

File identification

Resolution of sanctioning procedure no. PS 61/2020, referring to the Morell Town Council.

Background

1. On 23/10/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Morell City Council (hereafter, the City Council), on the grounds of 'an alleged breach of the regulations on the protection of personal data.

Specifically, the person making the complaint stated that on 15/10/2019 he had received a notification from the City Council, carried out by a municipal employee, "*which in no case came sealed in an envelope*", so that this person "*could read perfectly the notification he presented to me*". He added that the notification corresponded to the City Council's response to requests it had presented to the City Council on 1/07/2019, 6/07/2019 and 5/08/2019.

The person making the complaint also stated that the City Council always notified in the following way: "*they bring two uncovered copies, and they make you sign one as if I have received the notification*". And he provided a second letter of response from the City Council, dated 01/30/2019, which, according to him, had been notified in the same way.

2. The Authority opened a preliminary information phase (no. IP 290/2019), 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 06/10/2020 the reported entity was required to:

- Report on whether, in relation to the two notifications indicated, the notification was made in such a way that the person who notified could read the content of the documents.
- Information on whether, for the purpose of certifying the receipt of the notifications, the person making the complaint was made to sign a copy of the notified documents.
- Report on whether the notification system used in both cases was the one usually used by the City Council and whether it continued to use it at that time.
- Specify whether the person who carried out the notifications subject to the complaint was a municipal employee and, if so, what was their professional category.
- Determine the legal basis that would protect the treatment consisting of access to the content complete notifications by the person in charge of making them.

4. On 10/22/2020, the City Council responded to the above-mentioned request in a letter stating the following:

- That the notification made on 10/15/2019 was made as stated by the complainant.
- That the City Council changed the notification system a few months ago and that currently all notifications are delivered in a sealed envelope.
- That it had not been possible to identify the specific person who made the notification, but, in any case, it was a municipal employee. Specifically, it corresponded to make the notifications to the employees of the Municipal Brigade.
- That all City Council employees are bound by the City Council's privacy policy and the duty of confidentiality.
- That the treatment consisting of access to the content of the notifications by the people who made the notifications is protected in art. 6.1 e) of the RGPD in relation to the regulatory and self-organization powers that the 'LBRL attributes to the municipalities (art. 4.1 a) LBRL).
- That in no case was the integrity or confidentiality of the information put at risk, given that the reporting person was a public employee bound by the duty of secrecy.

The reported entity attached various documentation to the letter.

5. On 19/11/2020, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Morell City Council for two alleged infringements: an infringement provided for in article 83.4.a) in relationship with article 25.2; another offense 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 April 27, 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 11/27/2020.

6. In the initiation agreement, the accused entity was granted a term 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.

7. On 11/12/2020, Morell City Council made objections to the initiation agreement, which are addressed in section 2 of the legal foundations.

8. On 01/21/2021, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the Morell Town Council as responsible, firstly, of an infringement provided for in article 83.4.a) in relation to article 25.2, both of the RGPD.

This resolution proposal was notified on 28/01/2021 and a period of 10 days was granted to formulate allegations.

9. The deadline has been exceeded and no objections have been submitted.

proven facts

On 15/10/2019, Morell City Council, through an unspecified municipal employee, but in any case a member of the Municipal Brigade, notified the person denouncing the City Council's response to various requests that this person had presented to the City Council on 1/07/2019, 6/07/2019 and 5/08/2019. The notification was made without applying any protection measures, so that the person in charge of making the notification could access the full content of the same. In addition, the person who was notified had to sign a full copy of the act subject to notification that the municipal employee returned to the City Council.

The City Council has admitted that at the time of the imputed events, the system that was commonly used in the practice of notifications to natural persons who resided in the municipality was the one described above. It should be noted that, according to the City Council, all notifications are currently made in a sealed envelope.

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.

In its statement of objections, the accused entity admitted the facts alleged in the initial agreement, made allegations and reiterated the arguments it presented in its response to the Authority's request for information dated 06/10/2020.

2.1. On the duty of confidentiality in article 5 of the LOPDGDD.

In its statement of objections, the accused entity explained that the people in charge of notifying the City Council's resolutions were municipal employees subject to the duty of confidentiality in Article 5 LOPDGDD and, therefore, access in the content of the notification did not breach the duty of confidentiality. In order to justify his statement, he cited the Resolution of the Spanish Data Protection Agency of January 17, 2020, No. 12072/2019. In relation to the resolution of the AEPD, first of all, it must be remembered that

The Catalan Data Protection Authority is not subject to the criteria of the AEPD, given that there is no hierarchical or dependent relationship between the two authorities, but that each of the control authorities acts independently within its competence framework, without to the detriment of the existing instruments with the purpose of coordinating criteria. Secondly, it is important to indicate that the aforementioned resolution referred to a possible breach of the duty of confidentiality by the municipal employee.

In this case, it has been proven that the City Council practiced notifications to citizens resident in the municipality without applying any security measures to prevent access to the full content of the document to be notified. The accused entity argued in its defense that the people who had to practice the notifications were members of the Brigade, identifying them with names and surnames, all of them workers authorized to practice the notifications. However, this statement does not invalidate the fact that the principle of confidentiality contained in Article 5.1.f) of the RGPD obliges the data controller to treat the data in such a way as to guarantee adequate security, (...) through the application of appropriate technical or organizational measures. Well, in the case we are dealing with, the violation of the obligation of the person responsible for the treatment to adopt the appropriate technical and organizational measures is addressed in order to guarantee that, by default, only the data necessary to fulfill the purpose are processed

specifics of the treatment (Article 25.2 RGPD). This obligation also applies to data accessibility. On the other hand, in order to practice the notification, it is not necessary that the person in charge of notifying has access to the entire content of the notification, but only to the data strictly necessary in relation to the purpose of the treatment. Well, in the preliminary information phase it was proven that at the time of the imputed events, the City Council did not apply any technical measures that prevented access to the full content of the notification. Even more, as the City Council has recognized, the open notification was not a one-time event, but was the usual system used for notifications to natural persons domiciled in the municipality.

It is for this reason that this plea is held to fail.

2.2. On the power of self-organization of territorial public administrations.

In order to justify the system used in the practice of notifications, the imputed entity alleged the power of self-organization within the sphere of its competences, recognized in the municipalities by Law 7/1985 of the LBRL (article 4.1). However, the power of self-organization does not justify processing data without applying the appropriate technical and organizational measures that guarantee that, by default, only the personal data necessary for each of the specific purposes of the treatment are processed. Indeed, in the present case the specific purpose of the treatment activity was to carry out the notifications. Well, as we said above, to practice a notification it is not necessary that the person in charge of notifying has access to all the content of the notification, but only to those data strictly necessary to practice the notification.

In accordance with what has been set out, it is estimated that this allegation cannot succeed.

2.3. On the reasons why the notification system used is justified.

Next, in order to justify the notification system, the accused entity adds reasons for speed and diligence in the practice of notifications, as well as the fact that it is a small City Council. However, this allegation cannot succeed, first of all because the City Council as the data controller must comply with the obligations established in the data protection regulations, among which is that the data controller adopts the technical measures and adequate organizational measures to ensure compliance with the obligations imposed by the Regulation on those responsible for the treatment. Secondly, the fact of practicing notifications, for example, in a sealed envelope, as is currently being done, it is clear that nothing harms the speed in the practice of notifications and instead increases the level of diligence in to the protection of the data being processed.

2.4. About the corrective measures.

Finally, the City Council alleges that following the facts imputed to it, it has already adopted corrective measures consisting in practicing all notifications in a sealed envelope. In this regard, the adoption of measures does not distort the imputed facts, nor do they modify their legal classification. It is for this reason that, although the adoption of this measure is valued positively, this allegation cannot succeed either.

3. In relation to the facts described in the proven facts section, and in view of the allegations presented by the entity imputed to the Initiation Agreement and the rest of the actions contained in this procedure, of in accordance with what is provided for in article 90.2 of the LPAC, it is considered more appropriate to classify said acts as a violation of the obligations of the data controller in relation to article 25.2 of the RGPD, which provides that:

"the person in charge of the treatment must apply the appropriate technical and organizational measures with the intention of guaranteeing that, by default, only the personal data necessary for each of the specific purposes of the treatment are processed. This obligation applies to (...) and the accessibility of the data".

As indicated by the instructing person, during the processing of this procedure the fact described in the proven facts section, which is constitutive of the offense provided for in article 83.4.a) of the RGPD, has been duly proven, which typifies the violation of "a) *The obligations of the person in charge and the person in charge, in accordance with articles 8, 11, 25 to 39, 42 and 43*".

The conduct addressed here has been included as a serious infraction in article 73.1.e) of the LOPDGDD, in the following form:

"e) The lack of adoption of the appropriate technical and organizational measures to ensure that, by default, only the personal data necessary for

to each of the specific purposes of the treatment, in accordance with what is required by article 25.2 of Regulation (EU) 2016/679".

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 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, given that the accused entity modified the notification system by adopting measures that prevent access to its content by the personnel who carry out the notifications, the adoption of corrective measures should not be required.

For all this, I resolve:

1. Admonish the Morell City Council as responsible for an infringement provided for in article 83.4.a) in relation to article 25.2, 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 legal basis 2.4.

2. Notify this resolution to Morell Town 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 deems appropriate to defend its interests.

The director,