apdcat
Autoritat Catalana de Protecció de Dades

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In this resolution, the mentions of the affected population have been hidden in order to comply with art. 17.2 of Law 32/2010, since in case of revealing the name of the population affected, the physical persons affected could also be identified.

File identification

Resolution of sanctioning procedure no. PS 38/2019, referring to the Institute (...) of the Department of Education

Background

1. On 02/10/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Institute (...) (hereinafter, IES (...)), located in the municipality of (...), due to an alleged breach of the regulations on the protection of personal data. In particular, the complainant stated that the director of the IES (...), through the Department's corporate email (@xtec.cat), had sent an email to 157 addresses on (...) of mail corresponding to members of the families of students of the IES *"with advertising of a private activity of his"* and that *"a database of the IES itself has been used in order to obtain this data, because Mr. (...) I have NEVER disclosed my data in a private way".* The reporting person added that the e-mail was sent without using the bcc option, and therefore the e-mail address of all recipients was readable.

The reporting person provided as documentation relating to the facts reported, a copy of the referenced email with the subject *"Request for collaboration in personality research",* in which they are invited to participate in an investigation by responding to a survey, which can be done by clicking on the URL indicated there (...), from which the survey can be started. At the foot of the e-mail is the name and surname of the director of the IES (...), who signs in his capacity as director and also of different positions or qualifications that he also holds, among others (...) ".

2. The Authority opened a preliminary information phase (no. IP 32/2019), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure 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 whether the facts they 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 02/15/2019 the reported entity was required to report on whether the electronic addresses to which the email was sent

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controversial, they were part of the file containing the email addresses of the students and/or legal representatives of the IES (...), and if when these addresses were collected the affected people were informed about the purpose for which that specific data was collected, and if among these purposes was that of receiving electronic communications of the type of mail subject to complaint. The entity was also required to state the reasons that would justify the director of the IES (...) having sent the controversial email, and the legal basis that would legitimize this treatment, as well as the reasons why in the 'sending the disputed email did not use the bcc option. In the last one, the entity was required to report on the security measures it has implemented in order to prevent the sending of e-mails to a plurality of people, the recipients being able to view the addresses of the rest.

4. On 02/15/2019, also during this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint . Thus, it was established that when accessing the URL address (...) indicated in the disputed email, the same information was accessed regarding the possibility of participating in an investigation into the processing of information about which had already been reported in the body of the e-mail message sent, and from there you could directly access a survey that allowed you to participate in said research.

5. On (...), the reported entity responded to the aforementioned request through a report issued (...), in which he stated the following:

- That *"The electronic addresses to which Mr. (...) sent the e-mail of February 10 do not belong to students or their legal representatives. These are addresses of active teachers and current or former School Board members, contained in the root of the contacts in the Google application that manages email, that is, those that appear outside of any label or sublabel. The procedure to include the recipients of the aforementioned email was to open the* "select contacts" *option and check the* "select all" option. *The electronic addresses in many cases are associated with the first and last names of the owners, but in others there is no other associated data."*

- That *"When the electronic addresses used by the director of the Institute (...) in the controversial email were collected, he states that it was implicitly understood that information related to the center's own activity would be sent to those addresses school that could be of interest to the School Council or the teachers. They were not informed in writing of these circumstances, nor were they explicitly told orally that through these electronic addresses they could request participation in any study or research."*

- That *"It is a practice of the institute to forward information received from university departments or other institutions, which sometimes request data for an investigation."*

- That *"Mr(...)states that he did not use the CCOO (hidden carbon copy) option due to technical ignorance, because he believed that the CC (carbon copy) option would not reveal the addresses of all recipients of the mail in question".*

- That *"In order to avoid that when sending e-mails to a plurality of people, the recipients can view the addresses of the rest the Institute (...) has a contact with the company (...) (...), owner of an application for the management of a school."*

6. On 03/15/2019, the Authority received, by referral from the Spanish Data Protection Agency, a new letter of complaint from the person here denouncing the IES (...) about the same facts as the contents of the first letter of complaint that he had presented to this Authority on 02/10/2019.

7. On 04/10/2019, the Authority received a letter from the reported entity that complemented the first letter of response to the date request (...), through which it stated that *"On (...)of 2019, Mr(...)presented allegations in the report of the Education Inspectorate"* - a reference that must be understood as made in the report issued on (...)), as a response from the denounced entity to the request made by the Authority-, and proposes to admit some of these allegations presented by the director of the IES (...), specifically the following:

-"which is not an investigation by a private foundation, but an investigation by Mr(...) sponsored by a private foundation".

-"that the company (...)SL only deals with communications with the students' families. Communication with teachers and school board members is done through the Google app. "

8. On 11/11/2019, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the Institute (...) of the Department of Education, for an alleged violation of the article 83.5.a), in relation to article 5; all of them from 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 (hereinafter, RGPD).

9. On 02/03/2020, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the IES (...)as to responsible, in the first place, for an infringement provided for in article 83.5.a) in relation to article 5.1.b); and secondly, of an infringement provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.

This resolution proposal was notified on 03/04/2020 and a period of 10 days was granted to formulate allegations.

10. The deadline has been exceeded and no allegations have been submitted.

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proven facts

Of all the actions taken in this procedure, the facts detailed below are considered accredited.

1. The director of the IES (...), through the corporate e-mail of the Department of Education (@xtec.cat), sent on (...) an e-mail to a list of 157 addresses of mail corresponding to active teachers of the IES and current and former members of the School Board, in which they were invited to participate in an investigation on the processing of information sponsored by a private foundation within the framework of a Doctorate program (...) of the University of Barcelona, without the consent of the people affected to receive this type of communications external to the IES.

2.The disputed email was sent without using the BCC tool or option.
This allowed all the recipients of the said mail to access the email address of the rest of the people to whom the message was addressed.

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a 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.

2. The accused entity has not made allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the most relevant part of the motivated response of the instructing person to these allegations.

2.1.- On the non-existence of any previous complaint for the reception of other emails

The accused entity states that the complainant had received other e-mails for similar matters, and *"in none of these transmissions (...) did the complainant express his complaint or opposition to either the content or the method of sending ".*

First of all, it should be noted that, in any case, the eventual lack of prior complaint by the reporting person due to the unlawful processing of their personal data, does not allow to interpret that they gave their implicit consent to the receipt of emails electronic for purposes other than those consented to. Regarding consent, it is necessary to take into account article 4.11 of the RGPD, which provides the following: *"any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concerns you".*

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Having said that, it must be said that even in the event that the complainant, nor any of the recipients of the controversial email, had not taken any action to complain about the unlawful processing of their personal data, this does not prevent this Authority from exercising its sanctioning power, as a competent institution with respect to the treatments that are subject to imputation. In this regard, it should be noted that sanctioning procedures are always initiated ex officio by agreement of the competent body, on its own initiative or as a result of a superior order, at the reasoned request of other bodies or by complaint (articles 58 and 63.1 of the LPAC). And for the presentation of the complaint it is not required that a person directly affected do so, but it can be formulated by any person who has knowledge of a fact that may constitute an infringement (article 62 of the LPAC).

2.2.- On human error or lack of intention.

The director of the IES recognizes *"having contravened the principle of integrity and confidentiality",* and in his defense invokes the existence of human error and the lack of intention, to explain the sending of the controversial email without the send bcc option.

Well, this invocation must be traced back to the principle of guilt. In relation to this principle, it is worth saying that both the Supreme Court and the Constitutional Court have often declared that the sanctioning power of the Administration, as an expression of the "ius puniendi" of the State, is governed by the principles of criminal law , and one of its principles is that of culpability, incompatible with a regime of objective responsibility without fault.

As this Authority has pronounced in several resolutions (for all of them, the resolution of sanctioning procedure no. 52/2012 -available on the website http://apdcat.gencat.cat-) it is necessary to refer to the jurisprudential doctrine on the principle of culpability, both of the Supreme Court and of the Constitutional Court. According to this doctrine, the sanctioning power of the Administration, as a manifestation of the "ius puniendi" of the State, is governed by the principles of criminal law, and one of its principles is that of guilt, incompatible with a regime of objective responsibility without fault, in accordance with what was determined by article 130.1 of the already repealed Law 30/1992, and what is currently provided for by article 28.1 of Law 40/2015, of October 1, of the legal regime of the public sector (hereinafter the LRJSP).

In this regard, the Supreme Court in several rulings, all of 16 and 22/04/1991, considers that from this element of culpability it follows that the action or omission classified as an administratively punishable infraction must be in in any case, imputable to its author, due to grief or imprudence, negligence or inexcusable ignorance. Also the National Court, in the Judgment of 06/29/2001, precisely in matters of personal data protection, has declared that to appreciate this element of culpability *"simple negligence or non-compliance with the duties imposed by the Law is sufficient to the persons responsible for files or data processing to exercise extreme diligence...".* In this regard, it is clear that the director of the IES (...) did not act with the necessary diligence in the treatment of the disputed data, since if he had done so the sending of the mail would have been avoided electronic Consequently, the culpability element required by article 28.1 of the LRJSP also applies here. At this point

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it is also worth emphasizing that the duty of care is maximum when activities are carried out that affect fundamental rights, such as the right to the protection of personal data. This was declared by the SAN of 5/2/2014 (RC 366/2012) issued in matters of data protection, when it maintained that the status of person responsible for the processing of personal data *"imposes a special duty of diligence when it comes to the use or treatment of personal data or its transfer to third parties, in what concerns the fulfillment of the duties that the legislation on the protection of physical persons, and especially their honor and personal and family privacy, whose intensity is enhanced by the relevance of the legal assets protected by those rules".*

Likewise, the judgment of the Supreme Court of 25/01/2006, also issued in the area of data protection, is based on the required diligence and establishes that intentionality is not a necessary requirement for a conduct to be considered guilty . In short, it is necessary that in the conduct that is imputed there must be an element of culpability, but in order for culpability to exist it is not necessary that the facts have occurred with intent, but it is sufficient that negligence or simple non-observance

Based on the jurisprudential doctrine presented, the allegation expressed by the director of the IES (...) regarding the lack of intentionality in the commission of the reported facts cannot succeed, since in his action the lack of due diligence in the processing of personal data relating to the e-mails of *"active teachers and current or former School Board members".*

It is for this reason that this plea is held to fail.

2.3.-About the violation of the principle of purpose and the principle of confidentiality

The entity affirms that it relied on the *"oral"* consent of the recipients of the e-mail to receive communications external to the IES, and in relation to this, the lack of violation of the principle of purpose, arguing that using the contact details to send the disputed email would be a purpose compatible with the initial purpose for which the email addresses of the IES teachers and current and former School Board members were obtained. In this sense, he adds that *"I do not consider that the sending of the controversial e-mail has contravened the principle of legality and the principle of purpose limitation, given what is contemplated in article 89, section 1, of the RGPD".*

First of all, it must be taken into account that any processing of personal data must be subject to the principles and guarantees of the RGPD, and in this sense, it is necessary to refer to article 5 of the RGPD, referring to the principles relating to the treatment , and specifically for the case we are dealing with, the principle of integrity and confidentiality, and the principle of limitation of purpose in relation to the principle of legality.

With regard to the principle of integrity and confidentiality, it should be noted that the director of the IES himself acknowledges having violated it due to an *"error in the selection of the option", an* allegation that has already been

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object of analysis in the previous section. Likewise, the fact that the disputed e-mail was sent without the blind copy option has the direct consequence that these contact details were disclosed to third parties who, in turn, were also included in the open list of recipients, from which it can be inferred that no measures were adopted to provide adequate guarantees to those concerned.

With regard to the principle of lawfulness (art.5.1.a.RGPD), the RGPD establishes a system of legitimation of data processing that is based on the fulfillment of one of the legal bases of article 6.1 of the RGPD, either the consent of the affected person (letter a)), or one of the legal bases provided for in the same article. It is not a question here whether the IES had legitimacy to process the contact data of those affected in order to send communications relating to the scope of the IES, but whether this initial purpose for which the IES had the consent of the affected was compatible with the final purpose for which the contact data was used.

In the case at hand, the director of the IES affirms that the *"oral"* consent of the recipients of the e-mail was indeed counted on to receive requests to participate *"in some study or research".* However, the statement of the director of the IES contradicts the initial statement contained in the written response to the request in which it was said that the director of the IES stated that *"it was implicitly understood that at those addresses they would send information (...) that could be of interest to the school council or teachers. They were not informed in writing of these circumstances nor were they explicitly told verbally that through these electronic addresses they could request participation in some study or research".* In any case, regarding consent, it should be remembered that article 4 of the RGPD defines the consent of the interested party in the following terms: *"any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either by means of a statement or a clear affirmative action, the treatment of personal data that concerns you".* Likewise, on the conditions of consent, article 7 of the RGPD determines that *"when the treatment is based on the consent of the interested party, the person responsible must be able to demonstrate that he consented to the treatment of his personal data".* Well, it must be said that the IES (...), as the person responsible for the treatment, has not proven by any means that the requirements to understand the consent of the recipients of the controversial email to receive emails on different matters were met for which they agreed at the time to give their contact details. That's how things are, once the consent of the affected people is discarded to be able to process their data for the purpose

of sending them external information within the scope of the IES, it is necessary to analyze whether it would be compatible to use the data for this new purpose, different from that for which the affected persons granted their initial consent.

In this sense, in accordance with the principle of purpose limitation (art. 5.1.b. RGPD), the data relating to the electronic addresses that were collected by the IES (...) must use for that purpose or purposes (in this case differentiating the consent for each of them), about which the data controller informed the interested persons, in accordance with the duty of information established in article 13 of the RGPD, and certainly can be subject to

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processing for other purposes, but only to the extent that they are compatible with the purpose that justified the initial collection. In accordance with Article 89.1 of the RGPD, the subsequent processing of personal data for archival purposes in the public interest, for scientific or historical research purposes or for statistical purposes is not considered incompatible with initial purposes.

However, article 6.4 of the RGPD includes the elements that make it possible to know whether or not the new treatment is compatible with the initial purpose for which the data were collected.

In the case at hand, as already indicated in the initiation agreement, the new treatment by the IES of the contact data of teachers and members of the School Council cannot be considered compatible with the purpose for which the data was initially collected, in the terms provided for in article 6.4 of the RGPD, and specifically, what is provided by letters a), b), d) and e):

"4. When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives indicated in article 23, paragraph 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data was initially collected, will take into account, among other things: a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided; b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller; c) (..) d) the possible consequences for the interested parties of the planned further treatment; e) the existence of adequate guarantees, which may include encryption or pseudonymization"

In this sense, there is no relationship between the purpose for which the data were collected and the purpose of the subsequent treatment carried out by the director of the IES, and this because the new treatment would be outside the scope of informing or communicating about the relative and specific matters of the IES, which would be the purpose for which the collection of the contact data of the teachers of the IES or the members of the School Council was authorized. Likewise, with regard to the context in which the data was obtained, it should be noted that the data relating to email addresses were obtained by the IES within the framework of the existing relationship between the IES, the teachers and the members of the School Council, and the new treatment of said contact data, would be placed in a context different from that of the relationship marked by the link between the director of the IES and the teachers and members of the School Council. In this regard, it should be noted that the controversial email contained the name and surname of the director of the IES (...), who identified himself as director, but also of different positions or qualifications, among others (...)". In other words, the director of the IES, taking advantage of his position, which allowed him to access certain personal data, used them unilaterally to allocate them to a purpose

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different developed by an entity with legal personality other than the IES (...). In this sense, it should be borne in mind that the presumption of accounting starts from the premise that the data controller must be the same for both purposes, a characteristic that would not occur in this case, in which, as has been said , we are talking about treatments for different purposes and developed by independent entities.

Finally, it should be noted that article 13.3 of the RGPD provides as a guarantee for the interested party that when the *controller "projects the further processing of personal data for a purpose other than that for which they were collected, it will provide the interested party, prior to said further treatment, information on that other purpose and any additional information relevant to the tenor of section 2".* On this, it has not been proven that the interested parties were informed that the contact data would be used for a different purpose for which they were collected and consented to in the beginning.

For all the above, it is considered that the allegation regarding the compatibility of the treatment of the contact data of the affected person with a different purpose for which they were initially collected, cannot succeed.

3. In relation to the facts described in the proven facts section, it is necessary to refer to article 5.1, letters b) and f) of the RGPD, which provides for the following:

"1. Personal data will be: b)
collected for specific, explicit and legitimate purposes, and will not be subsequently processed in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose") ;

(…)
f) processed in such a way as to guarantee adequate security for personal data, including protection against unauthorized or illegal processing and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")."

As indicated by the instructing person, during the processing of this procedure the facts described in the proven facts section, which constitute two violations, as provided for in article 83.5.a) of the RGPD, which typifies the violation of *"the basic principles for treatment(..)",* which include both the principle of purpose limitation (art. 5.1.b RGPD), and the principle of integrity and confidentiality (art. .5.1.f RGPD).

The conduct addressed here has been included as a very serious infraction in article 72.1.a) of the LOPDGDD, in the following form: *"the processing of personal data violating the principles and guarantees established in article 5 of Regulation (EU) 2016/679"*

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4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

> *"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.*
> *The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."*

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:

> *"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . In addition, it can propose, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".*

In the present case, it becomes unnecessary to require corrective measures for the effects of the infringement given that the infringing behavior refers to a single and already accomplished event, the sending of an email, which due to its instantaneous nature cannot be corrected with the application of corrective measures.

resolution

For all this, I resolve:

1. Admonish the Institute (...)((...)) of the Department of Education, as responsible, for two violations: one violation provided for in article 83.5.a) in relation to the article 5.1.b); and another violation provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the legal basis 4rt.

2. Notify this resolution to the Institute (...)((...)) of the Department of Education

3. Communicate the resolution issued to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

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4. Order that this resolution be published 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 articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003 , of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. 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.

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 in the terms provided for in article 90.3 of the LPAC.

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

The director,