

## File identification

Archive resolution of the previous information no. IP 162/2022, referring to the City Council of l'Hospitalet de Llobregat.

## Background

1. On 03/05/2022, by referral from the Spanish Data Protection Agency, the Catalan Data Protection Authority received a letter in which a person filed a complaint against the City Council of l'Hospitalet de Llobregat, due to an alleged breach of the regulations on the protection of personal data .

Firstly, the complainant stated that, on April 28, 2022, he enrolled in a participatory process initiated by the City Council of l'Hospitalet de Llobregat (hereinafter, the City Council) and that, before to enter the premises where it was being held, they handed him a document whose purpose was the transfer of the use of the images that could be taken during said event. He adds that he refused to sign said document and that he stated, in front of two witnesses, that he did not authorize the use of his image. He explains that, upon leaving said event, to which he attended as a representative of an association that opposes the Urban Plan that was being debated, he realized that the City Council had published on its corporate accounts of the networks social networks Facebook and Twitter a photograph in which he appeared, which he considered could be interpreted as a validation of the Urban Plan to which he opposes, and this could damage his image and that of the association he represented.

Finally, the complainant asked for the removal of said publications of the photograph in which he could be identified, for the City Council to be sanctioned and for the association he represented, as well as himself, to be compensated with the amount of six thousand euros (€6000) to each.

The reporting person provided links to two posts on the social networks Facebook and Twitter and provided the following documentation relating to the events reported:

- Several mobile phone screenshots, with posts on the City Council's corporate Facebook page and Twitter account.
- Registration email for a meeting, sent from a corporate account of the Generalitat de Catalunya, dated April 26, 2022.
- Document with various information from the City Council.

2. The Authority opened a preliminary information phase (no. IP 162/2022), 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 05/11/2022 the reported administration was required to report on the legal basis that would legitimize the controversial treatment; to confirm that the person making the complaint did not authorize the use of their image (and, otherwise, to provide the testimony of the receptionist at the facilities where the act of the participatory process took place, on the 28 /04/2022); that he provide a copy of the form that the person making the complaint filled out when he attended the said event and, in the event that the

City Council had removed or anonymized the images of the person making the complaint on social networks, that he prove this.

4. On 31/05/2022, the City Council responded to the aforementioned request through a letter in which it stated the following:

—The Consorci per la Reforma de la Granvia a l'Hospitalet (CRGV), integrated by the Generalitat de Catalunya and the Ajuntament de l'Hospitalet de Llobregat, organized informative and participative sessions of the Urban Master Plan (PDU) Biopol- Gravia \_ One of these sessions, called "Discussion table: Urban model and sustainable development", was held on 04/28/2022 at the Tecla Sala Cultural Center, owned by the municipality.

—The PDU establishes the citizen participation program and includes its object, legal framework, calendar and actions to be carried out.

—In the web link to the PDU participation process, the General Directorate of Citizen Participation and Electoral Processes of the Department of External Action, Institutional Relations and Transparency of the Generalitat of Catalonia is established as responsible for the treatment. It also specifies the purpose of the treatment: "*Diffusion and sending of relevant documentation related to the mechanisms of citizen participation of the Generalitat de Catalunya: face-to-face or virtual participatory processes, stable spaces for participation and participation in the regulatory production procedure (...)*".

—To be able to participate in each session of the participatory process of the PDU, it was necessary for the participating people to sign up expressly and, at the time they signed up, the following informative text related to the protection appeared on the participa.cat portal of data:

*" In accordance with data protection regulations, we inform you that, by filling in this form, you give your consent for the Generalitat de Catalunya to process your data to manage contact with citizens and people interested in participating more actively in the acts, bodies and processes of participation promoted by the Generalitat de Catalunya and, given that this session is the subject of recording and broadcast via YouTube of the Generalitat de Catalunya, express your authorization for it to be recorded and broadcast your voice and/or your image through the aforementioned communication channel; legitimized actions based on your consent".*

a short note on the celebration of the event was published on the City Council's social networks Facebook and Twitter , illustrated with two photographs in which the participants appear in a purely accessory capacity.

—The legal basis for the treatment consisting in the dissemination of the person's image through social networks would be the consent of the affected person.

—The City Council's data processing of the images of the people attending the event is based on the exception of Article 8 of Organic Law 1/1982, of May 5, on civil protection of right to honor, personal and family privacy and one's image.

— They do not know that the person making the complaint signed the "transfer of image rights" document that was distributed among those attending the aforementioned event.

—That they have applied the following measures: they have updated and drawn up a new document of consent for the capture, reproduction and dissemination of the image, for future sessions of the participatory process, and have removed the images published on the social networks Facebook and Twitter corresponding to the act of 04/28/2022, where the complainant appeared.

the following documentation to the letter : the two versions of the transfer of image rights sheet and a collection of web links referring to the PDU participation process.

5. On 05/10/2022, also in the context of this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint. Thus, it was found that on the Facebook page and on the Twitter account of the City Council there were published several images referring to the act of public participation mentioned above, with a publication date of 04/28/2022. Subsequently, on 06/01/2022, the status of the posts was checked again and it was verified that the tweet dated 04/28/2022 had been deleted, on Twitter , and regarding the page of Facebook , the image in which the reporting person believed to be identifiable would have been removed from the publication.

### **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.

As has been progressed in the antecedents, the complainant complained about the dissemination of his image in two respective publications made on 28/04/2022 on the corporate accounts of the City Council of l'Hospitalet de Llobregat in the social networks Twitter and Facebook , as part of the dissemination of the participatory process called "Discussion table: Urban model and sustainable development", which was held on the same day in some municipal offices. The complainant considered that he was identified in one of the images that illustrated each of the two publications and believed that such dissemination violated his right to data protection.

In the case that concerns us here, it is of particular importance to elucidate whether the controversial images should be considered personal data.

Article 4 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 movement thereof (in hereinafter, RGPD), defines personal data as *"all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person"* .

This definition is complemented by the provisions of recital 30 of the same rule: *" (...) To determine whether a natural person is identifiable, all means, such as singularization, that can reasonably be used by the person responsible for treatment or any other person to directly or indirectly identify the natural person. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be*

*taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances (...)*”

On the consideration of the personal image as data and on the subjection of this issue to the provisions of the data protection regulations, the jurisprudence has been clearly pronounced on numerous occasions (for all, Judgment of the National Court of 29/09/2011).

However, both the jurisprudence and the precepts transcribed above require that the image, for it to be considered personal data, must comply with the requirement of identifiability, that is to say, that the image in question must allow the identification of the person or persons who appear there. And it must be said that this requirement - identifiability - cannot depend on the subjectivity of the affected person - who, in good logic, is easy to recognize himself - but must be identifiable, without disproportionate efforts, on the part of other people

Well, in this respect it must be said that this Authority believes that, in relation to the image that is the subject of the complaint, the concurrence of the requirement of identifiability is not clear. Indeed, among others, the framing and the angle from which said image was taken would make it very difficult to identify the affected person. In this regard, it should be noted that this is a group photograph in which the complainant appears in a third plan and is not even seen in full body, but in profile, located behind another person, which it only allows you to partially see the upper trunk, within the context of a table around which there are eight other people.

Having said that, it should be added that in this case there are other circumstances that prevent the data protection regulations from being considered breached, and this in accordance with the following:

Constitutional jurisprudence has considered that the right to one's image, recognized in Article 18 of the Spanish Constitution (CE), is not absolute and that, sometimes, it gives way to other rights that are considered preferential, such as the right to freedom of information or expression. In this sense, the Judgment of 02/27/2020 of the highest court is pronounced in the following terms: *" the fundamental right to one's own image is not an absolute and unconditional right. There are circumstances that can determine that the general rule, according to which it is up to the holder of this right to decide whether or not to allow the capture by a third party, gives way in favor of other constitutionally legitimate rights or interests. This will occur in cases where there is a public interest in the capture or diffusion of the image and this public interest is considered constitutionally prevailing over the interest of the person in avoiding the capture or diffusion of his image. This means that "when the right to one's own image collides with other constitutionally protected goods or rights, particularly freedom of expression and information [art. 20.1 a) yd) CE] the different interests faced must be weighed and, taking into account the specific circumstances of each case, decide which interest deserves greater protection "*.

Article 20 of the EC recognizes the right to freedom of information and expression, an article fully applicable in the case analyzed in which the use of images was carried out in the context of information relating to a process of citizen participation in the public sphere:

*" 1. The rights are recognized and protected:*

*a) To freely express and disseminate thoughts, ideas and opinions through speech, writing or any other means of reproduction.*

(...)

*d) To freely communicate or receive truthful information by any means of dissemination. The law will regulate the right to the conscience clause and to professional secrecy in the exercise of these freedoms.*

(...)

*4. These freedoms are limited by respect for the rights recognized in this Title, in the precepts of the laws that develop it and, especially, in the right to honor, to privacy, to one's image and to the protection of youth and childhood ".*

Along with the above, it is also necessary to take into account the content of Article 8 of Organic Law 1/1982, of May 6, on civil protection of the right to honor, personal and family privacy and one's own image, which states:

*"2. In particular, the right to one's own image will not prevent:*

- a) Its capture, reproduction or publication by any means, when it concerns persons who hold a public position or a profession of notoriety or public projection and the image is captured during a public event or in places open to the public.*
- b) The use of the caricature of said persons, in accordance with social use.*
- c) The graphic information about a public event or event when the image of a certain person appears as a mere accessory."*

The Supreme Court, in its Judgment of 03/30/2017, established that the image is accessory when *"the image is not the main element, because its presence is not necessary, nor does it have a special relationship with the object of the capture or projection ".*

Also, the National Court, in its aforementioned Judgment of 29/11/2011, has understood that *" Today day ca n't not knowing that the image is an essential complement to journalistic information and that it would be unthinkable for a report like the one published by the newspaper (...) to not come accompanied by information graphic and what it should required is that this is not contrary to the requirements imposed by law Orgánica 15/99 of Personal Data Protection ".*

Finally, on the use of images in an informative piece as a supplement to the information, the Constitutional Court has also pronounced, in the Sentence of 27/02/2020 cited above, in the following terms:

*"(...) the image of an anonymous or unknown individual, or what is the same, who does not hold a public position or a well-known profession, even if it is captured in a public place, cannot be used without his express consent, except in two cases. In the first place, the one in which the person appears in the photograph in a merely accessory and inconsequential manner, without any prominence (...)".*

Well, this is precisely the assumption that would have been made in this case, in which the image of the person reporting would have served to illustrate, in an accessory way, information - specifically, the "Discussion table: Urban model and development sustainable", in the context of a citizen participation process— in which the news is not focused on any specific person, but rather has a generic character and the image of the person making the complaint, along with that of more people, is that is to say, without giving it any prominence, and taken in a public area, such as the Tecla Sala Cultural Center, it serves to illustrate the information, under the protection of what is provided for in article 20 of the EC, the article 8 of

Law 1/1982 and the jurisprudence cited, and consequently the illegality of the publication cannot be concluded for lack of consent,

On the other hand, and in relation to the statement made by the complainant in his letter in which he complained about the damage caused by the use of his image associated with the validation of an urban plan to which he is opposed personally and as a representative of an entity he represented in said act, it must be said that, from the content of the publications in question, in no case can it be inferred that the person making the complaint validated said plan, since in both publications it was specified that it was a debate table or that several issues relating to said urban plan had been debated.

**3.** In accordance with everything that has been set out in the 2nd legal basis, and since 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 legislation on data protection, should be archived.

Article 10.2 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, provides that "(... ) *no charges will be drawn up and the dismissal of the file and the archive of actions when the proceedings and the tests carried out prove the non-existence of infringement or responsibility. This resolution will be notified to the interested parties*". And article 20.1) of the same Decree determines that dismissal proceeds " *a) When the facts do not constitute an administrative infraction.*"

Therefore, I resolve:

1. Archive the actions of prior information number IP 162/2022, relating to the City Council of Hospitalet de Llobregat.
2. Notify this resolution to Hospitalet de Llobregat City Council and 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, interested parties may file any other appeal they deem appropriate to defend their interests.

The director,