interested party to accept the treatment, in the terms have exposed

In any case, before carrying out a treatment such as that raised by the query, it is necessary to carry out an assessment of the impact on data protection in view of the specific circumstances in which the treatment is carried out where it is analyzed , among other issues, the legality of the treatment.

Barcelona, July 28, 2023.