

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

Dismissal resolution of sanctioning procedure no. PS 37/2020, referring to the municipal group (...)Municipal Agreement, of the City Council of (...)

Background

1. On 30/05/2019, the Catalan Data Protection Authority received a letter by which the City Council of (...) filed a complaint against the municipal group (...)Municipal Agreement (in hereinafter, GM AM), due to an alleged breach of the regulations on the protection of personal data.

Specifically, the City Council explained that Mrs. (...) as councilor of the said municipal group, had access to "certain municipal administrative documents that may contain personal data", and added that "there were indications that these documents would have been transferred to third parties without the prior consent of the interested parties".

The City Council provided various documentation, from which it can be inferred that the controversial "municipal administrative documents" dealt with municipal planning matters. The documentation provided was as follows:

- Copy of Mayor's Decree no.(...), which resolves to bring to the attention of the Authority, the facts ascertained by the City Council regarding the alleged transfer of personal data to third parties by the aforementioned Municipal Group, without consent of the affected people.
- Copy of the notification of the Mayor's Decree (...), which resolves to open an information procedure reserved to the (...).
- Copy of Mrs. (...)’s allegations in the Mayor's Decree (...).
- Copy of the request for documentation made by Mrs (...) at the City Council, dated 04/19/2017, and of the documentation that was given to her on 05/17/2017. Among the documentation, specifically, the contract between the City Council and the Sports Club (...) on the lease of a property for sporting, recreational and cultural purposes. The contract contains the data of both contracting parties: those of the representative of the City Council and the personal identification data of the representative of the sports club (name and surname, ID, and address).

- Copy of the documentation relating to the initiation agreement of the District Prosecutor's Office (...) of the fiscal investigation proceedings no. (...), dated 11/12/2018, initiated following a complaint from an individual, who attached a copy of the aforementioned contract between the City Council and the Sports Club (...).
- Copy of the request for documentation made by Mrs (...) at the City Council, dated 05/24/2016, and of the documentation that was given to her. Specifically, a copy of the Mayor's Decree (...), of April 29, 2016, which resolves to grant a construction license to a certain company, and in which the representative of said company is identified in through your personal data (name and surname, tax identification number and personal address).
- Copy of requests for information from an individual on the status of processing and documentation relating to the works and activities carried out in the area of (...), and specifically, a copy of the Decree (...). Also, a copy of the City Council's response denying access to this documentation.
- Copy of a summons from the Court of Instruction 2 of (...) and of the act of admission of the complaint for processing, dated 06/27/2017, in the annex of which all the documentation provided before that Court by the same person to whom the City Council had denied access. Among the documentation is a copy of the Mayor's Decree (...), of April 29, 2016.

2. The Authority opened a preliminary information phase (no. IP 171/2019), 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 26/06/2019 the reported entity was required to report on different aspects.

In this regard, it should be noted that the request was made after the change of legislature in the local world (26/05/2019), which in the case of the municipality of (...), would have led to the lack of municipal representation in the council of the Municipal Group (...)Municipal Agreement, a fact that did not prevent the request from being sent to the only councilor who constituted this municipal group at the time when the events reported occurred.

In the letter of request, information was requested on whether the GM AM councilor had access to all the documentation relating to the City Council and, if confirmed, to indicate the circumstances in which the said access, and in particular the specific people who accessed it, as well as the date of access. Also, the municipal group was required to confirm whether access was facilitated to the person who subsequently brought it to the aforementioned Court. If this end is confirmed, it was required to be reported

on the relationship that existed between GM AM and the individual who presented the documentation before the Courts; and, the reason that would justify the referral of the referenced documentation, which contained personal data of third parties.

4. On 07/14/2019, the councilor of the GM AM, responded to the aforementioned request in writing in which, after denying that the Municipal Group (...) -Municipal Agreement was the successor of the previous Group (...) Municipal Agreement, set out the following:

- That "we categorically deny that there is an illicit transfer of data by the defendant, in her capacity as a municipal councillor. A councillor's access to municipal information is a right regardless of his membership in the government or the opposition, and he finds in the exercise of the control function a legitimate basis for this access. What's more, the access to the documentation has always been made after a request and subsequent authorization by the City Council of (...)."
- That "the local regime legislation (art. 77 LBRL and art. 164.1 TRLMRLC) recognizes a right of access to all elected positions, regardless of whether they are in the government team or in the opposition, to the information that their local corporation has and that may be necessary for the exercise of the functions that correspond to them."
- That "with regard to the reason that justifies the contribution of the documentation designated in your request, it must be remembered that every citizen must bring to the attention of the competent authority the crimes of which he is aware. Article 259 of the Criminal Procedure Law establishes the following: "Whoever witnesses the perpetration of any public crime, is obliged to immediately report it to the investigating, peace, district or municipal judge, or fiscal official closest to the site that will be found."
- That "the transfer of this information has been carried out according to the most absolute fulfillment of the obligations on my part. The reason for it has been none other than the control by the courts of the legality of the contract on a matter of municipal urban planning."
- That "I was aware that in relation to the contract in question, a complaint had been filed by Mr. (...) before the Prosecutor's Office to be investigated, of which preliminary proceedings have subsequently been opened by the Court of Inquiry of (...). For this reason, I considered that these documents were essential for the correct investigation of the facts, and I decided to present it to the Prosecutor's Office, through Mr. (...), to be personally involved in these proceedings. There are resolutions of this body that give me the right and consider that my actions are not contrary to rights.
Specifically, Resolution 57/2018."
- That "judicial processes in the criminal field are not subject to the general regime contained in the RGPD and Organic Law 3/2018, of December 5, on Data Protection

Personal and Guarantee of Digital Rights, but have their own regime contained in Directive (EU) 2016/680 of the European Parliament and Council, of April 27, 2016, (..)".

- That "Article 11.2.d) LOPD establishes that consent will not be necessary when the communication to be made is addressed to the Ombudsman, the fiscal ministry or judges or tribunals or the Court of Auditors , in the exercise of the functions attributed to him."

5. On 08/07/2020, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the Municipal Group (...)Municipal Agreement for an alleged very serious infringement provided for in article 44.3 .d) relate to article 10, all of them of the LOPD. Likewise, he appointed Mrs. (...), an employee of the Catalan Data Protection Authority, as the person instructing the file.

This initiation agreement was notified to the imputed entity on 07/14/2020.

6. The initiation agreement also made it clear that no imputation was made with respect to the other fact reported, related to the possible violation of the duty of secrecy or confidentiality of the councilor of the GM AM, by the delivery to a third party of the Mayor's Decree (...), because the eventual reported violation would have prescribed , even days before the presentation of the complaint, causing the termination of the responsibility that could be derived from it.

7. In the initiation agreement, the accused entity was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests.

8. On 07/10/2020, the councilor of the Municipal Group (...)Municipal Agreement, made objections to the initiation agreement, which are addressed in section 2 of the legal foundations.

proven facts

Based on all the actions taken in this procedure, the following are considered proven facts.

The City Council, on 05/17/2017, made available to the councilor of the GM AM, in response to her submitted access request, a contract between the City Council and the Sports Club, the object of which was the lease of some land, which contained personal data of the contracting parties. The councilor of the GM AM handed over this documentation to a third party who filed a complaint against the City Council for an alleged violation of the legislation in urban planning matters. As a result of this complaint, the District Attorney's Office (...)-(...), on 11/12/2018, agreed to initiate fiscal investigation proceedings no. (...).

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. As stated in the antecedents (antecedent 5th), this Authority agreed to initiate a sanctioning procedure against the Municipal Group (...)Municipal Agreement, for an alleged serious infringement provided for in article 44.3.d) in relation to article 10 of the LOPD.

First of all, it should be noted that, at the time of issuing the agreement to initiate this procedure, the date on which the councilor delivered the document to a third party was an inaccurate date but included within the period between 17/05/2017 (date on which the councilor has access to the controversial document) and 11/12/2018 (date that the court initiates tax proceedings following the complaint filed). However, in the allegations made by the GM AM councilor before the initiation agreement, it is specified that the date on which she made the controversial documentation available to a third party was the same day 17/05 /2017, and proves this statement with the copy of the e-mail sent on that date, from the private e-mail address of the councilor to the e-mail address of the third party who filed the complaint against the City Council before the tribunals, which bears "(...)" and in which is attached, among other documents, the controversial lease agreement for some land between alphanumeric code of the City Council, the date of sending, the sender and the recipient, the date and the attached documents.

In relation to the conduct described in the previous section, it should be borne in mind that article 26 of Law 40/2015, of October 1, on the legal regime of the public sector (hereafter, LRJSP), provides the application of the sanctioning provisions in force at the time of the occurrence of the facts, unless the subsequent modification of these provisions favors the alleged infringer. In this respect, the jurisprudence has declared that given the possibility that the later rule, in this case the RGPD, could contain elements in favor of and against the alleged infringer, it will be necessary to resolve whether this later rule is more beneficial as a whole, referring -se both the classification and the penalty, and also the limitation periods, and in such case apply it in its entirety. In accordance with this, and given that the application of the RGPD (rule in force from 05/25/2018) would not favor the alleged infringer, the LOPD should be applied.

Based on this, it should be borne in mind that article 10 of the old LOPD determined that "The person in charge of the file and those who intervene in any phase of the processing of personal data are obliged to professional secrecy with regard to the data and the duty to save them, obligations that replace even after ending their relationship with the owner of the file or, where appropriate, with their manager".

This imputed fact could constitute the serious infraction provided for in article 44.3.d) of the LOPD, which typified as such the "violation of the duty to keep secret the processing of personal data to which refers to article 10 of this Law."

Having said that, it should be noted that the access by the GM AM councilor to the information detailed in the antecedents, which would have been provided by the City Council itself, is not considered contrary to data protection regulations. The right of access to municipal information that all members of the City Council have - regardless of the fact that they are in the government team, or in the opposition, as would be the case - is expressly provided for in the article 77 of Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL) which establishes that "all members of the Local Corporations have the right to obtain from the Mayor or President or the Comisión de Gobierno any antecedents, data or information in the possession of 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 the 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 services of the corporation and is necessary for the development of its function".

However, without prejudice to this legal authorization to access the content of the controversial documents, it must be borne in mind that once this access has been made, in accordance with the provisions of article 164.6 TRLMRLC, the councilors "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 article 10 of the LOPD, which entails that both the person in charge of the file, as well as any other person who intervenes in the processing of personal data, does not disclose them to third parties outside of the cases permitted by law, that is to say, it implies a duty to diligently guard the personal data subject to treatment.

In this sense, it should be noted that, here it is not questioned that the councilor could bring to the attention of the judicial authorities or the Public Prosecutor the detection of an alleged crime or present judicial actions accompanied by information obtained by reason of the position of councilor, as would be the example he invokes in his allegations (IP 57/2018), but this was not the case, because she was not the author of the complaint, but, as the councilwoman herself acknowledges, she handed over the controversial documentation to a third party, who in turn, was the one who reported the City Hall in front of the courts. In relation to this, it is also not possible to take into account the invocation that the GM AM councilor makes to article 11.2.d) of the LOPD, because the lease agreement that contained personal data was not handed over to the "defender of the people, the fiscal ministry or the judges or tribunals or the

Accounts, in the exercise of the functions attributed to him.", but to a third person who filed a complaint against the City Council for an alleged violation of the legislation in urban planning matters. Lastly, it should be noted that, contrary to what GM AM maintains, yes if the reported infringement had been committed during the validity of the RGPD, this rule would have been the applicable rule. And this because the action reported is the processing of data carried out by the councilor of the GM AM, and not the processing of data carried out by "competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, or execution of criminal sanctions (...)", as defended by the GM AM in his argument, according to which the facts reported would fall outside the scope of the RGPD, and Directive (EU) 2016/680 would be applicable, of European Parliament and Council, of 27/4.

Be that as it may, as already stated at the beginning of this section, the rule applicable to the events reported, taking into account the time when they happened, and in accordance with what is established in article 26 LRJSP, is the LOPD.

However, the fact is that with the application of the LOPD, the eventual infringement of the duty of secrecy would have prescribed, which prevents any imputation from being made in this regard. Indeed, the breach of the duty of secrecy could constitute the serious infringement provided for in article 44.3.d) LOPD. Well, on the figure of the prescription, article 47 of the LOPD establishes the following: "1. Very serious infringements expire after three years, serious ones after two years and minor ones after one year. 2. The limitation period begins to count from the day on which the offense was committed." In accordance with the above, the limitation period applicable to the present case would be 2 years, as it is a serious infraction, and taking into account that from the documentation provided it can be inferred that the facts that are the subject of the complaint were occur on 05/17/2017, the eventual reported infringement, as of today, would have prescribed, days before the presentation of the complaint in May 2019.

In short, in view of the specific circumstances of the case that is the subject of this resolution, it has been detected that in relation to the facts reported, the infringement has prescribed, causing the termination that could be derived from the eventual infringing conduct.

Consequently, the present procedure should be postponed in accordance with article 20.1.c) of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat of Catalonia.

resolution

For all this, I resolve:

1. Declare the suspension of sanctioning procedure no. 37/2020, relating to the Group Municipal (...) Municipal Agreement.
2. Notify this resolution to the Municipal Group (...)Municipal Agreement.

3. Order that this resolution be published on the Authority's website (www.apd.cat), from 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 reported 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.

Likewise, interested parties may file any other appeal they deem appropriate to defend their interests.

The director,