

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

File identification

Archive resolution of the previous information no. IP 328/2020, referring to the Sant Boi del Llobregat Town Council.

Background

1. On 05/12/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Sant Boi de Llobregat City Council, on the grounds of an alleged breach of the regulations on personal data protection. Specifically, the complainant complained about the following facts related to certain information published in the "(...)" programme, edited by the City Council and accessible on its website:

a) The inclusion in this program, without consent, of photographs showing images of performances of the school (...) to which the person making the complaint claims to belong, in which their components appear (some of them are minors). Specifically, the photographs to which the complainant alludes are the following: a) Page(...) of the program in pdf format: photograph where the members are wearing a bright blue dress; and, b) page(...) of the mentioned program: two photographs, one of them where the members of the group wear a black dress and the other photograph, which members would be minors, dressed in pink.

b) That in the aforementioned program, the aforementioned photographs had been incorrectly linked to the name of another school (...) "which was not ours, which also performed on the same day and had not been announced"

2. The Authority opened a preliminary information phase (no. IP 328/2019), 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. In this information phase, on 08/01/2020 the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint. Thus, it was found that the program "(...)" was available on the website of the Sant Boi City Council, which included the photographs that were the subject of the complaint.

4. Also in this information phase, on 08/01/2020 the person making the complaint was asked if he identified with any of the people who appeared in the images subject to the complaint, without obtaining any response to this request.

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5. On 07/02/2020 the reported entity was required to report on the following:

- The origin of the photographs subject to the complaint, which were published in the program of (...).
- The legal basis that would enable the publication of the referred photographs.
- Confirm whether, as indicated by the person making the complaint, the photographs subject to the complaint would be linked to the name of a (...)(...)that would not correspond to reality.

6. On 20/02/2020, the Sant Boi de Llobregat City Council responded to the request mentioned through a letter in which he stated the following:

- That, the photographs on the pages (...) of the program of the (...) "*correspond to the exhibits (...) organized by several academies (...) of the city that took place in (...) a municipally owned facility, during (...) of 2017. One of these photographs had also been published in the page 31 of the program of the (...) of the year 2018; moreover, the images had already been published on municipal social networks. The four photographs were taken, therefore, during a public event ((...)) and are the property of the Sant Boi City Council*" to the extent that they were taken within the framework of a service contract for the "*photographic coverage of acts, events and objects of communicative interest for the city of Sant Boi de Llobregat*"
- That, in accordance with the provisions of article 8.2 of Organic Law 1/1982, of May 5, on civil protection of the right to honor, personal and family privacy and one's image, "*we understand that the images are merely accessories to the information included in the program, so the dissemination of images of identifiable people in a public event would be enabled. In this way, it would not be necessary, from the point of view of data protection, to have the prior consent of those affected. In addition, the inclusion of the images is done as divulgative or informative of the events reported. Therefore, the main information that is to be made known through the publication of the photographs, is the actual publication and dissemination of the exhibition acts of the different schools (...). The images are accessories to the published textual information*".
- That, "*the photographs of the pages (...) were published in the program of the (...) as graphic resource material, while accompanying the written information about the different exhibitions of the academies (...) from the city. The images do not refer, therefore, to the exhibition of a specific academy, but are only intended to illustrate in a generic way and with a purely informative purpose the textual information of the pages where they are inserted. Proof of this aspect is that none of the photos has a caption that comments on it.*"

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

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of Data, 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.

As indicated in the antecedents, the complainant complained about the inclusion of several photographs of the (...) (...) to which he belongs in the information brochure of the activities scheduled by the City Council in the context of (...) (...), without having obtained the consent of the people who appeared there (some of them minors). He also complained that said photographs had been linked to the name of a school (...) that was not his, that had also performed at those parties, but that had not been announced in the aforementioned leaflet.

In the case we are dealing with here, it is of particular importance to clarify first of all 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 data 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, must comply with the requirement of identifiability, that is to say, that the image in question must allow identification, without disproportionate efforts, of the person or persons who appear there.

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Well, in this respect it must be said that this Authority believes that, in relation to the images subject to the complaint, the concurrence of the requirement of identifiability is not clear. Indeed, the distance and the angle from which the said images were taken, as well as the lack of definition of the same as they appear published in the program, would greatly hinder the identification of the people who appear in them. And the eventual identification would be even more difficult if to the above is added the fact that, according to what was stated by the same complainant, there would be no link between the controversial photographs and the name of (...)(.. .) what action is announced on the same page of the leaflet that would prevent the use of this data (the name of , the school (...)) as a coadjuvant element in the identification

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 would prevent the data protection regulations from being considered breached, and this based on the following:

Article 6 of the RGPD, regarding the lawfulness of the processing of personal data, states that:

"1. The treatment will only be lawful if at least one of the following conditions is met:

- a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;*
- b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;*
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;*
- d) the treatment is necessary to protect the vital interests of the interested party or another natural person;*

- e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;*
- f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child (...)"*

In the case at hand, and in the absence of consent, the legal basis that would enable the treatment of the controversial images would be that provided for in letter e) of the transcribed precept, that is, that the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the data controller, in this case, the Sant Boi de Llobregat Town Council.

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In fact, to the extent that the dissemination of the images would have a purpose of a cultural, divulgative or informative nature of events organized by the City Council, the precepts that are transcribed below that regulate municipal powers must be taken into consideration, among others, those that would be linked to the aforementioned purposes:

In this sense, article 25.2 of Law 7/1985, of April 2, Regulating the Bases of the Local Regime (hereafter, LRBRL) provides:

"2. The Municipality will in any case exercise its own powers, in accordance with the legislation of the State and of the Autonomous Communities, in the following matters:

(...)

l) Promotion of sport and sports facilities and leisure activities.

m) Promotion of culture and cultural equipment

(...)."

And article 69.1 of the LRBRL provides that:

"1. Local Corporations will provide the widest information on their activity and the participation of all citizens in local life."

For its part, in the area of Catalonia, Legislative Decree 2/2003, of April 28, which approves the revised Text of the Municipal and Local Government Law of Catalonia (TRLMRLC), has its article 66

Next:

"66.1 The municipality, for the management of its interests and within the scope of its competences, can promote all kinds of activities and provide all public services that contribute to satisfying the needs and aspirations of the neighborhood community.

66.2 Local bodies have powers in the areas of citizen participation(...).

66.3 The municipality has its own powers in the following matters:

(...)

n) Cultural and sporting activities and facilities, leisure activities, the tourism

(...)."

And article 71.1 of the TRLMRLC establishes that:

"For the management of its interests, the municipality can also carry out activities complementary to those of other public administrations and, in particular, those relating to:

a) Education.

b) Culture, youth and sport.

(...)."

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Therefore, starting from the concurrence in this case of a legal basis that would legitimize the processing of the images (art. 6.1.e of the RGPD), it is then necessary to analyze whether the rest of the principles enshrined in the RGPD would be complied with, in particular, the principle of minimization (art. 5.1.c of the RGPD), a principle that must be especially taken into account in the cases in which images are disseminated, given the consequences that such dissemination may entail for the people affected.

In this sense, it is important to remember that constitutional jurisprudence has considered that the right to one's image, recognized in Article 18 of the Spanish Constitution (EC), is not absolute and that, on occasion, it yields to other rights that they consider preferable, 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, cede in favor of other rights or interests constitutionally*

legitimate 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 an informative leaflet about the cultural activities scheduled by the City Council on the occasion of (...):

"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.

(...)

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:

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"1. Actions authorized or agreed upon by the competent authority in accordance with the law, or when a relevant historical, scientific or cultural interest predominates, will not generally be regarded as illegitimate intrusions.

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."

With regard to what is foreseen in letter c) of the transcribed precept, the Constitutional Court has pronounced, 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 controversial images (in the event that the people who appear there were recognizable) would have served to illustrate, in a completely accessory way, an information, specifically, the performance of schools (...) within the framework of events organized by the City Council. An example of this accessory is, firstly, that the images are from the set (...), that is to say, it does not seem that some components are given more weight than others and, secondly, that said images do not appear in the cover of the leaflet, but on the inside pages.

And the fact that the images that are reproduced is also a key element in this assessment in the informative leaflet that is the subject of the complaint, they correspond, as the City Council has stated, to an action by the academy (...) in question that took place in 2017 as part of the events organized by the City Council on the occasion of (...). In short, that the controversial images were not only captured at the time in a public event (a performance by the group), but that, in addition, this event was of an identical nature to the event that was intended to be illustrated with the inclusion of these images in the leaflet of the program (...) (performances of academies (...) in (...)). And finally, it should also be noted that, according to the complainant, the school (...) that appears in the reported images also acted as part of the festivities scheduled by the City Council (...), activities that they are precisely those that are collected in the leaflet.

The previous considerations are equally valid in this case in relation to the images in which minors appear (images, as said, of very doubtful identification), in which the greater legal protection of the that this collective enjoys in terms of what it does

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to the reproduction of his image (article 4 of Organic Law 1/1996, of January 15, on the legal protection of minors, of partial modification of the Civil Code and the Civil Procedure Law, and article 36 of Law 14/2010, of 27 May, on rights and opportunities in childhood and adolescence). At this point, it is necessary to emphasize in particular the fact that the images of minors included in the brochure correspond to a performance by (...), that is to say, they were captured in the midst of a public event.

In summary, this Authority believes that the dissemination of the controversial images in the leaflet of (...)(...) is legitimized based on the provisions of article 6.1.e) of the RGPD. Also, and in accordance with what has just been explained, this treatment would be respectful of the principle of data minimization (art. 5.1.c of the RGPD) to the extent that the images were taken in a public event, and served to illustrate in an accessory way an information (informational program of activities scheduled by the City Council(...)), so that its reproduction would conform to the provisions of Article 20 of the EC and article 8 of Law 1/1982.

Finally, it must be said that it is also this merely illustrative and accessory nature of the images, which prevents the principle of data accuracy from being considered violated, due to the fact that there is no link between the name of the (...)(...)that is announced, and the photograph that illustrates the program. And the fact that, as the City Council points out, the name of the group does not appear at the bottom of the photograph reinforces this condition of accessoryness.

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 infractions provided for in the applicable legislation, should be archived.

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 328/2019, relating to the Sant Boi de Llobregat Town Council
2. Notify this resolution to Sant Boi de Llobregat City Council and communicate it 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 February 20, which approves the Statute of the Catalan Data Protection Agency,

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the reported 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 what is 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, the reported entity can file any other appeal it deems appropriate to defend its interests.

The director,