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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 337/2019, referring to the Association of Families of School Students (...).

### Background

1. On 17/12/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Association of Families of Students of the School (...) ( hereinafter, the AFA), due to an alleged breach of the regulations on the protection of personal data. This first complaint was supplemented with additional information provided on 08/01/2020.

Specifically, in his writings, the complainant stated the following:

- That the AFA, with parental consent, disseminates on its social networks images about the activities carried out by the entity, in which the minors who participate are identified.
- That the AFA had informed the families that, if they did not give their consent, the minors participating in the activities organized by the AFA would be removed from the group at the time the images were taken; which had meant that many of the parents felt "pressured" to give their consent for the dissemination of the images of their sons or daughters and thus prevent them from being removed from the group.

The reporting person provided various documentation relating to the events reported, among others:

a) The text of a statement that, according to the reporting person, the AFA would have sent to the families, with the following text:

*"Regarding the open days, we will follow this guideline and will only publish photographs in which minors are recognized if, at the time of registration, the corresponding parents or legal guardians authorized us to do so.*

*If we have to take a group photograph, respecting the wishes of the legal guardians who do not want the image of the minor to be captured, we will respectfully explain to the minor that he cannot appear in the photograph."*

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In this text, provided by the complainant, there is no date, no identification of recipients or senders, nor any logo.

b) The text of a letter, which according to the complainant, a group of families would have sent to the AFA, with the following text:

*"We agree that photos and videos are taken of them and we like to see the activities they carry out, although we consider that, if the images are published on the school's or the school's social networks AFA should be shown in ways in which children are not identifiable. In the case of the images in which they are recognized - which we also wish to have - we believe that the channels to send them to us should be private: for example, through clickedu, archives, the cloud or , in case it was through the blog, that access to it was reserved only for the families of the children who appear there"*

In this text provided by the reporting person, there is no date, no identification of recipients or senders, and no logo.

2. The Authority opened a preliminary information phase (no. IP 337/2019), 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, by official letter dated 02/11/2020 (notified on 12/13/2019) the reported entity was required to comply with the following:

- Provide the document through which the AFA requests the provision of consent to the parents in order to disseminate the images of their children on the AFA's social networks.
- Confirm whether, as stated to the reporting person, if the parents do not give their consent, their sons or daughters would be removed from the group at the time of capturing the images.

4. On 02/17/2020, the AFA responded to the aforementioned request through a letter in which reported that this entity *"under no circumstances excludes its associates from the activity for not having given consent for the processing of their images"*.

The reported entity attached various documents to the letter, among others:

- Model form through which the AFA collects consent for the treatment and dissemination of images of minors. The model used until 2019, and the updated version, were provided.

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It is noted that in all models the box corresponding to the authorization / non-authorization for the publication of the images on the social networks of the AFA must be marked expressly. In the updated version, authorization is requested separately for publication on the Association's website or blog / social networks (Facebook and Twitter) / Filming (...).

- Copy of the letter dated 02/11/2019 that the AFA sent electronically to the families that same day, which contains the following text:

*"Regarding the treatment of images of associates, we inform you that it is only carried out if the express and informed consent of the interested party or their legal representatives is previously obtained (...)*

*According to this, and in accordance with what is established by the current regulations and the control authorities, the AFA does not process the images of those students who have not given us their explicit and express consent to do so.*

*If interested parties who have not given consent for the processing of their image participate in the activities managed by the AFA, it will be avoided to capture group photographs or videos in which these interested parties appear. Under no circumstances will a student be removed from any activity managed by the AFA for the sole reason of not having authorized the processing of their image. Therefore, no student will be treated differently (...)"*

5. In view of the answer given, on 02/24/2020 the AFA requested additional information; specifically, to confirm whether, as the complainant had stated, he had sent the families the communication with the content transcribed in letter a) of precedent 1.

6. On 03/03/2020 the AFA responded to this second request, in which it reported the following:

- That the statement referred to by the complainant *"was sent on December 10, 2019 by the course delegates, to a group that had created approximately 22 first grade families, through the Whatsapp platform . It was in response to the inquiry made by a person in this group after receiving a communication from the school about public events and capturing images"*.
- That, subsequently, the AFA, in view of the information that had been provided, *"decided to clarify its position and notify all families of the policy that would be adopted when capturing images. The communication will be sent to all the associated families on February 11, 2020" (previously 4th in fine).*
- That *"it is important to reiterate that a child, parent or person interested in a photo has never been separated fact of not having given consent"*.
- That *"the AFA has always taken into consideration the concerns and suggestions of parents for the adoption of its policy on the treatment of images from children and third parties"*. What proof of this is the exchange of e-mails that the AFA had with one of the families that had

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showed his concern about the treatment and eventual dissemination of the images of his children, to which *he was "reiterated that no minor would be separated to take images"*.

The reported entity attached various documents to the letter, among other things, the copy of the letter that the AFA, by email dated 12/24/2019, sent to one of the families that had shown their concern about the treatment of their children's images. This letter, with content almost identical to that which the AFA later sent to all families (4th precedent), contains the following verbatim:

*"Taking into account their main concern, students will not be treated differently.  
In no case will a student be removed from any activity managed by the AFA for the sole fact of not having authorized the processing of their image'  
If the activities managed by the AFA involve interested parties who have not given consent for the processing of their image, it will be avoided to capture group photographs or videos in which these interested parties appear"*.

#### **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.

As explained, the person making the complaint complained that the AFA had informed the families that, in case they did not give their consent for the processing and dissemination of the images of their sons or daughters on social networks, those They would be removed from the group at the time of the capture of said images, which is why many parents had been *"pressured"* to give their consent and thus prevent their sons or daughters from being removed from the group .

Article 6 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 circulation thereof (in hereinafter, RGPD), provides, among others, consent as one of the legal conditions for the processing of personal data.

In relation to this precept, article 4 of the RGPD defines consent as *"any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the treatment of personal data"*

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that concern him". And, directly related to this definition, recital (32) of the same rule provides that:

*"Consent must be given through a clear affirmative act that reflects a free, specific, informed, and unequivocal manifestation of the interested party's will to accept the processing of personal data that concerns him, such as a written statement, including by electronic means, or a verbal statement. This could include checking a box on a website on the Internet, choosing technical parameters for the use of information society services, or any other statement or conduct that clearly indicates in this context that the interested party accepts the proposed treatment of their personal data. Therefore, silence, already marked boxes or inaction should not constitute consent. Consent must be given for all processing activities carried out with the same or the same purposes. When the treatment has several purposes, consent must be given to all of them. If the interested party's consent must be given as a result of a request by electronic means, the request must be clear, concise and not unnecessarily disrupt the use of the service for which it is provided".*

In accordance with the transcribed precepts and recitals of the RGPD, a warning communication of an eventual withdrawal of the minors from the group at the time of the capture of the images, could lead to a defect in the consent of those parents who had provided it under this condition, so that the consent thus obtained would not be valid, since one of the requirements would be missing for its validity: the freedom in its provision. The Working Group on Article 29, in the guide WP259 "Guidelines on consent in the sense of Regulation (EU) 2016/679", defines this element in the following terms:

*"The term "free" implies real choice and control on the part of the interested parties. As a general rule, the RGPD establishes that, if the subject is not really free to choose, feels obliged to give his consent or will suffer negative consequences if he does not give it, then the consent cannot be considered valid<sup>12</sup>. If the consent is included as a non-negotiable part of the general conditions is assumed not to have been given freely. Consequently, consent will not be considered to have been given freely if the interested party cannot deny or withdraw their consent without prejudice. The notion of imbalance between the person responsible for the treatment and the interested party is also taken into account in the RGPD*

*When assessing whether the consent has been given freely, the specific situations in which the consent is subject to the execution of contracts or the provision of a service as described in article 7, section 4 must also be considered. Article 7, section 4, has been drafted in a non-exhaustive manner through the use of the expression "among other things", which means that there may be other circumstances that fall within the scope of application of this provision. In general terms, the consent will be invalidated by any inappropriate influence or pressure exerted on the interested party (which can be manifested in very different ways) that prevents him from exercising his free will".*

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Well, in the case at hand it must be said that there is no evidence, apart from the statements of the person making the complaint, that the AFA has clearly warned the families that, in case they do not give their consent for the treatment and dissemination of the images in the social networks of the AFA, their sons or daughters would be removed from the group at the time of capturing images in the framework of the activities organized by this entity; warning that, if it had existed, as has been said, it could affect the validity of the consent that might have been given. Nor has any element been provided that, at least circumstantially, could reveal that this was the intention of the AFA. In this regard, the following considerations must be made regarding any of the communications provided by the person making the complaint:

- About the letter that, according to him, was sent by a group of families to the AFA (letter b of the previous 1st): This letter, although it shows a concern on the part of these families about the treatment and dissemination to the social networks of the images of minors, does not include any complaint about a possible withdrawal of minors from the activity organized by the AFA.
- On the content of the "communication" that had been sent to certain families (letter a of the preceding 1st): In this regard it must be said that, certainly, the terms of this communication could give rise to misunderstandings, as in fact has happened, to the extent that the complainant filed a complaint with this Authority. However, it is important to note that, according to the AFA, this text does not correspond to any communication sent by this entity, but rather the content of a message sent by course delegates (not the AFA) to the families who were part of a whatsapp group, message that answered the restlessness shown by one of its components regarding the treatment of their children's images. The AFA has stated to this Authority that, precisely, it was as a result of this message that it decided send all the families the aforementioned letter dated 02/11/2019, clarifying their position in this regard.

For its part, the AFA has categorically declared to this Authority that *"it has never separated a child, parent or interested party from a photo for not having given consent"*.

In this sense, it is proven in these actions that the AFA, on 24/12/2019, expressly informed one of the families who had shown their concern about the treatment of their children's images, that in no case minors would be separated from the activities at the time of the capture of images (previous 6th grade). And in the same terms, the AFA informed all the families in writing dated 02/11/2020, sent electronically that same day (3rd precedent). At this point, it should be emphasized that the two communications were sent before the AFA was aware by this Authority that a preliminary information had been initiated, since it was on 02/13/2020 that it was notified of this circumstance (3rd antecedent).

That being the case, the right to the presumption of innocence enshrined in article 24.2 of the Spanish Constitution, and article 53.2.b) of the LPAC, which determines that *"The sanctioning procedures must respect the presumption of non-existence of administrative responsibility until the contrary is proven"*.

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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 337/2019, relating to the Association of Families of Students of the School (...).
2. Notify this resolution to the Association of Families of Students of the School (...) 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, the interested parties can] file any other appeal they deem appropriate to defend their interests.

The director,