

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

File identification

Archive resolution of the previous information no. IP 358/2020, referring to the Town Council of La Pobla de Montornès.

Background

1. En data 23/11/2020, va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per remissió de l'Agència Espanyola de Protecció de Dades, un escrit d'una persona pel qual formulava una denúncia contra l'Ajuntament of the Town of Montornès (hereinafter, the Town Hall), due to an alleged breach of the regulations on personal data protection.

In the first place, the complainant stated that she is the secretary of *the Neighborhood Association (...)* and the person responsible for guarding the members' data. It also indicated that although the neighborhood association was constituted in an assembly on 08/23/2020, at the time of the facts that are the subject of this complaint, it was still in the process of being registered in the register of associations.

Secondly, he stated that on 10/20/2020 he sent an email from the association's email address (...).gmail.com to the City Council's email address ajuntament@(...) in order to request an urgent meeting with the mayor to deal with a security problem related to his area of residence. Attached to the mail was a document containing personal data of the association's 55 members. They included: name, surname and ID number of each of them. From the information provided by the complainant, it appears that the City Council responded at 2:00 p.m. on the same day.

According to the complainant, on 21/10/2020, the list of members of the aforementioned association was published in the WhatsApp group "(...)" (*hereinafter*, WhatsApp group1), created by a particular and of which some residents of the residential area of the neighborhood association were part. In this group, a user who identifies with the pseudonym "(...)" uploaded a photo corresponding to the list of members of the association. The reporting person became aware of this fact in the circumstances that will be described later.

Finally, the complainant expressed the suspicion that the document in question could have been disseminated by a City Council employee, since it appeared published the day after the email was sent to the City Council.

In addition to the email dated 10/20/2020 to which he attached the controversial document, the complainant provided the following documentation that is relevant in this case:

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Several screenshots corresponding to two WhatsApp groups: a) the group of *WhatsApp1 "(...)" ib) the group the Association of neighbors "(...)"* (hereafter WhatsApp2 group).

- From the WhatsApp group1. The user "(...)" published a message with a photo of the list of members of the mentioned association. The message is published at 22:16, but the date is not included. In the photo it can be seen that the ID card and the second surname have been pixelated. The photo is accompanied by the following message: *"I'm bequeathing this... Do people's data really run there??? What is pixelated is because I pixelated it"*.
- At 22:28 (no date), one of the partners of the association and a member of the WhatsApp2 group forwarded the photo published by the user (...) to the WhatsApp2 group. One person replied: *"Yes, they just sent it to me. I have notified the Board"*.
- The reporting person claims to have requested the partner who made the forwarding to delete the post from the WhatsApp2 group, as he considered it to be a dissemination of data.
- There is no response from the partner, but there is a message from his daughter, sent to the WhatsApp2 group, which said: *"With which company is the data file on the LOPD legalized?"*. (...) *Ojito con amenazar that the photo of the group be removed because it is also being disseminated, because it has also been reported in a group of partners what a person has received so that the Board can take action"*. The reporting person stated that the member's daughter was not a member of the association nor of the WhatsApp2 group.
- Another message from the partner's daughter in the WhatsApp2 group: *"Could you explain to me how are all these without pixels that have reached a WhatsApp group? Do you know that it's a crime and that I'm going to report you for it?"* The message referred to the screenshot of the document with the members' personal data.
- From the WhatsApp group1, messages written by the member's daughter in this group. The first message referred to (...) (the person who posted the list photo and then deleted it). On 10/23/2020, the following messages were published: *"if the person who posted it, in this case (...), has deleted it, they will have to prove that he was the one who published it"; "(...) lo chitón, por tanto, there is no evidence against him unless someone from the partners in this topo group took a screenshot"*. The second message dated 10/24/2020 with the following content: *"Here's what I told you yesterday... I'm reporting it to the Board"*. And he added a screenshot of the complaint submitted to the AEPD.

2. The Authority opened a preliminary information phase (no. IP 358/2020), 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 1 October, on the common administrative procedure of public administrations (now

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hereinafter, LPAC), to determine whether the facts were likely to motivate the initiation of a disciplinary procedure.

3. In this information phase, on 26/01/2021 the reported entity was required to report on a series of issues, specifically, that:

- Confirm whether on 10/20/2020 you received the email with the attached document with the members' personal data.
- Indicate if at any time you were aware of the leaking of the controversial document and if any member of the City Council (employee or municipal representative) would have leaked the aforementioned document and, if so, report on the actions taken to determine the origin of the filtration.
- Information on the general procedure for managing the City Council's mailbox, indicating the people who have access to this mailbox.
- Report on the management of the mail on 10/20/2020, in particular, if forwarding, printing, etc. were carried out.
- Provide evidence of having informed the workers who manage the mailbox about the duty of confidentiality contained in Article 5 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights.

4. The deadline granted to the reported entity to comply with the previous requirement was far exceeded without the City Council providing the required information. For this reason, on 03/12/2021 the requirement of 01/26/2021 was reiterated.

5. On 03/19/2021, the City Council responded to the aforementioned request through a letter in which it stated the following:

- The email of 10/20/2020 was indeed received from the association's email (...) with an attached document corresponding to the list of partners.
- The mentioned mail was forwarded to the Mayor because it was directed to his attention and the object of the same was the request for a meeting.
- There is no evidence that any public employee or any elected office had leaked this information There is no public employee or elected position that is part of the "(...)" group.
- The people authorized to manage the City Council's email account are the two people attached to the public service, specifically Mrs. (...) and Ms. (...). The management of the City Council's mailbox is carried out by the two workers related in the preceding lines and every day they open the mail, enter the mailbox and proceed to forward the mail to the councilors of the corporation by virtue of the delegation of the special attributions made by the Mayor pursuant to Mayoral Resolution 2019-346 of June 19, 2019.
- A confidentiality document signed by the workers attached to the service is provided of attention to the public.

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6. On 03/30/2021, also during this preliminary information phase, the Authority deemed it necessary to obtain more information and required the reported entity to carry out a series of checks, specifically:

- If the message dated 10/20/2020 had been forwarded or if a message had been sent attaching the disputed document; that it be checked whether mail had been forwarded from the mayor's mailbox or if any message containing the document had been sent.
- In the event that no result was obtained from the previous checks, if backup copies were available, to check whether copies of the messages existed and, if so, whether they had been forwarded.

It was also requested that it be proven that the previous checks had been carried out.

7. On 04/22/2021, the City Council submitted a letter to the Authority in which it set out the following:

- We do not have the human or technical resources of the big administrations. We do not have any IT staff on staff, however, with the clear desire for transparency, a IT has been requested to proceed to thoroughly examine the e-mail in case he could capture any evidence that we have for now unnoticed given that the IT specialist will have all the necessary technical knowledge to check the issues that are the subject of the request.
- As of today, we cannot send you any evidence of the checks carried out as the inquiries and checks of both email addresses have been carried out and these checks do not leave any type of evidence. If once the technician goes to the City Hall premises and verifies the existence of any new information relevant to the subject of this procedure, we will send you the technical report issued in relation to the request carried out given that this administration is the first interested in clarifying the events that occurred.

8. Given the time that has passed since the previous letter, on 06/17/2021 the City Council was again required to provide the technical report made by the IT company hired by the City Council.

9. On 12/07/2021, the City Council complied with the previous requirement by providing a report dated 22/04/2021, prepared by the IT company (...) The content of this report, in summary, is the following:

- The computers of the municipal offices were checked to check the e-mail accounts. A message from the association (...) with a list containing personal data was found in the inbox of the computers of the administrative

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they access the City Council mail account (...). This message is not recorded forwarded, and no copies in the sent or deleted messages folders.

- After doing a complete search of all mailboxes, no information was found members of the association in the rest of the messages.
- There is no evidence to conclude that the personal information of the people contained in the original message sent by the association itself has been distributed from the City Council's computers.

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 background story, it is necessary to analyze the facts reported that are the subject of this file resolution.

Prior to the analysis of the facts, it should be remembered that all the people involved in any phase of the treatment are subject to the duty of confidentiality with respect to the personal data that is the subject of the treatment.

This obligation is included in article 5 of the LOPDGDD, which provides:

- 1. Those responsible and those in charge of data processing as well as all the persons involved in any phase thereof will be subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.*
- 2. The general obligation indicated in the previous section will be complementary to the duties of professional secrecy in accordance with applicable regulations.*

In turn, the RGPD in article 5 relating to the principles applicable to the processing of personal data establishes that: "1. Personal data will be: f) treated in such a way as to guarantee adequate security of personal data, including protection against unauthorized or illegal processing and against accidental loss, destruction or damage, through the application of technical or organizational measures appropriate ("integrity and confidentiality")."

In accordance with the previous provisions, the City Council, as the person responsible for the processing of personal data, has the obligation to guarantee the security and confidentiality of the processed data, and must apply the appropriate technical and organizational measures to ensure that

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there is no unauthorized or illegal access to personal data. Thus, in accordance with article 32.4 of the RGPD, *"The person in charge and the person in charge of the treatment will take measures to ensure that any person who acts under the authority of the person in charge or the person in charge and has access to personal data can only process said data following the instructions of the person in charge (...)"*. In relation to this, the City Council acknowledged having informed the two municipal employees in charge of managing the City Council mailbox about the duty of confidentiality to which they are subject. In accordance with the documents provided by the City Council, "Confidentiality and data processing agreement", signed by each of the workers, the documents contain a series of clauses relating to the duty of confidentiality and guidelines to be followed in data processing . For what's important here, it's necessary

emphasize the following: they are considered confidential information, among others, the information of the citizens; the employee's obligation not to disclose to any natural or legal person the confidential information to which she may have access during her relationship with the City Council is for an indefinite period. There is also the obligation not to have any paper or electronic copies of documents relating to citizenship, except to fulfill their obligations as a municipal employee.

Regarding the facts that are the subject of this filing resolution, it is not a disputed fact that the person reporting, on behalf of the members of the aforementioned association, on 10/20/2020 sent an email to the City Council with a attached document with the members' personal data.

On the other hand, according to the documentation provided by the complainant, it appears that:

- In the WhatsApp group1, (...) published a list of the association's members, after anonymization (pixelation) of the second surname and the ID, and subsequently deleted the publication. As can be seen from the message that accompanied the publication of the list of partners, the purpose of this was to denounce the dissemination of the list with personal data of the partners that someone would be doing on social networks, because he writes: *"I am bequeathing this... Seriously they run where are people's data??? What is pixelated is because I pixelated it"*.
- That a person who is a member of the WhatsApp group1, whom the complainant identifies as the daughter of one of the members, lodged a complaint with the AEPD for these facts against the Board of the association and that, in turn, the complainant (secretariat of the association), responsible for safeguarding members' personal data, also filed a complaint against the City Council for leaking members' data.

Once the above has been settled, it should be pointed out that the specific fact that is being analyzed here and that could constitute an infringement for breaching the principle of confidentiality, is if the City Council leaked the document that contained the list of members that appeared published in the WhatsApp group1.

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Regarding the origin of the distribution of the list of members, the person making the complaint suspects that the document it could have been leaked by some employee of the City Council. He bases his assumption on the fact that the document appeared published the day after it was sent by e-mail to the City Council.

The City Council, for its part, denies that the document was leaked from the City Council. Thus, in response to the Authority's request, he reported that he had no evidence that any public employee or elected official had leaked the information. In addition, it states that there is no public employee or elected official who is part of the WhatsApp group1.

Also, according to the report provided by the City Council, no re-issue of the mail or the document in question was made from the City Council mailboxes, nor was the information of the members found of the association in the rest of the analyzed messages or in the mailboxes. Finally, the report concludes that no evidence was found that the information had been distributed from City Council computers.

In the case at hand, from the actions taken in the previous information it has not been possible to establish that the origin of the dissemination of the list of members comes from the City Council. This, because the technical report, carried out by the IT company hired by the City Council, concludes that no evidence was found that the information had been distributed from the City Council's computers. And, because the person making the complaint does not provide any evidence to infer that the City Council is responsible for disseminating the document, beyond the fact that he sent the controversial document by email to the City Council. Nor have any indications been found in the documentation provided by the person making the complaint, in none of the WhatsApp group messages provided, there is no reference to the origin of the leak that would allow any link with the City Council to be deduced.

There being no sufficient elements to deduce that the origin of the leak is the City Council, the principle of presumption of innocence is applicable and, therefore, administrative responsibility cannot be demanded from the City Council. This principle, explicitly 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"*.

In the same line, the jurisprudence is pronounced, for all, the Sentence of the National Court of 18/03/2009, ratified by the Supreme Court in a sentence of 16/05/2012, which confirmed a resolution of the Spanish Agency of Data Protection by virtue of which the archive of the actions of prior information was declared because it was considered that there was no corroborating evidence of the authorship of the reported facts that would allow the same to be imputed: *"The appealed resolution recognizes that the the reported conduct could have given rise to an infringement of the duty of secrecy in application of the provisions of article 10 of the Organic Law 15/99 and which could give rise to the imposition of a sanction for carrying out unconsented 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 archival resolution and a new one*

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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 punitive law and, therefore, applicable to the scope of administrative sanctions (Article 137 of the Law of Legal Regime of Public Administrations and Common Administrative Procedures), implies the existence of a minimum evidentiary activity of charge, practiced with observance of all the procedural guarantees, 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 in relation to arts. 16 to 19 of RD 1,398/1993), for which there is no sufficient proof, it, therefore, being not possible to file an appeal against the 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, there are not sufficient indications to impute the leakage of the document with the personal data of the members of the neighborhood association (...) to the City Council.

Article 89 of the LPAC, in accordance 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 is not have been able to identify the person or persons responsible or appear exempt from responsibility.*

Therefore, I resolve:

1. File the actions of prior information number IP 358/2021, relating to the Town Council of La Pobla de Montornès.
2. Notify this resolution to the Town Council of La Pobla de Montornès 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 of

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count from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction.

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

The director,

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