

RESOLUTION of the procedure for protection of the right of access no. PT 34/2018, urged against the Vilafranca del Penedès Town Council

Background

1.- On 06/25/2018 it was registered with the Catalan Data Protection Authority, coming from the Spanish Data Protection Agency, a letter from Mr. (...) (hereinafter, the person claiming), for which he made a claim for the alleged neglect of the right of access he had previously exercised on 26/11/2015 before the Town Council of Vilafranca del Penedès, in relation to photographic images of his minor daughter who, according to the person making the claim here, had been captured on two occasions by an officer of the Local Police of this Town Council when photographed some terraces of bars in the municipality.

2.- In accordance with article 117 of Royal Decree 1720/2007, of December 21, which approves the Regulation implementing Organic Law 15/1999, of December 13, on data protection of personal nature (hereinafter, RLOPD and LOPD, respectively), applicable to the present case as it concerns the regulations in force at the time when the access request was made (11/26/2015), by means of 'office dated 27/06/2018 the claim was transferred to the Vilafranca del Penedès Town Council so that within 15 days it could formulate the allegations it deemed relevant.

3.- Once the time limit granted has expired without the Authority having received any letter from the City Council, and given that the response was considered necessary in order to resolve the claim presented, by means of office dated On 10/30/2018, a new deadline of 10 working days was again granted so that the City Council formulated the allegations it considered pertinent.

4.- The Vilafranca del Penedès City Council made allegations in a letter dated 07/11/2018, in which it set out, in summary, the following:

"On November 25, 2015, the Local Police officer with a Professional Identification Card (...), was attached to the Department of the Services Unit of Vilafranca del Penedès City Council, where he had the category of Inspector of public roads and, among his functions, exercised the inspection of the occupation of the terraces of the establishments.

The inspections had to be accompanied by graphic images to be attached to the files of the public competition establishments. The photographs were taken with general terms, in the exercise of an administrative competence and are not exposed to the public.

During the development of the inspection tasks of public road occupations, neither the Service Unit department nor the Local Police received any type of claim related to the exercise of the officer's duties (...).

Regarding the intervention we are dealing with, in the file of the inspection of the establishment, there are two photographs in which no image of a minor or any recognizable adult can be seen.

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We note that the person responsible for the photo file is the Public Road Inspection Service of Vilafranca del Penedès City Council.

Finally, we inform you that, due to a procedural error, we sent the response to the claim directly to the interested party by regular mail dated July 7, 2018."

4.- Subsequently, and at the request of the Authority, on 12/19/2018 the Vilafranca del Penedès City Council provided a copy of the two photographs of the public road taken on 11/27/2015, in which reference in the previous writing; and subsequently, on 02/01/2019, the same City Council provided a copy of the access request submitted by the person making the claim on 11/26/2015.

Fundamentals of Law

1.- The director of the Catalan Data Protection Authority is competent to resolve this procedure, in accordance with articles 5.b) and 8.2.b) of Law 32/2010, of October 1, of the Catalan Data Protection Authority.

2.- At the time when this resolution is issued, Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the treatment of personal data and the free circulation thereof (RGPD) and also Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter, LOPDGDD). However, this resolution is issued in accordance with the provisions of the old LOPD and the RLOPD, as these are the rules applicable at the time (before 05/25/2018) when the right of access was exercised which is the object of the complaint here.

3.- Well, article 15 of the old LOPD determined the following in relation to the right of access:

"1. The interested party has the right to request and obtain free of charge information about their personal data being processed, the origin of the data and the communications made or planned to be made.

2. The information can be obtained through the mere consultation of the data through visualization, or the indication of the data that is the subject of treatment through writing, copying, telecopy or photocopy, certified or not, in a legible and intelligible form legible, without using keys or codes that require the use of specific mechanical devices.

3. The right of access referred to in this article can only be exercised at intervals of no less than twelve months, unless the interested party proves a legitimate interest for this purpose, in which case they can exercise it earlier."

For its part, article 27 of the RLOPD, in its first and second section, provides the following regarding the right of access:

"1. The right of access is the right of the affected person to obtain information about whether their own personal data is being processed, the purpose of

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treatment that, if applicable, is being carried out, as well as the information available on the origin of the aforementioned data and the communications carried out or planned for this data.

2. By virtue of the right of access, the affected person can obtain from the controller information relating to specific data, to data included in a certain file, or to all their data subjected to processing.

However, when reasons of special complexity justify it, the person in charge of the file may request the affected person to specify the files in respect of which he wishes to exercise the right of access, and for this purpose he must provide him with a list of all the files."

Likewise, also on the right of access, article 29 of the RLOPD established the following:

"1. The person in charge of the file must decide on the access request within a maximum period of one month from the receipt of the request. After the deadline has passed without an express response to the access request, the interested party can file the claim provided for in article 18 of Organic Law 15/1999, of December 13.

In the event that it does not have the personal data of those affected, it must also notify them within the same period.

2. If the request is approved and the person in charge does not accompany his communication with the information referred to in article 27.1, access must take effect within ten days of the aforementioned communication.

3. The information provided, regardless of the medium in which it is provided, must be provided in a legible and intelligible manner, without the use of keys or codes that require the use of specific mechanical devices.

The information must include all the basic data of the affected person, the results of any computer processing or process, as well as the information available on the origin of the data, the transferees of the data and the specification of the specific uses and purposes for which the data was stored."

Lastly, article 18 of the LOPD, regarding the protection of the rights of access, rectification, opposition and cancellation, established in its sections 1 and 2 the following:

"1. Actions contrary to the provisions of this Law may be the subject of a claim by the interested parties before the Data Protection Agency, in the manner determined by regulation.

2. The interested party who is denied, in whole or in part, the exercise of the rights of opposition, access, rectification or cancellation, may bring this to the attention of the Data Protection Agency or, where applicable, of the competent body of each autonomous community, which must make sure of the validity or inadmissibility of the refusal."

In line with the above, article 16.1 of Law 32/2010 provides:

"1. Interested persons who are denied, in part or in full, the exercise of their rights of access, rectification, cancellation or opposition, or who may understand that their request has been rejected due to the fact that it has not been resolved within the deadline

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established, they can file a claim with the Catalan Data Protection Authority.”

4.- Having explained the applicable regulatory framework, it should first be noted that, although it is true that the right of access regulated in the old LOPD is a right of a very personal nature (article 23 RLOPD), so that it can be exercised the affected person himself, in the case of children under 14 years of age (ex art. 13 RLOPD, as would be the case of the child of the person making the claim here), who was entitled to exercise the right of access is the person who exercises his legal representation, for which reason, it must be understood that when the claimant here requested access to his daughter's personal data, he did so on her behalf. It is worth saying that the new LOPDGDD has maintained in the case indicated the age of 14 set by the old LOPD (art. 7.1 LOPDGDD).

5.- Next it is necessary to analyze whether the Vilafranca del Penedès City Council resolved and notified, within the period provided for by the applicable regulations, the right of access exercised by the person making the claim, since precisely the reason for the person's complaint that initiated the present procedure for the protection of rights was the fact of not having obtained a response within the period provided for the purpose.

In this regard, it is certified that on 26/11/2015 a letter was entered in the City Hall Register by the person here claiming, through which he exercised the right of access, on behalf of his minor daughter age, to photographic images of this that could be contained in City Council files, and that would have been captured by a Local Police officer, whom he identified with his TIP number, when he would have photographed the terraces of the local bars. Likewise, he asked to know the identity of the person responsible for the file, in order to exercise other rights, among them, the right of opposition (arts. 34 and 35 RLOPD).

In accordance with article 29 of the RLOPD, the City Council had to resolve and notify the access request within a maximum period of one month from the date of receipt of the request.

In relation to the question of the term, it should be borne in mind that in accordance with article 21.3 b) of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPAC) and article 41.7 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia (hereafter, LRJPCat), on the one hand, the calculation of the maximum term in initiated procedures at the request of a party - as is the case - it starts from the date on which the request was entered in the register of the competent body for its processing. And on the other hand, that the maximum term is for resolving and notifying (article 21 of the LPAC), so that before the end of this term the resolution must have been notified, or at least have occurred the duly accredited notification attempt (art. 40.4 LPAC).

Well, the City Council has not proven to have responded to the request for access made by the now claimant, neither within the one month period provided for the purpose, nor subsequently. It is worth noting that in the hearing procedure of the present guardianship procedure the City Council stated in writing dated 7/11/2018 that the images

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captured did not contain any image of a minor or any recognizable adult. Well, in the event that such a circumstance presented by the City Council occurred, it would also have to respond to the request made by the person making the claim, since such an obligation arises from article 25.2 of the RLOPD, which established that: " the person in charge of the treatment must respond to the request addressed to him in any case, regardless of whether or not personal data of the affected person appears in his files".

Consequently, the estimate of the claim proceeds, which was based on the lack of response to the request to exercise the right of access, since the Vilafranca del Penedès City Council did not resolve and notify in the form and deadline for said request submitted by the affected person.

This notwithstanding what will be said below regarding the substance of the claim.

6.- With regard to the substance of the claim, in the hearing procedure the City Council provided a copy of the photographs taken on 11/25/2015 by the local police to which the claimant referred in his request, and which, according to the council, are included in a file of the City Council's Public Road Inspection Service. Well, certainly in the two photographs mentioned there is no human figure that could correspond to a child under the age of 6 (the claimant's daughter's age at the time of the photographs, as he stated). Only three adults are visible, and apparently it seems difficult to identify them.

In any case, with regard to the request made by the person making the claim, referring to the images of his minor daughter on the terrace of a private establishment occupying the public road, the claim must be rejected, since in the documentation provided by the City Council and to which the claimant would have referred, the personal data for which access had been requested is not included.

7.- In accordance with what is established in articles 16.3 of Law 32/2010 and 119 of the RLOPD, in cases of estimation of the claim for the protection of rights, the manager of the file must be required so that in the period of 10 days to make the exercise of the right effective, which would imply in principle requiring the City Council to respond to the claimant here, in the sense of communicating that it did not have the personal data to which it sought to access . However, as the City Council has stated to this Authority, the statement of objections presented to the Authority in the hearing procedure, in which it asserted that it did not have the personal data in respect of which it exercised the right of access, he would also have sent it - by mistake - to the person here claiming. This is why it is not appropriate to make any request to the City Council, as it would be unnecessary for him to communicate to the claimant here what he would have already indicated.

For all that has been exposed,

RESOLVED

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First.- Appreciate for formal reasons the claim made by Mr. (...) against the Vilafranca del Penedès City Council, for not having responded to the access request, and dismiss it in terms of substance, since from the documentation provided by the City Council it can be inferred that the personal data referred to by the complainant here would not have been collected.

Second.- Notify this resolution to the City Council of Vilafranca del Penedès and the person making the claim.

Third.- Order the publication of the Resolution on the Authority's website (www.apd.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 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the interested parties can file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, in the period of one month from the day after its notification, in accordance with the provisions of article 123 et seq. of Law 39/2015 or directly file an administrative contentious appeal before the administrative contentious courts of Barcelona, 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 administrative contentious jurisdiction.

Likewise, the interested parties may file any other appeal they deem appropriate for the defense of their interests.

The director,