

National Data Protection Commission

OPINION/2023/29

I. Order

1. The Economy, Public Works, Planning and Housing Commission of the Assembly of the Republic, on March 6, 2023, requested the National Commission for Data Protection (CNPD) to issue an opinion on Bill No. 609/ XV/1,a (IL), which «Allows Civil Society to rehabilitate the State's vacant properties for affordable rent».

2. The CNPD issues an opinion within the scope of its attributions and competences, as an independent administrative authority with authoritative powers for the control of the processing of personal data, conferred by subparagraph c) of paragraph 1 of article 57, subparagraph b) Article 58(3) and Article 36(4) of Regulation (EU) 2016/679, of 27 April 2016 - General Regulation on Data Protection (hereinafter, GDPR), in in conjunction with the provisions of article 3, paragraph 2 of article 4 and paragraph a) of paragraph 1 of article 6 of Law no. 58/2019, of August 8, which implements in internal legal order the GDPR.

II. Analysis

3. Bill No. 609/XV/1, (hereinafter, Project) intends, according to the explanatory memorandum, to increase the supply of housing, through the «[...] provision, by the State, of its vast public real estate assets given over to the private and/or social initiative [...]».

4. For this purpose, the Project «creates the program for the disposal of the State's vacant real estate assets, hereinafter referred to as FÉNIX, which is in force throughout the national territory» (cf. Article 1 of the Project), specifying that by real estate assets Unoccupied by the State means urban or built land held exclusively by any entities of the central, regional, local or Social Security administration» (cf. article 3, paragraph a), of the Project).

5. According to the Project's explanatory memorandum, the FÉNIX program comprises several procedural phases. After identifying the vacant building, «[...] the interested party may submit an offer to purchase the house for rehabilitation and conversion into a habitable space. This offer triggers, in the Housing Portal, which will have to be created for this purpose, a bidding procedure for the property. At this moment, the State has two hypotheses: either it agrees to sell the property to the

highest bidder or it presents a proposal for the use of the property. The purchaser will have to rehabilitate the property and make it available for affordable rents for five years or use it for permanent housing.»

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6. Thus, with direct emphasis on the protection of personal data and other rights, freedoms and guarantees that this fundamental right aims to guarantee, the provisions of chapter VI of the Project are considered here.

7. In the first place, the creation of a computer platform is foreseen, which is associated with a database, with the purpose of organizing and keeping up to date all the information of the applications in the context of the referred program (cf. article 15 of the Project).

8. Article 17 of the Project also provides for interested parties to submit a form available on the said platform where they enter the personal data listed in Article 5 of the Project. If the categories of personal data to be provided by interested parties do not raise reservations, just as the data verification operation by the Instituto da Habitação e da Reabilitação Urbana, I.P. (IHRU), with the public entities where the relevant information is kept, while the regime established for the publication of candidacies raises the greatest reservations.

9. It is not that the CNPD is not sensitive to the relevance of the transparency of this administrative procedure, but the terms in which it is foreseen are, to say the least, incongruous.

10. Without taking care of the personal data to be published for the time being, we begin by highlighting, as the CNPD has insisted in other legislative procedures, the paradox of providing for the consent or authorization of the data subjects for this advertising operation as a legal duty (cf. Article 17(3) of the Draft). It is true that any manifestation of will, in order to have legal

relevance, presupposes conditions of freedom in the formation and expression of that will. It is very strange, therefore, that this Project imposes the duty to authorize the publication of personal data, also establishing the preliminary rejection of the application in case of non-authorization (cf. n.º 4 of article 17 of the Project).

11. It goes without saying here that, pursuant to paragraph 11) of article 4 and article 7 of the RGPD, the expression of will by the holder of personal data to serve as a basis for the lawfulness of the processing of personal data (here, the operation of publishing personal data on an open network) must be free and revocable also under conditions of freedom.

12. Furthermore, the publication of personal data online always entails the risk of reuse of this data, for the most disparate purposes, including for illicit purposes, such as the usurpation of identity in the digital context and, specifically, in online commerce, especially when intends to publish the name and tax identification number (NIF), a number that is also used as a credential for accessing computer platforms.

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13. In fact, despite the efforts made by the Project to mitigate these risks by delimiting the categories of personal data to be published, as the publication of the (full) name and NIF data is foreseen, one piece of data remains - the NIF - whose relevance to democratic scrutiny of these procedures is not evident. Citizens are not (or should not be) identified by the NIF except before the Tax and Customs Authority. Unless it is intended that anyone can verify whether the interested citizen has debts to the State -which seems unnecessary from the outset, taking into account that the IHRU will be able to carry out this verification within the scope of its attributions and legal competences, and certainly excessive, in clear violation of the principle of proportionality and the principle of minimization of personal data - cf. Article 18(2) of the Constitution of the Portuguese Republic (CRP) and Article 5(1)(c) of the RGPD).

14. Moreover, since those directly interested in the procedure have the right to access the relevant information under the terms of articles 82 and 83 of the Code of Administrative Procedure, the indispensability of publicizing information regarding the identity of the candidates, it seems that, at most, public scrutiny can be justified in relation to the purchaser of the property.

15. In this regard, the CNPD recalls that the legal regime for the protection of personal data and, specifically, the fundamental right to informative self-determination (or right to the protection of personal data), enshrined in article 35 of the CRP and in

article 8 of the Charter of Fundamental Rights of the European Union, aims to give citizens control over the information that concerns them. Now, when one associates the presentation of an application in this procedure with the consequence of publishing that information (moreover, with the ironic appearance of such being consented by the respective holder), any type of control over personal data is eliminated - which, once exposed on the Internet, they are definitely public, making it very difficult, if not impossible, to track their reuse by third parties with a view to their eventual elimination. As a result, in order to guarantee the fundamental right to housing, dimensions of private life are irremediably sacrificed, with legal consequences and negative practices in people's lives, without demonstrating the need for such sacrifice.

16. Thus, the CNPD recommends rethinking the option laid down in paragraphs 3 and 4 of article 17 of the Project to ensure effective conditions for citizens to control their personal data, in particular the disclosure of the identity of candidates or interested in the procedure, as this treatment appears to be unnecessary and excessive, in clear violation of the principle of proportionality and the principle of minimization of personal data.

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17. In order to maintain this option, the CNPD recommends that the NIF data be exempted from the duty to publish and considers it essential to eliminate the reference to an alleged desire of the holder to see his data published (the authorization), when manifestly the rule imposes a duty to publish.

18. In addition, attention is drawn to the vague nature of paragraph 1 of article 19 of the Project, regarding the period of data conservation, which does nothing in relation to the principle of limitation of data conservation provided for in the Article 5(1)(e) of the GDPR. Not even the reference to article 27 of the Personal Data Protection Law, which is assumed to be Law no.

58/2019, of August 8 (there being, presumably, a lapse in the indication of the article, here highlighting before Article 21 of this law), thickens that period, since Article 21 of that law suffers from the same vague and indeterminate content. It is therefore recommended, in accordance with paragraph 3 of article 6 of the RGPD, to define the period of retention of information, considering the moment when the data are no longer necessary for the purpose for which they were collected .

19. One last note to point out that the reference to the «Personal Data Protection Law», in articles 16.

19th and 20th of the Project, does not clarify the applicable regime. In reality, there is no «Personal Data Protection Law», given that Law No. 58/2019, of August 8, is limited to complementing the GDPR regime, which contains the relevant precepts in the context of those articles and which are directly applicable in the national legal system. Thus, the CNPD suggests that instead of referring to the «Personal Data Protection Law», the legal regime for the protection of personal data should be indicated.

IN. Conclusion

20. With the reasons set out above, the CNPD recommends rethinking the option, laid down in paragraphs 3 and 4 of article 17 of the Project, of publicizing the identity of the candidates or those interested in the procedure, as it appears to be this unnecessary and excessive treatment, in clear violation of the principle of proportionality and the principle of minimization of personal data.

21. If this option is maintained, the CNPD recommends that the NIF data be exempted from the duty to publish and that the reference to an alleged desire of the holder to see his/her data published (the authorization) be eliminated, when the rule clearly imposes a publicity duty.

22. The CNPD also recommends:

The. In Article 19 of the Project, the setting of the retention period of information, by reference to the moment when personal data are no longer necessary for the purpose for which they were collected;

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B. in articles 16.º, 19.º and 20.º of the Project the replacement of the «Personal Data Protection Law» with a legal regime for the protection of personal data.

Lisbon, March 23, 2023

Filipa Calvão (President, who reported)

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