

File identification

Resolution of sanctioning procedure no. PS 28/2021, referring to Tiana City Council.

Background

1. On 20/07/2020, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Tiana City Council, on the grounds of an alleged breach of the regulations on personal data protection.

Specifically, the person reporting stated that, on 13/07/2020, the City Council created a WhatsApp group to communicate information to citizens and that access to the group was made without the explicit consent of the person affected and without making effective the right of information in the collection of the data.

In this last sense, the complainant stated that, on 07/15/2020 (two days after the creation of the group), the data protection policy was included in the description of the group. In turn, the reporting person explained that the members of the WhatsApp group could see the phone number, name and profile photos of the other members.

2. The Authority opened a preliminary information phase (no. IP 212/2020), 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 07/28/2020, the complainant was requested to provide the various documentation indicated in his complaint letter; as well as specifying whether he had been included in the WhatsApp group subject to the complaint, or whether he had accessed it through a link.

4. On 07/28/2020, the complainant's letter was received in which he provided the requested documentation and explained that he had accessed the group through a link that was circulated through WhatsApp with the following content:

"
Hello, I'm (...), Mayor of Tiana. I have created this Whatsapp channel to share with the neighbors who want it, municipal information that I think will be of interest to you and very useful. If you want to participate and agree to receive this information, just click here and it will open on your phone to sign up.

[https://chat.whatsapp.com/\(...\)\(...\)](https://chat.whatsapp.com/(...)(...))

This is a one-way channel of information, remember that if what you want is to contact Tiana City Council to send us any incident, question, query (or congratulations), you always have the municipal WhatsApp on 600 00 (. . .).

Share this message with everyone you think they may be interested in receiving this information from Tiana.

Thank you very much and have a great day!
(...), Mayor of Tiana
(...)@tiana.cat"

Among the documentation provided by the complainant were several screenshots of the WhatsApp group, from which it is confirmed that the complainant joined the group on 07/14/2020, that the description of the group was modified on 07/15/2020 and that also on 07/15/2020 the group was full. In turn, the complainant provided a copy of the letter from the Tiana City Council of 07/16/2020 in which an answer was given to the questions she had asked on 07/15/2020 in relation to the WhatsApp group and compliance with data protection regulations.

5. On 07/30/2020, also during this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint . Through the link provided by the complainant in his written complaint (<https://chat.whatsapp.com/...>), the WhatsApp group called "News Tiana" and the following was verified, among others:

- That at the time of joining the group, information was provided on the identity of the data controller, the legal basis, the purpose of the treatment, the data retention period; on the possibility of exercising the rights of access, rectification, deletion, opposition and limitation; as well as a link to the City Council's electronic headquarters (at <http://tiana.eadministracio.cat>) to exercise your rights or contact the data protection officer (however, there was no information about right to file a claim with the Catalan Data Protection Authority).
- That this same information was also included in the "Group description" section, which was visible at the top of the screen where the messages were displayed; as well as in the "Group information" section.
- That through the "Group information" section, you could also access the mobile phone number and profile picture of all the members of the said WhatsApp group (257 at the time of verification). In that section it was also indicated that the group was created on 07/13/2020 at 18:35 hours.

6. On 08/09/2020 and still within the framework of this preliminary information phase, the reported entity was required to report, among others, on the legal basis that

would legitimize the collection of the data of the people who had subscribed to the WhatsApp group; about how the right to information was made effective for the people who joined to the group on 07/13/2020 and 07/14/2020 at the time of collection of your data; as well as what measures had been implemented to prevent members subscribed to the WhatsApp group from being able to consult the mobile number and profile photo of the rest through the "Group information" section.

7. On 09/30/2020, the Tiana City Council responded to the aforementioned request through a letter in which it stated the following:

- That as indicated in the informative clause that was included, the legal basis for the processing of the contact data of interested citizens is the fulfillment of a public interest mission. Specifically, the one that refers to the promotion and fulfillment of municipal competences in accordance with article 25 of Law 7/1985, of April 2, regulator of the Bases of the Local Government (hereinafter, LBRL) because the purpose pursued is the communication of institutional information to the citizens of the municipality.
- That the WhatsApp channel was created on 07/13/2020 and that it began to be operational on 07/15/2020 when the data protection information was provided.
- That the information note that was included stated that the other members of the group could have access to the contact data (image, first and last names and telephone).
- That despite this, a distribution list was generated in order to be able to keep informing the citizens and that their data could not be viewed by the rest of the group members.

The reported entity attached various documentation to the letter.

8. On 02/17/2021, the Authority's Inspection Area tried to re-access the "Tiana News" WhatsApp group (via the link <https://chat.whatsapp.com/>). ..)(...), noting that the group still had 257 members and that it was not possible to join the group "because it is full."

9. On 07/05/2021, the director of the Catalan Data Protection Authority agreed to start a disciplinary procedure against the Tiana City Council for two alleged infringements: an infringement provided for in article 83.5.b) in relationship with article 13; and another violation provided for in article 83.4.a) in relation to article 25; 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 05/11/2021.

The initiation agreement explained the reasons why no charge was made with respect to the fact reported relating to the failure to obtain the explicit consent of the affected persons, when they joined the WhatsApp group subject to the complaint. In

specifically, it was considered that the treatment was lawful, since it was necessary for the fulfillment of a mission in the public interest (art. 6.1.e RGPD) and that, even, it could be considered that the treatment was also based on the consent of the affected persons (art. 6.1.a RGPD), which should not be explicit to the extent that special categories of data were not treated.

On 18/05/2021, the Tiana City Council made objections to the initiation agreement.

10. On 02/07/2021, the person instructing this procedure formulated a proposed resolution, by which it proposed that the director of the Catalan Data Protection Authority admonish the Tiana City Council as being responsible, in the first place, for an infringement provided for in article 83.5.b) in relation to article 13; and secondly, of an infringement provided for in article 83.4.a) in relation to article 25.1, all of them of the RGPD.

This resolution proposal was notified on 02/07/2021 and a period of 10 days was granted to formulate allegations.

11. On 07/19/2021, the accused entity submitted a letter in which, without making any allegation on the merits to discredit the offense charged in the proposed resolution, it reported on the actions carried out to give compliance with the requirement for corrective measures proposed by the instructing person in the resolution proposal.

proven facts

1. On 07/13/2020, the Tiana City Council created the WhatsApp group called "Tiana News" with the purpose of communicating institutional information to citizens. At the time of the collection of the data of the people who joined the said group before 15/07/2020 (the date on which the City Council incorporated an informative clause on data protection and on which the group), the City Council did not provide all the information required by article 13 of the RGPD. It only informed through the message that contained the link to join the group about the data controller and how to contact him (art. 13.1.a RGPD); as well as on the purpose of the treatment (part of the information provided for in art. 13.1.c RGPD).

2. Also in relation to the said WhatsApp group, the Tiana City Council did not implement the appropriate technical and organizational measures to effectively apply the principle at the time of determining the means of treatment, as at the time of the treatment itself of confidentiality. In particular, it was not guaranteed that people who joined the WhatsApp group created by the City Council could not access the mobile number, profile photo and username of the other members.

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 has been advanced, the imputed entity has submitted on 07/19/2021 a letter to certify the adoption of the corrective measures that the instructing person proposed to require from the City Council in the resolution proposal. In said letter, however, no allegation was made regarding the proposed resolution.

On the contrary, the accused entity did make allegations against 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. About the right to information.

In the 1st section of its statement of objections to the initiation agreement, the accused entity explained that it provided certain information through the message transcribed in the 4th precedent and through a tweet on the account of Tiana City Council, carried out on 07/09/2019, with the following content:

"Whatsapp to communicate through direct messages with the City Council. We will transfer to the appropriate area and get back to you as soon as possible. Save it in your diary: 600 00 (...) or wa.me/34600002233 #TianaÉsComunicació"

Well, the transcribed tweet did not refer to the WhatsApp group subject to the present sanctioning procedure, which was created on 07/13/2020 (one year after the invoked tweet).

Having said that, in the resolution proposal it was admitted that the message transcribed in the 4th precedent, which was circulated through WhatsApp and which contained the link to join the "Tiana News" group, contained certain information on data processing, a circumstance that was already collected in the proven facts section of the proposal and that has been maintained in this resolution.

Specifically, as indicated by the City Council in its statement of objections to the initiation agreement, it could be considered that the information provided for in Article 13.1.a) of the RGPD was provided, given that the person signing the message was the mayoress of Tiana and contact details were provided; as well as that it was also partially informed of the end established in article 13.1.c) of the RGPD, since it was pointed out that the purpose was to communicate municipal information (on the contrary, it was not informed about the legal basis, information also provided for in article 13.1.c) RGPD).

Therefore, it was determined whether the City Council facilitated the right to information in layers, in the terms provided for in article 11 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD).

In this regard, when the City Council created the mentioned WhatsApp group on 07/13/2020 (and until 07/15/2020), it did not indicate an email address or another means that would allow interested people to access it easily and immediately to the rest of the information (art.

11.1 LOPDGDD); nor did it inform about the possibility of exercising the rights established by articles 15 to 22 of the RGPD (art. 11.2.c LOPDGDD). In this last sense, it cannot be admitted, as the accused entity intended, that information on the exercise of rights (art. 11.2.c LOPDGDD) can be understood as covered, simply by facilitating a communication channel.

Therefore, it must be concluded that until 15/07/2020, the Tiana City Council did not provide interested parties with all the information required by article 13 of the RGPD and, in particular, that it was not provided not even the basic information provided for in article 11 of the LOPDGDD.

Having established the above, on 15/07/2020 (the date on which the group was also full) the City Council incorporated in the sections "Description of the group" and "Information of the group" an informative clause on data protection, which it was in accordance with article 13 of the RGPD except for the fact that neither there, nor on the main page of the electronic headquarters to which it was referred (<http://tiana.eadministracio.cat>), was information to the affected persons of the possibility of submitting a claim to this Authority (art. 13.2.d RGPD).

However, the City Council of Tiana stated in its statement of objections to the initiation agreement, that this information was provided in a specific section of its electronic headquarters "Privacy Policy"

in a specific, a (<https://tiana.eadministracio.cat/privacy>), where information was given on the possibility of submitting a claim to the Spanish Data Protection Agency (AEPD). Despite this admitted that this information was not accurate considering that the supervisory authority competent to hear claims in this matter is the Catalan Data Protection Authority (APDCAT). It is worth saying, however, that the information on the competent control authority before which to submit a claim has already been modified as the Tiana City Council has certified.

On the other hand, Article 12.1 of the RGPD determines that the information indicated in Article 13 of the RGPD must be provided in a concise, transparent, intelligible and easily accessible form. And article 11.1 of the LOPDGDD establishes that, when the right to information by layers becomes effective, the 1st layer (or basic information) must indicate the electronic address (or other means) that allows access to the rest of the information simply and immediately.

In the present case, access to the rest of the information on the treatment (2nd layer) could not be considered to be easy (art. 12.1 RGPD) or immediate (art. 11.1 LOPDGDD). These requirements imply that the person concerned does not have to search for the information, but must be able to immediately recognize where and how to access the rest of the information about the processing of his personal data. In other words, to comply with them, the Tiana City Council had to provide the specific address where the affected person could consult the rest of the information about the treatment (<https://tiana.eadministracio.cat/privacy>), or at the very least, inform that its content could be accessed by selecting the "Privacy Policy" option from the bottom menu of the electronic site. In turn, it should also be specified which of the two informative clauses contained in the privacy policy refers to the treatment of your data.

So, the mere referral to the main page of the electronic headquarters (<http://tiana.eadministracio.cat>), without specifying the specific email address where the rest of the information on the treatment (the privacy policy) could be consulted would not comply with the requirements contained in articles 12.1 of the RGPD and 11.1 of the LOPDGDD, which have just been mentioned. That is why, in the resolution proposal and in the event that the data of the people included in the said WhatsApp group continued to be processed for the purpose of communicating institutional information and the right to information was provided in layers, it was proposed require the City Council to specify in the 1st layer the specific electronic address where to obtain the rest of the information on the treatment.

In short, in the proposed resolution it was considered that the allegations that had been addressed in this section could not succeed, except for those relating to the information on the treatment contained in the message that contained the link to join se to the WhatsApp group and regarding the fact that from 07/15/2020 information was also provided regarding submitting a claim to the control authority (art. 13.2.d RGPD), although the authority The one identified there was not the competent one.

2.2. About data protection by design.

Subsequently, the accused entity admitted in its statement of objections to the initiation agreement that it was aware that it created a WhatsApp group without providing for a security measure to prevent the data of the people who participated in it were accessible to the rest of the participants. However, he considered that the City Council could not prevent the people who joined the WhatsApp group from being able to access the mobile number, profile picture and username of the other members, "given that any user of the WhatsApp Platform already knows that this fact will happen the moment it accesses a distribution list".

In advance, it should be pointed out that the Tiana City Council did not create a distribution or distribution list as indicated in its statement of allegations, but rather a group in which it limited who could send messages and who could edit group information (only group administrators could do this).

Given the above and regardless of the operation of WhatsApp that the City Council detailed in its statement of objections to the initiation agreement, in compliance with the principle of data protection by design (art. 25.1 RGPD), if he was aware that he could not guarantee the principle of confidentiality by creating a WhatsApp group to send institutional information, what he had to do was to refrain from using this tool and look for others that do not lead to the violation of said principle. But even WhatsApp has an option that allows you to guarantee the principle of confidentiality when you want to send messages to several recipients or contacts. Indeed, if a broadcast list is created, the messages sent appear to each contact on the broadcast list as an individual message, so that the people included in the broadcast list do not know who the other members of the list are and, therefore, they cannot access other people's data.

On the other hand, the City Council alleged in that letter of allegations that it would have already adopted the corrective measures to correct the effects of the infringement addressed here. However, the "Tiana News" WhatsApp group was still active when the statement of objections to the initiation agreement was submitted and it was possible to continue accessing the mobile number, profile picture and username of the rest of the group members.

3. In relation to the facts described in point 1 of the proven facts section, it is necessary to go to sections 1 and 2 of article 13 of the RGPD, they establish the information that must be provided when personal data is obtained from the person concerned:

"1. When personal data relating to an interested party is obtained, the data controller, at the time it is obtained, will provide all the information indicated below:

- a) the identity and contact details of the person in charge and, where appropriate, of their representative;
- b) the contact details of the data protection officer, if applicable;
- c) the purposes of the treatment for which the personal data is intended and the legal basis of the treatment;
- d) when the treatment is based on article 6, section 1, letter f), the legitimate interests of the person in charge or of a third party;
- e) the recipients or the categories of recipients of the personal data, as the case may be;
- f) in its case, the intention of the person in charge to transfer personal data to a third country or international organization and the existence or absence of an adequacy decision by the Commission, or, in the case of the transfers indicated in articles 46 or 47 or article 49, section 1, second paragraph, refers to the adequate or appropriate guarantees and the means to obtain a copy of these or the fact that they have been provided.

2. In addition to the information mentioned in section 1, the controller will provide the interested party, at the time they are obtained

personal data, the following information necessary to guarantee fair and transparent data processing:

- a) the period during which personal data will be kept or, when not possible, the criteria used to determine this period;
- b) the existence of the right to request from the person responsible for the treatment access to the personal data relating to the interested party, and its rectification or deletion, or the limitation of its treatment, or to oppose the treatment, as well as the right to the portability of the data ;
- c) when the treatment is based on article 6, section 1, letter a), or article 9, section 2, letter a), the existence of the right to withdraw consent at any time, without it affecting the legality treatment based on consent prior to its withdrawal;
- d) the right to present a claim before a control authority;
- e) if the communication of personal data is a legal or contractual requirement, or a necessary requirement to sign a contract, and if the interested party is obliged to provide personal data and is informed of the possible consequences of not providing such data;
- f) the existence of automated decisions, including the creation of profiles, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information on the logic applied, as well as the importance and expected consequences of said treatment for the person concerned."

For its part, sections 1 and 2 of article 11 of the LOPDGDD, regarding transparency and information of the affected, provide that:

"1. When the personal data is obtained from the affected person, the controller can comply with the duty of information established by Article 13 of Regulation (EU) 2016/679 by providing the affected person with the basic information referred to in section below and indicating an electronic address or other means that allows you to access the rest of the information in a simple and immediate way.

2. The basic information referred to in the previous section must contain, at least:

- a) The identity of the data controller and his representative, if applicable.
- b) The purpose of the treatment.
- c) The possibility of exercising the rights established by articles 15 to 22 of Regulation (EU) 2016/679.

If the data obtained from the affected person must be processed for profiling, the basic information must also include this circumstance. In this case, the affected person must be informed of his right to object to the adoption of automated individual decisions that produce legal effects on him or significantly affect him in a similar way, when

this right is granted in accordance with the provisions of article 22 of Regulation (EU) 2016/679."

During the processing of this procedure, the fact described in point 1 of the proven facts section, which is constitutive of the violation provided for in article 83.5.b) of the RGPD, which typifies the violation, has been duly proven of "the rights of interested parties pursuant to articles 12 to 22", among which is the right to information provided for in article 13 of the RGPD.

The conduct addressed here has been included as a minor infraction in article 74.a) of the LOPDGDD, in the following form:

"a) Breach of the principle of transparency of information or the right to information of the affected person for not providing all the information required by articles 13 and 14 of Regulation (EU) 2016/679."

4. With regard to the fact described in point 2 of the proven facts section, relating to data protection by design, it is necessary to refer to article 25.1 of the RGPD which establishes the following:

"1. Taking into account the state of the art, the cost of the application and the nature, scope, context and purposes of the treatment, as well as the risks of varying probability and seriousness that the treatment entails for the rights and freedoms of people physical, the person in charge of the treatment will apply, both at the time of determining the means of treatment and at the time of the treatment itself, appropriate technical and organizational measures, such as pseudonymization, designed to effectively apply the principles of data protection, as the minimization of data, and to integrate the necessary guarantees in the treatment, in order to fulfill the requirements of this Regulation and protect the rights of those interested."

In accordance with what has been stated, the fact collected in point 2 of the section on proven facts constitutes the infringement provided for in article 83.4.a) of the RGPD, which typifies as such the violation of "the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43", among which is data protection by design (art. 25.1 RGPD).

The conduct addressed here has been included as a serious infraction in article 73.d) of the LOPDGDD, in the following form:

"d) The lack of adoption of the technical and organizational measures that are appropriate to effectively apply the principles of data protection from the design, as well as the non-integration of the necessary guarantees in the treatment, in the terms required article 25 of Regulation (EU) 2016/679."

5. 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".

As has been advanced, on 19/07/2021, the Tiana City Council has submitted a letter through which it reports on the actions carried out in relation to the corrective measures that the instructing person proposed to require in the proposal of resolution

Among others, the City Council states that it has proceeded to modify the information that is provided to the affected persons through the electronic headquarters, regarding the control authority before which they have the right to submit a claim (the APDCAT), which has been noted.

Therefore, this diligent action by the Tiana City Council means that it becomes unnecessary to maintain the requirement for corrective measures that the person who instructed in this regard proposed in the resolution proposal.

On the other hand, and for what is of interest here, the City Council also informs that it has proceeded to delete the "Notícies Tiana" WhatsApp group. However, it is noted that this group has not been removed, but has been left inactive. Specifically, this Authority is aware that on 07/09/2021 a message was published in said group indicating that it was inactive and that on 07/29/2021 (20 days later) there were still 142 members in the

group, so the mobile number, profile picture and username of those group members could still be accessed.

Given the above, although the willingness of the Tiana City Council to correct the effects of the infringement before the present resolution was issued should be positively assessed, it is necessary to require the reason as soon as possible, and in any case within the deadline maximum of 10 days from the day after the notification of this resolution, delete the WhatsApp group "Notícies Tiana" created on 07/13/2020, or in the case of leaving it inactive, adopt the relevant measures so that members of the group cannot access the personal data of the rest.

Once the corrective measure described has been adopted, within the specified period, the Tiana City Council must inform the Authority within the following 10 days, without prejudice to the authority's inspection powers to carry out the corresponding checks.

For all this, I resolve:

1. Admonish the Tiana City Council as responsible for two infringements: an infringement provided for in article 83.5.b) in relation to article 13; and another violation provided for in article 83.4.a) in relation to article 25.1; all of them from the RGPD.
2. Require the Tiana City Council to adopt the corrective measure indicated in the 5th legal basis and certify to this Authority the actions taken to comply with them.
3. Notify this resolution to Tiana City Council.
4. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.
5. 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 what they provide 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,

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