

In this resolution, the mentions of the affected entity have been hidden in order to comply with art. 17.2 of Law 32/2010, given that in case of revealing the name of the affected entity, the physical persons affected could also be identified.

File identification

Resolution of the rights protection procedure no. PT 35/2022, urged against the City Council of (...).

Background

1. On 30/03/2022, the Catalan Data Protection Authority, from the Spanish Data Protection Agency, received a letter from Mrs. (...) (hereinafter, the person claiming), for which he formulated a claim for the alleged disregard of the right of access to a recording of his voice corresponding to a telephone call that this person would have made to the City Council of (...) on 06/18/2021, or in any case on an approximate date.

The person claiming provided a copy of a generic instance that he had submitted electronically on 12/30/2021 before the aforementioned City Council, which was accompanied by a letter of the same date, through which he stated, as far as he is concerned, the next:

"1.- On Tuesday, June 18, 2021 at 11:39 I started a conversation on the phone with Mrs. (...) and at 11:40:57" interrupts the conversation taking the initiative Ms. (...), staff of this City Council. At no time was I informed that the call was being recorded.

2.- As a result of the judicial procedure followed by the Court of First Instance Instance and Instruction of (...), under the Autos de Diligencias Vias (...) I had knowledge of the aforementioned recording.

3.- So the things, through this communication I require them for that they bring me a copy of the aforementioned recording, as well as the legal explanation under which they support that it has been carried out without prior notice."

2. On 04/08/2021, the claim was transferred to the City Council of (...) so that within 15 days it could formulate the allegations it considered relevant.

3. The City Council of (...) made allegations through a letter dated 02/05/2022, in which it stated the following:

"(...) the City Council did not make any recording. The recording was made by a third person for his personal protection, taking into account that on several occasions Mr. (...), had threatened the staff of the City Council, both civil servants and elected officials."

4. Given the existing contradiction in the story of the events carried out by both parties, on 07/09/2022 the City Council was required to report on several points, specifically: to identify the *third person* who had made the recording object of the access request, indicate what was

its link with the City Council; state whether the City Council had the recordings, or failing that indicate whether on 18/06/2021 (or close to it) its mayor had filed a complaint with the Generalitat Police Station - Mossos d Squad of (...), in which he stated that he provided a copy of the aforementioned recordings, in addition to other voice recordings, and in such a case that he provided a copy of the complaint. He was also asked to state whether the City Council was a party to Preliminary Proceedings no. (...) processed by the Court of First Instance and instructed by (...), and if he provided the aforementioned voice recording, or that he indicated in any case the person who provided them and his connection with the City Council.

5.- On 03/10/2022 the Authority received a letter from the City Council of (...) dated 02/05/2022, in which it stated the following:

" On June 22, 2022 following a street inspection (...), the couple of Mrs. (...) pursues Mr. Mayor (...) and the municipal architect, (...) for the (...) with an (unknown) instrument on his fingers.

On the same date, the corresponding complaint was made to the police. (attached to this letter).

When the Mayor and the municipal technician arrive at the municipal offices, Mrs. (...) she phoned the City Hall excitedly and it is in this context that they recorded everything she was saying, which was brought to the attention of the police in the complaint filed. The recordings made by the municipal architect and the Mayor were also sent.

The City Council does not have the recordings made."

The City Council accompanied its letter of response to the complaint that on 06/22/2021 presented by Mr. (...), its mayor before the Police Station of the Generalitat - Mossos d'Esquadra de (...) (previous proceedings (...)), in which it was pointed out, for what is now of interest, the next:

*".. He has been mayor of (...) for approximately two years .
(...)*

.. That during these years he has had problems with a neighbor of the town (...).

.. That this person is Mr. (...) (husband of the person claiming) (...)

.. That the last problem with this person was on Friday, June 22, 2021 at approximately 10:20 a.m.

(...)

...That REQUESTS PROTECTION MEASURES since this person conditions his work as mayor (...)

"...That Mr. (...) this instruction will send a recording of how he followed them to Mr. (...) and a phone call from the wife of Mr. (...) at the City Hall ."

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 Catalan Data Protection Authority.

2. Article 15 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 movement thereof (in hereinafter, the RGPD), regarding the right of access of the interested person, provides that:

"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, the right to access personal data and the following information:

- a) the purposes of the treatment;*
- b) the categories of personal data in question;*
- c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations;*
- d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period;*
- e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment;*
- f) the right to present a claim before a control authority;*
- g) when the personal data has not been obtained from the interested party, any available information about its origin;*
- h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.*

2. (...)

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, and unless he requests that it be provided in another way, the information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

In relation to the rights contemplated in articles 15 to 22 of the RGPD, paragraphs 3 to 5 of article 12 of the RGPD, establishes the following:

"3. The person in charge of the treatment will provide the interested party with information related to their actions on the basis of a request in accordance with articles 15 to 22, and, in any case, within one month from the receipt of the request . This period can be extended another two months if necessary, taking into account the complexity and the number of requests. The person in charge will inform the interested party of any such extension within one month

of receipt of the request, indicating the reasons for the delay. When the interested party submits the request by electronic means, the information will be provided by electronic means whenever possible, unless the interested party requests that it be provided in another way.

4. If the person in charge of the treatment does not comply with the request of the interested party, he will inform him without delay, and no later than one month after receiving the request, of the reasons for his non-action and of the possibility of submitting a claim before a control authority and exercise judicial actions.

5. The information provided under articles 13 and 14 as well as all communication and any action carried out under articles 15 to 22 and 34 will be free of charge. When the requests are manifestly unfounded or excessive, especially due to their repetitive nature, the person in charge may:

*a) charge a reasonable fee based on the administrative costs incurred to facilitate the information or communication or perform the requested action, or
b) refuse to act in respect of the request.*

The person responsible for the treatment will bear the burden of demonstrating the manifestly unfounded or excessive nature of the request. (...)"

For its part, article 13 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), determines the following, also in relation to the right to access:

"1. The affected person's right of access must be exercised in accordance with the provisions of Article 15 of Regulation (EU) 2016/679.

(...)

2. The right of access is understood to be granted if the data controller provides the affected person with a remote, direct and secure access system to personal data that guarantees, permanently, access to all of it (...).

3. For the purposes established in article 12.5 of Regulation (EU) 2016/679, the exercise of the right of access more than once during the period of six months can be considered repetitive, unless there is a legitimate reason for do it

4. When the person affected chooses a means other than the one offered to him that involves a disproportionate cost, the request must be considered excessive, so the said affected person must assume the excess costs that your choice behaves. In this case, the person in charge of the treatment is only required to satisfy the right of access without undue delay."

In relation to the above, article 16.1 of Law 32/2010, of the Catalan Data Protection Authority, regarding the protection of the rights provided for by the regulations on personal data protection, provides the following:

"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 established deadline, they can submit a claim to the Catalan Data Protection Authority."

3. Having explained the applicable regulatory framework, it is then necessary to analyze whether the City Council of (...) 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 of his 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 12/30/2021 he entered the said City Hall a written statement from the person making the claim through which he requested a copy of the recording of a call that the claimant would have made to the City Council on 06/18/2021 (or on a date close to it), a request that insofar as contained his voice and his manifestations, it should be framed in the exercise of the right of access provided for in article 15 of the RGD.

In accordance with article 12.3 of the RGD, the City Council had to resolve and notify the request to exercise the requested right within a maximum period of one month from the date of receipt of the request legality

Well, the City Council has not proven to have given any response to the access request made by the person making the claim, neither within the period of one month (extendable for two more months) provided for that purpose, nor with posteriority

Consequently, since the claim was based on the lack of response to the request to exercise the right of access, it must be declared that the City Council of (...) did not resolve and notify in the form and time said request submitted by the affected person.

4. Once the above has been established, it is necessary to analyze the merits of the claim, that is to say whether, in accordance with the precepts transcribed in the 2nd legal basis, in this case access to the data in the terms usually tender the person claiming.

As a starting point, it should be borne in mind that article 15 of the RGD defines the right of access as the right of the affected person to obtain information about their own personal data that is the subject of treatment and, in such case, access said data and information on the purposes of the treatment, the categories of personal data, the recipients to whom the personal data have been communicated or will be communicated, as well as the rest of the information detailed in article 15.1 of the RGD. This right also entails the obligation to inform the affected person, if this is the case, that the requested personal data is not available, in accordance with the provisions of article 29.1 of Royal Decree Royal Decree 1720/2007, of December 21, which approves the Regulation for the implementation of Organic Law 15/1999, of December 13, on the protection of personal data (applicable where it does not conflict with the RGD or the 'LOPDGDD'). In addition, article 15.3 of the RGD expressly recognizes the right of any person to obtain from the data controller a copy of the document containing the personal data for which access has been requested.

The right of access is a very personal right, and constitutes one of the essential powers that make up the fundamental right to the protection of personal data. As has already been advanced, through the right of access the owner of the data can find out which data about his person are the subject of treatment. In addition, this right could be the basis for the exercise of other rights, such as those of rectification, deletion, limitation, portability or opposition.

This is why the limitations to this right of access must be minimal given that through its exercise the effectiveness of the fundamental right to the protection of personal data is guaranteed. The reasons for denying the right of access are found in article 23 of the RGPD, which must be provided for *"through measures legislative "* (art. 23.1 RGPD) .

As explained in the background, the City Council of (...) has stated that it does not have the aforementioned recording, since it was not made by the City Council but by a third person and for its personal protection .

In this regard, it should be noted that the fact that the City Council (that is, the staff at its service), as an institution, had not recorded the call made by the person making the claim, but the relevant fact is whether he currently has these recordings, because in that case he would be dealing with the data of the person making the claim, who, in principle, should be able to access them.

Regarding this second issue, the City Council has stated to the Authority that it does not have this recording, but the truth is that in the complaint that the mayor presented on 07/22/2021 before the police station, he stated expressly intending to provide it (5th precedent: *" That Mr. (...) (mayor) will send to this instruction a recording of how he followed Mr. (...) and a phone call from the wife of Mr. (...) at the City Hall"*).

The City Council did not respond to the Authority when it was asked if the City Council was part of the Preliminary Proceedings no. (...) initiated following this complaint, in order to find out whether the contribution of the recording in question to the judicial proceedings would have been made by the City Council, or by the mayor in a private capacity. In any case, it is considered unlikely that the City Council does not have the recording requested by the claimant here, if a set of concurrent circumstances is taken into account, such as: the fact that the person who made this complaint was the mayor himself and he expressly made it clear in the complaint, adding that the person complained about conditioned his work as mayor; that the complaint referred to events that took place while he was exercising his public duties, and that the recording would have been made in respect of a call that the complainant here made to the City Council, and that therefore would have been answered by his staff within the framework of the public service of citizen attention.

On the other hand, it does not seem that any of the reasons for denying access provided for in Article 23.1 of the RGPD apply, so it must be concluded that the person concerned would have the right to access the recording of his voice , in the event that the City Council has this recording.

5. 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 person in charge of the file must be required so that within 10 days counting from the day after the notification of this resolution will make effective the exercise of the right in the following terms:

5.1.- In the event that the City Council disposes of the recording of the call that is the subject of the access request, give the person claiming a copy of this recording.

5.2.- In the event that the City Council does not have the recording of this call , but has provided a copy of the recording to the Court of First Instance and investigation of (...) or the Police Station of the Generalitat - Mossos d'Esquadra de (...), and consequently it is within

their reach, carry out the necessary arrangements in order to deliver a copy of this recording to the person making the claim.

5.3.- In the event that the City Council does not have the recording of this call nor has it provided a copy to the bodies indicated in the previous point (5.2), give a written response to the person making the claim to inform them of this end and the reasons that justify it.

Once the right of access has been made effective in the terms set out and the person making the claim has been notified, within the following 10 days the City Council must give an account to the Authority.

For all this, I resolve:

1. Estimate the guardianship claim made by Ms. (...) against the City Council of (...), with the scope indicated in the 5th legal basis.
2. Request the City Council of (...) so that, within 10 counting days from the day after the notification of this resolution, it makes effective the right of access exercised by the person making the claim, in the manner indicated to the foundation of law 5th. Once the right of access has taken effect, within the following 10 days the claimed entity must report to the Authority.
3. Notify this resolution to the City Council of (...) and to the person making the claim.
4. Order the publication of the resolution 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 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 the LPAC or to directly file an administrative contentious appeal before the administrative contentious courts of Barcelona, in the period of 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,