

IMPLICATIONS OF COVID-19 IN DATA PRIVACY MATTERS

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POSSE | HERRERA | RUIZ



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Authorization for the processing of health-related personal data

Considering the health emergency that was recently declared in Colombia and the different measures that must be adopted in order to contain and mitigate the pandemic declared by the World Health Organization, it would be pertinent to analyze, within the data privacy legal framework, what type of personal information might be useful in order to contain and mitigate the spread of a virus, as well as any applicable exceptions to data privacy laws due to the current situation.

As a general rule, in order to process personal data (understood as *"any information related to or that may be associated with one or more determined or determinable individuals"* in accordance with literal c of article 3 of Law 1581, 2012) it is necessary to obtain an authorization from the data subject, meaning the owner of such personal data. Said authorization requires prior, express and informed consent for data to be processed for the purpose(s) informed by the data controller. This consent must be given by means of any mechanism that allows its subsequent consultation by the data subject or the competent authority.

However, the current legal framework contemplates certain exceptions that allow the processing of personal data without requiring an authorization from the data subject, although requiring that the exercise of rights by data subjects be guaranteed; specifically, article 10 of Law 1581, 2012 establishes that *"the authorization from the data subject will not be necessary under the following circumstances: (...) c) events constituting medical or health emergency."* (Underlined outside the text)

Regarding this particular exception, the Colombian Constitutional Court has recognized that it should be understood as applicable *"(...) only in cases in which, given the specific situation of urgency, it is not possible to obtain an authorization from the data subject or it is particularly problematic to obtain it, given the circumstances of constraint, risk or danger for the protection of other fundamental rights, either of the data subject or of third parties."*

In this sense, it is important to bear in mind that, in order to safeguard fundamental rights of third parties, such as life and health, it is possible to apply these exceptions in a health emergency scenario such as the current one, provided however, that obtaining authorization becomes impossible or requires excessive effort, and guaranteeing that legal principles related to data privacy are observed.

Guidelines for the processing of health-related personal data

The Superintendency of Industry and Commerce ("SIC"), through its website, issued certain guidelines regarding the principles that must be observed for the processing of sensitive data, considering the exception of obtaining authorizations from data subjects in medical or health emergencies. The SIC cautioned that, since health related data is considered sensitive information, its treatment requires special protection measures.

Thus, the data protection authority announced that: (i) the purpose for which data is collected under this exception must be used in order to prevent, treat and control the spread of COVID-19; (ii) it must be guaranteed that the collected information is truthful, complete, exact, updated, verifiable and understandable; (iii) the principle of restricted access and circulation shall be applied so that information is exclusively used to prevent or treat COVID-19; and (iv) security measures must be adopted to prevent the alteration, loss, consultation or unauthorized or fraudulent use and access to information.

Finally, the SIC reiterated that confidentiality must be maintained and guaranteed regarding people's health information, especially nowadays, since said information may lead to situations of discrimination.

Taking into account the sensitivity of the information, the principle of restricted access and circulation of information must be guaranteed, requiring that people who have access to it refrain from disclosing it or making it publicly known, and that technological platforms launched to manage this emergency, have the necessary security





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measures in place to safeguard rights of data subjects. In this sense, the competent authority made a call not to disclose the name of people infected with the virus since it may lead to discrimination.

Obligation to update databases registered in the RNBD remains in full force and effect

In accordance with Title V of the Basic Circular Letter of the Superintendency of Industry and Commerce, those responsible for the processing of personal data must register their databases in the National Registry of Databases ("RNBD") and must update information when:

- i. Substantial changes are made to the recorded information; and
- ii. Annually, between January 2 and March 31, starting in 2020. It should be noted that the duty to register personal databases arises when the data controller has assets equivalent to or above 100,000 UVT.

Recently, the Superintendency of Industry and Commerce suspended terms for the jurisdictional and administrative proceedings held by its different Delegations. However, despite the current situation, the authority has informed through its communication channels that the obligation to update the registered databases remains in full force and effect.

In accordance with the aforementioned information, those responsible for the processing of

personal data must update databases registered in the RNBD before March 31 of this year, which can be done virtually by following the link: <https://www.sic.gov.co/registronacional-de-bases-de-datos>

Supply of personal data to state entities by means of telephone operators and private entities

In order to apply the exception described in literal c) of article 10 of Law 1581, 2012, which provides that *"the authorization from the data subject will not be necessary under the following circumstances: (...) c) events constituting medical or health emergency"* (underlined outside the text), the Superintendency of Industry and Commerce issued on March 23, 2020 an External Circular Letter addressed to mobile phone operators and the Colombian Mobile Industry Association (ASOMOVIL) announcing that *"Colombian law authorizes mobile phone operators and private entities to supply the National Planning Department and other public entities with necessary personal data"* in order to address, prevent, treat or control the spread of COVID-19 and mitigate its effects, as well as to follow the measures adopted by the National Government in relation to this emergency.

In this way, public entities that receive such personal data must use them exclusively to prevent, treat or control the spread of COVID-19 and mitigate its effects, having the obligation to adopt special security measures and observe the principles of confidentiality and restricted access and circulation to preserve sensitive information.

