

Carrer Rosselló, 214, esc. A, 1st 1st  
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## File identification

Archive resolution of the previous information referring to the Secretary of Penal Measures, Reintegration and Attention to the Victim of the Department of Justice

## Background

1. On 18/12/2018, the Authority received single complaints (to which nos. 358/2018 and 359/2018 were assigned, respectively) made by a person against the Penitentiary Center (.. .)(...) (hereafter CP), dependent on the Secretary of Penal Measures, Reintegration and Victim Support of the Department of Justice (hereafter SMPRAV), due to an alleged breach of the regulations on protection of personal data.

The complainant (Mr. (...), who provides his services as an official at the CP) stated the following facts:

- That on 06/09/2017 he had requested compatibility to develop a private activity, providing the CP with various information to that effect, among other things, the work center where the private activity would be carried out (in this case a center of higher studies, (...) - hereafter, the Academy-), and the job he would occupy (teacher).
- That by resolution of September 2017, he had been denied compatibility requested
- That on 21/12/2017, at 14:42, the Academy had received a call from a person who did not identify himself, requesting information about him, and specifically about his activity as a teacher in said center. That when faced with the questions posed by the person who answered the call to the Academy, the person who had called cut off the communication. That, then, the management of the Academy carried out a "retraction", receiving as a response "*Penitentiary Center (...)*".
- That on 12/27/2018 he went to the CP to ask for explanations about the call that would have been made to the Academy, and that both the previous management of the CP (...), and the current (...) they informed him that "*they are not aware of this call and that it was not made in an institutional capacity and that they remain detached from it*".
- That on 01/23/2018 the director general of Penitentiary Services resolved the initiation of reserved information no. 2/2018, referring to his person.
- That when requesting a copy of the 2/2018 reserved information file, he observed that, among other documentation, this file included a printed copy that contained face-to-face class schedules corresponding to various subjects taught by the Academy in the month of July 2017, including those taught by "(...)" (given name of the complainant here). That this copy contained a handwritten annotation linked to the class taught by "(...)", with the handwriting of Ms. (...), head of the Human Resources office of the CP (from now on, DOC1), with the following literal "*Illness without leave*".

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- That in resolution (...) /18, issued as a result of a *"request for intervention for psychological harassment at work and other discrimination at work"* it is stated that (...) (who at that time was the director of the CP ) stated that the initiation of the disciplinary file against the complainant here was initiated *"by the receipt of two anonymous letters at the center in which it is stated that this professional is giving classes when he was denied compatibility"*.

With regard to the eventual violation of data protection regulations, the complainant complained of the following:

- a) That the CP had used the data he had collected from his person as part of a compatibility request for other purposes. According to the complainant, this improper use would have been evidenced by the following facts:
  - a) firstly, in the call made by the CP to the Academy on 12/21/2017 to inquire about its activity in said educational center (call that the reporting person adds would have been made prior to the initiation of the reserved information 2/2018); ib), secondly, for the inclusion of DOC1 in the actions of the reserved information reviewed.
- b) That the CP would have revealed to third parties (those people who reported him anonymously to the CP) that the request for compatibility of private activities had been denied. Thus, according to the complainant, these anonymous people *"were aware of a notification sent to me by the human resources office where the only recipient of the information and notification is myself"*.

2. The Authority opened a preliminary information phase in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, of the common administrative procedure of public administrations (from now on, 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 involved.

3. In this information phase, on 01/14/2019, the SMPRAV was required to comply with the following:

- Confirm whether on 12/21/2017 the CP would have made a telephone call to the Academy take an interest in the teaching activity of the reporting person.
- Report if the DOC1 is the result of research carried out within the framework of the aforementioned reserved information 2/2018.
- Provide a copy of the decision that would have put an end to the reserved information 2/2018, and, if applicable, of the resolution that would have been issued in the subsequent disciplinary proceedings against the person making the complaint.
- Provide a copy of resolution (...) /18 issued, according to the complainant, *"regarding the request for intervention due to workplace psychological harassment and other discrimination at work"*.

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4. On 24/01/2019, the SMPRAV responded to the aforementioned request through a letter in which it set out the following:

- That, regarding the call of 12/21/2017, the SMPRAV *"does not confirm that from the Center Penitentiary (...) no call was made to the Academy (...) or (...) in that one moment, nor the head of the Human Resources Unit, have ever made any telephone calls to the Academy"*. That *"given that the allegedly required information was available on the academy's website, it is not plausible that the management made the call or ordered it to be made"*; and, they add *"that the head of the Human Resources Unit was on leave due to temporary incapacity (...) and that, therefore, she could not have called from the penitentiary"*.
- That the DOC1 is part of the Reserved Information 2/2018, this document being one *"printout of the timetables that appeared on the Academy's website which was accompanied by a list of incidents taken from the human resources information system for criminal enforcement. The handwritten annotation to which reference is made would point out what emerged from crossing the dates of the two documents, without providing additional information to them (...) That it is unknown who among the resource personnel made the handwritten annotation humans and inspection that had access to the file, since it can be a work record of any of the technicians authorized to access the documents"*.

The reported entity attached the following documentation to the letter:

- a) Copy of the *"Resolution on the closure of reserved information 2/2018"*. In this document, dated 03/05/2018, entitled *"Resolution Proposal for Reserved Information no. 2/2018"* includes the following verbatim:

*"This reserved information was initiated by virtue of the Resolution of the Director General of Penitentiary Services dated January 23, 2018 due to the alleged incompatibility that could have been incurred by the official of the technical team of specialists, group of penitentiary services, of the Penitentiary Center (...) (...) (...).*

*(...)  
facts*

*1st Through a letter dated 04.01.18 (...) from the Penitentiary Center (...) (...) informed the Inspection Service that the official (...) could be carrying out a second activity in the private sector, specifically teaching classes at the company (...), despite the fact that on 07.09.17 the secretary general of the Department of Justice decided not to authorize the request to make both occupations compatible presented by the aforementioned official on 09.06.17.*

*2nd For these events, on 23.01.18, the director general of Penitentiary Services decided to initiate a confidential investigation, in order to determine the circumstances in which they occurred and state the possible responsibilities that could have been to incur*

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*unique From the information obtained so far, it has been established that the official (...) lied in his statement before this instructor.*

*Thus, despite the fact that the official stated that in the past he had worked as a professor at the Academy (in 2010 or 2011) but that he was no longer working there, what is true is that (...) he has been contributing for him during the time periods of the years 2015, 2016, 2017 and 2018 that have been specified in the statement of facts of this resolution proposal. What's more, according to the work life report issued by the General Treasury of Social Security, the official worked at the Academy the very day after the day of his statement in which he repeatedly denied having any type of current employment relationship with the aforementioned company. There is no doubt of the spirit of concealment and deception in the Administration in the action of the official.*

*(...)*

*The truth is that the official (...) has been developing a second private activity without obtaining the corresponding authorization of compatibility and that, moreover, he has hidden this circumstance from the Administration and has lied when he has been questioned about it in the framework of reserved information and with legal assistance.*

*(...)*

*I propose*

*That a disciplinary file be initiated against Mr. (...), official of the technical team of specialists, penitentiary service group, assigned to a generic mixed area position, of the Penitentiary Center (...)(...) , for alleged non-compliance with the rules on incompatibilities".*

- b) Copy of the "Resolution of the General Directorate of Public Service in a case of a request for intervention due to psychological harassment at work and other discrimination at work. Code (...)/2018", in which he is identified as "allegedly abused/ discriminated person"

the complainant here, and as an "allegedly harassing/ discriminating person" Mrs. (...) of the CP. In this resolution, signed on 10/10/2018, the following text is included in the "information analysis" section:

*"Regarding the persecution that Mr. (...)he declares that he is receiving calls for his compatibility at an Academy where he taught, (...)he declares that the processing of this disciplinary file is initiated by the receipt of two anonymous reports at the center in which shows that this professional is giving classes when he was denied compatibility".*

In this resolution it was finally determined that "there are no signs of harassment"

5. In view of the documentation provided, on 04/02/2019 the SMPRAV was again required to provide, among other information, a copy of the anonymous writings that would have received the CP to which the management of the CP had referred in the file "intervention for psychological harassment at work and other discrimination at work. Code (...)/2018".

6. On 06/02/2019 the SMPRAV responded to the request informing that "for the beginning of the prior information no anonymous writing was incorporated, nor does it exist in the file of the

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*same. The procedure was opened in response to a report from (...) of the CP (...) (...) which accompanied a printout of the academy's timetables that was on its website.*

*This copy was not included as evidence, since a certificate of contributions was requested from the TGSS in order to check whether he contributed to another activity during the periods he was on medical leave with respect to the link of civil servant attached to the Department of Justice" .*

7. On 08/02/2019 a final request was sent to the SMPRAV, so that it would comply with the following.

- Provide a copy of the anonymous writings that the CP would have received - Report on the persons, units or bodies that, on the date on which the CP would have received the controversial anonymous letters, could access the information relating to the person making the complaint here had denied his compatibility request.
- Provide the log of outgoing calls from landline telephone lines located in CP offices, corresponding to 21/12/2017, especially outgoing calls made between 2:00 p.m. and 3:00 p.m.

8. On 02/20/2019, the SMPRAV responded to this last request, reporting the following:

- That, *"regarding the copy of the anonymous writings, it cannot be provided. (...) of the center at that time found under the door of his office twice a printed copy of the schedule of the website of the academy with the name of the official marked with phosphorescent yellow marker. This circumstance was not reported to the instructor of the previous information, as stated by the Inspection service of the SMPRAV".*
- That *"the person who received this information, (...) from the penitentiary, does know the compatibility files of the officials assigned to his center. The center's human resources unit and the manager can also access it."*
- That *"with respect to the call log corresponding to December 21, 2017, the telecommunications provider tells us that, for the center's office infrastructure, the log is only kept for 3 months"*

#### 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 Agency, and article 15 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, is competent to issue this resolution (...) of the Catalan Data Protection Authority.

2. Based on the account of facts that has been presented in the background section, it is necessary to analyze the reported facts. Thus, first the reference to whether the CP would have used the data that will be addressed

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had collected from the person here reporting in the context of a request for compatibility for private activities (the name of the center and the activity for which he requested compatibility - teacher-), for other purposes, specifically to support the initiation of a reserved information against the complainant here, which resulted in the initiation of a disciplinary file.

According to the reporting person, this improper use would have been evidenced; firstly, in the call made by the CP to the Academy on 21/12/2017 to inquire about its activity in said educational center; and, secondly, for the inclusion of DOC1 in the actions of the reviewed reserved information.

First, with regard to the disputed telephone call, it should be noted that there is no evidence that it took place, apart from the complainant's statements.

In any case, even if the call was considered to have been made, this would only prove that a person who was at the CP at that date and time made a call to the Academy. In other words, the eventual call could have been made from any phone in the penitentiary from which calls can be made to the outside, and not just from a phone in the Human Resources Unit. And, with regard to the content of the call (allegedly interested in the teaching activity of the complainant here), it should be noted that although it is clear that the personnel of the HR Unit knew about the teaching activity of the here denouncing, this was information that anyone could access since, as stated in the proceedings, this information was available openly on the Academy's website. It should also be added to the above that it cannot be ruled out that the complainant himself had commented on this fact to other CP colleagues.

In any case, it should be noted that the use by the HR Unit of the data previously provided in the compatibility request, to carry out certain actions tending to check some facts that could constitute a disciplinary infraction, and thus support the initiation of reserved information, would be an action that would not contravene data protection regulations, to the extent that there would be a legal basis that would legitimize said treatment. Specifically, this treatment could be considered legitimate based on what is provided for in letter b) of article 6.1 of 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 processing of personal data and the free movement thereof (hereafter, RGPD): [e] *"the treatment is necessary for the fulfillment of a mission carried out in public interest or in the exercise of conferred public powers to the person in charge of the treatment"*. Indeed, in relation to this

legal basis that have been noted here, the following considerations must be made.

Article 57 of Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of Public Employees determines the following.

*"Duties of public employees. code of conduct*

*Public employees must diligently carry out the tasks assigned to them and look after the general interests subject to and observing the Constitution and the rest of the legal system, and they must act in accordance with the following principles: objectivity , integrity,*

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*neutrality, responsibility, impartiality, confidentiality, dedication to public service, transparency, exemplarity, austerity, accessibility, efficiency, honesty, promotion of the cultural and environmental environment, and respect for equality between women and men, which inspire the Code of Conduct of public employees configured by the ethical and conduct principles that regulate the following articles.*

*The principles and rules established by this chapter inform the interpretation and application of the disciplinary regime of public employees”.*

Article 108 of Legislative Decree 1/1997, of October 31, which approves the recasting in a single text of the precepts of certain legal texts in force in Catalonia in matters of public function, establishes the duties of the staff in Generalitat service:

*“Duties of the staff of the Generalitat*

*1. In the performance of their functions, aimed at the satisfaction of general interests, the officials of the Generalitat must strictly respect the principles of action derived from article 103 of the Constitution.*

*2. In particular, the staff in the service of the Generalitat will have the duty to:*

- a) Comply with the Constitution, the Statute of Catalonia and the other provisions that affect the exercise of their functions.*
- b) Comply strictly, impartially and effectively with the obligations specific to your job, comply with the orders received that refer to the service and formulate, where appropriate, the suggestions you think appropriate. (...)*

Article 1.2.c) of Law 21/1987, of November 26, on Incompatibilities of personnel in the service of the Administration of the Generalitat, establishes that the rule will be applicable, among others, to staff at the service of the Administration of the Generalitat of Catalonia.

Decree 329/2006, of September 5, which approves the Regulation for the organization and operation of criminal enforcement services in Catalonia, establishes, in its articles 12 and 13, the following:

*“Article 12*

*The director*

*1. The director of the penitentiary center will be the highest authority of the establishment and will have the representation of the management center of the competent department in matters of criminal execution and the collegiate bodies of the penitentiary center and will be the person obliged, in the first place, to comply with and enforce laws, regulations and other provisions, especially those that refer to the service.*

*2. The director will have the following powers:*

- a) Direct, coordinate, inspect and evaluate the services and activities of the penitentiary center.*
- b) Exercise the direction of the public workers assigned to the penitentiary center.*

*(...)”*

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*"Article 13*

*The manager*

*1. The manager, with the rank of deputy director, will depend on the director and will be the person responsible for the management of the human, financial, material and patrimonial resources assigned to the penitentiary center, as well as the operation of the administrative and service area and especially of the management of the unified management office of the files of the interns.*

*2. Specifically, the manager's powers will be:*

*(...)*

*4) Ensure compliance with their obligations and communicate to the management center all facts or actions that deserve reward or that could constitute a disciplinary infraction.*

*(...)*

*6) Issue the reports that are necessary in relation to the human resources management procedures assigned to the penitentiary center, and more specifically in the procedures for vacations, permits, licenses and in the control of absences.*

*(...)*

*3. The people responsible for the human resources unit, the penitentiary management unit and the economic management unit are obliged to provide assistance to the person who exercises the position of manager in the exercise of their powers.*

And, lastly, it is necessary to cite the provisions of Decree 243/1995, of June 27, which approves the Regulation of the disciplinary regime of the public function of the Administration of the Generalitat of Catalonia, in particular, the following articles:

*"Chapter 2*

*Summary procedure for minor offences*

*Article 33 Preliminary actions. List of charges -1 When*

*an official performs an act that may constitute a minor offense, in the judgment of the general secretary, general director or equivalent of the center in which he provides his services, he will proceed in the shortest possible time to obtain the complementary data and carry out the checks deemed necessary in order to clarify the facts, and if this is the case, by taking statements from the officials concerned (...)"*

*Chapter 3*

*Ordinary disciplinary procedure.*

*Initiation*

*Article 37*

*Ex officio*

*initiation -1 The procedure must always be initiated ex officio, by reasoned agreement by the competent body, either on its own initiative or as a result of a superior order, proposed by the head of the work center or of the unit where the affected person provides services, reasoned motion of the subordinates or complaint (...)"*



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In the case that is being examined here, the processing of the data that has been reported here would have its origin, precisely, in the need to ensure the due fulfillment of the obligations derived from the administrative relationship that links the official staff with the entity responsible for the treatment. And the control of compliance with this obligation is a function that corresponds to the Administration itself in which the staff provides services. In short, that we are in one of the cases regulated in article 6.1 of the RGPD transcribed above, which legitimizes the specific treatment of the controversial personal data analyzed here.

3. Secondly, the complainant complained about the eventual disclosure of his data to third parties - specifically, the fact that he had been denied compatibility due to private activities; and based this complaint on the statements that had been made by the person who at that time was in charge of the CP in the file (...) /2018, in the sense that two anonymous letters had been received warning that the here the complainant was teaching classes when his compatibility was denied.

First of all, it should be noted that there is no reference to the anonymous missives other than the statements made by the management of the CP within the file (...) /2018, having no documentary evidence of them. On the other hand, it should be emphasized that in the context of this reserved information this Authority was informed that the "anonymous" simply consisted of "a printed copy of the timetable of the academy's website with the name of the official marked with a phosphorescent yellow marker" (precedent 8th), that is to say, that no mention was made of an alleged breach of any resolution of incompatibility referred to the complainant here.

It should also be added that anyone could know if the complainant here had been granted compatibility, since the recognition of the compatibility of public employees is information that must be published on the Portal of Transparency (art. 8.1.g) of Law 19/2013, of 9 December, on transparency, access to public information and good governance). Therefore, on the other hand, if the person reporting here did not appear in this list published on the Transparency Portal, the logical deduction is to conclude that they had not been granted any compatibility.

In short, that there is no element that allows it to be maintained that any person with authorized access to said information referring to the denial of the compatibility request, had disclosed it to unauthorized third parties. That being the case, 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 administrative responsibility until the contrary is proven"*.

4. In accordance with everything that has been set out in the 2nd and 3rd legal foundations, and given that in the course of the actions carried out in the framework of the prior information it has not been proven that there are rational indications that allow imputation of any fact that could constitute any of the infractions provided for in the applicable legislation, it is necessary to agree on the archiving of these actions.

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Article 89 of the LPAC, in accordance with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions should be archived when the following is made clear in the instruction of the procedure: *"a) The non-existence of the facts that may constitute the infringement; b) When the facts are not proven"*.

resolution

Therefore, I resolve:

1. File the previous information actions (complaints 358/2019 and 359/2018) relating to the Secretary of Criminal Measures, Reintegration and Victim Support of the Department of Justice.
2. Notify this resolution to the Secretary of Penal Measures, Reintegration and Victim Support and communicate it to the reporting person.
3. Order the publication of the resolution on the Authority's website ([www.apd.cat](http://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 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 a discretionary character, an appeal for reinstatement before (...) the Catalan Data Protection Authority, within a period of one month from the day after its notification, of in accordance with the provisions of 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.

(...),