

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

File identification

Archive resolution of the previous information no. IP 233/2019, referring to the Catalan Corporation of Audiovisual Media, SA

Background

1. On 08/25/2019, the Catalan Data Protection Authority received a letter in which a person filed a complaint against the Catalan Corporació de Mitjans Audiovisuals SA (hereinafter, CCMA), on the grounds of a alleged breach of the regulations on personal data protection. Specifically, the complainant stated that in the Telenotícies Vespre (TN Vespre) space broadcast on (...)2019, his image appeared illustrating a report on (...) in Barcelona's municipal swimming pools, made which, according to his understanding, violated his right to privacy and data protection. The person reporting identified himself with the person who appeared in the minutes (...) of the aforementioned TN Vespre.

Along with his letter, the complainant provided the email that was sent to him on (...)2019 from the CCMA 's "Attendance to the Audience", through which they responded to the complaint that they had previously had formulated about the dissemination of his image in the aforementioned report. This email contains the following verbatim:

"(...) we regret what happened and ask for our most sincere apologies. We proceed to remove the image so that it will never be used again (...)"

2. The Authority opened a preliminary information phase (no. IP 233/2019), 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. On 07/10/2019, as part of this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint. Thus, the following was established:

- You can access the "Evening news" of (...)2019.
([https://www.ccma.cat/tv3/alacarta/telenoticies/telenoticies-vespre \(...\)/](https://www.ccma.cat/tv3/alacarta/telenoticies/telenoticies-vespre (...)/))
- That in this newscast, immediately after the space of time, from the minute (...), a report is broadcast on (...) in Barcelona's municipal swimming pools.
- That this report is accompanied by an illustrative video in which images are shown that collect an overview of some swimming pools, and in which several appear

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

people In some plans the images show one or two people. Images in which people appear are not pixelated.

This inspection action was reflected in the corresponding due diligence, to which a digitized copy of the TN evening referred to above was incorporated, in which the following is observed:

- a) At minute (...) (up to minute (...)) the image of a woman - the only person who appears in the image - is shown, dressed in a bathing cap, and (...), who is sitting on the edge of the pool.
- b) At minute (...) (up to minute (...)) the image of a woman is shown in a side view - the only person that appears in the image -, (...), and with glasses of the sun, who is lying on a hammock reading.

4. In this information phase, on 14/10/2019 the reported entity was required to report on several issues related to the reported events, specifically:

- Indicate the reason that would justify the need to illustrate with images such as those reported on aforementioned report broadcast on TN Vespre on (...)2019.
- Inform whether the people who, in a similar way to that of the person reporting here, appear in said report, were informed and/or asked for their consent.

5. On 11/11/2019 the CCMASA responded to the previous request in writing in which it set out the following:

- That following the complaint that on (...)2019 the complainant made to the Hearing Service, on (...)2019, *"with the purpose of attending to the request of Ms (...), the Information Services of the CCMA SA requested different people from their organization to proceed, on the one hand, with the depublication of the TNs of the day (...)(...), and, on the other hand, to the de-publication of the videos of the news that are published on the CCMASA website separately from the TNs. The same (...) the technical services of the CCMASA proceed to withdraw the videos of the news, which are published in isolation in the TN, but unfortunately, by mistake, they did not proceed to depublish the TNs despite having- instructions are given to unpublish them"*.
- That *"due to the request of this Authority that we are now responding to, the CCMASA has taken note of the error committed and on October 29 the technical services proceeded to depublish the TNs"*.
- That *"the reasons that justified the use of the image of the reporting person were social uses, public interest in the news and the existence of a relevant historical and cultural interest"*.
- That *"being a filming produced in a public space, it was considered that there was no need to ask for permission to the extent that the person in charge of the facilities authorized the access of the cameras of the CCMASA"*.
- That, *"once the affected person contacted CCMASA and made it public that he did not want to go out, they proceeded to adopt the measures previously set out and mark in the file that the images could not be broadcast again"*.

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

The reported entity attached to its letter the internal emails dated (...)2019, by means of which the corresponding department was requested to depublish certain videos.

6. On 04/03/2020, also during this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint . Thus, the following was established:

- By entering the URL in the browser: <https://www.ccma.cat/tv3/alcarta/telenoticies/telenoticies-vespre> (...) / the following message appears in relation to the TN Evening of date (...)2019: *"This video is unpublished"*
- That the CCMA website is accessed, in the TV3 section "a la carte">"TN Vespre" and it is checked that the one corresponding to the day (...)2019 is not accessible, giving the same message indicated in the previous section.
- That "(...)barcelona telenoticies" are entered as search terms in the Google search engine . The search results in a video titled *"Users (...) - Sign language"*, which corresponds to the report on (...) in Barcelona's municipal swimming pools that was shown on TN Vespre del dia (.. ..)2019, edited for people with hearing disabilities. The video has a duration of (...) minutes and shows in its entirety the report that was the subject of a complaint.
- That the two videos that also appear as a result of the search cannot be viewed, showing one of the following messages *"video without internet broadcasting rights"* or *"This video is unpublished"*
- That you access the CCMA website, in the TV3 "a la carte" > "TN Vespre" section, "clips" section. Next , the day (...)2019 is entered in the date finder and it is checked that it is you can access the viewing of the report titled *"Users (...) - Sign language"*, indicated above.

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 set out in the background section, it is necessary to analyze the reported facts that are the subject of this file resolution.

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

As has been advanced in the antecedents, the complainant complained about the dissemination of his image in a report about (...) in the municipal swimming pools of Barcelona that had been broadcast on TV3's Telenotícies Vespre, on day (...) 2019. The complainant identified himself with two images that illustrated said report (3rd *in fine precedent*) and believed that such dissemination violated, among others, his right to data protection.

In the case that concerns us here, it is of particular importance to elucidate whether the controversial images should be considered personal data.

Article 4 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (in hereinafter, RGPD), defines personal data as *"all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person"*.

This definition is complemented by the provisions of recital 30 of the same rule:

"(...) To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the controller or any other person to directly or indirectly identify the natural person must be taken into account.

To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment like technological advances (...)"

On the consideration of the personal image as data and on the subjection of this issue to the provisions of the data protection regulations, the jurisprudence has been clearly pronounced on numerous occasions (for all, Judgment of the National Court of 29/09/2011).

However, both the jurisprudence and the precepts transcribed above require that the image, for it to be considered personal data, it must comply with the requirement of identifiability, that is to say, that the image in question must allow the identification of the person or persons appearing in it. And it must be said that this requirement - identifiability - cannot depend on the subjectivity of the affected person - which, in good logic, is easy for him to recognize himself - but must be identifiable, without disproportionate efforts, on the part of other people

Well, in this respect it must be said that this Authority believes that, in relation to the images that are the subject of the complaint, the concurrence of the requirement of identifiability is not clear. Indeed,

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

among others, the distance and the angle from which said images were taken would make it difficult largely the identification of the affected person. In this regard, it should be noted that in one of the images - taken, as has been said, from a considerable distance - the person appears dressed in a bathing cap; and, in the other image, the person is lying on his side in a hammock with sunglasses.

So things are, to the extent that the image is not considered personal data, no data processing would take place, and, consequently, the data protection regulations and their guarantees would not apply, in accordance with as provided for in article 1 of the RGPD.

Having said that, it should be added that in this case there are also other circumstances that prevent the data protection regulations from being considered breached, and this based on the following:

Constitutional jurisprudence has considered that the right to one's image, recognized in Article 18 of the Spanish Constitution (CE), is not absolute and that, on occasion, it yields to other rights that are considered preferential, such as the right to freedom of information or expression. In this sense, the recent judgment of 27/02/2020 of the highest court, is pronounced in the following terms: *"the fundamental right to one's own image is not an absolute and unconditional right. There are circumstances that can determine that the general rule, according to which it is up to the holder of this right to decide whether or not to allow the capture by a third party, gives way in favor of other constitutionally legitimate rights or interests. This will occur in cases where there is a public interest in the capture or diffusion of the image and this public interest is considered constitutionally prevailing over the interest of the person in avoiding the capture or diffusion of his image. This means that "when the right to one's own image collides with other constitutionally protected goods or rights, particularly freedom of expression and information [art. 20.1 a) y d) CE] the different interests faced must be weighed and, taking into account the specific circumstances of each case, decide which interest deserves greater protection"*

Article 20 of the EC recognizes the right to freedom of information and expression, an article fully applicable in the case analyzed in which the use of the images was carried out in the context of journalistic information:

"1. The rights are recognized and protected: a)

To freely express and disseminate thoughts, ideas and opinions through speech, writing or any other means of reproduction. (...) d) To freely communicate or receive truthful information by any means of dissemination. The law will regulate the right to the conscience clause and to professional secrecy in the exercise of these freedoms.

(...)

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

4. These freedoms are limited by respect for the rights recognized in this Title, in the precepts of the laws that develop it and, especially, in the right to honor, to privacy, to one's image and to the protection of youth and childhood"

Along with the above, it is also necessary to take into account the provisions established in Article 8 of Organic Law 1/1982, of May 6, on civil protection of the right to honor, to personal and family privacy and to own image, which establishes:

"2. In particular, the right to one's own image will not prevent:

- a) Its capture, reproduction or publication by any means, when it concerns persons who hold a public position or a profession of notoriety or public projection and the image is captured during a public event or in places open to the public.*
- b) The use of the caricature of said persons, in accordance with social use.*
- c) The graphic information about a public event or event when the image of a certain person appears as merely accessory."*

The Supreme Court, in its ruling of 03/30/2017, established that the image is accessory when *"the image is not the main element, because its presence is not necessary, nor does it have a special relationship with the object of the capture or projection "*.

Likewise, the National Court in its previously cited sentence of 29/11/2011, has understood that *"Today it cannot be ignored that the image is an essential complement of journalistic information and that it would be unthinkable for a report like the one published by the newspaper (...) that was not accompanied by graphic information and what must be required is that this is not contrary to the requirements imposed by Organic Law 15/99 on the Protection of Personal Data"*

Finally, on the use of images in an informative piece as a complement to the information, the Constitutional Court has also ruled, in the recent judgment of 02/27/2020 cited above, in the following terms:

"(...) the image of an anonymous or unknown individual, or what is the same, who does not hold a public position or a well-known profession, even if it is captured in a public place, cannot be used without his express consent, except in two cases. In the first place, the one in which the person appears in the photograph in a merely accessory and inconsequential manner, without any prominence (...)".

Well, this is precisely the assumption that would have been made in this case, in which the image of the complainant (if it was recognisable) would have served to illustrate, in an accessory way, information - specifically, about (. ..) piscines de Barcelona-, in which the news is not personalized to any specific person, but has a generic character and the image of the complainant,

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

taken in a public area, such as a swimming pool, serves to illustrate the information, under the provisions of Article 20 of the EC, Article 8 of Law 1/1982 and the jurisprudence cited.

3. In accordance with everything that has been set out in the 2nd legal basis, and since during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have addressed in this resolution, any fact that could constitute any of the violations provided for in the applicable legislation, should be archived.

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 233/2019, relating to the Corporation Catalana de Media Audiovisuals, SA
2. Notify this resolution to Corporació Catalana de Mitjans Audiovisuals, SA and to the complainant.
3. Order the publication of the resolution on the Authority's website (apdcat.gencat.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 persons interested parties may file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after their notification, in accordance with what provided for in article 123 et seq. of Law 39/2015. An administrative contentious appeal can also be filed directly 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, governing the contentious administrative jurisdiction.

Likewise, interested parties may file any other appeal they deem appropriate to defend their interests.

The director,