

File identification

Resolution of sanctioning procedure no. PS 39/2020, referring to Navata City Council.

Background

1. On 04/02/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against Navata City Council, on the grounds of an alleged breach of data protection regulations of personal data.

Specifically, the complainant, a resident of the municipality, stated the following in his letter: a) that he had written several letters to Navata City Council in order to bring to their attention the alleged mistreatment of a dog in a home located at c. (...) of the municipality; b) that in these letters he had expressly asked the City Council that his identity not be revealed, something to which, according to him, the City Council had verbally agreed; and, c) that, contrary to what he had been informed, the City Council had revealed his identity to the person who owned the dog, a fact that had caused him obvious harm since this person had identified himself on the day 12/03/2019 at his home with an "aggressive" attitude.

The complainant stated that he did not have a copy of the letters he had addressed to the City Council in which he expressly requested that his identity not be revealed, but he provided other documentation in order to substantiate the facts reported, among other things :

a) Copy of the agreement of the Local Government Board of the City Council dated 12/19/2018, which contains the following text:

"E201801169, of December 17.- (name and surname of the person reporting) states that for many months a neighbor near his house has a dog on the terrace that spends practically all day tied with a short chain, to the (...), that he does not know that he is ever taken for a walk, and attaches photographs taken on several days and at different times, and requests that the relevant notice be given to the owner of this animal so that he has a better life

In view of the foregoing, the Local Government Board, by unanimity of its members, adopts the following agreement:

- Send a letter to the owner of the home where the dog is located, requesting him to comply with the conditions corresponding to the possession of domestic animals, following up on this situation"

b) Copy of the agreement of the Local Government Board of the City Council dated 02/19/2019 which contains the following text:

"E2019000227, of February 7.- (name and surname of the person reporting) reiterates the complaint submitted by a dog tied with a short chain (...). He requests that the city council inform him of the notice to the owners and of the municipal action in this regard, as well as to indicate what is the next step to be taken in the event that this second request is ignored by the owner, and requests the protection of your data [emphasis is the Authority's]

Given that on December 19 the city council agreed to send a notice to the owner of the dog, as it did, and it is not known if the animal has changed its attitude in this regard, although Mr. (surname of the person making the complaint) that the situation and the treatment remain the same, this Local Government Board, by the unanimity of its members, adopts the following agreement:

1st Reiterate the requirement to the owner of the dog (...), warning that the conditions established by art. 4 of Legislative Decree 2/2008, which approves the revised text of the Animal Protection Law, or that justifies compliance with current regulations.

2 where If you do not comply with the requirement of point 1, notify the Mossos d'Esquadra of the situation so that they adopt the appropriate measures in this regard. (...)

c) Copy of the 4 photographs that the complainant here would have provided to the City Council together with his first complaint in order to certify the deplorable state in which the dog was.

2. The Authority opened a preliminary information phase (no. IP 104/2019), 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 04/23/2019 Navata City Council was required to comply with the following:

- Bring a copy of the letters written by the person making the complaint before the City Council, in which he brought this entity to the attention of the alleged mistreatment of a dog owned by a neighbor of the municipality.
- Specify the rating given by the City Council to the writings made by the person making the complaint (if generic instance, complaint, complaint, query, etc.).
- Report whether the City Council provided the person making the complaint with information relating to the processing/transfer of their personal data, in compliance with the provisions of Article 13 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 circulation thereof (RGPD).
- Indicate through which means and under what circumstances the City Council had revealed to the person who owns the dog the identity of the person making the complaint here, identifying her

as the person who would have brought the situation of alleged abuse of this animal to the attention of the City Council.

- Indicate the legal basis that would enable the processing of personal data consisting of providing the person who owns the animal with the identity of the person making the complaint, such as the one who had brought the aforementioned situation to the attention of the City Council.

Given the lack of response from the City Council, this request was reiterated on 05/16/2019.

4. On 05/23/2019, the City Council responded to the request in writing in which it stated the following:

- That *"the writings were submitted through a web complaint form, but the qualification of the information that was given in the writings formulated by the person making the complaint is that of a complaint, as it raised a question related to the inspection of animals, jurisdiction of the city council (art. 70.3 of the LBRL), and which could amount to animal abuse"*.
- That *"the web complaint form is located on the City Council's web portal" [e-tram processor], through which the information provided for in article 13 of the RGPD is provided.*
- That *"the identity of the complainant was revealed in person at the City Hall when Ms. (...) [the owner of the dog] appeared, with the supervision of City Council staff, giving her access to the entire file in which she is an interested party, but without making copies of its contents"*.
- That based on the provisions of articles 53 of the LPAC, 26 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia and 85.3 of Law 40/2015, of on October 1, of the legal regime of the public sector, *"the City Council interpreted that the person reported here had the right to be able to access the documents contained in this administrative procedure in order to be able to exercise his right of defense, given the reiteration of the allegations (...)*
Pursuant to article 23 of Law 19/2014, on transparency, access to public information and good governance, the City Council carried out a weighting of access to information and it was considered that access to the information required did not contain particularly protected data (...) And secondly, according to the rules of article 24 of Law 19/2014, it also did not appreciate that the rights were impaired or that it could pose a risk to those affected because the purpose of access in order to exercise the right of defense is a reasonable purpose, and on the other hand, the information contained in the file did not affect the rights of minors nor was it understood that providing this information could be put in danger the safety of people.
For these reasons, Navata City Council considered that access to the file of the administrative procedure could be given to the reported person and owner of the dog, who is also an interested party in the procedure"

The reported entity attached to the letter a complete copy of the administrative file, which included, among others, the following documents:

a) Copy of various standardized forms of "*Complaints, suggestions and proposals*", submitted by the person making the complaint to Navata City Council electronically (through the e-tram processor), in which their name, surname, address, ID, telephone and email address. Among these forms, the following should be highlighted:

a.1) Electronic form submitted on 17/12/2018, in which the complainant here informs the City Council of the deplorable state in which a dog would be found in a house in the municipality (which facilitated Address). In this form he expressly requests "*that my data be hidden to avoid possible disturbances between neighbors*" [emphasis is the Authority's].

a.2) Electronic form dated 02/04/2019 in which the complainant states that the dog is still in the same situation, and reiterates the request that its data not be disclosed in the following terms: "*remember also that I have asked that my data be protected*" [emphasis is the Authority's].

a.3) Electronic form dated 03/19/2019, in which the complainant here complains that the City Council has provided the owner of the dog with her identification as the person who had notified the City Council 'deplorable condition of this lady's dog. He stated that on 12/03/2019 this lady "*appeared at my house, showing an aggressive attitude, shouting and threatening because she had been aware of my complaint, which had to be private and confidential*".

b) Copy of the orders that on 09/01/2019 and 06/03/2019 the City Council had addressed to the person who owns the dog.

c) Copy of the agreement of the Local Government Board dated 05/08/2019, which is issued in response to the complaint made by the complainant here against the City Council for having revealed his identity to the owner of the dog This agreement contains the following text:

"BACKGROUNDS

(...)

On March 6, 2019 (...) a letter was sent with the content of the municipal agreement [of 02/19/2019] to the owner of the animal, without the details of the complainant. The owner of the animal, who turns out to be Mrs. (...), appears in the town hall in order to have access to the file in which he is an interested party. In compliance with the regulations in force, view is given to Ms. (...) of the file (...)

FUNDAMENTALS OF LAW

The accused, in exercise of her rights and under the protection of current legislation, goes to the town hall to have access to the file that affects her and of which she is an interested party.

In this sense, any administrator who presents himself to the administration in order to view a file in which he is an interested party has the right to obtain this, as well as a copy of the documents that make up the file, after a reasoned and motivated request, which has not happened in this case, so no document has been delivered to Mrs. (...), but yes access to the entire file that affects it".

5. On 03/04/2020, also during this preliminary information phase, the City Council was again required to report on the following:

- Specify the date on which the City Council gave Ms. (...), owner of the dog, view of the file that the City Council would have initiated following the complaints made by the person making the complaint.
- Indicate whether this file had a disciplinary nature.
- Indicate if this file, aside from the complaints made by the complainant here and the photographs of the animal that he provided, included any other element tending to corroborate the facts reported, such as letters of complaint made by other people, actions taken by City Council officials (such as local police or environmental department officials); and, if so, provide a copy.

6. On 04/29/2020 the City Council responded to this last request, reporting the following:

- That he cannot specify the date on which it was given to the person who owns the dog view of the file, but that *"it was 2 or 3 days after the receipt of the notification"* of the agreement of the Board of Governors dated 02/19/2019, which was carried out by means of an office of 03/06 /2019.
- That *"the file did not have a punitive nature, since it was a matter of preliminary proceedings and, therefore, in compliance with the previous hearing procedure for the interested parties"*.
- That *"there were, at that time, no other documents than those provided by the complainant. Simultaneously with the procedure of hearing the interested party, in order to obtain their justification of the facts reported, other testimonies were requested, such as the inspection of the coordinator of municipal services and the Forestry Agents"*.
- That *"it should be noted that, as a result of the procedure carried out, the file has been archived as a result of the reports issued throughout the process by the municipal services, the Rural Agents and FAADA"*.

7. On 07/08/2020, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Navata City Council for an alleged violation provided for in article 83.5.a) of the RGPD), in relation to article 5.1.f) of the same rule and 5 of Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD. This agreement d initiation was notified to the imputed entity on 07/14/2020.

8. 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.

9. On 07/24/2020, Navata City Council made objections to the initiation agreement,

10. On 06/11/2020, the instructor of this procedure formulated a proposed resolution, by which she proposed that the director of the Catalan Data Protection Authority admonish Navata City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f, both of the RGD.

This resolution proposal was notified on 12/11/2020 and a period of 10 days was granted to formulate allegations.

11. The deadline has passed and no objections have been submitted.

proven facts

Navata City Council facilitated Ms. (...), the data relating to the here denouncing as the person who had brought to the attention of the said City Council the alleged mistreatment of the dog of which she was the owner, despite the fact that she had expressly requested in her writings the confidentiality of her data, request that the City Council collected in the Local Government Board Agreement dated 02/19/2019 (section b/ of precedent 1). In relation to this request - which the City Council should have considered as the exercise by the complainant here of a right of opposition - it must be shown that the City Council never analyzed this request or the reasons given by the affected person to object to certain treatments of their data.

This access to the data of the complainant here by Ms. (...) occurred on an undetermined date, but in any case between 03/06/2019 (date of the notification of the Local Government Board's agreement of 02/19/2019 to Ms. (...) background 6-) and on 12/03/2019 (date on which Ms. (...) appeared in person at the complainant's address - section a.3 of background 4) ; when the City Council gave this person a view of the file which included, among other documentation, the "*Complaints, suggestions and proposals*" forms that the complainant here had submitted electronically to the City Council complaining - of the situation in which a dog was found in a house in the municipality, forms containing its personal data (name, surname, DNI, address, telephone, email address (sections a.1 and a.2 of the antecedent 4th). On the date on which the City Council gave Ms. (...) a view of said file, no disciplinary procedure had been initiated for these facts, but was in the due diligence phase previous ones, as reported by the City Council itself (precedent 6th).

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. In this regard, it is considered appropriate to reiterate below the most relevant part of the instructor's motivated response to these allegations.

2.1.- On the right of opposition exercised by the complainant here.

In the 1st section of its statement of objections to the initiation agreement, the accused entity stated that it did not identify the request of the complainant here regarding not providing his data to any neighbor, as the exercise of a right of opposition; but that in any case the City Council did not provide Mrs. (...) a copy of the file in which the details of the person making the complaint were contained - which is what she had asked for but only a view of it.

In this regard, it must be clarified that in this procedure the City Council is not charged with the infraction consisting of disregarding the right of opposition, despite the fact that, as evidenced by the instructor in the resolution proposal, the content of the letters formulated by the person reporting on 17/12/2018 and 04/02/2019 before the City Council (letter a/ of the previous 4th) it was clear that this right was being exercised. In any case, the fact that the City Council did not take into consideration the complainant's request that his data not be communicated to his neighbors led to the conduct that is imputed in this procedure, consisting of the violation of the principle of confidentiality.

It must also be said that the fact that the City Council did not facilitate a copy of the documents in which the data of the complainant was included to Ms. (...) is an impassable fact for imputation purposes, since what has been proven and admitted by the City Council itself, is that it facilitated Ms. (...) view of the file, so that this person was able to access the data of the complainant here - such as the person who brought the alleged abuse of his dog to the attention of the City Council - who is the fact that is imputed in this proceeding.

2.2.- On access to the file in order to exercise the right to defence.

In the second allegation in the initiation agreement, the City Council argued in its defense that *"it assessed that in accordance with the weighting of rights rule of Article 23 of the Law*

19/2014, the reported person could access this data. The City Council considered that access to the data could be given because the interested parties have the right to know, at any time, the status of the procedures in which they have the status of interested parties, the competent body for the its instruction, and in its case, resolution, and the procedural acts dictated, as well as the right to access and obtain copies of the documents contained in these procedures, and to make allegations and use means of defense accepted by the Legal System (as established by Law 39/2915, of October 1, on the Common Administrative Procedure of Public Administrations and Law 26/2010, on the legal regime and procedure of the public administrations of Catalonia). In this way and in accordance with these principles, the City Council interpreted that the person reported here had the right to be able to access the documents contained in this administrative procedure in order to be able to exercise his right of defense, given the reiteration of the allegations". Finally, the City Council invoked two resolutions issued by this Authority (archive resolutions of prior information nos. IP 138 and 139 of 2018), in which it was considered that the person reported should have access to the file in order to to exercise his right to defence.

In relation to the arguments made by the City Council in this allegation, it is necessary to demonstrate that, as the City Council itself informed this Authority, the access to the data of the complainant here by Mrs. (...) it took place at a time when "the file did not have a sanctioning nature, since it was a matter of preliminary proceedings and, therefore, in compliance with the previous hearing procedure for the interested parties".

This Authority has had the opportunity to express itself in several reports and opinions (IAI 50/2017, CNS 14/2018, IAI 22/2018, IAI 45/2019, IAI 9/2020, IAI 10/2020) on access to the information contained in administrative files that are still in a preliminary information phase, as would be the case that concerns us here.

Thus, in CNS 14/2018, issued in relation to access to files of reserved information prior to the initiation of a disciplinary file, but perfectly extrapolable to sanctioning procedures, to the extent that also Law 39/2015, of October 1, of the common administrative procedure of public administrations (hereinafter, LPAC) expressly provides in its article 55 the possibility that the competent body, before agreeing to the start of an administrative procedure, may open a period of prior information; the following was exposed:

"The information that can be contained in an information file prior to the start of a procedure sanctioning or disciplinary, is "public information" for the purposes of transparency legislation and remains subject to the access regime provided for in this Law. Thus, in accordance with article 20 and s. of Law 19/2014, the right of access to public information may be denied or restricted for the reasons expressly established in the laws.

This preliminary information phase is opened with the aim of investigating some facts and determining whether or not they are likely to motivate the initiation of a disciplinary procedure, the identification of the person or persons who could be responsible and the relevant circumstances

concurrently, it has the character of reserved, as established in article 275 of Decree 214/1990, which approves the Regulation of personnel in the service of local entities.

It does not properly constitute an administrative procedure and the reserved nature of these investigative actions (knowledge of them may entail a clear prejudice to the result of the same), prevents that during their processing it is possible to facilitate access to the documentation that it is in the file. This affects even the person who is being investigated. In this sense, Law 19/2014 of December 29, 2014, on transparency, access to public information and good governance, provides in article 21.1 that "the right of access to public information may be denied or restricted if the knowledge or disclosure of the information entails a detriment to: (...) b) The investigation or sanction of criminal, administrative or disciplinary infractions".

Therefore, once this phase of previously reserved information is concluded with the adoption of one decision, be it from the archive of the proceedings or be it from the agreement to initiate disciplinary proceedings, the limit provided for in article 21.1 would probably no longer apply. b) of Law 19/2014, and it will be necessary to analyze whether any other limitations of those established in articles 20 and ss of the LTC or in any other law apply. Specifically, with regard to the personal information it may contain, it will be necessary to analyze the nature of the data requested, and apply the criteria provided for in the same Law to determine whether or not access to this personal information can be facilitated".

And in the most recent IAI report 9/2020, this Authority pronounced in the following terms:

"It is a consolidated jurisprudential criterion that the investigation phase prior to the start of a sanctioning or disciplinary procedure does not properly constitute an administrative procedure (among others, STSJM 471/2006, of May 24), as well as its reserved nature (its knowledge can lead to clear damage to the result of the same) prevents access to its content during its processing (among others, STS 21/2018, of February 15). And this affects, even, the person who is being investigated (among others, STSJC 1212/2005, of November 25), as would be the case of the person making the claim.

Along these lines, the LTC expressly establishes the possibility of limiting or denying access to public information if its knowledge or disclosure entails a detriment to the investigation

or the penalty for the criminal, administrative or disciplinary offense in question (article 21.1.b)"

So, as explained by the instructor in the resolution proposal, in the specific case that concerns us here, the access by Ms. (...) the data of the complainant here that were included in a file still in the reserved information phase could not be based on the right of defense, as argued by the City Council, since this right would come into play within the framework of the eventual sanctioning procedure that could be initiated as a result of the reserved information, at which time they would be fully applicable

the guarantees available to the people who are considered to be interested in the procedure, among them, the aforementioned right of defense contained in article 24 of the Spanish Constitution. And, even in the context of a sanctioning procedure, this right of defense should be weighed against other rights, interests or legal assets that could eventually be affected, such as the right to data protection of the people whose data be included in the file.

In the case that is analyzed here, apart from the fact that the file initiated by the City Council following the complaint of the complainant here, was still in the reserved information phase at the time that Ms. (...) acceded to it - so what has just been set out in the preceding paragraphs would apply - given the circumstance that the person making the complaint here had expressly requested the City Council that their data were not provided to the neighbors, stating the reasons for their request. Well, the City Council, not only did not respond to this request of the complainant, but also did not take it into account when assessing access to the file by Mrs. (...).

Finally, it must be said that the resolutions of this Authority invoked by the City Council in its allegations in the initiation agreement obey completely different factual assumptions to those that have given rise to the present sanctioning procedure, first of all, because in that case the person who was granted access to the file already knew the name of the person who had reported it prior to this access; and, secondly, because the information was provided in the framework of a criminal investigation, so the right of defense of the person concerned played, for the purposes of weighing rights, at its maximum intensity.

This is why it is considered that the allegations made by the City Council in the context of this sanctioning procedure cannot succeed.

3. In relation to the fact described in the proven facts section, relating to the principle of confidentiality, it is necessary to refer to article 5.1.f) of the RGPD, which provides for the following:

"1. The personal data will be:

(...)

f) processed in such a way as to guarantee an adequate security of personal data, 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").

On the other hand, Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter, LOPDGDD), establishes the following in its article 5, relating to the duty of confidentiality:

"1. Those responsible and in charge of data processing as well as all the people who intervene in any phase thereof are subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. The general obligation indicated in the previous section is complementary to the duties of professional secrecy in accordance with its applicable regulations (...)"

As indicated by the instructor, during the processing of this procedure the fact described in the proven facts section, which is constitutive of the infringement provided for in article 83.5.a) of the RGPD, has been duly proven, which typifies the violation of *"the basic principles for treatment"*, among which the principle of confidentiality is at the top.

The conduct addressed here has been included as a very serious violation of article 72.1.i) of the LOPDGDD, in the following form:

"i) The violation of the duty of confidentiality established in article 5 of this Organic Law".

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.

The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."

In terms similar to the LOPDGDD, 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 accordance with what the instructor indicated in the resolution proposal, in the present case it is not considered necessary to require the adoption of corrective measures, since these would be specific and already consummated events.

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resolution

For all this, I resolve:

1. Admonish Navata City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), both 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 4th legal basis.

2. Notify this resolution to Navata City Council.

3. Communicate the resolution 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 considers convenient to defend their interests.

The director,