

GUIDELINES FOR IMPLEMENTATION OF THE EIGHTH ADDITIONAL PROVISION AND TWELFTH FINAL PROVISION OF THE LOPDGDD.

Act 39/2015, of 1 October, on Common Administrative Procedure of Public Entities establishes, on article 28, that submitting documents within an administrative procedure is both a right and a duty.

On one hand, pursuant section 1 of such procedure, data subjects are obliged to submit any data and documents required by Public Administration Entities, pursuant to the applicable laws and regulation. On the other hand, as stated by section 2, the data subject is entitled to refrain from submitting any information when it is already held by such Public Administration Entities, either because it has been issued by such entities or because it had been previously submitted. Therefore, the *one-time principle* is applied, which is a cornerstone in the development of e-administration, since its goal is to remove any unnecessary administrative overload caused by making users submit the same information over and over to different public entities.

As a response of this need of interoperability and intercommunication between different bodies of the Public Administration, data verification and access services from intermediation platforms or other electronic systems enabled for this purposes, allow any public body to check or verify which data need to be submitted by a particular user within an specific proceedings, thus removing the need to request from such users the corresponding certificates or other supporting documents. Therefore, the citizen right is recognised by article 28.2 of Act 39/2015 is made effective.

The original wording of the aforementioned article, with regard to said right to be exempt of submitting any documents which had been already submitted to other Public Administration Entity, provided that, in order to authorise inter-entity access, the data subject must have expressed their consent, which could be understood as granted provided that there was no record of the data subject's express opposition or any specific act requiring express consent was applicable. That is, inter-administration document consultation was enabled by means of a consent which could be understood as tacitly granted.

However, this possibility incurred in a contradiction with Regulation (EU) 2016/679, General on Data Protection (hereinafter GDPR) which defines **consent** as “*any **freely given, specific, informed and unambiguous** indication of the data subject's wishes by which he or she, **by a statement or by a clear affirmative action**, signifies agreement to the processing of personal data relating to him or her*”, and, in consequence, excludes any possibility of basing data processing in any tacit consent whatsoever.

The enactment of Organic Act 3/2018, of 5 December, on Protection of Personal Data and Guarantee of Digital Rights (hereinafter LOPDGDD as per its Spanish acronym), whose purpose is to adapt the Spanish legal system to the GDPR and complete their provisions, has made necessary to change the wording of different sector laws, including the aforementioned article 28 of Act 39/2015 regarding “*Documents provided by data subjects in the framework of administrative proceedings*”.

Currently **article 28 of Act 39/2015, as modified by the LOPDGDD**, maintains the one-time principle by guaranteed in the user's right to “*not submit any documents which*

are already held by the acting administration entity or have been issued by any public administration entity whatsoever”, although, from a data protection approach, the true significance of this modification is the removal of the need to obtain the consent of the data subject, either express or tacit, given that “the relevant documents may be consulted or collected unless the data subject opposes” and opposition is not possible “when the relevant document is collected in the framework of a sanctioning or investigation process”

The Spanish Data Protection Agency has received many inquiries with regard to the interpretation of the new wording provided by the Twelfth Final Provision of the LOPDGDD, inasmuch as it is related to the need to obtain consent before proceeding to access, by means of data intermediation platforms or other systems enable for this purpose, of any data previously collected by the data subject and which are already held by the Public Administration Entities, such as the need to collect, or not, the express opposition to such access in the framework of the current proceeding.

For the purposes of establishing a practical criterion to be followed to define the data requests and data collection forms used by assignants and assignee of the verification and access services, these guidelines include those criteria already stated by legal opinions 108/2018, 155/2018 and 175/2018.

That is, in **any data processing** derived from the relationship of citizens with Public Administrations and which may include inter-administration data consultation, communication and verification operations, **the legal base for proceedings** is to be found on paragraphs **c) (compliance with a legal obligation)** and **e) (compliance of a public interest purposes or the exercise of public authority)** of article 6.1 of the GDPR. Therefore, it is taken for granted that there is an inherent unbalance between the Public Administration Entities, as data controller, and a citizen, as data subject, in which it is highly unlikely that the consent has been freely given under all circumstances; therefore, such consent shall not be admitted as legal grounds for a legitimate data processing.

Only in those cases where a special law applies requiring express consent, both legal grounds (compliance of a legal obligation and compliance of a purpose of public interest in the exercise of public powers) would be displaced by a consent provided under the conditions established by article 7 of the Regulations.

This consideration must also be taken into account in case that the data processing operations described above **involve special categories of personal data**. In such case, the prohibition to process established on section 1 of article 9 of the GDPR can only be cancelled when accessing such data is needed on grounds of a **fundamental public interest**, as defined by law and including specific guarantees pursuant section 9.2 g of the relevant Regulation.

As a consequence of the above, the **management of the right to oppose** referred by paragraphs 2 and 3 of article 28 of Act 39/2015 must be construed as the right of the data subject, by virtue of article 21 of GDPR to oppose, for any reason related to their particular situation, to have their personal data subject to any proceeding. In any case, when the right to oppose is exerted **a justification must be provided in order to allow the data controller to weight such justification; any opposition in absolute terms shall not be valid** inasmuch it could be understood as revoking a previous consent which has not been actually given, since the legal grounds for a legitimate processing are not user's consent. Besides, any justified opposition submitted by a citizen must have necessarily attached the documents with regard to which the right to oppose is exerted, so that the acting Public Administration Entity may verify whether such documents comply with the necessary requirements as per the corresponding procedures; if they do not, the request shall not be admitted

This construction involves, in practical terms, that, when collecting data linked to an specific proceeding by means of the different forms available in the electronic sites of Public Administration Entities, the acting administration shall carry out the corresponding processing in compliance with a legal obligation, a public interest purpose or in the exercise of their authority. By virtue of the principle of transparency, the acting Public Administration Entity must **inform the data subject of the data which are to be accessed** in order to complete a certain proceeding, as well as of **the possibility of exerting their right with regard to the protection of their personal data**, including the **right to oppose**, providing relevant information about the legal paths to exert such rights. However, it shall not be necessary or compulsory to include a check box or other system allowing the data subject to exert the right to oppose *ad nutum*, in absolute terms and without any supporting justification whatsoever. In the same manner, and pursuant the eighth additional provision of the LOPDGDD, the acting Public Administration Entity is hereby authorised, **in the exercise of their competences, to carry out any verifications needed to ensure that data provided** by a citizen upon request **are accurate**.

Only those cases requiring, due to a special proceeding, access, assignment or communication of tax-related data or other data governed by specific laws and regulations **requiring express consent** by the data subject, a **clause requiring such data subject to authorise access to such data** by the acting Public Administration Entity by action of the assign ant Public Administration Entity must be included.