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File identification File resolution of
prior information no. IP 114/2018, referring to the General Directorate of Security Administration

Background

1. On 23/04/2018, the Catalan Data Protection Authority received a letter from different people in which they filed a complaint, due to an alleged breach of the regulations on the protection of personal data .

First of all, the complainants stated that on 04/05/2018, they presented to the General Directorate of Security Administration (hereinafter, DGAS), a form, duly completed, through which the call for a demonstration planned for the day (...) in the city of Barcelona. This form included their personal details (name, surname and national identity document number), as representatives of the entities convening the demonstration ((...)).

Secondly, they stated that on (...), that is to say the day after the celebration of the demonstration, (...) the newspaper (...) - of national scope - published both in the printed version as in the digital version, the news of the demonstration was accompanied by an image that reproduced the call form presented by the complainants here before the DGAS.
They also pointed out that in the digital edition of the newspaper (...), although at first the image of the form with all the personal data was reproduced, the same morning it was modified to eliminate the data referring to the national documents of identity of the convenors.

The complainants provided various documentation relating to the events reported.
Specifically, they provided the e-mail addressed to (...)", corresponding to the DGAS, in order to communicate the celebration of the act; the PDF document of the form that was subsequently published in the newspaper (...); the news in this newspaper in the paper and digital edition (the latter, the version in which the ID data has been removed); and finally a printout of a series of news from the digital edition of the newspaper (...).

On the other hand, through the same letter, the newspaper was also denounced (...) for the publication of personal data. In relation to these reported facts, on 05/10/2018 the letter of complaint regarding this entity was sent to the Spanish Data Protection Agency.

2. The Authority opened a preliminary information phase (no. IP 114/2018), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the procedure

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penalty 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 if the facts 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 that occurred.

3. In this information phase, on 04/05/2018 the DGAS was required to report on the persons, bodies, entities and/or organizations to whom it sent a copy of the aforementioned form.

4. On 06/05/2018, the DGAS responded to the aforementioned request through a letter in which it set out the following:

   - That the communication of the demonstration by the convening entities was not done through the web form that the Department of the Interior has available for these purposes, but was done through an email addressed to (. ..)" (which belongs to the DGAS, as can be inferred from the documents provided by this body).

   - That in accordance with the procedure established with the affected units for the holding of meetings and demonstrations, when the DGAS receives a communication of a meeting or demonstration, it sends a copy of such communication, by e-mail, to the Police of the Generalitat-Mossos d'Esquadra (hereafter PG-ME), to the local police of the municipality where the demonstration is held, in this case to the Coordination Division of the Urban Guard of Barcelona, and the Delegation Territorial of the Government of the Generalitat in Barcelona. For this purpose, the DGAS attached to the letter a copy of the proof of sending of the various emails addressed to: (...)".

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5. On 19/12/2018, as part of the previous actions, and in order to have as many elements as possible to evaluate the facts reported, a request for information was made to the person who appeared first in the complaint submitted together with three other people - in accordance with article 7 LPAC -, on whether they had of information, some indication or element tending to determine which would be the organ or entity from where the information that was finally published in the newspaper would have been leaked (...).

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Act, and article 15 of Decree 48/2003, of February 20, which approves

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the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority is competent to issue this resolution.

2. Based on the account of facts that has been presented in the background section, it is necessary to analyze the reported facts. The first thing to highlight is that, apart from the DGAS, other bodies and entities also had access to the controversial letter of communication, which would therefore have the status of recipients of the personal data included in the said letter . From here, everything points to the fact that, on the part of one of the bodies or entities that accessed the data, an illicit treatment would have occurred, which would have resulted in the document being leaked and subsequently published in the newspaper (...). This fact could potentially constitute the violation provided for in article 44.3.d) of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD), a provision that typifies as serious " The violation of the duty to keep secret about the processing of personal data referred to in article 10 of this Law". And article 10 of the LOPD establishes that "The person responsible for the file and those who intervene in any phase of the processing of personal data are obliged to professional secrecy with regard to the data and the duty to save them, obligations which subsist even after the end of their relationship with the owner of the file or, as the case may be, with its manager". In relation to the citation made here of the LOPD, it should be noted that the type of infringer mentioned above was repealed by Royal Decree-Law 5/2018, of 27/7, on urgent measures for the adaptation of Spanish law to the European Union regulations on data protection. In turn, the LOPD has been repealed by Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereafter, LOPDGDD), which maintains the regulation of the duty of secrecy in its article 5, in terms similar to how art. 10 of the LOPD. In any case, neither the RDL 5/2018 nor the LOPDGDD would be applicable to the case at hand, given that the events reported and the beginning of the previous actions that gave rise to the complaint, date back to before its entry into force, and consequently, must be governed by the previous regulations. Likewise, it must also be said that after the events reported here, the full application of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons by regarding the processing of personal data and the free circulation of these (RGPD), which in its art. 5.1.f) also expressly includes the principle of integrity and confidentiality.

As indicated in the antecedents, the letter of communication was sent to the DGAS through an email (...), which was sent by email to the different units to which it is necessary to inform about the call for demonstrations to be held, in accordance with the procedure established for the purpose. In this case, given that the demonstration was held in the city of Barcelona, the PG-ME was informed, specifically the Demonstrations Office within the Technical Planning and Devices Area of the Technical Planning Division of Security, to the Coordination Division of the Barcelona Urban Guard and to the Territorial Delegation of the Government of the Generalitat in

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Barcelona The DGAS has certified the submission of the letter to these other bodies and entities.

In this regard, it should be added that the e-mail addresses to which the e-mail was addressed to communicate the call for the demonstration on 04/15/2018 did not correspond to an e-mail address linked to a specific natural person, rather, they were generic e-mail addresses linked to the competent units in the procedure established by the DGAS for the communication of calls for demonstrations in the city of Barcelona.

Certainly, these facts prove that both the DGAS and any other body or entity that had authorized access to the personal data contained in the communication letter could be responsible for the violation of the principle of confidentiality provided for in article 10 of LOPD. Consequently, it cannot be determined in which of these bodies or entities the leak of the letter that was subsequently published in the newspaper (...) would have taken place.

The Supreme Court, in its ruling of 03/27/1998, declares that one of the fundamental principles of the law of sanctions is the personality of sanctions, as a manifestation of the principle of responsibility for sanctions enshrined in article 28 of Law 40/2015, of October 1, on the legal regime of the public sector, under which the reproach for the imputed violation can only fall on the author of the infraction, in accordance with what is established in article 43.1 of the LOPD, according to which it is up to the person responsible for the file or treatment to assume responsibility for violations
committed

As has been advanced, in the case that we are dealing with here it has not been possible to determine in which of the bodies or entities that had access to the information relating to the persons reporting here, the illicit treatment that would have led to the access and subsequent disclosure by the newspaper (...), which means that it is not possible to determine the person responsible for the eventual infringement, based on the principle of personality mentioned above.

This principle of the personality of sanctions is intimately linked to another of the inspiring principles of the criminal order, which also govern the matter of penal law, with some nuance but without exceptions. This is the right to the presumption of innocence, enshrined in article 24.2 of the Spanish Constitution and article 53.2.b) of the LPAC, which determines that "The sanctioning procedures must respect the presumption of non-existence of responsibility administrative until proven otherwise".

In accordance with the principles of presumption of innocence and in dubio pro reo, in the area of sanctioning authority, the burden of proving the facts falls on the accuser

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and its authorship. In short, the presumption of innocence must always rule without exception in the penal system and must be respected in the imposition of any penalty.

In this sense, the Constitutional Court, in its Judgment 76/1990 of 26/04, considers that the right to the presumption of innocence entails "that the sanction is based on acts or probatory means of charge or incrimination of the reprehensible conduct ; that the burden of proof corresponds to the accuser, without anyone being obliged to prove their own innocence; and that any inadequacy in the results of the tests carried out, freely assessed by the sanctioning body, must be translated into an absolute verdict".

And in the same terms, the Judgment of the National Court of 18/03/2009 (ratified by the Supreme Court by means of a Judgment of 16/05/2012) was pronounced, by which it confirmed a resolution of the Spanish Agency of Data Protection by virtue of which the archive of the actions of prior information was declared because it was considered that there was no corroborative evidence of the authorship of the reported facts that would allow the same to be imputed: "The appealed resolution recognizes that the conduct reported could have given rise to an infringement of the duty of secrecy in application of the provisions of article 10 of the Organic Law 15/99 and which could give rise to the imposition of a sanction for carrying out a non-consensual data treatment (...). However, the only argument on which the file is based is that it has not been possible to prove who could be responsible for the offense committed.

The presumption of innocence thus becomes the basis of the archive resolution and a new assessment of the facts carried out by this Chamber obliges to confirm said criterion because said presumption (proceeding from Article 24 of the EC), is an essential figure of the punitive law and, therefore, applicable to the administrative sanctioning area (article 137 of the Law on the Legal Regime of Public Administrations and of the Common Administrative Procedure), implies the existence of a minimum evidentiary activity of charge, practiced with observance of all guarantees proceedings, from which the culpability of the accused can be deduced; to this is added the right to defense under the terms of the current sanctioning regulations (art. 135 LRJA-PAC relation to arts. 16 to 19 of RD 1,398/1993), so since there is no sufficient proof, it turns out that no it is possible to agree to the initiation of the sanctioning procedure, being reasonable the file agreed to by the appealed resolution." , in

In short, in the case we are dealing with, even though it is proven that the newspaper (...) had access to the communication letter of the demonstration that the complainants here presented to the DGAS, the truth is that it is not can impute to the DGAS the responsibility for the leak of the letter, having proven that they accessed the letter - and therefore the personal data included there - also other bodies and entities mentioned above, which therefore held the status of recipients of the disputed personal data.

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This, apart from the fact that people connected to the four organizations on whose behalf the communication letter was presented would presumably also have accessed the letter. It is because of all the above that it is not possible to demand responsibility from the DGAS for a possible leakage of data that was initially under its custody,
in accordance with what has been set forth and based on the principles of personality of the offenses and presumption of innocence. Therefore, it is necessary to agree on the archiving of the present actions.

Finally, it should be noted that, as stated in the first legal precedent of this resolution, with regard to the specific fact relating to the publication in the newspaper (...) of said form, made on for which the mentioned means of communication would be responsible, is not included in the cases over which the Catalan Data Protection Authority would have jurisdiction, in accordance with article 156 of the Statute of Autonomy of Catalonia and the article 3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority. This is why the complaint, in this specific part relating to the publication made by the newspaper (...), was transferred to the Spanish Data Protection Agency, an institution that rejected the complaint against the newspaper (. ..), by resolution of 29/05/2018, which became final as it had not been contested.

3. In accordance with everything that has been set out in the legal basis 2, and given that during the previous information it has not been proven that there are rational indications that allow the identity of the person allegedly responsible for any of the violations to be imputed provided for in the applicable legislation, it is necessary to agree on the archiving of these actions.

Article 89 of the LPAC, in line with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions should be archived when in the instruction of the procedure
obviously the following"; d) When the person or persons responsible does not exist or has not been identified or appear exempt from responsibility".

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resolution

Therefore, I resolve:

1. File the actions of prior information number IP 114/2018, relating to the DGAS.

2. Notify this resolution to the DGAS and communicate it to the complainants, as well as to the PG-ME, the Coordination Division of the Urban Guard of Barcelona and the Territorial Delegation of the Government of the Generalitat in Barcelona

3. 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.

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Against this resolution, which puts an end to the administrative process in accordance with article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the denounced entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with the which provides for article 123 et seq. of Law 39/2015. 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.

Likewise, the reported entity can file any other appeal it deems appropriate to defend its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)

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