

File identification

Archive resolution of the previous information no. IP 133/2022, referring to the municipal group All for Argentona of the Argentona City Council

Background

1. On 04/13/2022, the Catalan Data Protection Authority received a letter in which the Argentona City Council filed a complaint against the Tots per Argentona municipal group, on the grounds of an alleged breach of the regulations on personal data protection .

Specifically, the City Council stated that a councilor from the aforementioned municipal group, in his capacity as a local elected official, would have accessed the pre-registration and matriculation files of the municipal preschools for the 2021-2022 school year, and would have collected the personal data of those families who would not have obtained a place, in order to contact them by phone, and ask them via " *Whatsapp* " for their name, surname and ID, in order to present an instance to the City Council. In this regard, they consider that the mentioned action of the municipal group could contravene data protection regulations.

The documentation attached to the letter of complaint is as follows:

- Request for access to information presented on 05/10/2021 by the municipal group Tots per Argentona which had as its object access to the administrative file that collects pre-registrations, registrations and related correspondence, with registration in municipal nursery schools, for the 2021-2022 academic year.
- Resolution dated 11/10/2021 of the request for access to public information presented by the municipal group Tots per Argentona.
- Copy of certain instances, which make up the administrative file relating to the pre-registrations and matriculations of municipal nursery schools for the 2021-2022 school year, to which the reported municipal group acceded.
- Minutes of appearance signed by the Mayor and the municipal secretary of the Argentona City Council, which includes the complaint of a third person (with their anonymized data), in relation to the data processing carried out by the municipal group reported here.

2. The Authority opened a preliminary information phase (no. IP 133/2022), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to 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 susceptible to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 07/06/2022 the reported entity was required to, among others, report on the circumstances in which the municipal group accessed the information related to the pre-registration file and enrollment in municipal nursery schools and to confirm whether the families who had not obtained a place in nursery schools were contacted by phone.

4. On 06/16/2022, the reported municipal group responded to the aforementioned request through a letter in which it stated the following:

- That , *"During all the consultation days our councilor mr. (...) collected the relevant data to have a real knowledge of the situation of registrations and demands of the reception service, such as: dates of instances and reasons, registration numbers, initials of the child and date of birth (essential to know the classroom that corresponds to him). Based on this information, a summary table of the situation was drawn up"*
- That, *" At no time was any other unspecified data used (...) The contacts we established with the people and/or families interested were made through previous personal acquaintances or through third parties. In fact, these contacts were initiated prior to access to the file, when some parents close to our political group called us to explain the situation. From that moment we started looking for other parents of the nursery school and parents of babies born during the year 2020"*.
- That, *" There are countless contacts that we made from that moment on, but always, as we said, through personal relationships. It is not difficult to assume that in a town like Argentona you can get in touch with any villager with some ease. As an example, we can explain that: another councilor (...) has a son born precisely in 2020 and therefore has personal acquaintances with other parents with children of the same age. The councilor himself (...) has a brother with a son born in 2020 and another who had gone to the "Cargol treu banya" school a year earlier. We also went to the neighborhood of Cros for a couple of days and asked several families we saw with a baby carriage"*.
- That, *" This is how we weaved the network of contacts. When we contacted them through a telephone conversation or WhatsApp message, we explained our point of view and our intention to make a joint request to the City Council. Those who were interested gave their details. It's precisely because we didn't use any data from the file that we asked for it over the phone."*
- That, *" All the data that the interested parties themselves gave us were used solely for the purpose of complying with the proposal that we had announced to them (making a request to the City Council). When we made this instance public, all this data was hidden."*
- That, *" We invited all the people who showed their interest to a meeting on 10/25/2021, which was held in the middle of Plaça del Cros. It is precisely because these contacts were made openly and by "spreading the word" (...)"*

The reported entity attached various documentation to the letter.

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 Catalan Authority of Data Protection, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the Director of the Authority is competent to issue this resolution Catalan Data Protection Authority.
2. Based on the background story, it is necessary to analyze the reported events that are the subject of this archive resolution.

The complainant here pointed out that a councilor from the municipal group All for Argentona , in his capacity as a local elected official, would have accessed the pre-registration and matriculation files of the municipal preschools for the 2021-2022 school year, and would have collected personal data from those families who did not get a place in nursery schools,

to later contact them via " *WhatsApp* ", and ask them for their personal data - specifically, the name, surname, and ID - , to present an instance to the City Council.

In relation to the above, for the purposes of certifying the facts, the City Council provided, among other documents, a report of appearance, signed by the Mayor and the municipal secretary, through which it is stated that, a third person – whose identity and signature appear anonymised – would have filed a complaint with the City Council to show that, on 10/24/2021, he had received a call from a councilor of the municipal group denounced here, to inform her of the holding of a meeting, with those parents who had children who had run out of places in nursery schools. The record also records that this third person would have complained about the fact that said councilor had presented an instance to the City Council, where the families "*were identified with names and ID numbers. This data, specifically for them, was requested by the councilor himself via WhatsApp, after the first contact*".

As a preliminary matter, it should be noted that access by the councilor to the information detailed in the antecedents, which would have been provided by the City Council itself, does not contravene data protection regulations. The right of access to municipal information that all members of the Corporations have - regardless of whether they are in the government team, or in the opposition, as would be the case - is expressly regulated in the article 77 of Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) when it states that "*Todos los miembros de las Corporaciones locales tienen derecho a obtener del Alcalde or President or de Comisión de Gobierno cuantos background, data or information are held by the Corporation's services and are necessary for the development of its function. The request to exercise the right contained in the previous paragraph must be resolved motivatedly in the five natural days following the one in which it had been presented.*"

In this same sense, Legislative Decree 2/2003, of April 28, is issued, by which the revised Text of the Municipal and Local Government Law of Catalonia (TRLMRLC) is approved by providing, in its article 164.1, that "*all members of local corporations have the right to obtain (...) all the background, data or information that is in the possession of the corporation's services and is necessary for the development of its function*".

However, without prejudice to this legal authorization to access the content of the disputed documents, it must be borne in mind that, once access has materialized, in accordance with article 164.6 TRLMRLC, the local elected officials "*have to respect the confidentiality of the information to which they have access by virtue of their position if the fact of publishing it may harm the interests of the local body or third parties*". This duty of secrecy or confidentiality is also explicitly provided for in articles 5 of the RGD and of the LOPDGDD, which means that the aforementioned information is not disclosed to third parties, except in the cases enabled by law. In other words, there is a duty to diligently guard the personal data that is the subject of consultation.

In this sense, and as already said, it is not a matter of controversy that the municipal group could access the disputed file, but that the object of this complaint refers to the alleged collection, by the municipal group , of the personal data contained in the aforementioned file to, later, contact the affected families via " *Whatsapp* ", ask them for their personal data, and present an instance to the City Council.

The municipal group Tots per Argentona, after this Authority requested information about the events reported, has acknowledged having accessed the pre-registration and matriculation files of the municipal preschools for the 2021-2022 academic year, and having collected, in

the from this inquiry, the following data: dates of the instances and reasons, entry registration number, children's initials and date of birth, but denies having collected any other personal data - such as the telephone or the identity of the families -, and affirms that, although they contacted different people who had children who had run out of places in nursery schools, these contacts were initiated from acquaintances and relatives, and in some cases prior to the consultation of the referred file . In this sense, the municipal group adds that "*it is not difficult to assume that in a town like Argentona you can get in touch with any villager with some ease*" and that, even, they would have gone "*to the neighborhood of Cros for a couple of days and we will ask several families that we see with a baby carriage*", in order to reach more families, explain their point of view, and call them to a meeting, to propose the presentation of an instance to the 'Town hall. Attached to its letter of allegations, the municipal group provided the controversial instance, which would have been presented by six families, acting in their own name, as "*neighbors of Argentona and fathers/mothers of a baby born this year 2021*".

Well, aside from the claims of the complainant, there is no evidence that the municipal group, as part of the access to the controversial information, collected certain personal data from the affected families in order to subsequently contact them. And, in this regard, it should be pointed out that, the minutes of appearance provided in this procedure by the City Council, include the statement regarding the fact that a councilor of the GM reported here would have requested, via Whatsapp, the data relating to the *name* , surnames and ID number of the affected persons, for the subsequent presentation of an instance. This request for information would be unnecessary if, the local elector in question, had collected this data when he consulted the file, and this was the source of information used to contact them, as stated by the complaining party

In relation to the above, it is worth saying that, it cannot be ruled out that the personal data in question were obtained from contacts of the reported municipal group, as it claims after denying having obtained them from the aforementioned consultation file, taking into account that both the City Council and a third party have stated that the said group would have asked for personal data from the affected families. Data that, as has been said, would appear in the instances that the group was able to consult, as part of the access to the referred file.

And, with regard to the presentation of the controversial instance, by six families, this Authority also does not appreciate any breach of the data protection regulations, given that, although the municipal group denounced had the initiative to present an instance to the City Council, requesting the opening of a classroom at the "Cargol treu banya" nursery school, the reference instance with personal data is signed by the affected people, acting as residents of Argentona, and in their own name.

Having established the above, it must be taken into consideration that the sanctioning procedure is particularly guarantor because of the consequences that can be derived from it. This is why the existence of evidentiary elements or sufficient rational indications that allow the commission of an offense to be imputed is necessary. In line with article 24 of the Spanish Constitution, regarding the presumption of innocence, article 53.2.b) of the LPAC includes the following as the right of those presumed responsible for administrative procedures of a punitive nature: *To the presumption of non-existence of administrative responsibility until proven otherwise*".

It cannot be ignored that the penal administrative law applies, with some nuance but without exceptions, the inspiring principles of the criminal order, resulting in the full virtuality of the

principles of presumption of innocence and in dubio pro reo en the scope of sanctioning power, which shifts the burden of proving the facts and their authorship to the accuser. In this sense, the Constitutional Court, in its Judgment 76/1990 of April 26, considers that the right to the presumption of innocence implies that *" the sanction is based on acts or probatory means of charge or incrimination of the conduct reproached that the burden of proof corresponds to the accuser, without anyone being obliged to prove their own innocence; and that any inadequacy in the results of the tests carried out, freely assessed by the sanctioning body, must be translated into an absolute pronouncement "*. In the same way, the Supreme Court, in its Judgment of 10/26/1998, declares that the right to the presumption of innocence *"does not oppose that the judicial conviction in a trial can be formed on the basis of evidence indiciaria, but in order for this evidence to disprove said presumption, it must satisfy the following constitutional requirements: the evidence must be fully proven - it cannot be treated as mere suspicion - and it must explain the reasoning by virtue of which, based on the proven evidence, has come to the conclusion that the accused carried out the infringing conduct, then, otherwise, neither the subsumption would be founded in law nor would there be a way to determine if the deductive process is arbitrary, irrational or absurd, that is to say, if it has been violated the right to the presumption of innocence when considering that the evidentiary activity can be understood as a charge "*.

Therefore, in view of the specific concurrent circumstances in the case that is the subject of this resolution, the file of the actions proceeds, as there are not sufficient indications to consider the existence of an infringement proven and, in its case, the responsibility of the municipal group denounced in relation to the facts denounced.

In accordance with everything that has been set out in the 2nd legal basis, it is necessary to agree on the archive of the present actions, in accordance with article 10.2 of Decree 278/1993, of November 9, on the sanctioning procedure of 'application to the areas of competence of the Generalitat, which provides that no charges will be drawn up and the dismissal of the file and the archive of the actions will be ordered, when the diligence and tests carried out do not prove the responsibility of the alleged offender

Therefore, I resolve:

1. Archive the previous information actions number IP 133/2022, relating to the municipal group Tots per Argentona.
2. Notify this resolution to the Tots per Argentona municipal group and communicate it to Argentona City Council.
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 denounced 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 the which provides for 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,

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