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Data protection in Public Administrations' communications

ABSTRACT

Purpose: This article aims to find the criteria for solving the tension between the protection of personal data of citizens that are processed by Public Administrations, and the manifestations of Administrations' transparency, as part of the right to good administration, specially, the right to access to the public files.
Methods: With this purpose we have analysed the current law in force in Spain, which partially is based on the European Union Law, and we have taken into account some solutions given through case law.
Results: The results obtained lead us to apply some principles and criteria that are not included in the public transparency regulations, but they are deduced of the case law regarding the data protection rules and, only in part, of the public transparency regulations.
Discussion: To achieve a better solution to protect de personal data in its use by the Administrations, it is a must that those principles and criteria, that we will highlight in this paper, would be incorporated into the public transparency regulations, because only acting like that, we would find a better balance respecting public transparency, without undermining personal data protection.

KEYWORDS: *Administrations' transparency, personal data protection, right to good administration, the right to access to the public files*

Introduction

Activity of Public Administrations needs the processing of personal data of citizens. Despite the fact that regulation on data protection binds Public Administrations as well as private entities and individuals, the fact that public administrations have the main purpose of defending general interests, qualifies the right to data protection and it leads us to consider the special compatibility with other rights and legal situations, when Public Administrations do communication or social dissemination of information, especially for the obligation of being transparent that Public Administrations are due to.

As a starting point, we must bear in mind that administrative transparency imposes the obligation to communicate or disseminate information about administrative activities, which is considered of interest for the citizens. For some authors the personal data protection is a limit to the administrative transparency, whereas for others, personal data protection acts as a warranty of the citizens' autonomy regarding the public power (Arena G., 1997, p. 397).

It should be noted that transparency in public management includes the possibility for the citizens to access any type of information generated by public entities in the performance of their functions, and as a consequence: it is a manifestation of good democratic functioning because it supposes that the citizens have a more active role in the public issues (Ávila Rodríguez, C.M., 2009, p. 31; Jegouzo I., 1994, p. 12) and it is a tool to control arbitrary resolutions (Gimeno Feliu J.M., 2003, p. 10), it requires the right management of information of Public Administrations activities, and it is a requirement of good governance recognized as a Fundamental Right of Citizenship on Article 41 of the Charter of Fundamental Rights of the European Union, including the right of access to documents of European institutions.

Research methods.

The dissemination of information managed by Public Administrations requires that processing of personal data must be compatible with the

obligation of being transparent. The compatibility of both requires a casuistic weighting which is the aim of this work to some extent. That implies assessing what should prevail in the specific circumstances of the case, since we are talking about two of the fundamental rights acknowledged on the European Constitutions, so when they come into crash, the prevalence of one over another can only be solved by justifying the sacrifice of one in front of the other. The determination of the criteria or principle in which we can find the grounding issues must be done considering the rules in force in all the implied scopes and the results of case law. For doing that, it is necessary to start by fixing the relevance of both rights in conflict.

The relevance of the rights in conflict

On the one hand, the protection of personal data is linked to the Fundamental Right to personal and family privacy, and is also recognized as an autonomous Fundamental Right on article 8 of the Charter of Fundamental Rights of the European Union (Rodotà S., 2003, p. 17).

On the other hand, access to the administrative file is a manifestation of the administrative transparency linked to the Right to Good Administration, which also recognizes the Charter of Fundamental Rights of the European Union on its article 41.2.

Initially those rights were included in the frustrated European Constitution, as a manifestation of an emerging Constitutional Law of the European Union that was referred on article 6.2 of the European Unión Functioning Treaty (Tomás Mallén B., 2004, p. 31). Later on, the Charter of Fundamental Rights of the European Union originally proclaimed in the year 2000 in Nice, was subject to revision and proclamation at the signing of the Lisbon Treaty of 2007, which entered into force on December 1, 2009, becoming, at that time, binding on the Member States. As a consequence, the rights that it includes are considered as Fundamental Rights in the legal systems of the Member States. And the consequence is that as Fundamental Rights in the European Union legal system, they are considered principles of the European Law, as it was stated by the Court of the European Union in the case C-274/99, which

resolution was pronounced in 2001, March 6 (Piñar Mañas J.L., 2003, p. 55). Being considered as principles of the European Union, the right can be quoted in the resolutions of the courts of each Member States (Meilán Gil J.L., 2013, p. 14).

The weighting of both rights requires the former determination of the legal significance of each of them, assessing the legal nature of each one of these rights, so:

- The protection of personal data has its express recognition as a Fundamental Right within the European Union, but it is not recognized as a Human Right. However, its connection with the right to privacy is undeniable, and this is included on Article 12 of the Universal Declaration of Human Rights, which states that "No one shall be subjected to arbitrary interference in his private life, his family, his address or correspondence", in addition of that, it is too recognized as Fundamental Right in the Constitutions of European States and in the Charter of Fundamental Rights of the European Union on article 7, that recognizes the right to be respected in the private and family life. The bonding with the article 12 of the Universal Declaration of Human Rights has been used by some States in order to ground some regulations about informative auto-determination (so called, *habeas data*), as Suede and Hesse –which was the German Federal Republic- (Ribagorda Garnacho A., 2008, p. 377). Whereas, other European States have ground their personal data protection rules in the right to private intimacy. So it has been done by Netherlands and Finland (Troncoso Reigada A., 2003, p. 235).
- Access to administrative files, linked to the Right to Good Administration, is recognized as a Fundamental Right on article 41.2 of the Charter of Fundamental Rights of the European Union. However, it is not included as a Human Right in the Universal Declaration of Human Rights of the year 1948, carried out during the third General Assembly of the United Nations, since this is a right of recent configuration, and those contained there, can be identified with what we consider essential Human Rights, matching with the first generation of Fundamental Rights. The Human Rights contained

> in the Universal Declaration of 1948 are the hard core of Human Rights and it is maintained that its concept is interchangeable with those considered Fundamental Rights (Aguilar Cavallo G., 2010, pp. 62–63). In this sense, the Right to Good Administration is much more than a Fundamental Right, because it could be too a Human Right, for having been recognized as an European Fundamental Right, if we consider that both concepts are being referred to the same rights. But the identity of both concepts it is not totally accepted (Martín-Retortillo Baquer L., 2006, p. 47).

It is undoubtable that the use of electronic and telematics media makes more feasible the compliance of transparency dues, since was put into force the possibility for the citizens to communicate with Public Administrations through them (Aced Félez E., 2008, p. 1). But it multiplies the risk of show protected data, and that is the reason because the balance between transparency and personal data protection has become one of the most concerning issues for Public Administrations in recent years. A factor that has been highlighted in order to enhance the current protection of the personal data of the citizens is discriminate information about the rights included in its scope, because the citizens could not claim for the respect of their rights if they do not know the limits of the personal data public management (Cervera Navas L., 2003, p. 142), and the mechanisms to claim for their respect needs the progressive awareness of the character of the right as a Fundamental one (Calvo Rojas E. 2003, p. 230).

The European Court of Human Rights and the International Court of Human Rights have recognized that the concept of Human Rights and the concept of Fundamental Right are interchangeable and mean the same. In the scientific literature the interchangeability of both concepts is not fully accepted, as some authors accept it and others do not. Given the exceptional qualification of the legal nature of both rights, as fundamental, and as Human Rights, if we apply the broad interpretation of the concept of Human Rights, the weighting of which should prevail is not an easy task.

Personal data protection through the Spanish Trans Act.

The Spanish Transparency Act refers to the personal data protection, in the accomplishment of the administrative transparency obligations, so that if the requested information contains specially protected data of the type of personal data that reveal the ideology, union affiliation, religion and beliefs, access may only be authorized in case of having the express written consent of the affected person, unless that the affected party had made the data publicly evident before access was requested.

If the information includes specially protected data related to the commission of criminal or administrative offenses or personal data that are referred to racial origin, health and sexual life that do not entail public warning to the offender, the access may only is authorized in case of having the express consent of the affected party or if it is covered by a rule with the status of Law.

In all cases, implicit consent cannot be appreciated in order to allow the use of the personal data (Spanish Personal Data Agency, 2018, p. 2).

In general, and unless in the specific case the protection of personal data or other constitutionally protected rights linked to the public interest prevails, access will be granted to information that contains merely identifying data related to the organization, operation or public activity of the authority.

When the requested information does not contain specially protected data, the body to which the request is addressed will grant prior access to a sufficiently reasoned consideration of the public interest in the disclosure of information and the rights of those affected, whose data appear in the information requested, in particular their fundamental right to the protection of personal data.

For the realization of the previously mentioned weighting, the body will take particularly into consideration the following criteria:

- The least injury to those affected interests and rights if the documents only contain data of a merely identifying nature of those documents.
- The justification by the petitioners of their request in the exercise of a right or the fact that they have the status of researchers and motivate access in historical, scientific or statistical purposes.

- The greatest guarantee of the rights of affected persons in case the data contained in the document could affect their privacy or security, or if it is referred to minors. This criterion shall not apply if the access were made prior to dissociation of the personal data so that the identification of the affected persons is prevented. The personal data protection regulations will be applicable to the later treatment of those obtained through the exercise of the right of access.

Personal data protection in the application of the specific regulation.

The specific regulation about personal data protection is basically integrated by the European regulations, especially, Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, about the protection of natural persons with regard to the processing of personal data. In addition, in Spain, the Organic Act number 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights develops these issues in the Spanish legal system. Regulation (EU) 2016/679 has been enacted in place of the former regulation which was contained in the Directive 95/46/CE of the European Parliament and of the Council, of October 24, about the protection of natural persons with regard to the processing of personal data and the free movement of these data. The Directive 95/46/CE was applied in the State Members of the European Union unequally (Cazurro Barahona V., 2008, p. 232), so the new regulation aims to be more effective.

In regard of these acts we can extract some criteria that work as limits of the protection of personal data and that should also be weighting with the criteria that result of the regulation of personal data protection in the public transparency regulations. These criteria have been applied in case law to ponder both rights in conflict through casuistic crashes, and they are:

- Principle of license or legitimacy: the display of data is lawful if the consent of the owner of the data is granted or is made in compliance with contractual or legal obligations, or to protect vital interests, public or to satisfy legitimate interests. The causes of legitimacy are

based on the legitimate functions of the manager of the data, with origin in the law, a contract, or the express consent (Guasch Portas V. and Soler Fuensanta J.R., 2015, p. 419).

- Principle of information or transparency: transparency is applied in relation to the delivery of information that affects the interested party, whether he delivered the data or if it had been obtained from another source.
- Principle of data minimization or proportionality: the extension of the data shown should be limited to what is necessary and adequate to meet the purposes of administrative transparency in the specific case. There are also other similar specific rules that can be applied in some cases, as the one contained in the Act number 18/2009, about the Edictal Panel of Traffic Fines, where it is prevent that the publication done in substitution of a failed notification only must show the minimum personal data (Gamero Casado E., 2009, p. 50).
- Principle of limitation of the purpose: the use of the data is limited to the reason for which they were delivered, so that their subsequent use for others purposes is not justified. This criterion is suitable with the finalistic interpretation of the transparency system, which means that the dissemination of information is only justify to accomplish with the aim of it (Ortega Carballo C., 2006, p. 108).
- Principle of accuracy of data: Public Administrations can verify the accuracy of the data they treat.
- Principle of limitation of conservation period (right to be forgotten): personal data should not be kept longer than necessary for the purposes of treatment.
- Principle of integrity or security: it is necessary that Public Administrations guarantee the adequate security of personal data, including protection against unauthorized or illegal treatment and against loss, destruction or accidental damage.
- Principle of confidentiality: the Administrations have a duty to keep confidentiality regarding the personal data they treat, being a

complementary obligation to that of keeping professional secrecy that has a more general character.

We can state that the Spanish data protection must be improved by introducing these principles in the specific regulations of administrative transparency. But it only would be a step more in the path to get an enhanced data protection. Further improvements can be done in the European system by considering some global issues in order to near this system which is based on Continental Law, to the American one, which is based on the Common Law system, because this is a must of the globalization in communications (Cervera Navas L., 2003, p. 132), and there are between both of them some structural differences that have no sense in some global relations (Manny C., 2003, p. 146).

Conclusions

As it has been highlighted, the protection regulation of personal data crashes with the right of citizens to access administrative files, and both rights must be considered as specially qualified rights due to their connection with Human Rights, and furthermore they both are considered fundamental rights by the European Constitutions. So, the personal privacy to which the Right to the Protection of Personal Data appears linked to, and the Right to Good Administration, to which administrative transparency is linked to in its manifestation of access to the administrative file, have to recive the same treatment.

Given the extraordinary qualification of both rights and their connection with essential Human Rights, their compatibility has been shaped in judicial and administrative practice, through a weighting carried out applying the principles and parameters that are not all of them in the specific regulations of Data Protection, nor in the regulation of administrative transparency.

For reasons of legal certainty, it would be advisable that the criteria to make both rights compatible were enacted incorporating them into the specific

regulations on administrative transparency, since now they are only deducted from the regulation on data protection and some of them require further development in the field of Administrative Law. This is a requirement of the principle of legality, and with this, a better compliance with the protection of personal data and administrative transparency would be guaranteed, thus facilitating judicial control of compliance with both rights, which, undoubtedly, would facilitate and clarify the compatibility of both rights.

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