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File identification

File resolution of the Prior Information no. IP 164/2018, referring to the Sant Pere de Ribes Town Council.

Background

1. On 15/06/2018, the Catalan Data Protection Authority received a letter from a trade union section in which it set out some facts relating to Sant Pere de Ribes Town Council. Specifically, this entity indicated that the City Council had provided employees with a form in which, in order to communicate through electronic means, they were required to provide information about "their telephone number and their personal email address". thing at the union's discretion, could go against the doctrine established by the Supreme Court in the judgment of 9/21/2015. The entity provided a copy of said form.

2. The Authority opened a preliminary information phase (no. IP 164/2018), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application 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 (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 06/28/2018 the Sant Pere de Ribes Town Council was required to report, among others, on the reasons why the Town Council would not use the corporate email for communicate electronically with employees.

4. On 11/07/2018, the Sant Pere de Ribes City Council responded to the request mentioned through a letter in which he stated the following:

   - That in the context of the obligation established in article 14.2 e) of the LPAC, in order to implement electronic administration in relation to the right and obligation of public administration employees to communicate electronically in all those procedures and actions carried out with the City Council in their capacity as workers, on 04/27/2018 authorization was requested for the electronic notification of all City Council employees so that provide an email where notifications can be made.

   - That this obligation is not conditioned or subordinated to the aforementioned regulatory development.

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- That it was proposed to provide an external address to the City Council, given that not all the
workers have an electronic address at their place of work (workers of specific services, gardening, employment plans, cleaning and public road maintenance workers, etc.) and given that the work address does not allow the consultation of the mail if they are not at their place of work. This fact would cause notifications related to situations of leave, absence from work, etc., not being able to be attended to by the worker.

- That the address to provide is a decision of the worker, as well as the consequences of not being able to access outside of working hours.

The Sant Pere de Ribes City Council attached various documentation to the letter.

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Agency, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

2. Based on the account of facts presented in the background section, it is necessary to analyze the facts presented by the entity that went to this Authority, to consider that they could violate data protection legislation.

As has been advanced in the precedents, the union section questioned that the City Council could compel its employees to provide certain data in order to communicate through electronic means. To that effect, he invoked the Supreme Court Judgment of 09/21/2015 (appeal no. 259/2014), issued in the corporate jurisdiction, and in which it was determined that: "the data whose incorporation into the contract is questioned [teléfono móvil/correo electrónico] are in no way exempt from the worker's consent. They are not in the general exception of art. 6.2 LOPD, because absolutely “they are necessary for the maintenance or compliance” of the employment contract (...)”

In the present case, when the City Council requested this data from the employees (27/04/2018), Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, was not yet applicable , relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereafter, RGPD). This last rule is fully applicable from 05/25/2018, as established in article 99 of the RGPD.

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Therefore, the request for information made by the City Council must be resolved in accordance with the provisions of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD) , rule applicable at the time of the facts raised here.

On the basis of the above, it is considered that the controversial treatment is not based on the exception to consent provided for in article 6.2 of the LOPD - to which the STS invoked by the reporting entity alluded -, which legitimizes the treatment when the data "refer to the parties to a contract or a pre-contract of a business, employment or administrative relationship and are necessary for its maintenance or fulfillment".

This Authority considers that in relation to the personal data required by the City Council, it is necessary to go to article 6.1 of the LOPD, which establishes that "The treatment of personal data requires the unequivocal consent of the affected, unless that the law provides something else".

Thus, the aforementioned precept enabled the processing of personal data to be carried out without the consent of the affected person, if this is provided for by a rule with the rank of law. In this regard, article 14.2 of the LPAC provides the following:

> "2. In any case, at least the following subjects are obliged to communicate through electronic means with the public administrations to carry out any procedure of an administrative procedure: (...) e) The employees of the public administrations for the procedures and actions that they carry out with them due to their status as public employees, as determined by the regulations of each Administration."

Thus, the transcribed precept obliges public administration employees to to relate through electronic means with the public administrations, in that which affects the procedures and actions carried out with them due to their status as a public employee of the administration in question. Certainly, article 14.2.e) of the LPAC establishes that this electronic relationship must be regulated by each Administration. The regulatory provisions that are issued in development of article 14.2.e) of the LPAC may detail how the relationship must be through electronic means, but the absence of this regulatory development, in no case can exempt public employees from the obligation to relate -se electronically with your administration. Another thing is whether, in compliance with this obligation, the employed person must provide his private email address.

Having established the above, it must be concluded that the processing of the data of public employees that are necessary to relate to them through electronic means, in accordance with article 14.2.e) of the LPAC, did not require the consent of

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affected persons when this treatment is provided for in a rule with legal rank (article 6.1 of the LPOD).

It is worth saying that, the full application of the RGPD from 25/05/2018 would not alter the legality of the treatment disputed here, since in such a case the legal basis of this treatment would be the fulfillment of a legal obligation provided for in article 14.2.e) of the LPAC, so the treatment would also be lawful, since this would be necessary for the fulfillment of a legal obligation applicable to the person in charge of the treatment (article 6.1.c of the RGPD).

As has been advanced, from the perspective of the principle of proportionality regulated in article 4.1 of the LOPD and today included in article 5.1.c of the RGPD, under the name of the principle of minimization, it is not 'infers that the electronic address that the employed persons had to provide in order to relate to the City Council through electronic means, necessarily had to be their private one. In other words, from the point of view of the aforementioned principle and taking into account that the City Council had not determined by regulation the conditions of the relationship through electronic means with the employees, it cannot be described as necessary that the The City Council requires its employees to provide this personal data, which resides in the private and non-professional sphere.

That being the case, the processing of the private email address of employees, with the purpose of relating to them through electronic means, could not be lawful, in order not to meet the aforementioned legal basis.

At this point, some considerations should be made regarding consent as a legal basis. In this respect, the RGPD establishes in Recital 43 that to ensure that consent has been freely given, this must not constitute a valid legal basis for the processing of personal data in a specific case where there is an imbalance clear between the data subject and the controller, in particular if said controller is a public authority and therefore it is unlikely that consent was freely given in all the circumstances of that particular situation. In turn, the Working Group of Article 29 on Data Protection, in the guidelines on consent in the sense of the RGPD (WP 259) points out that in the work context there is also an imbalance of power, in the as it is unlikely that an employed person will be able to freely respond to the request for consent. In the present case, it seems that this inequality was manifest, in the understanding that in the e-mail that the City Council sent to the employees on 04/27/2018, by which the authorization for the notification was attached employees' email, it was indicated that "The attached document must be completed by entering the requested data, specifically, in relation to the email, it must be different from the one available as a City Council employee. "

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It is worth saying that the City Council argues for such a request in which not all employees have a corporate email address and because it is not possible to check the mailbox if the employees are not at their place of work. It can therefore be inferred from this statement that consultation is only allowed if the computer equipment is connected to the City Council's network.

These circumstances led the City Council to consider it necessary request a different e-mail address than the corporate address that the employee may have. At this point it should also be added that, this collection of another email address different from that of the corporate email that the City Council can provide, could also have its justification in avoiding eventual damages to the employees who, due to their situation (such as those indicated by the City Council: leave or absence from work) could not be aware of the notice as a notification has been sent to them by electronic means, which would imply that such notification was understood to be rejected, because ten calendar days from the notification being made available without its content having been accessed, in accordance with article 43.2 of the LPAC.

To the above, it should be added that article 14 of the LPAC does not precisely and completely regulate how the obligation of employees of Public Administrations to relate electronically with them must be complied with, for the procedures and actions they carry out due to their condition. In this respect, the precept foresees that each Administration determines by regulation the conditions under which this obligation must be fulfilled.

All this leads to consider that the facts that led to the complaint of the trade union section do not have sufficient entity to qualify them as constitutive of one of the infringements provided for in the data protection legislation, and specifically for the alleged violation of the legality of the treatment. Consequently, it is not considered appropriate to initiate a disciplinary procedure.

However, it is considered that the treatment that the City Council may eventually carry out of the private email address of the employees who had complied with the request that the City Council had addressed to them, from the point of view of the RGPD, could not adjust se to the principle of data minimization enshrined in its article 5.1.c), so as not to be strictly necessary to achieve the purpose pursued, consisting of being able to communicate with its employees by electronic means to comply with the obligation imposed by the art 14 of the LPAC. Indeed, of the provisions of art. 14.2.e) of the LPAC it can be inferred that the burden falls on the City Council to provide the necessary means to enable communications with its employees by electronic means. This is why, as will be explained later, the City Council should issue a warning in this regard.

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3. In accordance with everything that has been set out in the 2nd legal basis, and given that during the previous information it has not been proven that there are rational indications that allow imputing any fact that could be constitutive of any of the violations provided for in the applicable legislation, it is necessary to agree on the archive of these actions. Article 89 of the LPAC, in accordance with articles 10.2 and 20.1 of Decree 278/1993, provides that it is necessary to file the actions when the following is highlighted in the instruction of the procedure: "c) When the proven facts do not manifestly constitute an administrative infraction."

4. Article 58.2.d) of the RGPD empowers the control authorities, in the exercise of their corrective powers, to order the person in charge that the processing activities comply with the RGPD. In turn, article 8.2.c) of Law 32/2010 empowers the director of the Authority to require those responsible and those in charge of the treatment to adopt the necessary measures for the adequacy of the treatment of personal data subject to investigation in current legislation.

It is by virtue of this faculty that, despite the archiving decision based on the arguments expressed above, it is considered appropriate to require the Sant Pere de Ribes City Council to stop collecting the data relating to the electronic address particular of the employed persons, and respect the data that had already been collected previously of employees who had responded to the City Council's request using the controversial form, to delete them.

Once the corrective measure described has been adopted within the period indicated, within the next 10 days the Sant Pere de Ribes City Council must inform the Authority, without prejudice to the inspection faculty of this Authority to carry out the corresponding checks.

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 164/2018, relating to the Sant Pere de Ribes Town Council.

2. To require the Sant Pere de Ribes City Council to adopt the corrective measures indicated in the 4th legal basis and to accredit before this Authority the actions taken to comply with them.

3. Notify this resolution to Sant Pere de Ribes City Council and communicate it to the person making the complaint.

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4. 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 The City Council may file, with discretion, 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 what provided for in article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts, 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 the administrative contentious jurisdiction.

Likewise, the City Council can file any other appeal it deems appropriate to defend its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)