

RESOLUTION of sanctioning procedure no. PS 16/2018, referring to the Fray Luís de León School of the Department of Education.

#### Background

1.- En data 10/4/2018 va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per remissió de l'Agència Espanyola de Protecció de Dades, un escrit d'una persona pel qual formulava denúncia contra l'Escola Fray Luis de León of the Department of Education (hereinafter, the School), due to an alleged breach of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD) .

In particular, the complainant stated that the School had broadcast a video through the School's website and the You Tube Channel, which contained images and/or the voice of her daughter (under 14 years old) who had been captured during the celebration of the School's Christmas party, without having their consent or that of the other parent.

The person making the complaint provided the link to the You Tube channel on which the aforementioned video had been published, although he stated that the School had already unpublished it as a result of his dissatisfaction.

2.- The Authority opened a preliminary information phase (no. IP 104/2018), in accordance with 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 (hereafter, LPAC), in order to determine whether the facts were susceptible to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances concurrent with each other.

2.1.- As part of this information phase, on 11/4/2018 the Authority's Inspection Area carried out a series of checks via the Internet, in relation to the facts that are the subject of complaint. Thus, it was found that certainly, as stated by the person making the complaint, the video was no longer published on the YouTube Channel link that he had indicated in the complaint, but instead, it was found that the School had other videos of school activities published on the YouTube Channel.

Faced with this, this Authority, by official letter dated 12/4/2018, asked the person making the complaint for more elements tending to prove the specific facts reported. The complainant, by means of letters dated 4/20/2018 and 5/8/2018, has provided several elements to prove the facts reported, among which a copy of the form used by the School to collect consent for the processing of photographs, videos and sound files of minors attending school on the "centre's web pages", which is signed by the reporting person on 11/29/2017 with the following express note: "I do not authorize them to be taken images".

2.2.- Also during this preliminary information phase, by means of an official letter dated 4/27/2018, the reported entity was required to report on the reported facts.

Carrer Rosselló, 214, Esc. A, 1r 1a  
08008 Barcelona

The School responded to the previous request through a letter dated 5/16/2018, which set out, among others, the following:

- That: "There was a consent form signed by the mother (for the dissemination of the images on the center's website); and the non-authorization signed by the father."
- That: "It is recognized that the consent of both parents should have been obtained, but it was considered that since there was authorization signed by the mother together (...), it was already sufficient authorization to carry out the recording and broadcasting of the images."
- That: "Add that: Faced with the father's complaint, the center proceeded to remove the images immediately on February 21, 2018 and the authorization protocols for the families' image right have been reviewed to update - them so that situations like these do not occur again. The center has taken all the necessary actions to ensure that no digital traces remain of the broadcast images."

The reported entity provided with its letter, among other things, a copy of two authorization forms by means of which the parents' consent was requested so that their children could appear "in photographs and videos, as well as sound files, corresponding to curricular, complementary and extracurricular school activities organized by the teaching center and published on the center's web pages". In the first, dated 20/10/2017, the mother gave her consent but on the other hand, in the second, dated 29/11/2017, the other parent expressly stated that: "I do not authorize them to take images."

2.3.- During the preliminary information phase, on 5/30/2018, this Authority has noted that through the School's website, you can access videos published on the You Tube Channel, although these do not include those corresponding to the 2017 Christmas concert to which the complaint referred.

3.- On 31/5/2018 the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the School for an alleged serious infringement provided for in article 44.3.k.) in relation to article 11 LOPD. Likewise, he appointed the employee of the Catalan Data Protection Authority, Mrs. (...).

This initiation agreement was notified to the imputed entity on 6/4/2018.

In the initiation agreement, the accused entity was granted a term of ten business days from the day following the notification to formulate allegations and propose the practice of evidence that it considered appropriate for the defense of its interests .

This deadline has been exceeded without any objections being raised.

Of all the actions taken in this procedure, the facts that are detailed below as proven facts are considered proven.

#### Proven Facts

The Fray Luis de León School published on YouTube a video containing images and/or voices of minors, taken during the Christmas party in 2017, in which the daughter of the complainant, without the mandatory consent of the legal representatives,

given that she was a minor under the age of 14. This video could be accessed from the School's website, and was available to anyone with an internet connection for an indeterminate time, but at least until 2/18/2018, date on which the School withdrew it.

## Fundamentals of Law

1.- The provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereafter, LPAC), apply to this procedure; as well as in Decree 278/1993, of November 9, on the sanctioning procedure for application to the areas of competence of the Generalitat, as provided for in DT 2<sup>a</sup> of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

As a preliminary consideration, it should be indicated that at the time this act was issued, the precept containing the infringing rate applied here has been repealed by Royal Decree-Law 5/2018, of 27/7, on urgent measures for the adaptation of Spanish law to the regulations of the European Union in the matter of data protection. But since it is a sanctioning procedure started before the validity of this rule - or in which the previous actions that had preceded it had started before -, it must be governed by the previous regulation (DT 1a RDL 5/2018).

Also, in this act, the eventual application to the present case of what is provided for in Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, regarding the protection of natural persons, has also been taken into account with regard to the processing of personal data and the free circulation of these (RGPD), which as of 05/25/2018 has displaced the LOPD in everything regulated by the RGPD. And as a result of this analysis, it is concluded that the eventual application of the RGPD would not alter the legal classification that is made here, and specifically would not favor the person responsible for the infringement.

2.- In accordance with article 64.2.f) of the LPAC, and in accordance with what was indicated in the agreement initiating the present procedure, the present resolution should be issued without the need to formulate the proposal beforehand of resolution, given that the imputed entity has not formulated allegations within the period granted for that purpose in the notification of the initiation agreement, which contained a precise statement on the imputed responsibility.

3.- In relation to the facts described in the proven facts section, relating to the transfer of personal data, it is necessary to refer to article 11 of the LOPD, as this was the rule in force at the time the facts here occurred imputed. The aforementioned precept provides for the following:

"1. The personal data subject to treatment can only be communicated to a third party for the fulfillment of purposes directly related to the legitimate functions of the assignor and the assignee with the prior consent of the interested party.

Well, during the processing of this procedure, the fact described in the proven facts section has been duly proven, that is to say, that the School published the images and/or voice of a minor without the consent of their parents.

As a preliminary question, it is necessary to differentiate between the images recorded of minors as part of the educational activities of the school, from other images that can be recorded on the occasion of public events, such as the one made on the occasion of a party that can be accessed freely. In these latter cases of public events, the capture and subsequent processing of the images (such as their disclosure) would be subject to the provisions of Organic Law 1/1982, of May 5, on civil protection of the right to honor, to personal privacy and one's own image, expressly cited in the authorization model that the School provided to the students' legal representatives. Well, article 8.2.c) of this Organic Law establishes the following:

"2. In particular, the right to one's image does not prevent: (...)

c) The graphic information about an event or public event when the image of a person certain appear as merely accessory. (...)"

Therefore, if the act could be qualified as a "public event", in accordance with the provisions of LO 1/1982, the consent of the affected persons could not be required, as long as their image appeared as an accessory.

Having said that, it is stated in the proceedings that the School's authorization model previously indicated, at first (10/20/2017) was signed by the mother, but subsequently (11/29/2017) it is also stated that the father signed the same authorization model in which he expressly stated that: "I do not authorize images to be taken." In this way, given the subsequent refusal of the father that contradicted the authorization previously signed by the mother, a situation of disagreement between the consenters was evident. Faced with this, and taking into account above all that the last demonstration was against the dissemination of images, the School had to choose to exercise extreme caution and refrain from carrying out the aforementioned treatment, at least as long as that situation. At this point it is necessary to take into account what is indicated in article 236-11 (and in a similar sense article 236-13 CCCat): "In case of disagreement about the exercise of parental authority, either parent can resort to the judicial authority, which must decide after listening to the other parent and the children who have reached the age of twelve or who, being younger, have sufficient knowledge." What's more, article 236-18 of the CCCat excludes from the legal representation of children, those acts in which there is a conflict of interests between both parents.

In any case, it must be emphasized that the said authorization model approved by the School referred to the dissemination, not only of "teaching school activities", but also of "complementary" and "extracurricular activities organized by the school". Thus, this mention of "complementary" activities would mean including those public activities that could be qualified as "public events". So, to the extent that the School also requested consent for these "complementary" activities, it generated an expectation of privacy for the people who did not give their consent, in the sense that the images would not be disseminated either collected in these complementary activities in which not only the students participate, but also other people without restriction and which could therefore qualify as public events.

Apart from everything explained so far, it should be noted that in the authorization model itself it was indicated that the dissemination would be done on the "centre's web pages", so that even in the case of people who gave their consent (as would be the case of the mother before the father opposed it), it would not allow us to understand consent for dissemination on social networks, as is the case with the You Tube channel.

Consequently, the facts imputed here are considered constitutive of the serious infringement provided for in article 44.3.k) of the LOPD, which typifies as such:

"k) The communication or transfer of personal data without justification for this in the terms provided for in this Law and its implementing regulatory provisions, unless this constitutes a very serious infringement."

4.- Article 21 of Law 32/2010, in line with article 46 of the LOPD, provides that when the infractions are committed by a public administration, the resolution declaring the commission of an infraction must establish the measures to be adopted so that the effects of the infringement cease or are corrected. It is proven, however, that at the time the present sanctioning procedure was initiated, the School had already unpublished the images and/or voice of the affected minor, which is why it is not considered appropriate to require the adoption of corrective measures.

Making use of the powers conferred on me by article 15 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Government of Catalonia,

RESOLVED

First.- Declare that the Fray Luís de León School of the Department of Education has committed a serious infraction provided for in article 44.3.k) in relation to article 10, all of them of the LOPD. It is not necessary to require the adoption of corrective measures because the School has already adopted them, as explained in the 4th legal basis.

Second.- Notify this resolution to Fray Luís de León School.

Third.- Communicate this resolution to the Ombudsman, by means of its literal transfer, as specified in the 3rd Agreement of the Collaboration Agreement between the Ombudsman of Catalonia and the Catalan Data Protection Agency dated 23 /06/2006.

Fourth.- 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 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 imputed entity can file, on an optional basis, 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 provisions of article 123 et seq. of the LPAC or you can file an administrative appeal directly before the Courts of Administrative Disputes, 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. If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended under the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity may file any other appeal it deems appropriate for the defense of its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)

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