

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 if the name of the entity is indicated, the natural persons affected could also be identified.

### **File identification**

Archive resolution of the previous information no. IP 312/2021, referring to the Foundation (...).

### **Background**

1. On 04/08/2021, the Catalan Data Protection Authority received a letter from a person for which he made a complaint against the Foundation (...) (hereinafter, the F(...)), due to an alleged breach of the regulations on personal data protection.

In particular, the complainant (Ms. (...)), who claims to have been the data protection officer (DPO) of the entity from November 2019 until she was dismissed on 27/10/2020, stated that during this time, he was *"not able to carry out my functions as DPD due to the continuous interference with actions to be carried out or tasks carried out, among others, the most frequent: problems to sign the Monthly System Review Reports, problems to sign the Act of closing the Audit and raising the conclusions to the Person in charge of the Treatment, represented by (...) and that he did not have either the time or the necessary resources to carry out his duties as DPD.*

As an example, the reporting person alluded in his letter to a security incident (...) that occurred at the entity in September of (...) in which Ms. (...) exchanged several emails with Mr. (...) (...) and also with the complainant, from the content of which it would be clearly inferred - always according to the complainant - the facts subject to the complaint (not to support and interfere in the exercise of the functions of the DPD).

In order to substantiate the facts reported, various documentation was provided:

- Copy of the emails exchanged between management and the DPD following the incident detected in September (...).
- Copy of the consultation carried out on the Type Code to which the F(...) (Catalan Union of Hospitals) adheres (...)
- two documents titled, respectively, *"Monthly data processing review report"* dated 10/22/2020 and *"LOPD current status report towards pending tasks"* dated 10/26/2020, both issued by the reporting person.

2. The Authority opened a preliminary information phase (no. IP 312/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of 1

of October, of the common administrative procedure of public administrations (henceforth, LPAC), to determine if the facts were likely to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 10/05/2021 the reported entity was required to report on:

- The specific actions carried out by the entity in order to involve the person reporting the incident (...), in order for them to exercise their functions as DPD without any interference.

- Any aspect that it considers appropriate in order to clarify the facts that are the subject of the complaint.

4. On 10/15/2021 the reported entity requested an extension of time to respond to the request, which was granted by means of an agreement of 10/19/2021, notified that same day.

5. On 10/27/2021 F(...) responded to the aforementioned request through a letter in which he set out the following:

- That they want to highlight that the reporting person makes *"instrumental use of the present complaint, as a pre-trial act of the complainant, aimed at favoring her defense in an ongoing judicial dismissal procedure, in the field of social jurisdiction. (...). the present complaint, (...)], is framed in the employment dismissal, by the F(...), with respect to certain intermediate commands of the Foundation: The Manager of(...); the Manager of(...); and the Data Protection Delegate, the complainant here Ms. (...)(...). The first of the 3 labor trials to be held was on 26/07/2021, corresponding to that of the Head of (...) Mr. (...), which contributed as a party witness, at the trial, the complainant here Mrs. (...)(...). Regarding the testimonial statement of Ms. (...), the Judgment handed down by the Social Court (...), on the aforementioned trial, tells us: "the actor deduced a security incident and sent a letter to management, which was transmitted to the protection representative of data, Ms. (...), who closed it without consequences. In the act of oral judgment she declared that she was forced to do so, but without clarifying how, why and by whom, the reason why that statement has not been taken into account. .../...The statement of Ms. (...), also dismissed, has also been evaluated in critical terms, by not explaining in an intelligible way why he forcibly closed the incident opened by the actor. .../...» (...). The facts explained and examined in this Judgment are precisely t(...), which correspond to the Security Incident (...). The fraudulent purpose in the use carried out by the complainant is flagrant of this Authority in matters of data protection, for the sole purpose of obtaining a procedural income in its subsequent and particular labor dismissal procedure, in the Social Jurisdiction (...). The complainant did not bring the facts of the alleged compulsion to close the incident(...) to the attention of the Catalan Data Protection Authority, at the time they allegedly occurred; (...) and he has only reported it now (...), curiously and casually, right after his testimony in the trial on 07/26/2021".*

- That Mr. (...) sent on 09/18/2020 to the staff of the F(...), among them the DPD, an email alerting them of possible uncontrolled access, and that it was not until 01/ 10/2020, when the DPD returned from vacation now reporting, which it gave

response to said email informing that *"a security incident has been opened(...). Its management is proceeding with urgency"*. That the complainant opened this incident when she had already been given all the explanations from management and was informed that there had been no uncontrolled access. That taking into account that on the date when the incidence opens Ms. (...) she also knew that she had said goodbye to(...); it is clear that this incident opened it up to the sole effect of *"pressing the direction of the F(...)"*.

- That on 10/05/2020, an email was sent from the management of the F(...) to the DPD giving it explanations again about what had happened in relation to the alleged uncontrolled accesses of which had warned Mr. (...). That, given that the DPD showed its willingness to reassess the situation, the F(...) consulted the Type Code to which the F(...) adheres (Catalan Union of 'Hospitals'), with *"the purpose of definitively removing doubts"*. That in response to the response given by the Type Code, and in accordance with the link by the entities that are attached to it, the DPD proceeded to close the incident.
  
- That, in short, *"The context in which the incidence of (..) was open, clearly indicates doubts about what was the true intention that motivated Ms. (...) to open this security incident. (...) There has been no interference with the DPD in the exercise of its functions; on the contrary, all the necessary support was given, taking into account his desire to re-examine the situation suffered, when rejoining from his holidays; he had all the supporting documentation, and even an express consultation was made of the Type Code, which concluded and reinforced the closure of the incident(...), directly by the DPD, in full satisfaction"*.
  
- That during all the time that Ms. (...) performed data protection functions within the F(...) until her dismissal on 10/27/2020 (since 2015 when she was hired by the entity and from 2019 working as to DPD) *"has never shown any complaints in the performance of his duties"*. That has always been provided to Ms. (...) training in data protection, which always performed its functions with full independence and which always had the means, time and resources necessary to be able to perform its functions.

The reported entity attached various documents to the letter, among others:

- Copy of documentation linked to the incidence of (...): among other things, the query made to the Type Code and the response and copy of emails exchanged between Ms. (...) and management.
  
- Certificate of adherence to the Type Codes of the F(...)-
  
- Accreditation of the list of training courses taught by the Type Code attended by Ms. (...).
  
- Impact assessment reports carried out by the F(...).
  
- Copy of the 26 queries to the Type Code carried out by Ms. (...) during the years 2019 and 2020, until she was fired.

- Copy of the lawsuit, dated 11/16/2020. which was filed by Ms. (...), against F(...), for his dismissal for objective reasons. This lawsuit reproduces the letter that on 10/27/2020 the F(...) addressed to the complainant here notifying him of his dismissal for "*organizational reasons*".

## **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 February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

The reported data processing falls within the competence of the Authority under the provisions of article 156.b) of the Statute of Autonomy of Catalonia (EAC) and article 3.h) of the Law 32/2010, since the F(...) is a provider of the Network of Social Care Services Public, and provides public services on behalf of the Department of Social Rights of the Generalitat.

2. Based on the background story, it is necessary to analyze the facts reported that are the subject of this file resolution.

The complainant, who had been the DPD of the F(...) until his dismissal on 27/10/2020, complained that the entity had prevented him from exercising his functions independently, interfering with his work, and gave as a clear example of this impediment the action taken by management during the events that took place in September (...) and that led to the opening of a security incident.

Well, after analyzing the documentation contained in the proceedings, both that provided by the person making the complaint, and that provided by F(...), it must be said that there is no evidence, not even circumstantial evidence with which it can be argued that the entity has prevented the DPD from exercising its functions independently. In this regard, it is necessary to mention: a) that in the claim for dismissal filed by the complainant here against F(...), it is not alleged that said dismissal was intended to prevent Ms. (...) exercised his functions as DPD of the entity, and, b) that the complainant has also not provided any evidence to prove that on other occasions prior to the incident that occurred on (...) and during during the time he served as DPD, he was prevented from carrying out his duties with full independence and with adequate resources. To the above it should be added that, certainly, some of the e-mails exchanged between the management and the DPD following the aforementioned incident hint at a lack of understanding, but in no case of these e-mails, nor of the documentation linked to the incident, it can be deduced that the F(...) interfered in its functions.

Consequently, the principle of presumption of innocence is applicable here as there is no evidence to prove the facts reported, and therefore, the commission of an offense by the F(...), specifically the collection in article 83.4.a) 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 circulation of these, typified in article 73.w) of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (in connection. In

in this sense, article 53.2.b) of Law 39/2015, of October 2, 2015, recognizes the right "*To the presumption of non-existence of administrative responsibility until proven otherwise*".

3. In accordance with everything that has been set out in the 2nd legal basis, and since during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have addressed in this resolution, no fact that could be constitutive of any of the violations provided for in the legislation on data protection, should be archived.

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 the following is highlighted in the instruction of the procedure: *b) When the facts are not proven* ".

**Therefore, I resolve:**

1. File the actions of prior information number IP 312/2021, relating to the Foundation (...).
2. Notify this resolution to the Foundation (...) and to the person making the complaint.
3. 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 article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the persons interested parties may] file, as an option, 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. An administrative contentious appeal can also be filed directly 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, governing the contentious administrative jurisdiction.

Likewise, the interested parties can] file any other appeal they deem appropriate to defend their interests.

The director,