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In this resolution, the mentions of the affected entity have been hidden in order to comply with art. 17.2 of Law 32/2010, given that in case of revealing the name of the affected entity, the physical persons affected could also be identified.

File identification

Archive resolution of the previous information no. IP 252/2019, referring to the Foundation (...).

Background

1. On 20/09/2019 the Catalan Data Protection Authority received a letter by which Mr. (...) filed a complaint against the Private Foundation (...) (hereinafter, the Foundation), on the grounds of an alleged breach of the regulations on the protection of personal data.

Specifically, the person making the complaint stated that he is the parent and guardian of (...) "with the modified capacity to act by means of the firm sentence special verbal judgment on capacity (...)/2006, Court of First Instance number (...) of those of Barcelona, user of a privately managed public square, located in (...)", which is managed by the Foundation.

Next, the complainant stated that in August 2019 the Foundation organized a holiday trip to (...) in which his son (...) participated, in which the professionals from the Foundation that participated took photographs in which his son would appear, without having previously asked his consent.

In order to certify the collection of images of his son by the Foundation, the complainant provided an email that a Foundation worker sent him on 09/20/2019, which indicated the Next:

*"During the month of August, your relatives and/or wards went on vacation and the professionals took photographs of the trip and of the places they were (...).
In order for us to provide you with the images, you must also authorize us to be able to share them with the other family members of the other users."*

2. The Authority opened a preliminary information phase (no. IP 252/2019), 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.

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3. In this information phase, on 03/07/2020 the Foundation was required to, among other things, confirm that Mr. (...) (henceforth, the complainant's son) was a user of a privately managed public square managed by the Foundation; to point out whether the Foundation had collected photographic images of the child during the vacation trip it organized in August 2019, in which the child would have participated; and, in the case that the Foundation had collected their images, to indicate whether, prior to their collection, the person making the complaint informed about the points indicated in article 13 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 (hereafter, RGPD), as well as whether consent was requested to collect the images and for subsequent treatments thereof.

4. On 07/16/2020, the Foundation responded to the aforementioned request in writing, in which he stated the following:

"1º.- It is confirmed that Mr. (...) is a user of a public square of private management, located in the (...) managed by the Foundation.

2º.- The Foundation did not collect photographic images of Mr. (...) during the holiday outing that was organized in August 2019, in which (...) he participated.

3º.- The Foundation sends the users or guardians of the users the documents number 1 and 2 that are attached to this letter. In the case of Mr. (...), the parents objected to the consent, as stated in said documents. This party considered that the consent was not clear (verbally requests that photographs be taken on the part of the parents, but then not authorized in writing), and for that reason no images were taken, nor are they being taken, of this user, in order to avoid conflicts.

4º.- Therefore, since there are no photographs of this user, they cannot be disseminated."

The Foundation attached various documents to the letter, including the following two forms, which the Foundation would have sent to the complainant, and which the latter would have signed:

1) A form where the reporting person authorized their child to participate in activities and outings organized by the Foundation during the 2019-2020 school year.

2) A second form relating to the treatment of images (in which consent was requested for the transfer to other family members or their legal representatives of images taken during the 2019-2020 academic year in the Occupational Therapy Service (...), in which the complainant's handwritten refusal to consent requested by the Foundation, as follows: *"we do not authorize and do not give consent to the transfer of images, except that in each situation that occurs, ask us for authorization and express consent of the situation, in which participate (...), extendable also to the coexistence unit"*.

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Fundamentals of law

1. The reported data processing falls within the competence of the Authority under the provisions of article 156.b) of the Statute of Autonomy of Catalonia (EAC) and article 3.h) of Law 32/2010, of October 1, of the Catalan Data Protection Authority, to the extent that this treatment would have been carried out within the framework of the provision of a specialized social service, specifically, of the temporary or permanent residence service for people with intellectual disabilities, provided by the Foundation on behalf of the Department of Labour, Social Affairs and Family, and therefore within the competences attributed to the Administration of the Generalitat in subject of social affairs.

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, and article 15 of Decree 48/2003, of 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the director of the Catalan Data Protection Authority is competent to issue this resolution.

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.

The complainant made a complaint to consider that the Foundation had violated the right to the protection of his son's data - with regard to who would be the legal guardian - for having collected his images for a few days in August 2019, in that the Foundation organized an outing to (...) with the users of the residential center, among whom was the complainant's son.

With regard to the provision of consent, the complainant has provided several emails to the Authority regarding this departure, and the Foundation has provided a form relating to the provision of consent for the processing of images of users of the residential center, and in particular, for the transfer to other family members or their legal representatives of images taken during the 2019-2020 academic year in the Occupational Therapy Service (...), in which the complainant's refusal to provide consent appears.

Leaving aside the issue related to the provision of consent, a previous issue becomes relevant, and it is the fact that the Foundation has stated in writing dated 07/16/2020 that it did not collect images of the child of the person making the complaint on the way out which he carried out in (...) the month of August of 2019. In fact, the Foundation has gone further and pointed out that it does not collect images of the child of the person making the complaint, and this because, as it states, the complainant would not have expressed clearly what his will is, as his verbal statements - in accordance with the treatment of images of his son - are contradictory to those made in writing, in reference to the aforementioned form.

If the Foundation does not collect images of the child of the person making the complaint - and therefore would not have collected images of the child during the trip to (...) in August 2019 -, the complaint relating to the lack of

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consent would be unfounded, because it is obvious that if personal data is not collected it is not necessary to request consent beforehand.

However, these manifestations of the Foundation are contradicted by those made by the complainant in his complaint, in which he starts from the existence of the processing of images of his son. In order to prove it, the complainant presented together with the letter of complaint, an e-mail that the Foundation sent to him after he left to (...), in which the Foundation asked him for his consent to share the images of his child with other parents or legal representatives of the users who had participated in the exit.

Certainly, the content of this mail refers to the reported image processing. However, if this email is analyzed in detail, it can be seen that it is a generic and impersonal email, addressed to all the parents or legal representatives of the users. This is clear from the content of the message itself, which states the following: *"During the month of August, your relatives and/or guardians went on vacation and the professionals took photographs of the trip and of the places where they went been (...). In order for us to be able to provide you with the images, you must also authorize us to be able to share them with the other family members of the other users"*.

On the other hand, the generic nature of the mail is also inferred from the fact that the recipient of the mail is listed (displayed) as the sender of the Foundation itself, and not the reporting person or anyone else, which would indicate that the mail was sent with the option of sending with a blind copy (c/o), used when the same mail is sent to a plurality of recipients, and it is intended to avoid the disclosure of the electronic addresses of each of them .

So everything seems to indicate that when the Foundation sent this email, it sent a mass message to all the parents or legal representatives of the users, without making any distinctions, and therefore including the complainant among the recipients of the email. e-mail for the mere fact of being the guardian of a person using the service (your child). This specific treatment has neither been reported nor would the entity have enough to initiate a disciplinary procedure. However, one cannot fail to point out that this would be an error that should have been avoided in order not to confuse the complainant, as it seems to have happened.

This is how things are, with regard to the accreditation of the facts reported, in the face of the Foundation's forceful statement - which has pointed out that it does not include any images of the complainant's son -, the email provided by the complainant, without any further proof , becomes insufficient as an evidentiary element from which it can be inferred that the Foundation collected images of his son during the trip to (...) in August 2019. Therefore the complaint relating to the lack of provision of the consent for its collection, remains empty of content due to lack of factual presupposition necessary, as is the existence of the treatment (the collection of images).

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Consequently, the principle of presumption of innocence is applicable here given that it has not been possible to prove the existence of evidence of infringement, and, therefore, administrative responsibility cannot be demanded. This principle, which is included in article 53.2.b of the LPAC, recognizes the right "*To the presumption of non-existence of administrative responsibility until the contrary is proven*".

3. In accordance with everything that has been set out in the 2nd legal basis, and given that during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have been addressed in this resolution, no fact that could be constitutive of any of the violations provided for in the legislation on data protection, should be archived.

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 252/2019, relating to the Foundation (...).
2. Notify this resolution to the Foundation (...) and to the person making the complaint.
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,