

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

In this resolution, the mentions of the affected population 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 population, the physical persons affected could also be identified.

File identification

Archive resolution of the previous information no. IP 339/2020, referring to the Municipal Group (...) of the City Council (...).

Background

1. On 12/11/2020, the Catalan Data Protection Authority received a letter from Mr. (...), mayor of (...), for which he filed a complaint against the Municipal Group (...) of the City Council (...) (henceforth, the GM), on the grounds of 'an alleged breach of the regulations on the protection of personal data.

First of all, the complainant stated that two councilors of the GM, Mr. (...) and Ms. (...), they had filtered through various channels their health data and those of another councilor of the City Council, Mr. (...).

Specifically, the complainant stated the following:

That on 14/10/2020 Mr. (...) asked in the "*Ple Ajuntament (...)*" *WhatsApp group*, a group made up of 13 councilors and which is used to inform the Municipal Groups on related issues to the City Council, the following question:

"After the confinement of the football club, have measures been taken to find out if any councillor, in contact with the club, has tested positive and in this hypothetical case will the rest of the councilors know?"

The councilman, Mr. (...), answered:

"(...) The whole football team tested negative, the only one who tested positive was me, but I got infected at my school (...). I was asymptomatic, so thanks to the tests they gave us for football I was able to know that I was positive. Once the tracing and information from the school was done we were able to find out where my infection was coming from. Luckily, the prudence we had in confining ourselves and getting tested has all been able to cut a possible chain of transmission (...)."

On 16/10/2020, the councilor, Mr. (...), sent a WhatsApp message to the complainant (the mayor) with the following content:

"political bickering aside, I wish you well and get through this one quickly"

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

scared".

The complainant replied:

"Hello! We are fine, the only symptom was tenths of a fever... now to wait to continue like that for a few days and that's it. Thanks!".

On 17/10/2020 a GM councilor sent a message to the complainant with the following content:

" Good morning, Yesterday I found out that you had tested positive for covid. I just wanted ask yourself how you are (...) . I'm sorry that you have to go through this suffering and I wish that, for all of you, it will be as mild as possible... Good luck!".

The reporting person replied to this message on 10/19/2020:

"If you look, a bit of a coincidence I took a PCR and tested positive, but all my surroundings that Salut tracked have tested negative. So until Thursday closed working from home. thank you"

That the same 17/10/2020 the councilor, Mrs. (...), published the following content in a WhatsApp group of a reading club of the Municipal Library which has 24 participants:

"(...) and (...), positive for Covid, confirmed"

That on 19/10/2021, Mr. (...), asked via WhatsApp to the journalist of the municipal public broadcaster: *"the fact that the main manager of the City Council is confined due to coronavirus and the measures that are being applied to avoid the contagion of 2 councilors could affect the service, are they not newsworthy and should appear somewhere?".*

The journalist replied: *"we have been debating it and we considered that doing so would turn into signaling someone, in the same way that we did not do it for the owners of the restaurants..."*.

On 1/21/2020 at 1:12 p.m., the journalist of the digital newspaper "(...)" asked the complainant via WhatsApp:

"Hello, I know you are confined, how are you? well Symptoms?"

The reporting person replied: *"No symptoms at any time, but by protocol until tomorrow confined"*.

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

On the same day, the digital newspaper published the news entitled: *"The mayor (...), (...), positive for coronavirus"*. The news included a photograph of the reporting person. The content of the news was the next:

"(...) is on sick leave because he contracted the coronavirus. The bat (...) is in quarantine following medical prescriptions. He is at his home until this Friday. At this time, it is unknown how he became infected. In statements to (...).cat he said that he will remain at home until this Thursday and that he does not have any symptoms at the moment.

*To date, the mayor is the only elected official who is confined after testing positive for Covid-19. However, the Councilor for Festivities and Sports (...), also gave a positive result. For this reason (...) he was unable to attend the triathlon awards ceremony.
The opposition parties complain that they have not received any information about the mayor's state of health after contracting the virus or whether he is on leave or working from home while confined.*

Minutes after the news was published, the GM echoed it on social networks. A then the councilor, (...), made a comment on the retweet: *"An example of lack of transparency, after a week it took an outside media to say so because the information reaches (...), citizens have the right to know if their rulers are in session conditions or that they have taken the relevant anti-covid measures"*.

On 10/22/2020, the complainant had the following WhatsApp conversation with the journalist from "...):

— *What did the (...) tell you? I will talk to him.*

— *What will you say to him?*

— *That I don't think it's right for me to explain to journalists, with all due respect, my state of health.*

— *It's not your state of health either...it's that the MAYOR (public figure) has tested positive — Who is he to tell you if I have a disease?*

— *They told me, not only the (...).*

On 27/10/2020, the local radio interviewed the (...) who denied that the GM was behind the leak of the health status of the mayor and councilor. However, he admitted to having spoken to the media.

The complainant concludes the complaint letter as follows: *"In our opinion, it is very clear what happened. 2 councilors (...) and (...) received the information that 2 councilors (...) and (...) were positive for COVID:*

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

- From the councilor (...) it reaches them through an exclusive channel for use by councilors. By filtering this information they skip their duty to treat the information they have for their position as councilors with due treatment and confidentiality.

- From the mayor (...) it probably reaches them first through comments from the people, but then they start disseminating the information in a coordinated way. First (...) he spreads it through Whatsapp groups of activities related to the Municipal Library and then (...) he leaks it to the newspaper (...), as confirmed by the journalist (...) when he recognizes that "they told me, not just the (...)"

Then, with a clear will to use private information politically especially protected, according to the RGPD, they begin to "report", through their social networks (personal or corporate (...), an alleged lack of transparency).

The complainant provided screenshots of the WhatsApp conversations and various documentation relating to the events reported.

2. The Authority opened a preliminary information phase (no. IP 339/2020), 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 were capable of motivating the initiation of a sanctioning procedure.

3. In this information phase, on 30/11/2020 the reported entity was required to report on the date and circumstances in which the GM became aware of the positive for Covid-19 of the mayor and alderman; confirm whether the GM or any member of the GM informed the digital media "(...)" or disseminated it through social networks of the aforementioned Covid positives.

4. On 17/12/2020, the GM responded to the aforementioned request through a letter in which he set out the following:

- That the GM was aware of the positives from various sources in the town. In the case of the councilor he found out on October 9 and in the case of the mayor on the 13th. In both cases, days before the interested parties themselves confirmed it via WhatsApp. In relation to the circumstances he states: *"When the person who tests positive is a councilor and especially the mayor himself, many people expressed their concern about the risk of transmission due to their social agendas"; especially because the mayor had presided over an awards ceremony on October 10.*
- That the rumors were spreading through the village, for this reason, on 14/10/2020 they asked the question on WhatsApp of the councilors of the City Council and on 16/10/2020 they spoke directly to the mayor.

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

- That on 10/20/2020, the GM received a "contact" from the digital medium "La (...)" whereby *"he was interested in knowing what the reaction of the main opposition group was regarding the mayor's positive attitude. There was no information from any other member of the municipal group in the digital media "La (...)" but it was this media that addressed our councilor"*.
- *"That the councilor (...), in a personal capacity, echoed in her closed group of the Reading Club the information that was coming to her from various sources and because they are two politicians with a broad agenda social and public presence"*.

5. On 27/11/2020 and 24/03/2021, also during this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts object of complaint. Thus, it was found that:

- On 10/8/2020, the following information was published on the FaceBook profile of the CE (...) (it has 2527 followers): *"we inform you that we have quarantined the first team of the CE (...) due to a positive case of PCR"*.
- On 9/10/2020 the following news was published on the website www(...): *"Day marked by the postponement of the match between (...)B and CE (...) due to a positive from (...). On Thursday, the positive was confirmed and the club quarantined the squad"*.
- On 10/21/2020 the news was published on the website [https://la\(...\).cat/](https://la(...).cat/) of the newspaper "(...)" object of complaint.
- That on the same day, the news was retweeted from the GM's official Twitter profile.
- That on the councilor's Twitter account, (...), there is a retweet with a comment on the GM's tweet: *"An example of a lack of transparency, it was necessary for an outside media to echo the news arrive at (...) after a week of the positive. The people have the right to know if their rulers are in full condition and that they have taken all the anti-covid measures"*.

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.

Prior to the analysis of the events reported, it is necessary to refer to the data protection regulations that are applicable to the events being analyzed. In accordance with what is established in articles 2.1 and 4.1) of the RGPD, the regulations apply to the treatments that are carried out on any information *"on an identified or identifiable natural person ("the interested party"); any person whose identity can be determined will be considered an identifiable natural person,*

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

directly or indirectly, in particular by means of an identifier, como por ejemplo un number, an identification number."

Article 4.2) establishes the concept of treatment: *"any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion (...).*

Article 4.15 of the RGPD considers that data relating to health refers to *"(...) the physical health (...) of a natural person, including the provision of health care services, which they reveal information about their state of health".*

Consequently, there is no doubt that the positive result of the PCR test is data relating to the health of a natural person that reveals information about his state of health. Consequently, this data would be subject to the regime provided for in article 9.1 of the RGPD, according to which: *"The treatment of personal data that reveals (...), data relating to health or data relating to the sexual life or sexual orientation of a natural person is prohibited".*

However, this prohibition will not be applicable to the extent that any of the circumstances provided for in article 9.2 of the RGPD occur. Rather, in order for the processing of this personal data to be lawful, it must be protected in one of the circumstances provided for in article 9.2 of the RGPD. Specifically, the responsible administrations, in the scope of their competences, they will be able to treat this data when the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health; in case of necessity to safeguard the vital interests of the interested parties or third physical persons; to safeguard essential public interests in the field of public health or the fulfillment of legal obligations, in the legal framework corresponding to the Member State of the European Union in each applicable case. It is clear that the above assumptions are not applicable to the case analyzed here. It doesn't work either applicable the circumstance of article 9.2 e): when the treatment refers to personal data that the interested party has made manifestly public, given that the affected persons did not manifestly make public the positive of Covid. Indeed, in one of the cases it was done in the WhatsApp group of councilors of the City Council and, in the other case, in two WhatsApp conversations between the person reporting and two councilors of the GM. As we will see below, in both cases, there was an expectation of confidentiality. Thus, in the first case, due to the characteristics of the WhatsApp group of the City Council which was intended to inform the councilors about municipal issues. The expectation of confidentiality is obvious, because councilors know that they must maintain the duty of confidentiality, in accordance with the provisions of article 164.6 of the TRLMRLC: *"Members of the corporation must respect the confidentiality of information in what they have access to because of their position if the fact of publishing it could damage the interests of the local body or third parties.* In the second case, because it is a private conversation about the state of health of natural persons who, despite being public persons, do not lose the right

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

fundamental to the protection of your data. Nor is the circumstance contained in section g) of the same article applicable, more specifically, 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 (...).

2.1. About the origin of the leak and the publication of the data in the media digital

First of all, the complainant states that on 14/10/2020 a member of the GM asked the councilor in the WhatsApp group used by the City Council to inform municipal groups if, following the confinement of the football club, any councilor in contact with the club had tested positive and, in this case, if they would inform the other councilors.

It should be noted that previously, on 8/10/2020, the FaceBook account of CE (...) published the news of the positive of a member of the football team, as well as that the first had been confined team The FaceBook account of the CE (...) has 2,527 followers. Then the day On 10/9/2020, a news item was published on the web (...) reporting on the same events. Although in the previous publications it is not stated that the person who had tested positive was identified, it cannot be ruled out that at least the players of the EC first team (...) and/or their managers knew the identity of this person . It should also be borne in mind that (...) is a small municipality, with 5,307 inhabitants (source: IDESCAT, 2020 data), and even if the affected person had not made the information public, a considerable number of people they could know this fact and it cannot be ruled out that the rumors had spread through the village. This would lend credence to the GM's version when he explains that: *"When the person who gives a positive is a councilor and especially the mayor himself, many people expressed their concern and the rumors spread through the village.* Version that, in part, would be endorsed by the complainant in the conclusions of his letter of complaint expresses: *"In our opinion it is very clear what has happened. 2 councilors ((...) and (...)) received the information that 2 councilors ((...) and (...)) were positive for COVID. That the rumors were spreading through the town, for this reason, on 14/10/2020 they asked the question on WhatsApp of the councilors of the City Council and on 17/10/2020 they spoke directly to the mayor".* This agrees with the version of the GM when he states that: *"In the case of the councilor, he found out on October 9 and in the case of the mayor on the 13th. In both cases, days before the interested parties themselves confirmed it by WhatsApp".*

In fact, the complainant admits that the information would have reached the GM *"probably because of comments from the people, but then they start spreading it in a coordinated way. The councilwoman, (...), through the WhatsApp group of the reading club, and the councilor (...) in the newspaper (...)"*. This version is plausible with the fact that on 16/10/2020, the councilor, (...), sent the mayor a WhatsApp message with the following content: *"aside from political disputes, I wish you to be well and pass this scare quickly".* The complainant replied: *"Look, by some chance I had a PCR and tested positive, but all my surroundings that Health tracked have tested negative. So until Thursday closed working from home".* Likewise, in date 10/17/2020 another GM councilor sent a message to the complainant

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

asking how he was and related that the day before he had found out that he had tested positive for Covid. According to these conversations, it cannot be inferred that the councilors had had knowledge of this information due to their condition as councillors, but from the previous conversations it seems to be deduced that when the councilors contacted the person reporting they were already aware of the positive for Covid.

Regarding the alderman's alleged leak to the digital newspaper, the GM denies leaking the information. According to him, on 10/20/2020 the GM received a *"contact" from the digital media "(...)" in which he was interested in knowing what the reaction of the main opposition group was regarding the positive of the mayor* There was no information from any other member of the municipal group in the digital medium *"(...)" but it was this medium that addressed our councilor*". Well, in the conversation dated 10/22/2020, held between the journalist and the person reporting, she complained that the councilor, (...), had leaked her health data to the newspaper. The journalist replies: *"They told me, not just the (...)"*. This answer would support the thesis that there were several people with knowledge of the information and that the rumors had reached the journalist from several sources. Therefore, it has not been possible to prove that the publication of the health data of the affected people had its origin in the councilor's leak. It is not a disputed fact that the information about the health of the affected people circulated in the village and, consequently, anyone could have leaked it to the digital newspaper. Perhaps this information would have reached the journalist from several sources, as is clear from his statements. It is possible, as the GM says, that the journalist went to the councilor to find out the GM's opinion about the positives of the mayor and the councilor. However, the last paragraph of the news draws attention, specifically when it is said that the opposition parties complain *that they have not received any information about the health status of the mayor after contracting the virus or whether he is on leave or working from home when confined*. Well, the reasons for these statements are unknown, but this contradicts the WhatsApp conversations of 16/10/2020 and 17/10/2020 held between the councilors of the GM and the mayor, in which this he informs them that he is working from home and the day the confinement will end.

Regarding the retweets of the news published in the digital newspaper, these occurred moments after the publication of the digital newspaper. It is not known that the GM published the data previously.

Leaving aside the origin of the leak in the digital newspaper, since it was not possible to establish the authorship of the leak, it must be emphasized that the information circulated through the town, as stated by the complainant: *"the information would have reached the GM "probably because of comments from the people"*. However, from the conversations provided, it is clear that the GM is interested in making this data public. This is evidenced, among others, by the conversation of the councilor, (...), with the journalist of the municipal radio, who insists that he should publish the positive data of the mayor and the councilor, or the dissemination what does the councilor of the GM do in her WhatsApp group of the book club, or the retweet from the Twitter profile of the GM of the news published in the digital newspaper and the councilor's subsequent comment, (...). But it cannot be said that the councilors of the GM have

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

disclosed confidential information of which they have become aware in the exercise of their duties.

2.2. About the dissemination of data in the WhatsApp group of the library's reading club.

In relation to this, the reporting person states that the councilor's information reached the GM through the Councillors' WhatsApp group and the mayor's through the town's comments.

On the other hand, the GM states that the information came to him from several sources and justifies it because they are two politicians with a broad social agenda and public presence. However, she does not deny that the councilor filtered her into the library's book club group. In this regard, it should be noted that the WhatsApp message was published on 17/10/2020, one day after the conversation in the WhatsApp group of the City Council, but in this group the mayor was not discussed, but only from the councilor. In accordance with this, it is not possible to determine the specific source of the information considering that there were several people who knew or could know this information, a fact that has been recognized by the reporting person.

Two conclusions can be drawn from what has been said so far. On the one hand, that the information about the positives for Covid-19 of the mayor and the councilor of the City Council had been spreading through the town since before the alleged facts occurred. On the other hand, despite the fact that GM councilors seem to have played an active role in disseminating information, it has not been possible to determine that they were aware of it because of their public position, nor has it been possible to establish the origin of the information that was published in the digital newspaper, nor the origin of the information published by the councilwoman on the club's WhatsApp reading. Therefore, in this case the presumption of innocence prevails.

Indeed, the Judgment of the National Court of 18/03/2009, ratified by the Supreme Court in a judgment of 16/05/2012, which confirmed a resolution of the Spanish Data Protection Agency under which the archive of the actions of prior information was declared because it was considered that there was no evidence of the authorship of the reported facts that would allow the same to be imputed: *"The appealed resolution recognizes that the reported conduct could have given rise to an infraction of the duty of secrecy in application of the provisions of article 10 of the Organic Law 15/99 and which could lead to the imposition of a penalty for non-consensual data processing (...). However, the only argument on which the file is based is that it has not been possible to prove who could be responsible for the offense committed. The presumption of innocence thus becomes the basis of the archive resolution and a new assessment of the facts carried out by this Chamber obliges to confirm said criterion because said presumption (proceeding from Article 24 of the EC), is an essential figure of the punitive law and, therefore, applicable to the administrative sanctioning area (article 137 of the Law on the Legal Regime of Public Administrations and of the Common Administrative Procedure), implies the existence of a minimum evidentiary activity of charge, practiced with observance of all guarantees*

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

proceedings, from which the culpability of the accused can be deduced; to this is added the right to defense under the terms of the current sanctioning regulations (art. 135 LRJA-PAC relation to arts. 16 to 19 of RD 1,398/1993), so since there is no sufficient proof, it turns out that no it is possible to agree to the initiation of the sanctioning procedure, being reasonable the file agreed to by the appealed resolution."

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.

Article 89 of the LPAC, in line with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions should be archived when the following is highlighted in the instruction of the procedure: "d) *When it does not exist or does not it has been possible to identify the person or persons responsible or appear exempt from responsibility*".

Therefore, I resolve:

1. File the actions of prior information number IP 339/2020, relating to the Municipal Group (...) of the City Council (...).
2. Notify this resolution to the Municipal Group (...) of the City Council (...) and 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,