

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

File identification

Archive resolution of the previous information no. IP 190/2021, referring to Calafell Empresa Municipal de Serveis, SA (CEMSSA).

Background

1. On 05/03/2021, the Catalan Data Protection Authority received a letter from Ms. (...) for which he filed a complaint against Calafell Empresa Municipal de Serveis, SA (hereinafter, CEMSSA), on the grounds of an alleged breach of the regulations on the protection of personal data.

First of all, the complainant explained that he started working for the municipal company CEMSSA on 01/04/2021, in the afternoon shift, and the company notified him of the termination of the employment relationship on 13/04/2021 because he had not passed the trial period.

Secondly, the complainant stated that he asked for explanations from the person in charge, Mr. (...), on the reasons why the probationary period had not passed and, after a lot of insisting, he told her that there was a photo of him that caused a very bad image. According to the reporting person, a worker on the morning shift took a photo in which two people were seen: the reporting person sitting on the sidewalk with her back and another worker standing next to the company vehicle that was watching the mobile. The complainant complained that the photo was taken without his consent while he was having a snack during the 30-minute work break available to workers.

The reporting person provides an audio of a conversation held by some people. In the audio, two female voices can be distinguished (one would be that of the person reporting and another that could be the person in charge who is alluded to in the conversation) and two male voices (one that responds to the name of Mr. (...)) and another corresponding to the companion of the person reporting).

The complainant asks Mr. (...) an explanation because according to him she has been fired. Mr. (...) tells him that the reason is that he has not passed the trial period. The reporting person (hereinafter, PD) insists that he wants to know the reason.

The conversation between the four people is transcribed below:

Mr. (...): "This is not what they want"

PS: "And what do they want?"

Mr. (...): "I don't know, okay. I can say many things and she (...) knows it. And we have hasta images because we are in the street".

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PS: "Images of what?"

Female voice: "The best are the images that I told you would bring repercussions"

Mr. (...): "We are in the street. We are a public service. In the whole municipality we have sight of all the people, the (...) knows it"

PS: "That doesn't work for me. Tell me specifically what I did or what I said."

Female voice: "Maybe the image is the one I told you"

PS: "But we were snacking."

Female voice: "Do you know what's going on? That this is nonsense because I talked to her and I talked to the other boy..."

Mr. (...): "The part that I can tell you, that they have sent images where you were sitting on the curb".

PS: "Snacking".

Mr. (...): "But people don't know. If you come here to eat..."

PS: "It seems to me that you are not sincere (...). He's lying to me."

Then the complainant and his companion go to the company's offices to ask for their papers and a new conversation begins with another person (male voice) who identifies himself as Mr. (...) (office person).

The complainant says she was fired over the phone and that is not manners.

PS: "The reason? Sitting having a snack..."

Office person: "You're taking something for granted. The forms I agree are not correct"

Accompanying person: "Let them take a picture of her from the back, the friend of the person in charge (...)"

2. The Authority opened a preliminary information phase (no. IP 190/2021), 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 07/08/2021 the reported entity was required to report on the reporting facts, specifically:

- To confirm whether CEMSSA, by itself or through one of its employees, took the photograph in which the complainant appeared. In the case of an affirmative answer, specify the purpose for which the photograph would have been taken and indicate the legal basis that in his opinion would justify taking the photograph of the person making the complaint.

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- In the case of having taken the photograph, confirm whether this was the cause of the termination of the employment relationship with the person making the complaint or for a different purpose and specify the legal basis that in his opinion would justify its use.
- In the event that the photograph was not taken, nor were any of its employees, report whether the company received the photograph from a third person and, in such case, clarify whether it had implemented any channel through which neighbors could send photographs to the municipal services company.
- In the event that you claim that you were not aware of the mentioned photograph, report it how would it be explained that, according to the complainant, Mr. (...) had told him that "there was a photo of the person reporting that caused a bad image."

The 10-day period granted to the reported entity to comply with the requirement was far exceeded without it having provided the required information,

4. On 09/27/2021, the request dated 07/08/2021 was reiterated to the reported entity, and 5 days were granted to provide the required information. He was also warned that if he did not comply with this requirement, he could be in breach of the regulations on the protection of personal data.

5. On 09/29/2021 CEMSSA responded to the aforementioned request through a letter in which it set out the following:

- That the reporting person terminated the employment relationship with the CEMSSA company for not having passed the trial period, for strictly labor reasons applicable to all its workers.
- That no manager of the company took any photographs of the complainant.
- That the company does not know the existence of the photograph mentioned by the person reporting
- That the company had not established any complaint channel for neighbors, users or workers through which photographs can be sent for the presentation of complaints or suggestions.
- That they don't know that Mr. (...) refer to any image of the reporting person.

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.

In accordance with article 3.1, the scope of action of the Catalan Data Protection Authority includes the files and the treatments carried out by: "e) Legal entities

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private that meet, at least, one of the following three requirements in relation to the Generalitat, the local bodies or the bodies that depend on them: first. That their capital belongs mostly to the said public bodies".

CEMSSA is a mercantile company with entirely municipal capital that was established as a municipal service company of the Calafell Town Council.

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

About the authorship of the photograph of the complainant and its subsequent use to terminate the employment relationship.

On the one hand, the complainant states that a company worker on the morning shift took a photograph of him while he was on the public road. According to him, two people were seen in the photograph: the complainant sitting with her back on the pavement and another worker located next to the company's vehicle who was looking at her mobile phone. The complainant complained that the photo was taken without her consent while she was having a snack during the 30-minute work break that workers have.

Therefore, the facts reported by the person in the present case are the following: the company, through a worker identified as a morning shift worker, without her consent, would have taken a photograph of her and subsequently 'company would have used it as a reason to terminate his employment contract while he was still in a trial period.

In the audio provided by the person reporting, it is said that a friend of the person in charge took a photo of her back (according to the person accompanying the person reporting) and Mr. (...) he says that images have reached him because they are on the street, in public view. Well, the first thing to say is that the audio provided by the complainant does not allow us to prove who took the photograph (which could be company staff or not), or through which channel it would have reached hands of the person in charge (in case this had happened), nor that the photograph was processed in company files or databases

On the other hand, in its written response to the Authority's request for information, the reported company stated that it was unaware of the existence of the controversial photograph and added that no manager of the company had carried out or ordered to carry out no photograph of the reporting person. It further stated that the company has no complaint or suggestion channel through which residents, service users or company workers can send photographs to the company. He also stated that he had no record that Mr. (...) refer them to any image of the reporting person. And he assured that the company decided to terminate the employment relationship with the complainant for strictly employment reasons, for not having passed the trial period.

Carrer Rosselló, 214, esc. A, 1st 1st
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It should be noted that the employer does not have to justify the termination of the employment relationship when the employee is in a probationary period and, therefore, the company did not need the controversial photograph to justify the termination of the employment relationship. According to article 14.2 of Legislative Decree 2/2015, of October 23, which approves the revised text of the Workers' Statute Law (hereinafter, the Workers' Statute): "During the trial period, the working person will have the rights and obligations corresponding to the job that he performs as if he were a staff member, except those derived from the resolution of the employment relationship, which may occur at the instance of any of the parties during its course".

In short, in the preliminary information phase, no indications were found that the complainant's photograph had been processed by the company, which even denies having any knowledge of it. At this point it is not superfluous to point out that in the event that the photograph had reached the hands of the person in charge, this fact alone would not allow any administrative responsibility to be imputed to the company since, as has been said, neither the company had no system in place to collect this type of information, nor is there any indication that the company treated this photograph in its files.

Finally, to say that, even in the denied case that the company had treated the photograph controversial, this treatment could be considered justified in the employer's need to control the conditions in which the service is provided, and that the photograph was taken in the middle of the street, that is to say, in a public place where the working person would have no expectation of privacy.

Having found no evidence of the commission of an infringement in the matter of personal data protection, the right to the presumption of innocence enshrined in article 24.2 of the Spanish Constitution and specified in article 53.2.b) of the LPAC, which provides that "(...) in the case of administrative procedures of a punitive nature, the alleged responsible parties will have the following rights: b) The presumption of non-existence of administrative responsibility while not prove otherwise."

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 accordance with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions should be archived when the following is made clear in the instruction of the procedure: "a) The non-existence of the facts that may constitute the infringement"

Therefore, I resolve:

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1. File the previous information actions number IP 190/2021, relating to Calafell Empresa Municipal de Serveis, SA.
2. Notify this resolution to Calafell Empresa Municipal de Serveis, SA 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,