

File identification

Resolution of sanctioning procedure no. PS 27/2019, referring to Albiol Town Council

Background

1. On 31/12/2018, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Albiol Town Council, on the grounds of an alleged breach of the regulation on protection of personal data.

In particular, the complainant stated that a member of the Councilor of the City Council complained of, specifically the person who holds the position of (...) and holder of a council office within the council, acceded to the instance that he had by rubric "*escrito nullidad Albiol initial approval 17/08/2018*" (Register ID: (...), and which he presented to the City Council through electronic means, on 11/11/2018, as (. .) of the EUC Masies Catalanes, and also in its own name. The complainant adds that this instance that he had addressed to the City Council would have been forwarded to a plurality of third parties through an email sent on 11/16/2018 by this municipal councilor, from the address de mailo (...)", and in which the aforementioned instance was included as an attachment.

The reporting person provided various documentation about the facts reported, specifically, the printout of the controversial email, sent on 11/16/2018, and a copy of the request that was attached to said email.

2. The Authority opened a preliminary information phase (no. IP 368/2018), 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 they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 14/01/2019 the City Council was required to report on the bodies and/or people of the City Council who would have had access to the instance indicated, and on the reasons that would justify such access. Likewise, it was required that he report on the functions he has orders and powers that correspond to the councilor Mr. (...), as a person who occupies the position of (...) and holder of the council of (...), and if the functions entrusted to him by the position held, justified the access of this person to the reference request relating to the Masies Catalanes urbanization project; and about the reasons that would have brought Mr. (...) to disseminate the said request via e-mail and the number of people to whom this e-mail would have been sent.

4. On 04/23/2019, the City Council responded to the aforementioned request in writing in which it stated the following:

- What " *With regard to the identification of the bodies and/or persons of the Albiol City Council who have had access to the document, these are the following: the administrative department that keeps the register of documents; the Secretary-interventor of the City Council, who must draw up the agreement to resolve the allegations and final approval of the urbanization project; the municipal technical services, which have drawn up the corresponding report; and the members of the local Government Board, who have approved the agreements, Mrs(...), mayoress, and councilors Messrs. (...)*".

- That " *Regarding the competences of Mr. (...), comment that this is the (...) of this City Council; member of the Local Government Board, and Alderman of (...), in accordance with the corresponding Mayor's Decrees, which was reported at the Organizational Plenary of this City Council held on the 3 July 2015*".

- That " *His competence as Alderman of (...), as well as the fact of being part of the Local Government Board, this body competent for the approval of the drafted urbanization project, justify the access of alderman in the document presented by Mr. (...) on November 11, 2018 at this City Council*"

- That " *Regarding the dissemination of the initial document, it must be said that we do not know whether or not this e-mail was sent or the reasons that motivated the transmission if it was sent.*"

- That " *Given that the letter is part of a file on a subject with public action (urban planning), it is possible that the document has been sent to several residents of Masies Catalanes, people interested in the file, for the purpose of the interest in this issue expressed by the residents of the urbanization, but it is necessary to carry out an internal investigation in order to clarify the facts.*"

That " *It is not known the number of people to whom the document could have been sent by e-mail, since it seems that it was sent by e-mail (...), and it is the e-mail alderman's staff.*"

5. On 09/09/2019, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against Albiol Town Council, for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.f); all of them from Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereinafter, RGPD).

This initiation agreement was notified to the imputed entity on 09/10/2019.

6. On 09/25/2019, the City Council made objections to the initiation agreement.

7. On 12/11/2019, the person instructing this procedure formulated a proposal for a resolution, by which he proposed that the director of the Catalan Data Protection Authority admonish the Albiol Town Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.

This resolution proposal was notified on 19/11/2019 and a period of 10 days was granted to formulate allegations.

8. The deadline has been exceeded and no allegations have been submitted.

proven facts

Of all the actions taken in this procedure, the facts detailed below are considered accredited.

On 16/11/2018, the (...) of Albiol Town Council, member of the Local Government Board and councilor of (...), sent an email, from the address from personal mail (...)", addressed to a plurality of people (presumably owners of homes that were part of the EUC Masies Catalanes), among whom it is recorded that at least one of them received the email, in which he attached the request for "*written annulment Albiol initial approval 17/08/2018*", which the complainant here had presented a few days earlier to the City Council, as (...) of the EUC Masies Catalanes and also in a private capacity, following the approval of the Local Government Board of the "*Completion and reception of the urbanization works of the UA:5 (Masies Catalanes)*" project.

The councilor who disclosed the request had access to its content due to his position at the City Council, but in the aforementioned email, he indicated that "*I am addressing all of you as a neighbor of Masies Catalanes and therefore the owner of a plot of land. the one not received by the City Council*". In this email, the municipal councilor complains about the fact that the complainant here had presented the request to the City Council.

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2. The accused entity has not made allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the most relevant part of the motivated response of the instructing person to these allegations.

2.1. On the lack of damage to the person holding the data

In the 1st section of its statement of objections, the accused entity stated that the shipment by part of the municipal councilor of the controversial e-mail to a plurality of third parties *"did not cause any type of damage to the person who presented the instance on behalf of an entity"*.

The first thing to note is that the council's statements respond to a subjective assessment of an element, the damage, which is not an objective element that configures the typification of the facts imputed here. In this respect, it should be noted that the facts alleged here have been typified by article 83.5.a) of the RGPD, which typifies the violation of *"the basic principles for the treatment"*, and specifically, as regards to the object of this procedure, the alleged violation of article 5.1.f) of the RGPD, which refers to the principle of integrity and confidentiality, which consists of the following:

"1. The personal data will be: processed in such a way as to guarantee adequate security of the personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of technical or organizational measures appropriate ("integrity and confidentiality")."

Thus, among the objective elements that make up this type of infringer is not included the need for the person holding the data in relation to which there has been a breach of the confidentiality principle, to have suffered damage or prejudice. In other words, the objective element of the infringing type will occur whenever and when there is an effective disclosure to third parties of personal data that, a priori, must only be known by the interested party and the person in charge of the treatment, and with respect to which 'requires confidentiality.

That is why, the instructing person considered that this allegation could not succeed, and that it was necessary to understand that the action of the municipal councilor violated the principle of confidentiality, since by sending the controversial email he allowed that unauthorized persons had access to the instance that the complainant here had presented to the town hall, not only as (...) of the EUC Masies Catalanes, but also in a private capacity.

2.2. On the withdrawal of the complaint

Subsequently, the imputed entity argued that *"we do not even rule out a withdrawal by the person who filed the complaint against Albiol Town Council"*. First of all, as was noted in the proposed resolution, this allegation cannot succeed considering, as it follows from the reading of article 63 of LPAC, that the presentation of a complaint by an individual does not generate a binding effect in the face of the initiation of the administrative procedure

sanctioning body, since it is one of the powers of the body competent for the initiation of the sanctioning procedure to determine, prior to or without carrying out the investigative actions (art. 55 LPAC), the origin of dictating the appropriate agreement to initiate the procedure when there are reasonable indications of the alleged commission of an infringement of the regulations on the protection of personal data. What's more, even in the case, like the present one, that the complaint has led to the effective initiation of a sanctioning procedure, the complainant does not hold the fact of being *"the interested party of the procedure"* (art. 62.5 LPAC). That is why, in the present case, the decision of the reporting person to withdraw or not from his action to report the facts alleged here, does not bind the authority of the competent body to continue with the processing of the administrative sanctioning procedure for which are sanctioned for the commission of acts classified as an infringement of the RGPD.

3. With regard to the fact described in the proven facts section, it is necessary to go to article 5.1.f) of the RGPD, which provides that *"personal data will be (...) f) treated in such a way that an adequate security of personal data is guaranteed, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")"*.

In accordance with what has been presented, as indicated by the instructing person, the fact collected in the section of proven facts constitutes the violation provided for in article 83.5.a) of the RGPD, which typifies the violation of *"a) the basic principles for treatment"*.

4. Article 83.7 of the RGPD provides that each Member State may establish rules on whether can impose administrative fines on authorities and public bodies, without prejudice to the corrective powers of the control authority under art. 58.2 of the GDPR. And adds article 84.1 of the RGPD that the member states must establish the rules regarding other sanctions applicable to the violations of this Regulation, in particular those that are not sanctioned with administrative fines in accordance with article 83. In this sense, art. 46 of the LOPD - not repealed by Royal Decree-Law 5/2018, of 27/7, on urgent measures for the adaptation of Spanish law to EU regulations on data protection, and therefore valid until at the entry into force of the new LOPDGDD-, provided that in the case of infractions committed by public administrations, the resolution in which the infraction is declared must establish the measures to be adopted so that the effects of the offense In this same sense, article 21.2 of Law 32/2010, determines the following:

"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . In addition, it can propose, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".

In the present case, it becomes unnecessary to require corrective measures for the effects of the infringement given that the infringing conduct refers to a single and already consummated fact, the sending of an email, which due to its instantaneous nature cannot be corrected by the application of corrective measures.

resolution

For all this, I resolve:

1. Admonish Albiol City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the legal basis 4rt.

2. Notify this resolution to Albiol Town Council.

3. Communicate the resolution issued to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

4. Order that this resolution be published 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 articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003, of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal 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, regulating the administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director,