

I. Order

1. The Commission for Constitutional Affairs, Rights, Freedoms and Guarantees, of the Assembly of the Republic, requested, on March 1, 2023, the National Data Protection Commission (CNPd) to issue an opinion on Bill 592/XV /1 (IL), on the «reform of the system of access to administrative information, making the fourth amendment to Law No. 26/2016, of 22 August, which approves the system for access to administrative and environmental information and reuse of administrative documents'.

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 articles 57, paragraph 1, letter c); 58, no. 3, letter b); 36, no. 4, all of Regulation (EU) 2016/679, of April 27, 2016 - General Regulation on Data Protection (hereinafter, RGPD), in conjunction with the provisions of articles 3; 4th, No. 2; 6, no. 1, letter aj, all of Law no. 58/2019, of August 8, which implements the GDPR in the domestic legal order.

II. Analysis

3. Bill No. 592/XV/1, (hereinafter, Bill) amends Law No. 26/2016, of August 22, last modified by Law No. 68/2021, of 26 of August (hereinafter, Law No. 26/2016), in order to reinforce the role and powers of the Commission for Access to Administrative Documents (CADA), in particular, attributing binding effect to the respective opinions and providing for the possibility of application of compulsory pecuniary sanctions for holders of administrative bodies that do not comply with the meaning of the opinions.

4. According to the explanatory memorandum that accompanies the Project, «[...] the binding effect of CADA's deliberations reinforces the principle of open administration as a basic principle of our administrative law and ensures that these are taken into account by all bodies and entities of the Public Administration", at the same time that the compulsory pecuniary sanction regime serves the purpose of encouraging the guarantee of access to administrative documents.

5. Such changes are not incompatible with the legal regime for the protection of personal data, so that the CNPD has nothing to indicate, in principle, regarding such an option.

6. However, practical difficulties may arise in reconciling the binding legal effect of CADA's opinions with binding decisions of the CNPD, bearing in mind the boundary competences of the two entities, difficulties that are highlighted here for possible consideration by the legislative power.

Av.D. Carlos 1,134,1° 1200-651 Lisbon

T (+351) 213 928 400 F (+351) 213 976 832

gerai@cnpd.pt

www.cnpd.pt

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7. In fact, the principle of open administration is not applicable (or may not be applied) to its fullest extent whenever administrative documents contain personal information relating to natural persons that identify them or enable their identification, /and always containing personal data (cf. Article 4(1) of the RGPD) - documents that Law No. 26/2026 designates as nominative documents. It is true that the information available to the Public Administration corresponds, to a large extent, to the personal data of citizens - whether they are users of public services, other citizens interacting with public organizations, or their workers. And, therefore, when nominative documents are in question, their disclosure and their availability presupposes a process of complete and irreversible anonymization or the verification of conditions specifically provided for in paragraph 5 of article 6 of that legal diploma.

8. However, sometimes administrative entities process personal data without legal grounds for the purpose or keep them beyond the period necessary to fulfill the purpose of the treatment (in violation of paragraph 1 of article 5 of the RGPD) . In these cases, it may happen that, because the information exists in the information systems of the entities, the same administrative entity is the recipient, on the one hand, of an opinion from CADA in the sense of guaranteeing access to documents with such personal data and, on the other hand, of an order to erase personal data unlawfully retained (or subject to another type of processing operation), issued by the CNPD under paragraphs c), d) or g) of paragraph 2 of article 58. of the GDPR. Faced with two contradictory legal duties, there will remain a doubt, for the recipient entity of the two legal acts, which duty to be fulfilled, given that, according to the legal data protection regime, non-compliance with the CNPD order corresponds to a unlawful conduct, liable to be criminally sanctioned (cf. Article 52 of Law No. 58/2019, of August

8).

9. It also takes the opportunity to raise a question regarding the scope of the binding effect of the CADA opinion, in particular if, as it seems to result from the Project, the opinion is binding whatever its meaning. The question concerns the ratio legis of this amendment: if what is intended, as set out in the explanatory memorandum, is to promote an administrative culture of transparency and reinforce the principle of open Administration, does it make sense, in light of the attributions of the CADA, the binding force of the opinion when it is issued with the meaning of guaranteeing access to administrative documents (nominative or not), leaving the doubt whether the same binding legal effect is justified when CADA understands that there are other rights or interests that exclude that principle or legitimate interest in access.

10. This issue was, on another legislative level that is brought up here by way of example, decided in different terms: the CNPD has the legal powers to order those responsible for the

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processing the guarantee of the rights of the holder of personal data and to prohibit the processing of personal data, but it does not have the power to order those responsible to make personal data available to third parties, as this goes beyond the reason for its legal attributions and powers of correction.

11. The CNPD therefore leaves this note for possible consideration.

12. To conclude, one still takes the liberty of pointing out, in paragraph 1 of the new article 39-A, the inconsistency of mentioning “that they do not comply with the deliberations contained in the opinion” (emphasis added). Consistent with the content of the projected amendments, which always refer to the binding effect of the opinion, it would be better to establish that they fail to comply with the duty imposed by the opinion or that they fail to comply with the meaning of the binding opinion.

III. Conclusion

13. Based on the grounds set out above, the CNPD understands that the changes projected here are not incompatible with the legal data protection regime, drawing attention, however, to the difficulties in reconciling the binding legal effect of CADA's opinions with the binding decisions of the CNPD, in particular with orders for the deletion of personal data unlawfully stored, bearing in mind the borderline competences of the two entities (cf. above, point 8).

14. The CNPD also takes the liberty of raising a doubt as to the scope of the binding effect of CADA opinions (/and „if the binding effect occurs whatever the meaning of the opinion or only when the meaning is to ensure the access to administrative documents), in the light of the principle of open administration on which the projected amendments are based (cf. supra, points 9 to 11).

Approved at the meeting of March 14, 2023

Filipa Calvao (President)

Av. D. Carlos 1,134,1° 1200-651 Lisbon

I (+351) 213 928 400 F (+351) 213 976 832

gerai@cnpd.pt

www.cnpd.pt