

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

File identification

Archive resolution of the previous information no. IP 186/2018, referring to the City Council of Gavà

Background

1. On 10/07/2018, the Catalan Data Protection Authority received a letter from a person who filed a complaint against Gavà City Council, on the grounds of an alleged breach of the regulations on personal data protection. Specifically, the person making the complaint stated that a certain media outlet had published a news report that the City Council had planned to notify complaints for administrative violations relating to the request, offer and practice of remunerated sexual relations in public, at the home of the alleged infringer (customers). Therefore, it was inferred that the Gavà City Council did not notify the client and alleged infringer in the act, but rather that the complaint was notified at the latter's address.

The reporting person provided various documentation relating to the events reported.

2. The Authority opened a preliminary information phase (no. IP 186/2018), 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 11/07/2018, the Inspection Area of the Authority went access the news that the complainant linked in his complaint, published on "eldiario.es" on 07/10/2018.
4. On 07/16/2018, also during this preliminary information phase, the Authority's Inspection Area verified via the internet that Gavà City Council had published, the 07/09/2018, the following press release: "Gavà promotes new actions to eradicate prostitution". Among others, this note stated the following:

"The Councilor for Equality, (...), has explained that "new actions are being launched this summer, including home notification of fines to customers. This is a substantial change with respect to the campaign started last year with the aim of documenting the illegal activity that is being carried out."

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

5. On 16/07/2018 and still within the framework of this preliminary information phase, the reported entity was required to inform, among others, whether the home notification system had already been implemented of people who request sexual services, who would have been reported for alleged violations; as well as for it to indicate the reasons that would eventually prevent the alleged offenders from being personally notified of the complaint at the time of formalizing the complaint, as well as those that would justify the change announced by the City Council to notify at home.
6. On 27/07/2018, Gavà City Council responded to the request mentioned in through a letter in which he stated, among others, the following:
- That although no notification had yet been sent to the address (electronic or postal) of the alleged infringer, the demonstration of a political nature made regarding the notifications: "new actions are being launched, among them the notification at home (...) to record the illegal activity he is doing", did not affect, nor modify the ordinary legal processing of the sanctioning administrative files initiated by the City Council.
 - That notifications corresponding to infringements of all types are made to the address provided by the alleged infringer: electronic or physical address indicated by the person concerned.
 - That the notifications of the sanctioning procedure are only addressed to the person concerned and in no case is this information disclosed to third parties.
 - That the notification of the complaint to the suspected offender is carried out by the Municipal Police officer, on site, always in person, once the reported facts have been visualized and confirmed, by hand-delivering the complaint sheet.
 - That the payment of the fine by the person reported by the Municipal Police officer results in the end of the procedure, so in accordance with what is established in articles 84 and 85 of the LPAC, notification will be made to the interested party the resolution of the procedure.
 - That this agreement to end the procedure was not notified to the person concerned ("this is the novelty"), since until then, in the notices of traffic violations, motor vehicle circulation and road safety, it was reported that the payment with a reduction within the corresponding term entailed the waiver of making allegations and the end of the procedure, without express resolution.
 - That the complaint bulletins are being adapted to inform that in case of sanctions by the Municipal Ordinance on the use of roads and public spaces, the express resolution of the end of the procedure will be notified.
 - That the information contained in the sending of the notification of the resolution on paper, which could be accessed by a person other than the person concerned, does not state the typology of the disciplinary file.

The reported entity attached various documentation to the letter.

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

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 that has been presented in the background section, it is necessary to analyze the facts denounced

From the previous information actions carried out, it has been established that, contrary to what could be inferred from public demonstrations by a councilor from Gavà City Council -which precisely gave rise to the present complaint-, this City Council has declared to the Authority that it does not plan to notify the complaints for administrative violations relating to the request, offer and practice of paid sexual relations in the public street, at the home of the allegedly infringing person (clients), when this notification can be made directly to the alleged infringer at the scene. So, the change with respect to the previous system consists of notifying this person of the resolution of the sanctioning procedure, which will be issued expressly from the change (previously it was not issued when there was advance payment). In fact, in the press release of the Gavà City Council of 07/09/2018, although the councilor's statements were included, the subtitle indicated that "Customers will receive notification of the penalty at home his".

Having established the above, it is worth saying that the legality of this data processing would be based on the exercise of the public powers attributed to the data controller (Article 6.1.e of the RGPD); and with regard to data on sexual life or sexual orientation, which are considered special category data (Article 9 of the RGPD), the legal basis for the treatment would be in Article 9.2.g), which allows it to be carried out without need for the consent of the affected person when the treatment is necessary for reasons of essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, respect in the essential the right to data protection and establish appropriate and specific measures to protect the interests and fundamental rights of the interested party.

Indeed, in the processing of the sanctioning procedure, Gavà City Council exercises the sanctioning power, which involves the processing of personal data of the alleged infringer.

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

Having said that, the news that the complainant referred to and the statements included in the municipal press release seem to refer to the case in which the alleged infringer proceeds to pay the fine and/or acknowledges his responsibility.

Well, as the Gavà City Council indicates, in this case sections 1 and 2 of article 85 of the LPAC determine that:

- "1. Once a penalty procedure has been initiated, if the offender acknowledges his responsibility, the procedure can be resolved with the imposition of the appropriate penalty.
2. When the sanction is solely pecuniary or it is necessary to impose a pecuniary sanction and another of a non-pecuniary nature but the impropriety of the second has been justified, the voluntary payment by the presumed responsible, at any time prior to the resolution, implies the termination of the procedure, except with regard to the replacement of the altered situation or the determination of compensation for damages caused by the commission of the infringement."

In accordance with the above, when the infringing person acknowledges his responsibility once the procedure has been initiated, the resolution can be issued in which it is determined what is the appropriate penalty to impose. On the other hand, the voluntary payment of the pecuniary sanction (fine) at any time prior to the resolution by the person allegedly infringing, even if it is not accompanied by the recognition of responsibility, implies the termination of the sanctioning procedure, without prejudice of the exceptions provided for in article 85.2 of the LPAC. That being the case, the termination of the procedure will result in the City Council issuing the corresponding resolution (article 84 of the LPAC).

In any case, the resolution issued must be notified to the persons interested in the sanctioning procedure in accordance with articles 21.1 and 40.1 of the LPAC.

With regard to the practice of notifying the resolution that should be done on paper and not by electronic means, the City Council has stated that the acknowledgment of receipt document that accompanies the shipment (in a sealed envelope) does not include information that makes it possible to infer what the imputed facts are that can be considered constitutive of an administrative infraction, which would be detailed in the document included in the shipment, in a sealed envelope. Therefore, among the information that is visible when the shipment is made and that could be accessed by third parties (such as the person who practices the notification or the person who, in the event that the recipient is not present at his address, takes charge of the notification), there are no data on the type of sanctioning file.

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

In this sense, it is important to remember that the disclosure of this information to a third party would imply a violation of the principle of confidentiality provided for in article 5.1.f) of the RGPD. Likewise, article 10 of Organic Law 15/1999, of December 13, on the protection of personal data also provides that the data controller and those "who intervene in any phase of the processing of personal data are bound by professional secrecy with regard to the data and the duty to save it, obligations that subsist even after the end of their relationship with the holder of the file or, where applicable, with its manager. your staff."

In short, in the present case there is no evidence that the notification of the decision to the infringing person entails a breach of the duty of confidentiality.

3. In accordance with everything that has been set forth in the legal basis 2, and given that during the previous information it has not been proven that there are rational indications that allow imputation of 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, foresees that the actions should be archived when the following is made clear in the instruction of the procedure: "a) The non-existence of the facts that may constitute the infringement; b) When the facts are not proven".

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 186/2018, relating to the City Council from Gavà
2. Notify this resolution to Gavà City Council and communicate it to the person reporting
3. 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 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 the which provides for article 123 et seq. of Law 39/2015. You can also file an appeal directly

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

administrative litigation before the administrative litigation 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 of the administrative contentious jurisdiction.

Machine Translated

Carrer Rosselló, 214, esc. A, 1st 1st
08008 Barcelona

Likewise, the reported entity 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)

Machine Translated