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ARCHIVE RESOLUTION of the Preliminary Information nos. IP 57/2018, IP 58/2018, IP 59/2018 and IP 60/2018, referring to Arenys de Munt Town Council and the Municipal Group of the Popular Unity Candidacy (CUP) in Arenys de Munt.

Background

1.- On dates 15 and 16/2/2018 they had access to the Catalan Data Protection Authority two written by two people, for which complaints were made against Arenys de Munt City Council (hereinafter, the City Council) and the Municipal Group for the Candidacy of Popular Unity in Arenys de Munt (hereinafter, CUP), with due to alleged breaches of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD).

Specifically, it was stated that on 1/13/2017 an instance had been presented to the City Council by one of the complainants here, who in said letter announced that he was acting on behalf of the "Majority group of people who presented in the elections of May 24 under the acronym of the CUP-PA for Arenys de Munt". This letter contained various personal details, including a number of a bank account of which the complainant would be the holder, together with two other people who held the position of councilors of the CUP in Arenys de Munt (one of them, also here complainant). (...) In the complaints made before this Authority it was indicated that the content of that instance and the documentation that accompanied it would have been revealed to a third party, specifically to the entity Candidatura d'Unitat Popular (hereinafter, CUP), entity that would have subsequently used that information in order to take legal action against him on behalf of the CUP. They also complained about the fact that with respect to the instance presented to the City Council and then disclosed to a third party, the City Council did not give effect to the right to information provided for in article 5 of the LOPD, so that the people those affected were unaware of the possible data communications that the City Council could make, as well as that it would have "prevented our exercise of the rights of access, rectification, cancellation and opposition."

Finally, it also referred to the fact that the lawyer who represented the CUP in the aforementioned legal action, when accessing the personal data, had not given effect to the right to information in accordance with the provisions of article 5.4 of the LOPD. In short, that the violation of the LOPD by the City Council and also by the lawyer representing the CUP was reported.

The complainants provided various documentation relating to the events reported: 1) Copy of the application dated 1/13/2017-registered at the City Council on the same day with settlement number (...)/2017- and the accompanying documentation; 2) Complaint filed by the CUP before a Court. The numbers were assigned to these complaints. IP 57, 58, 59 and 60/2018.

2.- The Authority opened a preliminary information phase, in accordance with article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations, in order to determine whether the facts were likely to motivate the initiation of a sanctioning procedure, the identification of

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the person or persons who could be responsible and the relevant concurrent circumstances.

As part of this information phase, by means of an official letter dated 2/21/2018, the City Council was required to report on several issues relating to the events reported.

The City Council responded to the previous request through a letter dated 6/3/2018, which set out, among others, the following:

- That: "(...) since the approval of the municipal charter on 7/14/15, the CUP group has suffered the excision of two councilors on the one hand and one councilwoman on the other, and that both parties have presented disputes to the City Council for the resolutions that it has been taking, one the (...)section D before the administrative contentious court no. 13 of Barcelona and the other on 44/18-4 before the administrative contentious court no. 1 of Barcelona (...)"
- That: "the two factions of the CUP group have declared themselves interested in all the files that affect the municipal group, but, in the specific case of this instance (...) /17, no record of exit through which the data is communicated and, therefore, no right to information document can be provided."

The City Council provided various documentation with its letter, including a copy of the instance dated 1/13/2017 (...) and the accompanying documentation.

3.- On 2/23/2018 and 3/2/2018, the Spanish Data Protection Agency (AEPD) forwarded to this Authority, two complaints made by the same people who reported here, in which they came to report the same facts set forth in the 1st precedent.

Fundamentals of Law

1.- In accordance with the provisions of article 2 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, in relation to article 5 of the Law 32/2010, of October 1, of the Catalan Data Protection Authority, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Agency Catalan Data Protection Authority, the director of the Catalan Data Protection Authority is competent to issue this Resolution.

2.- Based on the account of events that has been set out in the antecedents section, it is necessary to analyze the reported events relating to the data processing carried out by the City Council, and also the subsequent one that the complainants impute to the lawyer of the CUP in the exercise of a judicial action, but which should be understood as carried out by the municipal group of the CUP of Arenys de Munt, which is also included in the scope of competence of this Authority, as would be corroborated by the fact that the AEPD forwarded to this Authority the complaints that had been presented to that institution, and in which the data processing carried out by the CUP lawyer in the aforementioned complaint was also denounced .

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So, first of all, we will address what refers to the eventual communication of data from the City Council to the CUP; and then, the issue related to the possible breach of the right to information, both by the City Council regarding the data collected through the controversial instance, and also by the municipal group regarding the data eventually collected and included in the complaint

2.1.- About the communication of data.

The first thing to say is that the request and documents presented to the City Council on 01/13/2017 included personal data, in accordance with the definition provided for in article 3.1.a) LOPD: "any information relating to identified or identifiable natural persons". Specifically, the personal data included were the following: a) of one of the people complainants here and who declared there to act on behalf of the "Majority group of people who presented themselves in the elections of May 24 under the acronym of the CUP-PA for Arenys de Munt", the first and last name, ID number, telephone mobile phone, postal address and email address; b) name and surname of two councilors of the municipal group of the CUP-PA of Arenys de Munt (one of them, the complainant here); c) and the bank account number of which the person who had formulated the request and the two councilors mentioned would be the holders, and in which the settlement of certain outstanding amounts relating to their municipal group was requested from the City Council.

As indicated in the background, the City Council has denied that it has transferred to a third party a copy of the instance dated 1/13/2017 (...) ("in the specific case of this instance (..)/17, no exit record has been found through which the data is communicated and, therefore, no document of the right to information can be provided"). In this regard, the complainants have provided a copy of a written extension of the complaint filed on behalf of the CUP, against the complainant here and one of the two councilors of the CUP who appeared in the controversial instance. In the written extension of the complaint, it is expressly stated that: "Specifically, this party has become aware that (...) would have submitted a letter to the register of the Arenys de Munt City Council requesting the "payment of the grant corresponding to the Mixed Group, made up of Mr. (...) and Mrs. (...) to a Banco Sabadell current account number." And further on, it is requested that the Court officiate "the Town Council of Arenys de Munt in order to provide a copy of all the documentation presented by (...) in relation to the entry for any concept to the account number (...)". So, from what was indicated in the letter expanding the complaint, it can be inferred that the representation of the CUP effectively had in some way access to the content of the controversial instance, even if the City Council states that it did not have -formal record of it.

Be that as it may, the case is that this Authority considers that any councilor of the Municipal Group of the CUP in Arenys de Munt Town Hall was legitimate to access the controversial instance. Indeed, the existence of a controversy in the municipal group of the CUP in the City Council following a split cannot be ignored. Faced with this, the City Council has stated that it granted the status of interested persons to all the members of this municipal group with respect to the issues linked to the municipal group, and it seems clear that the facts referred to in the complaint filed by the CUP, would be related to this controversy generated on the occasion of the split of the municipal group.

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Law 19/2014, of December 29, on transparency, access to information and good governance (hereafter LTC) establishes in section 2 of the first additional provision that "access to public information in matters that have established a special access regime is regulated by their specific regulations and, additionally, by this law."

In accordance with this provision, in the case of councillors, the provisions established by the local regime legislation apply, specifically Law 7/1985, of April 2, regulating the bases of the local regime (hereafter LRBRL) and Legislative Decree 2/2003, of April 28, which approves the revised text of the Municipal and Local Government Law of Catalonia (hereafter TRLMRLC). Before analyzing this regulation, it should be clarified that the access by the councilors of a City Council to data included in the City Council's documentation cannot be considered a communication of data in the sense established in the article 3.i.) LOPD previously transcribed, and this because in accordance with the provisions of article 19.2 of the LRBRL, councilors are an integral part of the City Council, so they would not have the status of "third party" .

Having said that, it is necessary to go to article 77.1 of the LRBRL, which determines that: "All members of the local Corporations have the right to obtain from the Mayor or President or the Government Commission the background, data or information in power of the Corporation's services that are necessary for the development of its function".

Also in relation to the right of information of all councillors, article 164 of the TRLMRLC has the following:

"164.1 All members of local corporations have the right to obtain from the mayor or mayoress or the president, or from the governing commission, all the background, data or information that is in the possession of the corporation's services and are necessary for the development of their function.

164.2 Corporation services must provide information directly to corporation members when:

- a) Exercise delegated functions and the information refers to matters of their own responsibility.
- b) These are matters included in the agenda of the sessions of the collegiate bodies of which they are members.
- c) It is about access to information or documentation of the local corporation that is freely accessible to citizens.

164.3 In the other cases, the request for information is understood as accepted by administrative silence if a negative resolution is not issued within four days from the date of presentation of the request. In any case, the negative decision must be motivated, and can only be based on the following assumptions:

- a) When the knowledge or dissemination of the information may violate the constitutional right to honor, personal or family privacy or one's image.
- b) When it comes to matters affected by the general legislation on official secrets or summary secrecy.

164.4 The provisions of the previous sections are understood without prejudice to the obligation to provide all members of the corporation with complete documentation of all matters included in

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the agenda of the sessions of the collegiate bodies, from the moment of the call. When it is a matter covered by a declaration of urgency, the necessary documentation must be distributed, at least, to be able to have knowledge of the essential aspects of the matter under debate.

164.5 The members of the corporation have the right to obtain a copy of the documentation to which they have access. This copy can be obtained in paper format or in the technical support that allows access to the required information.

164.6 The members of the corporation must respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it may harm the interests of the local body or third parties".

Therefore, in accordance with the specific legislation referred to, any member of the local corporation, whether or not he is in the government team or the opposition, can request access to information that is necessary for the development of his functions. In addition, it should be borne in mind that, in accordance with the jurisprudence (STS of 5/11/1999), elected officials are not required to explain or substantiate the purpose of their request, given that the reason for their request must be understood as implicit in the exercise of the functions that correspond to them as elected officials, in the terms provided for in the local regime legislation.

In relation to the information contained in the controversial instance and documentation that accompanied it, it should be remembered that it referred to the liquidation of the outstanding amounts regarding "the majority group of people who presented themselves in the elections of May 24 under the acronym of the CUP-PA for Arenys de Munt". In this sense, article 73.3 of the LRBRL provides the following:

"3. For the purposes of their corporate action, the members of the local corporations will form political groups, in the form and with the rights and obligations that are established with the exception of those who are not part of the political group that constitutes the electoral formation by those who were elected or who leave their group of origin, who will be considered non-affiliated members.

The Plenary of the corporation, in charge of its annual budgets, may assign to political groups an economic endowment that must have a fixed component, identical for all groups and another variable, depending on the number of members of each one of them, within the limits that, as the case may be, are established with a general character in the General Budget Laws of the State and without which they can be allocated to the payment of personnel remuneration of any type in the service of the corporation or the acquisition of goods that can constitute fixed assets of a patrimonial nature.

The economic and political rights of non-affiliated members may not be superior to those that would have corresponded to them had they remained in the group of origin, and will be exercised in the manner determined by the organic regulations of each corporation.

This provision will not apply in the case of candidacies presented as an electoral coalition, when any of the political parties that make up it decide to abandon it.

The political groups must keep a specific accounting of the endowment referred to in the second paragraph of this section 3, which they will make available to the Plenary of the Corporation, whenever it requests it.

When the majority of the councilors of a municipal political group leave the political formation that presented the candidacy for the one they contested in the elections or are

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expelled from it, the councilors who remain in the aforementioned political formation will be the legitimate members of said political group to all intents and purposes. In any case, the secretary of the corporation will be able to address the legal representative of the political formation that presented the corresponding candidacy in order to notify the accreditation of the circumstances indicated."

Therefore, by virtue of what is determined by article 164.2 of the TRLMRLC and article 73.3 of the LRBRL that has just been transcribed, access to the information contained in the controversial documents by CUP councilors could be justified, to deal with information referring to matters of their own responsibility, given that the different municipal groups of which councilors are part, must keep a specific accounting of the amounts received at the expense of the municipal budget. And also because the councilors who remained in the municipal group of the CUP after the split, would be in accordance with the provisions of art. 73.3 of the LRBRL the legitimate members of the aforementioned municipal group.

However, without prejudice to this legal authorization to access the content of the controversial documents, it must be borne in mind that once this access has been made, in accordance with the provisions of article 164.6 TRLMRLC, the councilors "have to respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it may harm the interests of the local body or third parties". This duty of secrecy is also explicitly provided for in article 10 of the LOPD: "The person responsible for the file and those who intervene in any phase of the processing of personal data are obliged to professional secrecy with regard to the data and the duty to keep them, obligations that subsist even after ending their relationship with the owner of the file or, where applicable, with their manager".

The duty of secrecy or confidentiality provided for in article 10 LOPD entails that, both the person responsible for the file, and any other person who intervenes in the processing of personal data, do not disclose them to third parties outside of the cases permitted by the law, that is to say, it implies a duty to diligently guard the personal data subject to treatment. The natural person holding the data must have the guarantee that both the person in charge of the file and anyone who intervenes in the treatment of the personal data will preserve the same, that they will treat them in accordance with the consent granted for a certain purpose, or the legal provision that enables this treatment, and that there will be absolute confidentiality.

Well, from the documentation provided by the complainants, it can be inferred that indeed, based on the eventual access to the aforementioned information by a member of the CUP, that information would have been used within the framework of the judicial complaint filed by the CUP against the complainants here.

Article 270 of the Criminal Procedure Law approved by Royal Decree of September 14, 1882 (henceforth, LECrim) provides that all Spanish citizens, whether or not they have been offended by a crime, can complain, exercising the popular action established in article 101 of the LECrim. In turn, article 277 of the LECrim establishes that the complaint must include, among others, the name, surname and neighborhood of the person sued as well as the circumstantial relationship of the fact, with an expression of the place, year, month day and time it was executed, yes

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are known and finally, the expression of the diligences that should be practiced to verify the fact.

The set of precepts that have been mentioned so far would therefore enable people who are councilors of the CUP in Arenys de Munt to access the information contained in the disputed instance, and to use the data recorded there to include them in the story of the facts carried out in the complaint formulated in exercise of the right of defense of art. 24 of the EC. It is worth saying that the purpose for the exercise of rights is provided as an element favorable to access to information, if it contains personal data of third parties other than the applicant, in requests for access made by any person and subject to Law 19/2014, which in the present case is not applicable due to the existence of specific legislation for access to information of councillors, which has a wider and more privileged regime.

In short, we would therefore be dealing with personal data treatments that did not require the unequivocal consent of the affected person, to be provided for in the law, so that they would be lawful treatments, in accordance with art. 6.1 of the LOPD.

At this point, it should be remembered that of the set of personal data that appeared in the demand and documentation that accompanied it, in the written complaint provided with the complaint only the minimum data relating to the facts to which referred to the complaint, so that it would conform to the principle of data quality provided for in article 4 of the LOPD, principle according to which personal data can only be collected for processing when they are adequate, relevant and not excessive in relation to the specific, explicit and legitimate scope and purposes for which they have been obtained. Proof of this is that at the end of the complaint, the Court was requested to go to the Arenys de Munt City Council to provide a copy of the disputed instance and documentation.

This consideration that is made with respect to the treatments reported and analyzed here, would coincide with that made by the National Court in its Judgment of 11/01/2011: "As rightly pointed out in the Resolution de archivo de la Agencia Española de Data Protection, along with the fundamental right to the protection of personal data, there are other fundamental rights-such as the right of defense, to legitimately use means of proof in defense of one's right and effective judicial protection-that could be compromised if would make that fundamental right prevail in any case, which neither results from the Spanish Constitution nor from the constitutional jurisprudence that interprets it.

Certainly not every restriction or limitation of the structural principles of the right to data protection, such as that of consent, is justified for the sake of the right to defense or effective judicial protection, but in this case this Court cannot do I have no objection to the weighting carried out by the Social Courts and by the Spanish Data Protection Agency."

2.2.- Regarding the right to information

As has been said, the complainants also referred to the alleged violation of the right to information, both with respect to the data collected by the City Council through the receipt of

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the instance, as regards the data used later by the CUP lawyer in the complaint.

The first thing to say about the right to information is that data protection legislation regulates it differently, depending on whether the data is collected directly from the data subject or not. This different regulation was already provided for in Directive 95/46/EC of the European Parliament and of the Council, of October 24, 1995, relating to the protection of natural persons with regard to the processing of personal data and the free disposal of 'this data (articles 10 and 11); and this differentiated scheme has also been maintained by art. 13 and 14 of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data and which repeals Directive 95/46/EC (RGPD). And the same can be said of the LOPD, which despite collecting all the regulations on the right to information, differentiates specifically in sections 4 and 5 of article 5, the case in which the data is not collected from the interested

2.2.1.- Alleged violation of the right to information by the City Council.

In this respect, the complainants complained that in relation to the personal data recorded in the instance presented on 13/01/2017, they had not been informed of the ends provided for in article 5 of the LOPD, which is why they did not know that "our bank details were going to be made available to other people preventing us from exercising our rights of access, rectification, cancellation and opposition."

Indeed, at the time that instance was presented, art. 5 of the LOPD obliged to report the extremes provided for in art. 5.1 of the LOPD, and in the case of using forms or model forms, as was the case in the contested instance, said information had to appear on said printed form (art. 5.2 LOPD). It is worth saying that from 05/25/2018 the right to information must be fulfilled according to the provisions of art. 13 and 14 of the RGPD.

Well, in the instance presented on 01/13/2017, the required information clause is not displayed, and even if the CUP letterhead appears next to the City Council's coat of arms, this local body would be responsible for the treatment because it was addressed to the mayor of the City Council, and therefore he was obliged to comply with art. 5 of the LOPD. To the above, it should be added that there is also no evidence that the City Council had subsequently informed of the right to information. However, the fact is that any infraction committed by the City Council to violate the right to information would have been time-barred, which precludes the formulation of any charges in this regard. In effect, failure to comply with the duty to provide information could constitute a minor offense provided for in article 44.2.c) LOPD.

Well, on the figure of the prescription, article 47 of the LOPD establishes the following:

- "1. Very serious infringements expire after three years, serious ones after two years and minor ones after one year.
2. The limitation period begins to count from the day on which the offense was committed."

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In accordance with the above, the limitation period applicable to the present case would be one year, as it is a minor infraction, the calculation of which would begin on the day on which the alleged infraction would have been committed, that is to say, on 1/13/2017, the date on which the request was submitted to the City Council Registry. As things stand, the eventual reported infringement would have been time-barred on 1/13/2018, that is to say, it would have already been time-barred prior to the filing of the complaint in February 2018.

The prescription of the infringement causes the extinction of the responsibility that could be derived from the eventual infringing conduct, which in turn would prevent the initiation of the corresponding sanctioning procedure, since no action could be taken to pursue the alleged infringement .

2.2.2. Alleged violation of the right to information by the CUP of Arenys de Munt.

On the other hand, the complainants also complained about the alleged violation of their right to information, to the extent that the lawyer who acted on behalf of the CUP in the judicial complaint, would have violated the duty to inform about the personal data that would not have been collected directly from the interested party. So it is necessary to go to the regime specifically provided for this case in article 5.4 and 5.5 of the LOPD. On the one hand, the art. 5.4 determines the following:

"4. When the personal data have not been collected from the interested party, the latter must be informed expressly, precisely and unambiguously, by the person in charge of the file or by their representative, within three months following the moment of registering the data, of content of the treatment, the provenance of the data and what is provided for in letters a), d) and e) of section 1 of this article, unless you have already been informed previously".

And then, the art. 5.5 adds that the duty of information referred to in art. 5.4 will not be enforceable when "a law provides for it", a provision that must be interpreted according to what is provided for in the precept that transposed it, that is to say, art. 11.2 of Directive 95/46/EC, in which it was provided that the information required for the case in which the data has not been collected from the interested party but from a third party, does not need to be provided "when the registration or the communication to a third party are expressly prescribed by law".

This scheme of exemption from the duty of information has also been maintained in the new RGPD, which in its art. 14.5 foresees four cases in which the information requirements of paragraphs 1 to 4 of article 14 do not apply. Specifically, article 14.5.c) exempts the duty of information to interested parties "when the obtaining or the communication is expressly established by the Law of the Union or of the Member States", an exception that is consistent with that already provided for in article 11.2 of Directive 95/46/EC, and which was transposed by article 5.5 LOPD.

So, as set out in the legal basis 2.1 of this resolution, the legal rules invoked there legitimized the people who are councilors of the CUP in Arenys de Munt to access the controversial data and their subsequent treatment, linked to municipal functions. We are therefore dealing with data treatments provided for in a rule with the rank of law, cited in the legal basis 2.1.

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In short, it is based on the existence of rules with the rank of law that have expressly provided for the collection and/or processing of personal data to which the complaint refers, and based on these legal powers, given that the data are not 'had collected directly from the interested parties -here complainants-, it was not required to comply with the right of information of these interested parties, based on the provisions of art. 5.4 and 5.5 of the LOPD and the equivalent precepts of Directive 95/46/CE.

3.- In accordance with everything that has been set forth in the 2nd legal basis, and since it has not been proven during the present information prior to the existence of rational indications that allow imputing any fact that could be constitutive of any of the infractions provided for in the LOPD, it is necessary to agree on the archive of the present actions.

Article 89 of Law 39/2015, in accordance with articles 10.2 and 20.1 of Decree 278/1993, provides that the proceedings shall be archived when in the instruction of the procedure the following is highlighted: "c) When the proven facts do not manifestly constitute an administrative infraction" and "e) When it is concluded, at any time, that the infraction has expired".

For all this,

RESOLVED

First.- File the actions of prior information IP numbers 57, 58, 59 and 60/2018, relating to Arenys de Munt Town Council and the Municipal Group of the People's Unity Candidacy in Arenys de Munt.

Second.- Notify this Resolution to the City Council of Arenys de Munt, to the Municipal Group of the Candidature of the People's Unit in Arenys de Munt and communicate it to the complainants.

Third.- Order the publication of the Resolution on the Authority's website (www.apd.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the denounced entity can file, with a discretionary character, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with the provisions article 123 et seq. of Law 39/2015 or directly file an administrative contentious appeal before the Courts of Administrative Disputes, within two months from the day after its notification, in accordance with articles 8 , 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction.

Likewise, the reported entity may file any other appeal it deems appropriate for the defense of its interests.

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The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)

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