

National Data Protection Commission

OPINION/2023/32

## I. Order

1. The Commission for Transparency and Statute of Deputies, of the Assembly of the Republic, requested on March 8, 2023 the National Commission for Data Protection (CNPd) to issue an opinion on Bill No. 358/XV/1a (PAN) - "Strengthens and clarifies the impediments and mechanisms for preventing conflicts of interest applicable to holders of political and high public office, proceeding with the fourth amendment of Law n.0 52/2019, of July 31".

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 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 statement, to comply with the observations presented by the Advisory Council of the Attorney General's Office [ ...]», specifically proposing to amend Law No. 52/2019, of July 31, on the one hand, to extend the impediment regime provided for in Article 8, which is currently focused on the scope of procedures for public procurement, to «[...] procedures for awarding public subsidy, financial incentives, incentive systems or tax benefits by means of an administrative act [...] and, on the other hand, to enshrine the «[...] mandatory publication of requests for apology by holders of political offices and senior public positions in decision-making processes within the scope of the exercise of their respective functions, due to their own conflicts of interest in the matter in question, in an accessible, online, free way , complete and up-to-date.”

4. As for the first projected amendment, the CNPD has no reservations as to its compliance with the legal regime for the protection of personal data - only the doubt remains as to the indispensability of its forecast, taking into account that the

situations now added seem to fall within the scope of range of impediments of article 69 of the Code of Administrative Procedure (CPA), to which any holder of an administrative body is subject, which is why it also binds holders of political offices and high public offices who have the competence to intervene in this type of procedure administrative procedures, since such intervention occurs

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in the exercise of legal-administrative powers (or materially legal-administrative) and in the pursuit of the administrative function.

5. The new regime for publishing requests for excuses, provided for in Article 8(3) and Article 9(13) of Law No. 52/2019, raises concerns. At issue is the obligation, when holder of political office or high public office, to request an excuse on grounds of impediment provided for in the same law, «[...] the respective waiver request [...] be made available, in full and free access, in an autonomous section on the website of the respective public entity» (since, unlike article 9, whose heading is impediments, article 8 is limited to impediments resulting from activities previously carried out by the holder ).

6. The proposed solution immediately raises the question of knowing what is actually intended to be regulated, since the regime of impediments is not to be confused with the regime of excuse and suspicion (cf. articles 69 and 73 of the CPA). It should be recalled that, in the latter regime, there is a set of (relational) circumstances that may threaten the exemption of the holder of the office, but in relation to which the national legislator understood not to presume the existence of a conflict of interests and risk of partiality, because the holder's direct or indirect interest in the procedure is less likely or more tenuous; and, therefore, the request for excuse or suspicion is subject to an administrative decision, which will only remove the administrative procedure if it is concluded that there is a risk of partiality (cf. articles 73 to 75 of the CPA). However, when there is a situation of impediment, the removal of the holder, in the concrete administrative procedure, occurs *ope legis*, not depending on any pronouncement or administrative decision.

7. Thus, it is important to clarify the wording of paragraph 3 of article 8 and of paragraph 13 of article 9 of the Project, so that it is understood whether the declaration of impediment made by the holder or the request of excuse based on circumstances likely to generate a conflict of interests other than those provided for in the legal range of impediments.

8. Admitting that, as it seems to result from the reference in those provisions to the causes of impediment provided for in the same articles, it is intended to oblige the publication of the declaration of impediment issued by the holder of the organ, it does not seem to be evident the adequacy, nor the need for such a measure to achieve the purpose of enhancing public transparency. Let's see.

9. In the explanatory memorandum that accompanies the Project, it is explained that «[...] the consecration of a legal advance such as this one could make an important contribution to guaranteeing the effectiveness of the legislation in force in terms of conflicts of interest, since which, without prejudice to a regulation on lobbying, will allow any citizen to track and scrutinize this type of situation in which there must be requests for apology on the part of

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of the holder of political office or high public office - something that simultaneously ensures, through transparency, his protection against information that may prove to be unfounded or incorrect in the context of this type of situation.».

10. Now, from the perspective of the CNPD, the principle of administrative transparency or public transparency does not require the stripping of all administrative activity or the holders of political offices and high public offices, not least because it has to be reconciled with certain fundamental rights and others constitutionally protected values. That principle, especially when it is in tension with other public or individual values, must assert itself and prevail when public democratic scrutiny is likely to contribute to the realization of the public interest, and not as a mere affirmation devoid of an effective contribution to the good. common.

11. Now, when the holder of political office or high public office declares himself to be impeded in a specific administrative procedure, he is already moving away from the procedure, having no intervention in it, so the risk to the public interest that the conflict of interests represented is necessarily eliminated.

12. In this perspective, the CNPD does not achieve what it serves the State and a democratic society «[...] any citizen to track and scrutinize this type of situation in which requests for apology must be verified by the holder of the office political or high

public office [...]», when the holder has already withdrawn from the administrative procedure, in compliance with the law, and there is no risk of conflict between the public interest and private interests.

13. In addition, as the CNPD has always highlighted, the publication of personal data on an open network means the dissemination of information revealing the dimensions of private life, far beyond the universe of relevant interested parties (citizens managed by the Portuguese State) and far beyond of the relevant period, since the information made available on the Internet is perpetuated and can be reused indefinitely and for any purpose, even illegitimate ones, making it very difficult if not impossible to track personal data.

14. Now, if it is true that holders of public office and high public office have, by virtue of the exercise of public functions, to endure a greater restriction of their privacy, the online publication of the declarations of impediment exposes the private life of family members or people in a close relationship with them, without seeing the adequacy or necessity (to safeguard the public interest) of restricting the fundamental rights to self-determination and respect for their private lives, removing the risk of partiality and harmful to the public interest - cf. Articles 26 and 35 of the Constitution of the Portuguese Republic (CRP) and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (CDFEU).

15. However, the risks arising from the exposure on the Internet of personal data of holders of public and high public offices are certainly not compensated or mitigated with the apparent advantage of «[...]

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simultaneously ensure, through transparency, its protection against information that may prove to be unfounded or incorrect in the context of this type of situation» (argument invoked in the explanatory memorandum), not least because this supposed advantage is also ensured, by direct will of the holder of political office or high public office, in case of circulation of unfounded information, with full respect for the right to self-determination in information, enshrined in article 35 of the CRP and article 8 of the CFRUE.

16. In this way, the CNPD recommends that the option of imposing the publication on the Internet of declarations of impediment of holders of political offices and high public offices be reconsidered, because such a measure of administrative transparency does not respect the principle of proportionality in the restriction of rights fundamental to informative

self-determination and respect for private life (cf. paragraph 2 of article 18 of the CRP and paragraph 1 of article 52 of the CDFUE), or because it does not appear to be adequate to safeguard the interest public, either because it is at least manifestly unnecessary, as it concerns situations in which the holder has no intervention and, therefore, the risk to the public interest that the conflict of interests represented has ceased.

### III. Conclusion

17. Based on the reasons set out above, the CNPD recommends reconsidering the option, expressed in paragraph 3 of article 8 and in paragraph 13 of article 9 of the Project, to impose the duty to publish on the Internet the declarations of impediment of holders of political offices and high public offices, as they represent a disproportionate restriction of the fundamental rights to self-determination information and respect for the private life of their own but, above all, third-party relatives or people in close relationship with them.

18. If this option is maintained, the CNPD suggests clarifying the wording of no. 3 of article 8 and no. 13 of article 9 of the Project, in order to avoid confusion between the legal regime of impediments and the legal regime of excuse and suspicion.

Approved at the meeting of March 28, 2023