NATIONAL DATA PROTECTION TIBISSION

OPINION No. 9/2018

1. Order

The Office of the President of the Legislative Assembly of the Azores sent the National Data Protection Commission (CNPD), with the request for an opinion, Draft Resolution No. creation of the “Transparency and Citizen Participation Portal” within the scope of the website of the Legislative Assembly of the Autonomous Region of the Azores (ALRAA).

The request stems from the powers conferred on the CNPD by paragraph 2 of article 22 of Law no. 67/98, of 26 October, amended by Law no. Protection of Personal Data - LPDP), and is issued in accordance with the competence set out in paragraph a) of paragraph 1 of article 23 of the same legal diploma.

2. Assessment 2.1. prior question

Draft Resolution No. 50/XI (hereinafter, Project) proposes to implement the Transparency and Citizen Participation Portal”, through which it is intended to disseminate parliamentary activity among citizens and facilitate the means necessary to monitor the work of deputies.

In the Project, it is also stated that the website of the Legislative Assembly of the Autonomous Region of the Azores is the most suitable means for this dissemination, as it allows “to make information available in a structured and accessible way, using reusable formats, now it is enough to proceed with a reorganization of its contents and, if and when necessary, the addition of others not currently available, based on the perspective of the interested citizen”.

The data to be processed is not broken down, but it is stated that the following information is intended to be disclosed regarding the personal data of deputies and workers of the Regional Legislative Assembly of the Autonomous Region of the Azores, as well as citizens in the exercise of their citizenship rights.

This Project intends to guarantee the principle of administrative transparency and public activity carried out in the context of the Legislative Assembly of the Autonomous Region of the Azores,

as well as the principle of citizen participation in public activity. Given that the provision of information on this activity on a portal is an adequate means of achieving such purposes, the protection of the fundamental rights of all individuals who, in this way, may be affected cannot be neglected.

In fact, there are no doubts today as to the risks that the dissemination of information on the Internet entails for the private life of the people to whom it relates. On the one hand, information remains forever on an open network, not being protected in relation to generalized access, in the national territory or anywhere in the world; on the other hand, information can be cross-referenced with other information, thus allowing the creation of individual profiles that are then used to make decisions about their holders, possibly with discriminatory consequences.

For this reason, the legislative provision for the availability of information on identified or identifiable natural persons corresponds to the provision of processing of personal data, pursuant to paragraphs a) and b) of article 3 of the LPDP, which may have a special impact. on the legal sphere of those, especially when it involves people exercising their citizenship or exercising public labor functions.

In fact, with information on holders of political positions at stake, it is understood that the exercise of such functions implies a greater compression of a set of rights, of which the right to respect for private life stands out, since their exercise it implies the primary decision on the creation of rights or duties in the legal sphere of citizens and, to that extent, supposes a greater submission to public scrutiny. Such compression cannot fail to be less when involved are workers in public service, with merely auxiliary or executive functions of such political-legislative options. Finally, in the case of information concerning petitioners or plaintiffs, and above all citizens who are the subject of eventual reference in such petitions or complaints, the need or convenience of public scrutiny is substantially reduced.

Now, if the definition of the regime for publicizing the activity of a Regional Legislative Assembly is, of course, up to the legislative body to which the activity object of publicity relates, the prediction of restrictions or compressions of the fundamental rights of individuals as a result of such publication can only occur under the terms defined by the Constitution of the Portuguese Republic (CRP). However, it follows from the provisions of paragraph 1 of article 228.

and paragraph 1 of article 227 of the CRP, that the legislative competence of the Autonomous Regions is limited to matters not reserved for sovereign bodies and matters subject to relative reservation by the Assembly of the Republic in relation to which the possibility is recognized of regional legislation upon authorization of this sovereign body. However, under the terms of subparagraph b) of paragraph 1 of article 227, the regulation of rights, freedoms and guarantees, provided for in subparagraph b) of paragraph 1 of article 165 of the CRP, is excluded from that scope. of competence.

In other words, the reservation of legislative competence provided for in paragraph b) of article 165, to which paragraph b) of paragraph 1 of article 221 refers, is, for the Autonomous Regions, an absolute reservation of the Assembly of the Republic.

The reason for this option of the constituent legislator (and the constitutional revisions) is related to the fact that «[the] Constitution seeks, in this way, to subtract the rights, freedoms and guarantees from the bodies with legislative competence that are not directly legitimized by the suffrage of all Portuguese, which constitutes a particularly important democratic guarantee(...)»1. Focusing attention on the rights, freedoms and guarantees most affected by the forecast or execution of personal data processing, this exclusion is due to the fact that human dimensions are at stake that do not present themselves differently depending on the territorial space or the population community in which such treatments take place.

As it is consensual in national constitutional jurisprudence and doctrine that the reserve of competence provided for in subparagraph b) of paragraph 1 of article 165 covers all legislative interventions, therefore not limited to those of a restrictive nature2, a regional legal diploma can only affect the fundamental right to the protection of personal data and other fundamental rights in the context of the processing of personal data (e.g. privacy, image) with respect for the CRP and the general regime for the protection of personal data, that is,

Bearing this in mind, the CNPD then proceeds to analyze the forecast of availability on the portal of categories of personal data that may raise doubts in light of the principle of proportionality.

1 J. C. 'vieira de Andrade, Fundamental rights in the Portuguese Constitution of 1976, 5th ed., Almedina, 2012, p. 323.

2 Cf. Gomes Canotilho/ Vital Moreira, ob. cit., p. 327; Jorge Miranda and Pereira da Silva, in Jorge Miranda/Rui Medeiros, Annotated Portuguese Constitution, tome I, 2nd ed., Coimbra Editora 2010, pp.356 to 358; Vieira de Andrade, ob. Cit.., pp. 322 and 323.

the LPDP.

2.2. Online publication of personal data

The. Online plenary meetings

We begin by considering the forecast of transmission and online availability of the Plenary meetings of the Regional Legislative Assembly or other public meetings that take place in the respective space of the Assembly. It is true that this provision cannot take place under the constitutional and legal regime of the media, since the Regional Legislative Assembly is not a media body, it is thus a means of ensuring transparency to the legislative procedure that technology today makes it possible, to that extent proving to be an adequate means for this purpose.

It so happens that the image data and the statements made (object of recording and live transmission), constitute personal data, in the sense that they are information related to identified or identifiable natural persons, so their treatment affects not only the right to the image as well as the right to the protection of personal data (cf. Articles 26 and 35 of the CRP).

The compression of rights that we mentioned, occurring, it is true, for all the participants of the sessions, does not operate in the same way and with the same intensity for all of them. In the case of deputies, the nature of the position they occupy requires greater public exposure and, in particular, the publicity of their interventions in plenary sessions and other public meetings, so the online dissemination of images and statements is a necessary measure and not excessive.

On the other hand, the dissemination of possible images of the workers of the Legislative Assembly may prove necessary, insofar as they are, in the exercise of their functions, in the place of the meetings on which the cameras focus, and it is not possible to avoid their capture. In any case, since workers are performing work functions, it does not seem that such exposure can be particularly impacting on their private life, thus not revealing an excessive affectation of fundamental rights.

With regard to people who are in the area reserved for the public, the same cannot be said, not least because the dissemination of these images reveals aspects of the private life of these citizens (e.g., location, interest in a certain subject).

As for these, the CNPD therefore understands that, if the video cameras focus on the area intended for the public, it must

the obligation to collect a declaration of consent from citizens regarding the recording and availability of images related to them is foreseen in this Project3.

B. On-Une publication of personal data of deputies related to remuneration status

Pursuant to Article 3(a) of the LPDP, information on the remuneration status of each Member, which includes salary and other remuneration received (allowances for representation expenses, subsistence allowances), is part of the concept of personal data.

The Court of Justice of the European Union (CJEU) has already ruled on this issue in its judgment of 20 May 2003 Rechnungshof v. Ósterreichischer Rundfunke others (C-465/00) - in particular, in §§ 85 to 87, 88, 94 -, which admits that the wide dissemination of information relating to the identification of the beneficiaries of certain public revenues is not, in abstract, incompatible with the European system for the protection of personal data, provided that it is specifically concluded that this is appropriate and necessary. disclosure.

In this case, recognizing that the public is interested in knowing information regarding the granting of grants and considering that information is at stake regarding a benefit to which, under the law, holders of political offices are entitled by virtue of the exercise of political functions , and that everyone who occupies such positions is known (or is likely to be known by everyone) - information that is subject to official publication -, such disclosure does not appear to result in a significant interference in the private life of the holders of such positions. Therefore, the compression of the right to the protection of personal data of political office holders with regard to the publication of information regarding their remuneration status is considered justified and proportionate.

With regard to the public availability of the exact amounts awarded as remuneration, it is important to remember that information relating to amounts received as remuneration and/or other patrimonial benefits is, according to the European jurisprudence mentioned above, qualified as information relating to the private life and thus subject to the regime

3 The right to information provided for in article 10 of the LPDP must be ensured (see gaffing at the entrance to the enclosure with notices on the existence of cameras intended for recording and broadcasting, via the internet, the ALRAA session).

Furthermore, pursuant to Article 10(4) of the same law, the data subject must also be informed that their personal data may circulate on the network without security conditions, at the risk of being seen and used by unauthorized third parties.

Rua de São Bento, 148-3° • 1200-821 LISBON Tel: 213 928 400 Fax: 213 976 832

www.cnpd.pt

PRIVACY LINE

Weekdays from 10 am to 1 pm

doubts@cnpd.pt

specific protection of sensitive data enshrined in article 7 of the LPDP, in accordance with the provisions of paragraph 3 of article 35 of the CRP and article 8 of the ECHR4.

However, since the restriction of the fundamental rights of holders of political positions cannot go beyond what is necessary to safeguard other fundamental rights or constitutionally relevant interests, the CNPD has understood that the principle of administrative transparency and the control of public decisions on the allocation of grants does not seem to claim the availability on the Internet of the exact amounts actually received.

However, considering that there are an increasing number of legal provisions requiring transparency measures regarding the source and value of income for holders of political offices, high public offices and holders of certain professions, the CNPD admits that the same reasons for transparency apply extend to the deputies of legislative assemblies, in compliance with the principle of equality, even as it is for these, whose mandate has direct democratic legitimacy, that public scrutiny of their activity and conditions for its development is more justified.

ç. Online publication of workers' personal data

As for the information on the employees of the Regional Legislative Assembly, the CNPD understands that the online availability regarding the remuneration status, as well as the salaries and possible subsidies received, is only admissible in aggregate form, i.e., without identification of the workers.

Otherwise, the CNPD understands that the essential content of the right to the protection of personal data, provided for in article 35 of the CRP and article 8 of the Charter of Fundamental Rights of the European Union, has been reached, as the general disclosure is at stake. and permanent data relating to the private life of citizens simply because they are civil servants.

This is the understanding of the CJEU and the European Court of Human Rights (ECtHR), reiterated in successive judgments, already mentioned. As the CJEU clarifies, the data identified

4 cf. Judgments of the CJEU of 20 May 2003, Rechnungshof (C-465/00) v. Õsterreichischer Rundfunk and others, and Christa Neukomm and Joseph Lauermann v. Õsterreichischer Rundfunk (C-138/01 and C-139/01), as well as the judgments of the European Court of Human Rights, Amann v. Switzerland of 16 February 2000 (in Recueil des arrêts et décisions 2000-II, § 65) and Rotaru v. Romania of 4 May 2000 (in Recueil des arrêts et décisions 2000-V, § 43).

relating to an individual's professional income (compensation and pensions) fall within the concept of private life, even when it is a public entity that assigns them, expressly recognizing that such information is protected by the right to respect for private life, in in accordance with Article 8 of the European Convention on Human Rights.

In fact, only in the case of holders of high public office is this restriction of the fundamental right considered admissible, due to the evident relevance of their intervention in public management, which is no longer the case, to the same degree and intensity, with the majority of workers in public. In addition, the procedures for selecting workers for the different functions are already transparent, and greater exposure of citizens' private lives cannot be demanded simply because they are employees of public entities. Moreover, it is not possible to achieve that, as a rule, generalized knowledge of this individualized personal information is relevant for the control of public management and administrative activity.

Note that even the publication of this aggregated information (i.e., anonymized) is not acceptable if it is accompanied by a complete list of personnel with the respective regime of exercise of functions and the position held. The fact is that the publication of the personnel map implies the communication, by dissemination on an open network, of personal data that can be crossed with the aggregated information on the remuneration received annually by all workers, thus allowing the achievement of a result that the CJEU and the ECtHR censor.

It is also important to point out that the legal obligation of registering interests for workers in public service is not known. To that extent, neither the legitimacy nor the need for the online publication of a record of this nature is achieved. It is true that workers in public service must respect the regime of incompatibilities and impediments provided for in labor legislation, but the power-duty to verify compliance lies with the directors of the respective services.

d. Online publication of petitions, proposals and complaints submitted by citizens to ALRAA

As for the publication on the Internet of petitions, proposals and complaints submitted by citizens to the ALRAA, the CNPD has already had the opportunity to mention, with regard to the publication of

Rua de São Bento, 148-3° Tel: 213 928400

1200-821 LISBON Fax: 213 976 832

www.cnpd.pt

PRIVACY LINE

Weekdays from 10 am to 1 pm

doubts@cnpd.pt

petitions to the Assembly of the Republic5, that consent is not able to legitimize such treatment, first of all due to the possibility of revocation of consent by one of the subscribers and the consequent illegitimacy of the ALRAA to, at least as regards that holder, continue the treatment.

Moreover, Law No. 43/90, of 10 August, with the last amendment given by Law No. 51/2017, of 13 July, which establishes the regime for exercising the right to petition, provides for the publication in the Diário da Assembleia da República available on the website of the Assembly on the Internet the entire petition provided that it is signed by a minimum of 1000 citizens. As this law does not specifically regulate the publication of petitions presented before regional legislative assemblies, the form of a regional legislative decree is not sufficient to restrict the rights, freedoms and guarantees affected by the online publication of such documents with personal data.

In these terms, the CNPD understands that the online publication of petitions, proposals and complaints from citizens can be envisaged, provided that the purge of personal data, both of the subscribers and any third parties, is guaranteed, that is, provided that they are anonymized.

3. Conclusion

On the grounds set out above, the CNPD understands that the Project in question complies with the constitutional and legal regime of data protection, provided that, with regard to workers in public service and individuals exercising citizenship, under the terms indicated (in especially in point 2.2.c. and d.), their fundamental rights are safeguarded.

This is the opinion of the CNPD.

Lisbon, March 20, 2018

Filipa Calvão (President)

5 Cf. Authorization No. 961/2004 (in https://www.cnpd.Pt/bin/decisoes/Aut/10_961_2004.pdf)