

Home »Practice» CPDP Decisions for 2018 »CPDP Decision on Adoption and Publication of Practical Guidelines on Consent as a Basis for Personal Data Processing CPDP Decision on Adoption and Publication of Practical Guidelines on Consent as a Basis for Personal Data Processing DECISION OF THE COMMISSION FOR PROTECTION OF PERSONAL DATA Reg. № NDMSPO-01-652 / 2018 Sofia, 05.07.2018 SUBJECT: Adoption and publication of practical guidelines on consent as a basis for personal data processing Commission for Personal Data Protection (CPDP) composed of: Chairman: Ventsislav Karadzhov and members: Tsanko Tsolov, Tsvetelin Sofroniev, Maria Mateva and Veselin Tselkov, at a meeting held on July 2, 2018, considered a file with ent. № NDMSPO-01-652 / 20.06.2018 by the Deputy Prime Minister of the Republic of Bulgaria Mr. Tomislav Donchev. His letter draws attention to the fact that in connection with the application of the new General Regulation on Personal Data Protection (Regulation (EU) 2016/679), which began on 25 May 2018, there is a massive request from the state and municipal administration to provide with the express written consent of the applicants for an administrative service. This circumstance complicates administrative procedures and increases the administrative burden for citizens and businesses. In this regard, Mr. Donchev points out that in the information and explanatory materials published on the official website of the CPDP, the issue of cases in which it is necessary (respectively not necessary) to require consent is not clarified. In addition to the letter of the Deputy Prime Minister of the Republic of Bulgaria, the CPDP has received numerous inquiries and signals from citizens and the media for the widespread practice of requiring the signing of declarations of consent for the processing of personal data, for which there are other a legal basis within the meaning of Regulation (EU) 2016/679, such as a legal obligation, the exercise of official powers, a contract, etc. Consent is one of the grounds for collecting and processing personal data. Despite the fact that it is mentioned in the first place in Art. 6 and Art. 9 of Regulation (EU) 2016/679, it is important to know that all legal bases are alternative and equal, and they are not arranged in a hierarchical relationship. The presence of any of them makes the processing lawful, provided that the other requirements of the regulation are met. In cases where a data controller decides whether to process personal data on the basis of consent, he must examine whether there is no other legal basis for their processing, such as a legal obligation or contract, and what the consequences would be for the relevant activity in case of withdrawal of the consent from the person. In connection with the above and on the grounds of Art. 10, para. 1, item 4 of the Personal Data Protection Act, the Personal Data Protection Commission adopted the following DECISION: 1. Adopts practical guidelines in which cases consent to the processing of personal data is not required in accordance with Regulation (EU) 2016/679 . 2. The guidelines under item 1 to be published on the official website of the CPDP. Five members

of the CPDP voted: Ventsislav Karadzhov, Tsanko Tsolov, Tsvetelin Sofroniev, Veselin Tselkov - "For", Maria Mateva - "Against". CHAIRMAN: MEMBERS: Ventsislav Karadzhov / n / Tsanko Tsolov / n / Tsvetelin Sofroniev / n / O.M. Mariya

Mateva / p / Veselin Tselkov / p / IN WHICH CASES CONSENT IS NOT REQUIRED FOR PERSONAL DATA PROCESSING

The processing of personal data by personal data controllers, both in the public and private spheres, is legally lawful; grounds exhaustively listed in Art. 6 (1) of Regulation (EU) 2016/679 (General Data Protection Regulation, DPO): a) the data subject has consented to the processing of his or her personal data for one or more specific purposes; (b) the processing is necessary for the performance of a contract to which the data subject is a party or for taking steps at the request of the data subject prior to the conclusion of the contract; (c) the processing is necessary to comply with a legal obligation to which the controller is subject; (d) the processing is necessary in order to protect the vital interests of the data subject or another natural person; (e) the processing is necessary for the performance of a task in the public interest or in the exercise of official authority conferred on the administrator; (f) the processing is necessary for the legitimate interests of the controller or a third party, except where such interests take precedence over the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is kid. Consent is one of the grounds for collecting and processing personal data. Despite the fact that it is mentioned in the first place, it is important to know that all legal bases are alternative and equal, and they are not arranged in a hierarchical relationship. The presence of any of them makes the processing lawful, provided that the other requirements of the regulation are met. In cases where a data controller decides whether to process personal data on the basis of consent, he must examine whether there is no other legal basis for their processing, such as a legal obligation or contract, and what the consequences would be for the relevant activity in case of withdrawal of the consent from the person. Some of the most common situations in which the controller should not seek the consent of the person to process his personal data are the following: 1. Administrator - public or private, collects a certain amount of personal data in fulfillment of its obligations under the law , e.g. under the Health Act, the Accounting Act, the Administrative Violations and Penalties Act, the Labor Code, the Social Security Code, the Ministry of the Interior Act, the Civil Registration Act, the Tourism Act, the Preschool and School Education Act and so called In these cases, the legislator has not left the discretion of the controller or the data subject, as a result of which the possible consent of the person will not be freely given, respectively will not be valid. This is especially true for public administrators, as well as for sectors where there is detailed legislation, such as health care, education, banking and others. 2. Personal data shall be collected in connection with

the provision of various administrative services by public authorities or local authorities. In these cases, the legal basis is the performance of a task of public interest or the exercise of official powers and the requirement of the consent of the persons is unnecessary.

3. Personal data shall be collected and processed for the purposes of an employment relationship. In these cases, the employee has no real free choice and is unable to refuse or withdraw his consent without adversely affecting him due to the apparent inequality between the two parties. In addition, the relationship between data subjects and their employers or appointing authorities, including with regard to the processing of personal data, is comprehensively governed by labor law, individual and / or collective agreements. In these circumstances, the condition for the lawfulness of the processing of personal data is a legal obligation and / or the performance of a contract (depending on the hypothesis).

4. Personal data are necessary for the conclusion and performance of a contract to which the data subject is a party. To the extent that the main subject and purpose of the contract objectively cannot be achieved without providing a certain amount of personal data, in these cases the will of the parties to enter into contractual or pre-contractual relations is sufficient and accordingly no separate consent is required. . This does not preclude the possibility of using consent as a legal basis for the processing of personal information (contact details, etc.) for additional purposes, such as marketing and advertising, unless a legal act provides for this. In these cases, the requirement to obtain consent may be waived if the requirements set out in the relevant legislation are met. It is important to know that the controller is not entitled to link the performance of a contract, including the provision of a service, with the consent to the processing of personal data when this is not necessary for the performance of the contract, such as receiving advertising messages. In these cases, the consent will not be freely given, as the person has no real free choice and is not able to refuse or withdraw his consent without adversely affecting him.

5. Personal data are necessary to protect the legitimate interests of the controller or a third party if those interests take precedence over the interests and / or fundamental rights and freedoms of the individual. Such hypotheses in practice are the undertaking of security and protection measures, including through video surveillance, inspection of persons and registration of access to buildings, actions to ensure information and network security, etc. There is also a legitimate interest in processing personal data to protect the rights of the administrator in court or out of court, for example to file a claim for breach of contract or to seek liability for damages.

6. Personal data shall be transferred from one controller to another as a result of a transfer of receivables (assignment). In these cases the legal basis for the processing of personal data is the fulfillment of the legal obligation under Art. 99, para. 3 of the Law on Obligations and Contracts. The law obliges the previous creditor to hand over to the new creditor the documents in his

possession, which establish the claim. This circumstance determines the transfer of personal data, insofar as they are contained in the relevant documents. Upon receipt of the claim, the new creditor may process the data on the basis of its legitimate interest in recovering the amount due, including enforcement. the obligation to be transparent and to provide information within the meaning of the General Regulation.7. Personal data shall be transferred by the controller to a processor. The General Regulation allows controllers to involve a "processor" - a natural or legal person, public authority, agency or other entity that processes personal data on behalf of the controller. One of the most common hypotheses of personal data processors are accounting firms, occupational health services, debt collection companies, IT companies that maintain the information systems of companies and departments and others.

In all these cases, the General Regulation does not require the consent of the data subjects to involve a processor, leaving the discretion entirely to the controller.

8. A specific hypothesis of personal data processing without requiring the consent of the data subject is the photographing and video recording of persons in a public place. If it is carried out by a natural person in the course of purely personal activities, then the General Regulation does not apply at all. In case the filming is part of a professional activity, then the exceptions and reliefs for academic, artistic or literary expression under Art. 85 of the ORZD. The provision of Art. 13 of the Copyright and Related Rights Act, according to which the photographer (videographer) does not require the consent of the depicted person, if the image was made in the course of public activity of the depicted person or in a public or public place, the image of the person is only detail in a work showing an assembly, procession, or landscape, or the person depicted has been rewarded for posing.

9. In cases where special categories of (sensitive) personal data are processed, such as data on ethnic origin, political views, religious beliefs, trade union membership, biometric data, health data, sexual orientation, etc., the grounds for legality are referred to in Art. 9, paragraph 2 of the ORD.

In this connection, the processing of health data is lawful if it is carried out for the purposes of preventive or occupational medicine, for the assessment of the employee's ability to work, medical diagnosis, provision of health and social care, treatment, management of health or social care systems. care, in the field of public health, protection against serious cross-border threats to health, etc. Therefore, if the treatment is necessary for any of these purposes, the relevant hospital, laboratory or pharmacy has neither the obligation nor the right to request additional explicit consent of the person (patient). The

opposite would mean that the hospital will refuse treatment or the pharmacy - medicine, if the person does not give his consent. Such conduct would constitute a direct infringement of the General Regulation, which may be punishable by a fine or pecuniary sanction.

Indicative non-exhaustive list of cases in which consent is not required:

In accordance with the above criteria, the separate consent of the persons, including the signing of all forms of declarations, is not normally required for the processing of their personal data by the administrators listed below in the course of their normal professional activities. This does not include the processing of personal data for direct marketing, where consent should be the leading basis.

- doctors, dentists and pharmacists;
- lawyers;
- employers;
- public bodies (state and municipal);
- educational institutions (kindergartens, schools and higher education institutions);
- banks and other credit institutions;
- insurers;
- undertakings providing public electronic communications networks and / or services;
- courier companies and other postal operators;
- enterprises providing utility services (electricity distribution companies, water supply and sewerage, district heating);
- personal data processors (accountants, occupational medicine services, etc.);
- hoteliers and travel agencies;
- condominium managers (house managers);
- copying services;
- translators;
- journalists, photographers and videographers;
- religious, political, public and trade union organizations;
- and other.

## SPECIAL OPINION OF MARIA MATEVA

I am voting against the opinion of the CPDP on the cases in which the consent of the natural persons is not required, for the following reasons:

1. I consider that the opinion is incomplete and could therefore mislead both data controllers and the individuals whose data are processed.

What I mean is that the opinion does not specify that other grounds for the processing of personal data of individuals, other than consent, cover only the processing operations to which they relate. The existence of such grounds in no way entitles administrators to process personal data of persons for purposes other than those for which they were collected (such as publishing data on the Internet or disclosing personal data to third parties without a legal basis for this), as well as in a volume greater than that for which the ground is available.

Information about such a legal basis for data processing must be clearly disclosed in the personal data protection policies of the respective controller.

2. The opinion is not precise, as it does not comment on the terms for which the personal data of the persons will be processed. The opinion must state that the time limits for the processing of personal data of individuals on all the above grounds cannot be longer than the time limits for which these grounds for processing exist.

3. The opinion is unbalanced. It is aimed at the controllers of personal data and their facilitation in their assessment of the grounds for processing personal data. Given that the General Data Protection Regulation is a legal act for the protection of individuals with regard to the processing of their personal data, the opinion should also be addressed to individuals, indicating that although in the cases cited in the opinion processing of their personal data is not necessary, the subjects of such data have all the rights to protection of their data specified in the regulation. This is necessary to make it clear to individuals that although they have not given their consent to the processing of their personal data to the controller concerned, they have the right to request the deletion or destruction of their data after the grounds for processing the data have expired. their data.

Individuals must also be informed of the fact that they can protect themselves from disproportionate and unlawful processing of their personal data and of controllers who process their personal data without the need for consent.

In conclusion, what is missing in the document, in my opinion, can be summarized as follows:

"The use of a legitimate interest by controllers in the processing of personal data of individuals is relevant only to the types of

processing of personal data and the purposes of processing for which such interest exists, as well as the time limits for which it exists. Information about such a legal basis for data processing must be clearly disclosed in the personal data protection policies of the respective controller. Although in the cases cited in the opinion the consent of data subjects is not required for the processing of their personal data, the protection against unlawful processing of personal data provided for in the Regulation is fully applicable. "

The lack of this clarification, in my opinion, leads to incompleteness and imbalance of opinion.

For the reasons set out, I am voting against its adoption.

Maria Mateva / p /

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