

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 286/2022, referring to the City Council (...)

Background

1. On 08/02/2022, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the City Council (...) on the grounds of an alleged breach of the regulations on the protection of personal data, specifically, for the disclosure to a third person linked to the Bar (...) of your personal data (specifically, your mobile phone).

The complainant stated the following:

1.1. That on 04/11/2022, he processed a request for access to public information at the City Council (...) in relation to the activities of a bar that (...) (Bar (...)).

1.2. That on (...) he received a call on his mobile phone from someone who identified himself as the one from Bar '(...)'.

1.3. That, as a result of that call, he submitted a claim to the City Council's Data Protection Officer (hereinafter, DPD), in which he complained that the data he had provided to the City Council as part of a request for public information (specifically their telephone number), were provided to a third person linked to the Bar (...). In this letter he stated that he had provided his data to the City Council because *'they were necessary for the city council to manage my request and therefore, in the context of this procedure (...)'* and that *'Surprisingly, this Monday (...), the person who runs the bar (...) contacted me through my mobile phone. I have never given my phone to this person, we have no relationship, so the only place he could have gotten my mobile number from is the City Council.'* and that the City Council was not authorized to communicate their data to third parties.

Together with the complaint, the person making the complaint provided:

- The claim presented to the DPD on 06/15/2022 and the DPD's response of 06/22/2022, and
- A second claim presented to the DPD dated 06/24/2022.

2. The Authority opened a preliminary information phase (no. IP 286/2022), 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 09/13/2022 the City Council (...) was required to confirm whether the City Council provided the identity or, in its case, the private mobile phone of the person here denouncing a person linked to the Bar (...). And, if you answer affirmatively, indicate the legal basis that justified the communication of the data.
- 4.** On 16/09/2022, the City Council (...) responded to the request through a letter in which it informed this Authority that it had not communicated either the identity or the mobile phone number of the person here complainant, neither to the owner of the bar nor to any third party.
- 5.** On the same date, 16/09/2022, the complainant was requested to provide some proof or indication of the call he received from a person linked to the bar, and to briefly state the reason and content of said call.
- 6.** On 09/22/2022, the person reporting here responded to the request for information by means of a letter in which he set out the following:
 - That ' (...)' However, in his letter of allegations, he referred to a mobile phone number from which, according to him, he received the call from the person linked to the bar in question.
 - Next, the complainant presents a series of antecedents about the bar. In summary, he states that it had caused him discomfort, being located at (...) from the building (...) and that for some time parties had been being celebrated '(...)' *And that this led to to which he carried out several actions before the City Council to find out if the bar had the relevant authorizations.*
 - That on (...) he received a call from the number he refers to in his writing and that *' the person calling me is identified as (a first name), the girl who runs the bar (..), and he informs me that on the night of (...) they plan to hold a party for the young people of the village until 6 in the morning and that, since he knows we come from far away, to warn us that it won't happen to us let's go there and meet the party.'*
 - The complainant concludes that *' the only place where they could get personal telephone numbers is the Town Hall (...), (...)'.*
- 7.** On 10/23/2022, the person reporting here was again required to provide the full identification of the owner of the bar '(...)', for the purposes of finding out - through this person who had allegedly called him - how he had obtained the mobile phone of the person here reporting.
- 8.** On 25/10/2022, the person reporting here provided the complete identification of the owner of the bar '(...)'.
- 9.** On 2/11/2022, this Authority addressed a request for information to the owner of the bar '(...)' in order to find out if she had obtained the telephone number of the person reporting through the Council or of a person linked to the same.
- 10.** On 10/11/2022, the person who ran the bar '(...)' responded to the request, acknowledging first of all that he called the person here reporting but, at the same time, denying that he had been the City Council who had provided him with the phone. In this regard, he explained: " (...)". And that ' (...)'.

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 complained that the City Council (...) had provided a person linked to the Bar (...) with data relating to his person, specifically his mobile phone. The complainant stated that on 04/11/2022 he had provided the City Council with his data (including his mobile phone) as part of a request for public information related to the aforementioned establishment, and that coincidentally on (...) he received a call from a person connected to the bar to inform her that he was planning to hold a party on the night of (...).

For its part, the City Council, in its response to this Authority's request, denies having communicated the data of the person making the complaint to third parties linked to the bar (it has not communicated the identity or any mobile phone number *of now reporting to the owner of the Bar (...) or to any third party since there is no file that legitimizes this communication of data'*).

Faced with the City Council's demonstrations, this Authority addressed the person who ran the bar '(...)', in order to obtain more information on how he would have obtained the mobile phone of the person making the complaint. In response, that person acknowledged having made the call, but denied having obtained the phone through the City Council or any person connected to it.

In the case at hand, it must be considered that in the previous information phase, the reporting person has not provided any proof or evidence that would prove the fact reported beyond a mere suspicion. In addition, both the City Council and the person who made the call have categorically denied that it was the City Council that provided the complainant's mobile phone. To this end, it should be added that the person who made the call stated that he had obtained the telephone through a third person who, as can be seen from his answer, had nothing to do with the City Council and that, in more, ' (...) ". From all the above, it is likely that people related in some way to the complainant and who knew his mobile phone number, could provide it to the person who ran the bar.

In this order of things, it cannot be ignored that the penal administrative law applies, with some nuance but without exceptions, the inspiring principles of the criminal order, the full virtuality of the principles of presumption of innocence being clear and *in dubio pro reo* in the area of sanctioning authority, which shifts to the accuser the burden of proving the facts and their authorship. In this sense, the Constitutional Court, in its Judgment 76/1990 of April 26, considers that the right to the presumption of innocence entails " *that the sanction is based on acts or probative means of charge or incrimination of the reprehensible conduct; 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 ".

Article 53.2.b) of the LPAC, in line with article 24 of the Spanish Constitution, determines that in administrative procedures of a punitive nature, those allegedly responsible have the right "To the presumption of non- existence of administrative responsibility as long as prove otherwise ".

3. 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 procedure penalty of application to the areas of competence of the Generalitat, which provides that no charges will be drawn up and the file and the archive of the actions will be ordered to be dismissed, when the diligence and tests carried out do not prove the responsibility of the alleged offender .

Therefore, I resolve:

1. Archive the actions of prior information number IP 286/2022, relating to the City Council (...)
2. Notify this resolution to the City Council (...) and to 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 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, interested parties may file any other appeal they deem appropriate to defend their interests.

The director,