

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

Archive resolution of the previous information no. IP 329/2021, referring to the 'City Council of (...)'

Background

1. On 08/17/2021, the Catalan Data Protection Authority received a letter in which a person filed a complaint against the City Council of (...), on the grounds of an alleged breach of the Regulation (EU) 2016/679 of the Parliament and of the Council, of 27 of April of 2016, relative a the protection of the people physical by what does to treatment of data personal i a the free circulation of these data (in hereinafter , RGPD), and Organic Law 3/2018, of December 5, on Protection of Personal Data and Guarantee of Digital Rights (hereinafter, LOPDGDD).

Specifically , the following emerges from the facts related:

- On 06/03/2021, the complainant received an email from the Human Resources unit (hereinafter, HR) of the City Council of (...), by which he was required to, within a maximum period of 24 hours, state to the said Department whether the reporting person had been vaccinated against covid-19, and whether he had received the two doses of this vaccine.
- In response, on 06/04/2021, the person making the complaint submitted a letter to the City Council, through which he made it clear that the vaccination was not mandatory, that she was not an essential worker, and requested to know the reasons and the legal basis for requesting this information.
- On the same day 06/04/2021, the reporting person received a response email from HR of the City Council, in which they stated the following:

"(...) you were declared a vulnerable person by the medical services of the City Council's risk company, which is why you are currently only teleworking.

On the instructions of the Councilor for Human Resources and the General Secretary, I formally require you to let me know if you have been vaccinated against COVID-19, and on which dates.

You are warned that, if you do not answer within a maximum period of 24 hours, or if you refuse to answer in a clear and conclusive way, it will be understood that the answer is positive, and it will be considered that you have proceeded to his vaccination.

Once you let us know the answer, the head of the corresponding Area will be notified to take the corresponding measures."

- On 07/06/2021, the complainant submitted a letter to the City Council, through which he stated, among others, the following:

" FOURTH.- The determination of vulnerable people is carried out through the Council's Health Surveillance Prevention Service, already contracted or internal. In this way, it must be the said Service, through a medical examination, who will determine if I am still a

vulnerable person and in this case which actions or preventive measures will need to be applied in my workplace. The Prevention Service is the only one that will be able to know my medical data, and not the City Council staff.

For the reasons stated, I have no obligation to give this information to the Alderman or to any other official or body of the City Council."

- On 07/06/2021 the complainant received a response email from HR of the City Council, in which the following was noted:

"(...) I reiterate the intention of this town hall to know if she has been vaccinated or not.

As a result of your answer I comment: As specified in the previous communication, from this town hall your answer does not respond to the established in article 29.6 of Risk Prevention, which establishes the obligation of collaboration of the worker towards the company.

In any case, and following the procedure, we will transfer your answer to the Risk Prevention company to determine what is appropriate.

Remain waiting, then, for the risk company to contact you in order to proceed with a new medical examination."

- On 06/08/2021, the complainant received a final HR email from the City Council, in which the council informed him about access to the required information:

"(...) the risk company of the City Council has sent us the following communication verbatim: "contacted with the worker, she refers that she has not completed the vaccination schedule, therefore it is advisable to continue with the same preventive measures current until she is adequately immunized, or the procedures of the Health Authorities dictate a change in guidelines (...)"

2. The Authority opened a preliminary information phase (no. IP 329/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to 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 whether the facts were susceptible to motivate the initiation of a sanctioning procedure.

At the request of the Authority, on 03/07/2022 the complainant amended his complaint, providing a copy of the emails sent from the HR unit of the City Council on 03/06/2021, 04/06/2021, 07/06/2021 and 08/06/2021, as well as the letter dated 07/06/2021 that the complainant presented to the City Council.

3. In this information phase, on 07/13/2022, the City Council of (...) was required to report on various issues relating to the reporting events.

4. On 07/27/2022, the City Council of (...) responded to the aforementioned request through a letter in which it set out, in summary, the following:

- That the e-mails mentioned in antecedent 1 were sent by the coordinator of the Human Resources Area of the City Council of (...).
- That the person making the complaint is a municipal employee attached to (...), of the Area of (...) of the City Council, and is entrusted with the functions of personal attention to (...) and to the people who can contacting them to ask for information, the reception and distribution of correspondence, the taking and transmission of orders by the companies in the center, and the monitoring of the entrances and exits of the building, among others.
- That the City Council of (...) has contracted the company (...) SL, for the provision of the Occupational Risk Prevention Service for its workers.
- Regarding the request to the reporting person for information about the covid-19 vaccination:

"The complainant has been declared by the Medical Services of the Occupational Risk Prevention Service as a person particularly vulnerable to the risk of exposure to SARS-CoV-2. Therefore, on the dates of the e-mails, the reporting person was providing services through the remote service provision modality in the telework modality, in accordance with the assessment of the Occupational Health Unit (...) who had advised that the reporting person telework until he had the appropriate vaccination to minimize the risk of contagion.

As a result of this assessment and with the purpose of guaranteeing the safety of workers in the work centers and adopting the necessary measures to avoid contagion to the City Council staff, it was considered appropriate to ask the person making the complaint if he had vaccinated or not in order to assess their inclusion in the face-to-face work modality, with the aim of organizing the service under the appropriate conditions, taking into account the functions of their workplace."

"The legal basis that legitimizes the treatment is the fulfillment of a legal obligation applicable to the person responsible for the treatment, contained in article 6.1.c) of the RGPD. Law 31/1995, of November 8, on the prevention of occupational risks (hereafter LPRL) establishes the employer's duty to protect the workers in his service. Specifically, article 14.2 LPRL establishes that in compliance with the duty of protection, the employer must guarantee the safety and health of the workers (...). Article 29 LPRL establishes that workers must ensure their safety and health at work and that of those other people whose professional health may be affected by their acts and omissions at work.

Article 29.6 LPRL establishes that workers, in accordance with their training and following the instructions of the City Council, must cooperate so that it can guarantee working conditions that are safe and do not entail safety risks and the health of the workers."

- With regard to the communication made by the SPRL to the City Council of the information on the covid-19 vaccination status of the reporting person:

"The information contained in the email dated June 8, 2021, was provided directly to the Department of Human Resources, by the Occupational Risk Prevention Service,

so that the City Council has the minimum information necessary to the organization of the provision of services, face-to-face or remotely, of its workers.

In this sense, the Service for the Prevention of Occupational Risks determined that the reporting person, being considered a person particularly vulnerable to the risk of exposure to SARS-CoV-2, had to continue the execution of the tasks of his position work through the provision of services at a distance by the telework modality.

The legal basis that legitimizes the treatment is the fulfillment of a legal obligation applicable to the person responsible for the treatment, contained in article 6.1.c) of the RGPD.

Article 5 of the LPRL establishes that the prevention policy aims to promote the improvement of working conditions aimed at raising the level of protection of the safety and health of workers at work.

Article 72 et seq. of Royal Legislative Decree 5/2015, of October 30, approving the revised text of the Law on the Basic Statute of the Public Employee (hereafter TREBEP), states that in the framework of their self-organization skills (...)

Article 47 of TREBEP establishes that Public Administrations must establish the general and special working hours of their public servants. And in article 47bis of the TREBEP it is recorded that teleworking is a method of providing remote services that must be expressly authorized.

In addition, article 9.2.h) of the RGPD allows (...).

Health surveillance is an obligation for the City Council when there are specific risks and the person may be a danger to himself or his colleagues (...)."

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

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

As explained in the background section, the complainant complains about the fact that the City Council's HR unit required her to state whether she had been vaccinated against covid-19 and which dates, as well as to indicate the number of inoculated doses, a requirement to which the complainant objected, considering that only the Health Surveillance Prevention Service of the said City Council, which the council had entrusted to the company (...) SL.

Next, the legal suitability of the request made by the City Council's HR unit will be analyzed, as well as the access by this unit to said information through the company in charge of the prevention service surveillance of the health of the workers of said City Council.

First of all, it should be noted that the data relating to whether the reporting person had been vaccinated (as well as the inoculated doses), insofar as it reveals information about the state of health of this person, is health data, in accordance with the definition contained in article 4.15) of the RGPD, which defines as data relating to health: "*personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about your state of health*".

When the data on vaccination is treated as health data, it is part of the so-called special categories of data. In accordance with article 9.1 of the RGPD, the general rule that applies to the treatment of this type of data is that of its treatment prohibition, unless one of the exceptions provided for in its section 2 applies, including the following:

"h) the treatment is necessary for the purposes of preventive or occupational medicine (...) on the basis of the Law of the Union or of the Member States or in by virtue of a contract with a health professional and without prejudice to the conditions y guarantees contemplated in section 3."

In accordance with article 9.2 of the LOPDGDD, a treatment can only be protected in the case indicated in this section h), if this is provided for in a rule with the rank of law.

With regard to the rule with the rank of law that in the present case could protect the controversial treatments, the seventeenth additional provision of the LOPDGDD establishes, as far as we are concerned, that these rules can be any of the following: Law 14/ 1986, of April 25, general health (LGS), Law 31/1995, of November 8, on the prevention of occupational risks (LPRL), Law 16/2003, of May 28, on cohesion and quality of the National Health System, and Law 33/2011, of 4 October, general public health (LGSP).

On the other hand, it must be borne in mind that once the general prohibition provided for in article 9.1 of the RGPD is exempted, in order for the treatment carried out to be considered legitimate, it must also be protected by one of the legal bases provided for in article 6.1 of the RGPD, which includes the following:

- "b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application of pre-contractual measures at the latter's request;*
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;*
- d) the treatment is necessary to protect the vital interests of the interested party or another natural person;*
- e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment."*

In accordance with the indicated precepts, it will be analyzed below whether the indicated treatments can be protected in the case provided for in article 9.2.h of the RGPD.

From the content of the emails provided, as well as from the statements made by the City Council, it appears that on 06/03/2021, and therefore, once the state of alarm had ended on 05/09/2021 due to the health emergency situation arising from the covid-19 pandemic, and Law 2/2021, of March 29, on urgent prevention, containment and coordination measures to deal with the health crisis caused by due to the COVID- 19 -which established in article 7.1.h) the obligation of the holders of economic activities or directors of centers, "*to adopt measures for the progressive reincorporation in person in the workplaces and the promotion*

of the use of telework when due to the nature of the work activity it is possible", the City Council's HR unit requested the complainant to inform them about his covid-19 vaccination status, in order to determine whether he could return to his workplace in person, or he had to continue working remotely in a telework regime.

The criterion followed by the City Council to determine their presence was the fact of having followed the complete vaccination schedule. This criterion obeyed the medical assessment carried out by the *Occupational Health Unit (...)*, who - in view of the fact that the Medical Services of the SPRL had considered the complainant as *"especially vulnerable to the risk of exposure to SARS- CoV-2"* -, had recommended that he ***"telework until he disposes of the adequate vaccination that minimizes the risk of contagion."***

In this context, the information required from the reporting person about their covid-19 vaccination status is framed, first of all, in the City Council's duty to protect the staff in its service against occupational risks, which involves carrying out preventive activities that materialize, among others, in the monitoring of the health of its workers, as established in article 14.2 LPRL:

"In compliance with the duty of protection, the employer must guarantee the safety and health of the workers in his service in all aspects related to work. For these purposes, within the framework of his responsibilities, the employer will carry out the prevention of occupational risks through the integration of preventive activity in the company and the adoption of the measures that are necessary for the protection of safety and the health of workers, with the specialties that are included in the following articles in terms of occupational risk prevention plan, risk assessment, information, consultation and participation and training of workers, action in cases of emergency and serious risk and imminent, health surveillance, and through the constitution of an organization and the necessary means in the terms established in chapter IV of this law.

The employer will develop a permanent action to monitor the preventive activity in order to continuously improve the identification, evaluation and control activities of the risks that could not be avoided and the existing levels of protection, and will have the that is necessary for the adaptation of the prevention measures indicated in the previous paragraph to the changes that may occur in the circumstances that affect the performance of the work."

On the other hand, given that the reporting person had been considered *"particularly vulnerable to the risk of exposure to SARS-CoV-2"*, article 25 of the LPRL is applicable, which establishes that the employer - in this case, the City Council has a special duty to protect workers who are sensitive to certain risks, as follows:

"1. The employer must specifically guarantee the protection of workers who, due to their personal characteristics or their known biological state, including those with a recognized physical, mental or sensory disability, are particularly sensitive to the risks arising from work . To this end, it must take these aspects into account in the risk assessments and, according to them, must adopt the necessary prevention and protection measures.

Workers must not occupy those jobs in which, due to their personal characteristics or their biological state or due to their duly recognized physical, mental or sensory disability, they as well as other workers and other related persons can with the company to expose

themselves to dangerous situations or, in general, when they are manifestly in transitory states or situations that do not meet the psychophysical demands of the respective jobs."

In the case analyzed, article 22.1 of the LPRL is also applicable, which establishes that monitoring the worker's health will be mandatory when *" the performance of the examinations is essential (...) to verify whether the state health of the worker may constitute a danger for himself, for other workers or for other people related to the company or when so established in a legal provision in relation to the protection of specific risks and dangerous activities special."*

As things stand, the City Council was obliged to assess the risk factors involved in the reinstatement of the complainant to his workplace in person, and the complainant was obliged to submit to the medical examination required for this purpose.

However, article 31 of the LPRL establishes that it is the responsibility of the Prevention Services to carry out: *" preventive activities in order to guarantee adequate protection of the safety and health of workers, for which they must to advise and assist the employer, the workers or their representatives and the specialized representative bodies"*, and specifically refers to advice on health surveillance in relation to risks arising from work.

Regarding the criterion used by the SPRL regarding the complete covid-19 vaccination schedule, it should be noted that the SPRLs must follow the guidelines and action protocols determined by the competent health authorities. This is determined in article 10 of the LPRL, which establishes that it corresponds to the competent public administrations in health matters, among others: *"a) The establishment of adequate means for the evaluation and control of actions of a health nature that the active prevention services carry out in companies. To do so, they must establish the guidelines and action protocols, once the scientific societies have been heard, to which the aforementioned services must be submitted"*. I Royal Decree 39/1997, of January 17, which approves the Prevention Services Regulation, which establishes in article 37 that: *"Health surveillance will be subject to specific protocols or other existing means with regarding the risk factors to which the worker is exposed. The Ministry of Health and Consumer Affairs and the Autonomous Communities, hearing the competent scientific societies, and in accordance with the provisions of the General Health Law regarding the participation of social workers, will establish the periodicity and specific contents in each case."*

Regarding these actions in the context of the covid-19 pandemic, the Catalan health authorities approved the *"Guide for action and collaboration of occupational risk prevention services to deal with the covid-19 pandemic"*, which in its section 3.2 establishes the following respect for vulnerable people and particularly sensitive workers in relation to infection by the SARS-CoV-2 coronavirus:

"The SPRL must determine the presence of personnel belonging to vulnerable groups in relation to infection with the SARS-CoV-2 coronavirus and assess the level of risk to which they may be exposed in order to consider them particularly sensitive workers and determine the measures of prevention, adaptation and protection that are necessary, including possible relocation to another workplace and teleworking.

The qualification of a worker as particularly sensitive to SARS-CoV-2 must be the result of an individual assessment in which, in addition to the vulnerability factors, the tasks to be

performed and the existence or non-existence of working conditions that allow the work to be carried out without increasing the inherent risk of the worker's health condition. This assessment will make it possible to determine the prevention, adaptation and protection measures that are necessary, including the possible relocation to another workplace and telecommuting.

(...)

If after the individual assessment, the SPRL considers that the worker is particularly sensitive and requires a temporary incapacity, it will issue a report (annex 1.2). This report will preferably be sent to the ICAM, to the e-mail box of the corresponding province authorized for this fact, giving prior knowledge to the affected person and sending him a copy of the document:

(...)

The SPRL will report on the actions prior to the company and the representative bodies in matters of safety and health at work, if any had, keeping due confidentiality."

On the other hand, the Ministry of Health approved the document "*Procedimiento de actuación para los servicios de prevención de riesgos laborales frente a la exposición al Sars-cov-2*" (the 1st version of which is dated 28/02/2020, and the 21st and last , dated 06/06/2022) , which deals, among others, with the reinstatement of vaccinated workers. In heading 3 entitled "*Vulnerable area, vulnerable people and groups. Especially sensitive worker*", the following is established:

"The health service of the SPRL must evaluate the presence of particularly sensitive workers in relation to the SARS-CoV-2 coronavirus infection, establish the nature of the worker's special sensitivity and issue a report on prevention, adaptation and protection measures . For this, it will take into account the existence or non-existence of conditions that allow the work to be carried out without raising the risk of the worker's health condition."

In the present case, the complainant has provided an email that the City Council's HR unit sent him on 08/06/2021, which in turn contains the transcript of the statement sent to the City Council by the company in charge of the SPRL following the medical assessment of the complainant, in which it is pointed out that: "*contacted with the worker, she refers that she does not have the complete vaccination schedule, therefore it is advisable to continue with the same current preventive measures until that she is adequately immunized, or the procedures of the Health Authorities dictate a change in guidelines*", with which statement it is evident that the information requirement obeyed the health guidelines in force at the time of the facts regarding the reinstatement to face-to-face work of people who are particularly vulnerable in relation to covid-19 infection.

According to what has been said, the information required from the person reporting on their covid-1 vaccination status was necessary for the City Council's Occupational Risk Prevention Service, so that the council could comply with their obligation to monitor the health of the person reporting as a municipal worker.

Consequently, the processing of information on whether the reporting person had been vaccinated against covid-19, as well as the inoculated doses and vaccination dates by the company (...) SL that managed the Prevention Service of Occupational Risks of the City

Council, has a legitimate basis in the provisions mentioned in matters of health and safety and health at work in relation to articles 6.1.c) and 9.2.h) of the RGPD.

Having said that, the complainant's disagreement centers on the fact that the City Council's HR unit requested this information directly, that is to say, without the intervention of the SPRL.

In this respect, there is no doubt that the City Council had to know whether the person making the complaint could be reinstated to his workplace in person, or whether provisionally he had to continue to provide services remotely, in the mode of teleworking, taking into account that the SPRL had previously recommended that this worker " *telework until she has the appropriate vaccination that minimizes the risk of contagion.* "

It is true that what was appropriate was for the City Council to refer the worker to the SPRL so that they could gather the information necessary to carry out a new assessment of the worker, and not directly request this information. However, in the present case, the following circumstances are present:

- That the SPRL had previously informed the City Council that the maintenance of the vulnerable situation of the working person was linked to the administration of the complete vaccination schedule.
- That upon becoming aware of the complainant's complaint, the City Council ended up directing it to the SPRL, which was the one who finally informed the City Council that the situation of vulnerability remained because it did not have the complete guidelines for the vaccine
- That in the case that the SPRL had limited itself to recommending to the City Council that the person making the complaint continue to work remotely, the City Council could deduce that the person making the complaint did not have the complete guideline, due to the fact that it knew the criterion of the SPRL to condition their vulnerability to their vaccination status.

Given all of these circumstances, it is considered disproportionate to initiate punitive actions against the reporting City Council.

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 been addressed in this resolution, any fact that could be constitutive of any of the infractions provided for in the legislation on data protection, it is necessary to agree to its archive.

Article 10.2 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, provides that "(...) *no charges will be drawn up and the dismissal of the file and the archive of actions when the proceedings and the tests carried out prove the non-existence of infringement or liability. This resolution will be notified to the interested parties*". And article 20.1) of the same Decree determines that the dismissal proceeds: " a) *When the facts do not constitute an administrative infraction; c) When the existence of liability has not been proven, or its termination has occurred.* "

Therefore, I resolve:

1. File the actions of prior information number IP 329/2021 , relating to the City Council of (...).
2. Notify this resolution to the City Council of (...) and the complainant.
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 their notification, in accordance with what provided for in 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, interested parties may file any other appeal they deem appropriate to defend their interests.

The director,

Machine translated