

National Data Protection Commission

OPINION/2021/164

I. Order

1. The Assistant Secretary of State for Cultural Heritage asked the National Data Protection Commission (CNPD) to issue an opinion on the Draft Ordinance that «Regulates the registration of professionals in the field of culture».
2. The CNPD issues an opinion within the scope of its powers and competences as an independent administrative authority with powers of authority to control the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, subparagraph b) of Article 58(3) and Article 36(4), all of Regulation (EU) 2016/679, of 27 April 2016 - General Data Protection Regulation (hereinafter RGPD), in conjunction with the provisions of article 3, paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6, all of Law No. 58/2019, of 8 August , which enforces the GDPR in the domestic legal order.
3. The application is accompanied by the report on the impact assessment on data protection (AIPD).

II. Analysis

4. The CNPD understands to start by highlighting that this request was sent on December 24, 2021, for indictment to be issued until December 29 of this year.
5. Although it is understood the need or convenience of publishing the regulation until December 31, it is worth noting that the usefulness of prior consultation with the CNPD, legally required in the context of the procedure for approving administrative regulations that provide for or affect treatments of personal data, it depends on giving this entity enough time to analyze the legal rules and the accompanying IAPD - time that, under the terms of paragraphs 3 and 4 of article 92 of the Code of Administrative Procedure, is at least 10 (working) days -, and enough time for the author of the regulatory project to consider the recommendations contained in the opinion, under penalty of having such consultation as a mere formality empty of any substantial content.
6. This reminder serves here to explain that the CNPD limits itself to pointing out little more than the aspects that clearly deserve to be changed in the draft decree, without taking care to analyze the AIPD in more detail and, above all, without

having the opportunity to request clarification on some elements of data processing that are not explained in this document.

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7. Thus, the draft decree regulates the registration of professionals in the field of culture (RPAC) provided for in the Statute of Professionals in the Field of Culture (hereinafter, Statute), approved in annex to Decree-Law no.

105/2021, of November 29, on which the CNPD was not consulted.

8. In paragraph 4 of article 9 of the draft decree, it is stipulated that "Registration in the RPAC requires express acceptance of the respective conditions of use". Despite the fact that the CNPD is not aware of such conditions - therefore, in terms of these, it only recalls the need for them to comply with the principles and rules provided for in the RGPD -, it is important to clarify that the legal basis for the processing of personal data associated the RPAC is in the law and in the obligation foreseen therein of its creation (in accordance with subparagraph c) of paragraph 1 of article 6 of the RGPD). For this reason, it makes no sense to refer here to the express acceptance of the conditions of use of RPAC, even less to make the registration dependent on such acceptance.

9. In fact, even though, under the terms of paragraph 2 of article 5 of the Statute, registration in the RPAC is optional, paragraph 1 of the same article requires the creation of the RPAC and, therefore, results from it obligation to carry out the processing of personal data necessary for its creation and operation. What must be ensured is the provision of information on the processing of personal data to the professionals interested in the registration - given that the AIPD report mentions that this information is provided, and at the most, proof is guaranteed that such information was made known.

10. Thus, because the basis for the processing of personal data resulting from registration in the RPAC does not depend on the consent of the data subject, but is based on a legal obligation for the person responsible for the treatment, the CNPD

recommends the elimination of paragraph 4 of article 9 of the draft ordinance.

11. With regard to paragraph 1 of article 10, even if it is not explained what the electronic verification of information consists of, it is accepted that the means to be used for this purpose are those referred to in articles 13. and 14th of the project.

12. Regarding paragraph 1 of article 13 of the project, on the possibility of requesting information or opinions from certain entities, it is worth remembering that for the express authorization of the data subject it is only legally relevant to legitimize access or consultation of such personal data if such authorization is freely issued (cf. point 11 of article 4 of the GDPR); in other words, it must be guaranteed that any non-authorisation, by the professional, to obtain information or opinions from third parties does not, per se, prejudice the registration in the RPAC.

13. Regarding paragraph 1 of article 14 of the project, it is admitted that there is some mistake in the indication of 'paragraph 2 of article 4-A of Law No. 37/2014, of 26 June , in its current wording.' This legal precept refers to the following: "Citizens holding a citizen's card or CMD can, through secure authentication, obtain constant data

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from the databases of Public Administration bodies to be made available on authentication.gov.». And in the article 14 of the draft ordinance is concerned with the exchange of information between the RPAC support system, the Tax and Customs Authority and Social Security, so the exact meaning of that regulatory norm is not reached.

14. Unless here we want to provide for the possibility for the citizen to directly extract from the AT and Social Security databases the personal data necessary for registration in the RPAC and submit it to this information system, in which case it does not seem justified to speak in «exchange of information» (in the title of the article 14) or in 'exchange of data' (in paragraph 1 of article 14), and this possibility should first be explained, perhaps by reference (also) to paragraph 3 of article 4 - Law No. 37/2014, of 26 June.

15. Still regarding article 14 of the draft decree, now to point out that in paragraph 2 it is not enough to provide for the possibility of using 'other means of electronic data transmissiony>, and the adoption of measures of adequate security when other means of electronic transmission of personal data are used.

16. With regard to article 15 of the draft ordinance, we take the opportunity to recall that, since the draft ordinance (and the

AIPD) is silent on some aspects of the processing of personal data, from the outset it does not specify the conditions of use of the RPAC and not specifying the way in which personal data are communicated within the scope of article 13 and within the scope of the second part of paragraph 1 of article 14, the protocols referred to in article 15. ° must be submitted to the CNPD for prior consultation, with adequate time for its consideration.

17. Finally, a note on the AIPD report, to point out that it was not clear whether the cookies referred to there are only «essential» or whether there are also non-essential cookies (since in the points referred to therein there is no mention of " not applicable"), in which case the user must be informed of its existence and purpose and its activation must depend on the user's consent.

III. Conclusion

18. Based on the above grounds, the CNPD recommends:

The. the elimination of paragraph 4 of article 9 of the draft ordinance;

B. the revision of the title and paragraph 1 of article 14 of the draft ordinance, in the terms indicated above, in the point 14;

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ç. the amendment of paragraph 2 of article 14, adding the requirement to adopt adequate security measures.

Lisbon, December 30, 2021

Filipa Calvão (President, who reported)