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N/REF: 0007/2021

The query asks if it is in accordance with the protection regulations
of data the request made from the Ministry of Universities to the
IMSERSO, consisting of the communication to the consulting Institute of a database
of data with the identifiers of the people included in its SIIU database
-Integrated System of University Information, which does not include the
variable disability-, with the aim that IMSERSO itself performs a
crossing of these data with those in the State Database of Persons with
Assessment of the Degree of Disability, subsequently referring to the
Subdirectorate requesting the information obtained for each identifier of your
grade of DISCAPACITY.

As stated by the consulting Institute, the Subdirectorate of
Research University Activity of the Ministry of Universities, has
transferred that, subsequently, based on the data obtained,
including the indication of whether or not the person has a recognized
disability in a degree equal to or greater than 33 percent-, would carry out
certain data crossings, enabling a procedure to publish
only aggregated tables with the information -anonymized data-, without,
at no time, identifying data is published
referring to identified or identifiable persons, but only said tables
added.

As a preliminary matter, it should be mentioned that, at the time of the
formulation of the query must be based on the new regime established by the
Regulation (EU) 2016/679, of the European Parliament and of the Council, of 27
April 2016, on the protection of natural persons with regard to

to the processing of personal data and the free circulation of these data by the

repealing Directive 95/46/EC (General Regulation for the protection of

data, RGPD) and in Organic Law 3/2018, of December 5, on Protection

of Personal Data and guarantee of digital rights -LOPDGDD-.

Indeed, as indicated in the Explanatory Memorandum of Law 3/2018 "the

The greatest novelty presented by Regulation (EU) 2016/679 is the evolution of

a model based, fundamentally, on the control of compliance with another

which rests on the principle of active responsibility, which requires prior

assessment by the person in charge or by the person in charge of the treatment of the risk that

could generate the processing of personal data for, from

of said assessment, adopt the appropriate measures".

Therefore, it is the data controller who must comply

with the principles that are included in article 5 of the RGPD, among which are

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finds, as seen, that of proactive responsibility, collected in its

section 2, "the data controller shall be responsible for compliance

of the provisions of section 1 and capable of proving it ("responsibility

proactive")". And among the principles of section 1 is that of "limitation

of the term of conservation", collected in its letter e).

Well, in the present case it should be noted that the query

formulated fully meets the requirements of the "principle of

proactive responsibility", since the consulting body has

proceeded to a detailed analysis of the issues raised,

contributing their own conclusions and reasoning what are the doubts that are

arise as a result of the request made by the Ministry of

Universities.

I

Regulation (EU) 2016/679 of the European Parliament and of the Council of

April 27, 2016, regarding the protection of natural persons in what

regarding the processing of personal data and the free circulation of these

data and which repeals Directive 95/46/CE (General Regulation of

Data Protection -RGPD-), and Organic Law 3/2018, of December 5, of

Protection of Personal Data and guarantee of digital rights

-LOPDGDD- make up the reference legal framework in Spain that affects

the protection of personal data. These rules regulate the

principles and foundations to which the collection and treatment of

personal data by any public or private person who carries out

processing of personal data in the exercise of its activity.

Among other definitions, article 4 of the RGPD refers to “data

personal” as any information about an identified natural person or

identifiable ("the interested party"); An identifiable natural person shall be considered any

person whose identity can be determined, directly or indirectly, in

by means of an identifier, such as a name, a number

identification, location data, an online identifier, or one or more

elements of the physical, physiological, genetic, psychic,

economic, cultural or social of said person. And "treatment" like any

operation or set of operations carried out on personal data or

personal data sets, whether by automated procedures or not,

such as the collection, registration, organization, structuring, conservation,

adaptation or modification, extraction, consultation, use, communication by

transmission, dissemination or any other form of authorization of access, collation or

interconnection, limitation, suppression or destruction.

In relation to the so-called "health data", art. 4.15 of the GDPR

defines them as personal data relating to the physical or mental health of a

natural person, including the provision of health care services, which

disclose information about your health status.

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The art. 9.1 of the RGPD prohibits the processing of personal data that

reveal ethnic or racial origin, political opinions, convictions

religious or philosophical beliefs, or trade union affiliation, and data processing

genetic, biometric data aimed at uniquely identifying a person

natural person, data relating to health or data relating to sexual life or

sexual orientation of a natural person.

Only said prohibition shall not apply when there is any

of the circumstances of paragraph 2 of the aforementioned article 9, namely:

“a) the interested party gave his explicit consent for the treatment of said

personal data for one or more of the specified purposes, except when the

Law of the Union or of the Member States establishes that the prohibition

mentioned in section 1 cannot be lifted by the interested party; (the

underlining is ours)

b) the treatment is necessary for the fulfillment of obligations and the
exercise of specific rights of the person in charge of the treatment or of the
interested in the field of labor law and safety and protection
social, to the extent authorized by the Law of the Union of the
Member States or a collective agreement under the law of the
Member States that establishes adequate guarantees of respect for the
fundamental rights and the interests of the interested party;
c) the processing is necessary to protect the vital interests of the data subject or
of another natural person, in the event that the interested party is not qualified,
physically or legally, to give your consent;
d) the treatment is carried out, within the scope of its legitimate activities and with
the due guarantees, by a foundation, an association or any other
non-profit organization, whose purpose is political, philosophical, religious or
trade union, provided that the treatment refers exclusively to the members
current or former members of such organizations or to persons who maintain
regular contacts with them in relation to their purposes and provided that the data
personal data are not communicated outside of them without the consent of the
interested;
e) the treatment refers to personal data that the interested party has made
manifestly public;
f) the treatment is necessary for the formulation, exercise or defense of
claims or when the courts act in the exercise of their function
judicial;
g) the treatment is necessary for reasons of an essential public interest, especially
the basis of the law of the Union or of the Member States, which must be
proportional to the objective pursued, respect essentially the right to

data protection and establish adequate and specific measures to

protect the interests and fundamental rights of the interested party;

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h) the treatment is necessary for the purposes of preventive or occupational medicine,

evaluation of the work capacity of the worker, medical diagnosis,

provision of assistance or treatment of a health or social nature, or management of

health and social care systems and services, based on the Law

of the Union or of the Member States or by virtue of a contract with a

healthcare professional and without prejudice to the conditions and guarantees

referred to in section 3;

i) the treatment is necessary for reasons of public interest in the field of

public health, such as protection against serious cross-border threats

for health, or to guarantee high levels of quality and safety of

health care and medicines or health products, on the

basis of the Law of the Union or of the Member States that establishes

adequate and specific measures to protect the rights and freedoms of the

concerned, in particular professional secrecy,

j) the processing is necessary for archiving purposes in the public interest,

scientific or historical research or statistical purposes, in accordance with the

Article 89(1) on the basis of Union or Member State law

members, which must be proportional to the objective pursued, respect in what

The right to data protection is essential and establish adequate measures and

specific to protect the interests and fundamental rights of the

interested." (emphasis ours)

This means that the legislator has considered that the treatment of

data that under these rules must be carried out using data

of health or genetic data must be protected for the reasons to

that the RGPD refers to in art. 9.2, by constituting exceptions to the

general prohibition of its treatment, which must be subject to interpretation

restrictive.

Further reinforcing this restrictive interpretation is the fact that the

Spanish legislator has incorporated into the scope of our internal regulations a

specific guarantee, embodied in article 9.1 LOPDGDD, by providing that:

“Article 9. Special categories of data.

1. For the purposes of article 9.2.a) of Regulation (EU) 2016/679, in order to avoid

discriminatory situations, the consent of the affected party alone will not suffice

to lift the ban on the processing of data whose main purpose

is to identify their ideology, union affiliation, religion, sexual orientation,

racial or ethnic beliefs or origin. (Bold is ours).

The provisions of the preceding paragraph shall not prevent the treatment of said

data under the other assumptions contemplated in article

9.2 of Regulation (EU) 2016/679, when appropriate.” (The bold is

our).

2. The data processing contemplated in letters g), h) and i) of article

9.2 of Regulation (EU) 2016/679 based on Spanish Law must

be covered by a rule with the force of law, which may establish

additional requirements relating to your security and confidentiality.

In particular, said rule may protect the processing of data in the field of

of health when required by the management of healthcare systems and services.

health and social assistance, public and private, or the execution of a contract of

insurance of which the affected party is a part.

For its part, seventeenth additional provision of the LOPDGDD,

relating specifically to the processing of health data, has in its

section 1 that:

"one. They are protected by letters g), h), i) and j) of article 9.2 of the

Regulation (EU) 2016/679 on health-related data processing

and genetic data that are regulated in the following laws and their

development provisions:

a) Law 14/1986, of April 25, General Health.

b) Law 31/1995, of November 8, on the Prevention of Occupational Risks.

c) Law 41/2002, of November 14, basic regulation of the autonomy of the

patient and rights and obligations in terms of information and

clinical documentation.

d) Law 16/2003, of May 28, on cohesion and quality of the National System

of health.

e) Law 44/2003, of November 21, on the organization of professions

sanitary.

f) Law 14/2007, of July 3, on Biomedical Research.

g) Law 33/2011, of October 4, General Public Health.

h) Law 20/2015, of July 14, on the organization, supervision and solvency of

insurance and reinsurance entities.

i) The consolidated text of the Law on guarantees and rational use of medicines

and health products, approved by Royal Legislative Decree 1/2015, of 24

July.

j) The consolidated text of the General Law on the rights of persons with

disability and their social inclusion, approved by Royal Decree

Legislative 1/2013 of November 29." (bold is ours)

Furthermore, the interpretation of the aforementioned precepts

stems from the Considerations of the RGPD, referring to the eventual

undesired consequences that the treatment of this type of data could

result.

Thus, the second paragraph of Recital 71 of the RGPD refers

generically to certain circumstances and contexts in which

produce processing of personal data, providing that:

"Considering (71) (…) In order to guarantee fair and transparent treatment

with respect to the interested party, taking into account the circumstances and context

specific in which the personal data is processed, the person in charge of the

processing must use appropriate mathematical or statistical procedures

for profiling, applying technical and organizational measures

appropriate measures to ensure, in particular, that factors that

introduce inaccuracies in the personal data and minimize the
risk of error, secure personal data in a way that is taken into account
account the possible risks to the interests and rights of the interested party and
prevent, among other things, discriminatory effects on natural persons due to
reasons of race or ethnic origin, political opinions, religion or belief,
union membership, genetic condition or health status or sexual orientation, or
that give rise to measures that produce such an effect. The decisions
automated and profiling based on categories
particulars of personal data should only be allowed under conditions
specific."

For its part, in Recital 75 of the RGPD itself, it is provided that:

"Considering (75) The risks to the rights and freedoms of people
physical, of variable severity and probability, may be due to the treatment of
data that could cause physical, material or
immaterial, in particular in cases in which the treatment can give
give rise to problems of discrimination, identity theft or fraud,
financial loss, reputational damage, loss of confidentiality of
data subject to professional secrecy, unauthorized reversal of the
pseudonymization or any other significant economic or social damage; in
cases in which the interested parties are deprived of their rights and freedoms or
they are prevented from exercising control over your personal data; in the cases in which
that the personal data processed reveal ethnic or racial origin,
political opinions, religion or philosophical beliefs, trade union membership
and the processing of genetic data, data related to health or data on the
sexual life, or criminal convictions and infractions or security measures
related; in cases in which personal aspects are evaluated, in particular

the analysis or prediction of aspects related to job performance,

economic situation, health, personal preferences or interests, reliability or

behavior, situation or movements, in order to create or use profiles

personal; in cases in which personal data of individuals is processed

vulnerable, in particular children; or in cases where the treatment

involves a large amount of personal data and affects a large number of

interested."

II

Next, it should be remembered that the data protection regulations

It contemplates different legal bases of legitimation that can give rise to the

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Treatment of personal data. According to article 6

–“Legality of the treatment”-, of the General Data Protection Regulation

-RGPD-, said treatment is lawful, and, therefore, legitimate when:

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

terms:

a) the interested party gave their consent for the processing of their data

personal for one or more 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 the latter of measures

pre-contractual;

c) the treatment is necessary for the fulfillment of a legal obligation

applicable to the data controller;

d) the processing is necessary to protect the vital interests of the data subject or

of another natural person;

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the controller

of the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests

pursued by the data controller or by a third party, provided that

over said interests do not prevail the interests or the rights and freedoms

fundamental data of the interested party that require the protection of personal data,

in particular when the interested party is a child.

The provisions of letter f) of the first paragraph shall not apply to

treatment carried out by public authorities in the exercise of their

functions."

For its part, as indicated in Point I of this Report,

in terms of health and health data, article 9 of the RGPD -under the

epigraph "Treatment of special categories of personal data"-,

establishes a specific regulation that incorporates an initial prohibition of

treatment and removal of this in accordance with certain requirements and

terms:

"Article 9 Treatment of special categories of personal data

one.

The processing of personal data that reveals the

racial or ethnic origin, political opinions, religious convictions or

philosophical, or union affiliation, and the treatment of genetic data, data

biometrics aimed at uniquely identifying a natural person,

data relating to health or data relating to sexual life or orientations

sex of a natural person.

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Section 1 will not apply when one of the

two.

following circumstances:

(…)

“a) the interested party gave his explicit consent for the treatment of said

personal data for one or more of the specified purposes, except when the

Law of the Union or of the Member States establishes that the prohibition

mentioned in section 1 cannot be lifted by the interested party; (the

underlining is ours)

(…)

or statistical purposes

j) the processing is necessary for archiving purposes in the public interest,

, in accordance with the

scientific or historical research

Article 89(1) on the basis of Union or Member State law

members, which must be proportional to the objective pursued, respect in what

The right to data protection is essential and establish adequate measures and

specific to protect the interests and fundamental rights of the

interested." (emphasis ours)

(…)

Member States may maintain or introduce conditions

Four.

additional information, including limitations, with respect to data processing

genetic data, biometric data or data relating to health.” (bold is

our)

Consequently, section 2 of article 9 of the RGPD

determines the non-application of the provisions of its paragraph 1, raising the

initial prohibition and allowing the processing of said data in the cases

and under the conditions established therein, among which are the

regarding the necessary treatment for archiving purposes in the public interest, purposes

scientific or historical research or statistical purposes, in accordance with

Article 89(1) on the basis of Union law or the

Member States, which must be proportional to the objective pursued, respect

essentially the right to data protection and establish measures

adequate and specific to protect the interests and fundamental rights

Of the interested.

In relation to the processing of personal data for purposes

statistics, in general, article 5.1.b) of the RGPD indicates that the

Personal data will be “collected for specific, explicit and

legitimate, and will not be further processed in a manner incompatible with said

purposes; according to article 89, paragraph 1, the further treatment of the

personal data for archiving purposes in the public interest, research purposes

scientific and historical or statistical purposes shall not be considered incompatible with

original purposes ("purpose limitation").

In turn, paragraph e) of article 5.1 of the GDPR determines that personal data will be "maintained in a way that allows the identification of the interested parties for no longer than is necessary for the purposes of processing personal data; personal data may be kept for longer periods as long as they are treated exclusively for archival purposes in the public interest, research purposes scientific or historical or statistical purposes, in accordance with article 89, section 1, without prejudice to the application of technical measures and appropriate organizational measures imposed by this Regulation in order to protect the rights and freedoms of the interested party ("limitation of the term of conservation")".

And, as it has been exposed, specifically, for the purposes of the matter on which this consultation deals, in relation to the categories personal data, in article 9.2 j) of the RGPD, a reference to article 89.1 of the General Regulation for the Protection of Data, which operates in the terms that are analyzed below.

In accordance with said article 9.2 j) RGPD, they may be carried out processing for statistical purposes when the processing is necessary, in accordance with Article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, being -in addition- proportional to the objective pursued, essentially respecting the right to data protection and establishing adequate and specific measures to protect the interests and

fundamental rights of the interested party. For these purposes, the States
Members may maintain or introduce additional conditions, including
limitations, regarding the processing of genetic data, biometric data
or data related to health -ex article 9.4 RGPD-.
Indeed, article 89 of the RGPD regulates the guarantees and
exceptions applicable to processing for archiving purposes in the public interest,
purposes of scientific or historical research or statistical purposes, in which
following terms:
"one. Processing for archival purposes in the public interest, research purposes
scientific or historical or statistical purposes will be subject to the guarantees
appropriate, in accordance with this Regulation, for the rights and
freedoms of the interested parties. These guarantees will make available
technical and organizational measures, in particular to ensure respect for the
principle of minimization of personal data. Such measures may include
pseudonymization, provided that such purposes can be achieved in this way.
Provided that those purposes can be achieved by further processing
that does not allow or no longer allows the identification of the interested parties, those purposes
will be achieved that way.
2. When personal data is processed for the purpose of scientific research or
historical or statistical Law of the Union or of the Member States

may establish exceptions to the rights contemplated in articles 15,

16, 18 and 21, subject to the conditions and guarantees indicated in section 1

of this article, provided that it is probable that those rights

make it impossible or seriously impede the achievement of scientific goals and how much

those exceptions are necessary to achieve those purposes.

3. When personal data is processed for archiving purposes in the public interest,

The law of the Union or of the Member States may provide exceptions to

the rights contemplated in articles 15, 16, 18, 19, 20 and 21, subject to

the conditions and guarantees cited in section 1 of this article,

provided that such rights may render impossible or seriously impede the

achievement of scientific purposes and how long those exceptions are necessary to

achieve those ends.

4. In the event that the treatment referred to in sections 2 and 3

also serves another purpose at the same time, the exceptions will only apply

to treatment for the purposes mentioned in said sections."

For its part, Recital (52) of the GDPR provides that:

"Likewise, exceptions should be authorized to the prohibition of dealing with categories

of personal data when established by Union Law or

of the Member States and provided that the appropriate guarantees are given, in order to

to protect personal data and other fundamental rights, when it is in

public interest, in particular the processing of personal data in the field of

labor law, social protection law, including

pensions and for security, supervision and health alert purposes, the prevention

o control of communicable diseases and other serious threats to the

Health. Such an exception is possible for purposes in the field of health,

including public health and the management of health care services,

especially in order to guarantee the quality and profitability of the

procedures used to settle claims for benefits and

services in the health insurance scheme, or for filing purposes in

public interest, scientific and historical research purposes or statistical purposes.

The processing of said data must also be authorized exceptionally.

when necessary for the formulation, exercise or defense

of claims, either through a judicial procedure or a procedure

administrative or extrajudicial. (bold is ours)

And Considering (53) of the Regulation, states that:

“The special categories of personal data that deserve greater

protection should only be processed for purposes related to health

when necessary to achieve those ends for the benefit of the people

physical and society as a whole, particularly in the context of

management of health or social protection services and systems, including the

treatment of these data by the managing authorities of the health and the

central national health authorities for quality control purposes,

information management and general national and local supervision of the system

health or social protection, and guarantee of continuity of care

health or social protection and cross-border health care or purposes of

security, supervision and health alert, or for archiving purposes in the interest

public, scientific or historical research purposes or statistical purposes,

based on the law of the Union or of the Member State to be

meet an objective of public interest, as well as for studies carried out in the public interest in the field of public health. (...) The Law of the Union or the Member States must establish specific measures and adequate to protect fundamental rights and data personal of natural persons. Member States must be empowered to maintain or introduce other conditions, including limitations, with respect to the processing of genetic data, data biometric or health-related data. (…)". (bold is ours)

Therefore, as suggested in the consultation itself, the Institute consultant, "in view of the applicable regulations on the protection of data, it is necessary, to carry out the assignment, for public statistical purposes, of specially protected personal data, such as data revealing the state of health or disability, that it is an action specifically protected and regulated by European Law or by the legislation of the Member States", which has been analyzed in preceding paragraphs.

In this scenario, article 25 of the LOPDGDD regulates the treatment of data in the field of the public statistical function, in the following terms:

"one. The processing of personal data carried out by the organizations that have attributed the powers related to the exercise of the function public statistics will be subject to the provisions of its specific legislation, as well as in Regulation (EU) 2016/679 and in this organic law.

2. The communication of the data to the competent bodies in matters statistics will only be understood as covered by article 6.1 e) of the Regulation (UE) 2016/679 in the cases in which the statistics for which the information is required by a rule of law of the European Union or

is included in the statistical programming instruments

legally provided. In accordance with the provisions of article 11.2 of

Law 12/1989, of May 9, of the Public Statistical Function, will be

strictly voluntary contribution and, consequently, can only be collected

prior express consent of those affected the data to which they refer

Articles 9 and 10 of Regulation (EU) 2016/679.

3. The competent bodies for the exercise of the statistical function

may deny the requests for exercise by those affected of the

rights established in articles 15 to 22 of Regulation (EU) 2016/679

when the data is protected by the guarantees of secrecy

statistics provided for in state or regional legislation".

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For its part, Law 12/1989, of May 9, on the Statistical Function

Public, establishes in its article 8 that the National Statistical Plan is the

main computer instrument of the statistical activity of the Administration

General of the State and will be valid for four years. The Royal Decree

1110/2020, of December 15, approving the Statistical Plan

National 2021-2024 (BOE 12/30/2020), develops its forecasts for said

period, including the statistics for state purposes that must be

carried out in the four-year period by the statistical services of the Administration

General of the State or any other entities dependent on it.

From the Ministry of Universities, the statistical publication is carried out

of “University Performance Indicators”, with IOE number: 44052

(Inventory of Statistical Operations), currently included in the Plan

National Statistics 2021-24 with the code "8674 University Indicators".

As can be seen, in the current IOE File: 44052, to which are incorporated

said “indicators”, https://www.ine.es/dyngs/IOE/es/operacion.htm?id=1259946001133,

it is stated that (i) “the objective of this operation is to monitor the

students and the studies they carry out, presenting data related to the

academic performance in relation to credits, renewal of

students in the different degrees, to abandonment and change of studies, to the

time invested to graduate, to the notes of the files and to the rates of

transition from Bachelor to Master”, that (ii) the “study variables” are the

referred to "Performance, note of the file, abandonment of the study, change

of study, suitability, duration of studies, renewal of the degree,

transition from Bachelor to Master", and that (iii) the "classification variables" must

contain the “Type and modality of the university, university and scope of

study".

Well, from the analysis of the variables and objectives incorporated into the

"University Performance Indicators", published by the organ

competent as a specification of its activity in relation to its participation

in the National Statistical Plan, it is not extracted that, with regard to the

corresponding to 2021-2024, the regulation has contemplated the

realization of comprehensive statistics of health data referring to

identified or identifiable natural persons, which are those referring to the type and

degree of your disability.

Consequently, the consulting Institute will have to comply

in Chapter II of Title I of the aforementioned Law 12/1989, of May 9, which regulates

the data collection regime for these purposes, and, specifically, in accordance

with which article 11.2:

will be strictly voluntary contribution and, in

"In any case,

Consequently, they may only be collected with the express consent of the users.

interested parties the data likely to reveal the ethnic origin, the opinions

political, religious or ideological convictions and, in general, how many

Circumstances may affect personal or family privacy.

In accordance with all of the above, and in accordance with the transcribed regulations,

The request does not comply with data protection regulations.

carried out from the Ministry of Universities to IMSERSO, for the purposes of

carrying out the crossing of information with personal data object of

this report.

Madrid, February 24, 2021