

File identification

Resolution of sanctioning procedure no. PS 40/2019, referring to the City Council (...).

Background

1. On 28/02/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the City Council (...), on the grounds of an alleged breach of the regulation on protection of personal data. Specifically, the complainant (Local Police officer) stated that the City Council initiated disciplinary proceedings against him for events that occurred on 07/01/2017. The complainant stated that, on 19/11/2018, he learned of the City Council's intention to initiate one or more disciplinary proceedings against him based on the information transmitted to him by another Local Police officer, who in turn would have accessed this information because a certain corporal would have told him verbally.

2. The Authority opened a preliminary information phase (no. IP 60/2019), 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 07/03/2019 the reported entity was required to report, among others, on how many disciplinary proceedings had been initiated against the reporting person since 01/07 /2017 and on whether any administrative act had been notified through an announcement published in the BOE. In turn, the City Council was required to provide a copy of the supporting documentation of the unsuccessful personal notification attempts and of the administrative acts that had been attempted to notify the person making the complaint.

4. On 03/20/2019, the City Council (...) responded to the above-mentioned request in a letter in which it stated, among others, the following:

- That since 07/01/2017, only one disciplinary case had been initiated against the complainant.
- That the integral acts of the disciplinary procedure were not attempted to be notified by electronic means, given that they were not procedures and actions due to his status as a public employee, but rather a disciplinary file. In turn, there was no regulatory procedure in the City Council that developed the provision of article 14.2.e) of the LPAC.
- That the only thing that was available to the person filed was his address of residence. In addition, the reporting person was in a situation of temporary incapacity since 11/17/2017,

so it was not feasible to communicate to him about the various procedures at his workplace.

- That an announcement was published in the Official State Gazette (hereinafter, BOE) for each of the procedures that had been attempted to be notified by certified mail.

The reported entity attached various documentation to the letter.

5. On 11/11/2019, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the City Council (...) for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.c); 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).

This initiation agreement was notified to the imputed entity on 11/19/2019.

6. On 11/11/2019, an archive resolution was also issued regarding the alleged lack of confidentiality regarding the initiation of a disciplinary file against the person making the complaint. In that resolution, the reasons that led to its archive were justified.

7. On 02/12/2019, the City Council (...) made objections to the initiation agreement.

8. On 12/18/2019, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the City Council (...) as to responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.c); all of them from the RGPD.

This resolution proposal was notified on 12/18/2019 and a period of 10 days was granted to formulate allegations.

9. The deadline has passed and no objections have been submitted.

proven facts

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

On dates (...), the City Council (...) published in the BOE a different notice of notification regarding the disciplinary procedure imposed on the complainant.

In all those advertisements, the complainant was identified through his first and last name and full ID.

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.

In its statement of objections to the initiation agreement, the City Council (...) admitted that it had published in the BOE several notification notices referring to a disciplinary procedure imposed on the complainant, in which identified her through her first and last name and full ID.

In turn, the City Council assumed that *"the published data could have been reduced"* and that *"obviously it would not be done like this now"*.

In relation to the first three publications, he pointed out that they were carried out when Organic Law 15/1999, of 13 December, on the protection of personal data (hereafter LOPD) was still in force, a rule which he considers *"perhaps not it was as clear and transparent as the current RGPD is"*.

As indicated by the instructing person in the resolution proposal, the LOPD contemplated the principle of data quality, in its aspect of proportionality (article 4.1 LOPD), in the following terms:

"1. Personal data can only be collected to be processed, as well as subjected to this processing, when they are adequate, relevant and not excessive in relation to the scope and the determined, explicit and legitimate purposes for which they are have obtained."

In accordance with this principle, only appropriate, relevant and not excessive data could be processed to achieve the purpose pursued. In similar terms, the RGPD has regulated the principle of data minimization in article 5.1.c), establishing that personal data will be *"adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed"*.

In any case, as indicated by this Authority in opinion CNS 56/2017, issued when Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD) was not in force), *"for the purposes of achieving the purpose pursued with the publication, which is none other than that the interested persons can find out about the existence of an administrative act that must be notified to them, and that can reach"*

third parties, it may be excessive to publish the name and surname of the beneficiary together with the DNI or NIF number with all the figures."

And it was added in that opinion that the *"purpose of people interested in a procedure being able to identify who has been the beneficiary person or persons, would be achieved, in principle, with the disclosure of their first and last names. Facilitating the NIF in addition, would only make sense in the case of coincidence in the name and surname between the participants. However, even if this were the case, unequivocal identification could be achieved by incorporating only the last four digits of the ID number. Partial access to this information would be sufficient for the interested persons to be able to identify themselves, without the need to disclose this information to third parties with the consequent greater risk that this would entail in the event of illegitimate processing of this data by third parties."*

Therefore, the criterion of this Authority during the validity of the previous LOPD was that the publication of the name and surname together with the complete DNI was disproportionate. In this regard, it should be added that the aforementioned criterion was reflected in several sanctioning resolutions, such as those in sanctioning procedures no. PS 49/2015, PS 22/2013, PS 60/2012 or PS 44/2012.

Apart from the above, it is also necessary to take into account that article 46 of the LPAC establishes that *"If the competent body appreciates that the notification by means of announcements or the publication of an act injures rights or legitimate interests, it must be limited to publishing in the corresponding official newspaper a succinct indication of the content of the act and the place where the interested parties can appear, within the period established, to learn the full content of the 'mentioned act and record this knowledge."*

Well, although the precept transcribed requires that in the notification by means of announcements the content of the act should be succinctly indicated, as indicated by the instructing person in the resolution proposal, it is recommended that in the announcement does not specify that the administrative act refers to a disciplinary procedure, maximum when procedural acts are notified, which would be much more respectful of the principle of data minimization (art. 5.1.c of the RGPD).

As an example, the procedure in which the administrative act is integrated could be identified through its code.

Having said that, although it does not apply to the present sanctioning procedure, subsequent to the facts imputed here, additional provision 7a of the LOPDGDD, which repealed the previous LOPD, has included in its section 1 how 'identify people interested in notifications through advertisements:

"(...) When it comes to notification by means of announcements, particularly in the cases referred to in article 44 of Law 39/2015, of October 1, on the common administrative procedure of public administrations, the affected person must be identified exclusively by means of their full number

national identity document, foreigner's identity number, passport or an equivalent document.

When the affected person does not have any of the documents mentioned in the two previous paragraphs, he must be identified solely by his first and last name. In no case should the name and surname be published together with the full number of the national identity document, the foreigner's identity number, the passport or an equivalent document."

Therefore, in the case of notification through advertisements, it is sufficient to identify the interested person through their ID, without stating their first and last names. And for the assumption that the affected person does not have an identity document, he should be identified only by his first and last name. And it is worth saying that the LOPDGDD expressly points out that under no circumstances can the name and surname be published together with the full number of the identity document when notification is made through advertisements.

In the last one, the City Council (...) highlighted that during the month of December 2019 a position of Head of Legal Services would be created, which would have among its functions the establishment of guidelines and guidelines that help comply with data protection regulations.

In this regard, as stated by the instructing person in the resolution proposal, although the previous statement does not allow the facts imputed here, nor their legal qualification, to be distorted, it is considered appropriate to highlight this measure of proactive responsibility in order to to comply with the obligations imposed by the regulations on data protection.

3. In relation to the facts described in the proven facts section, relating to the minimization principle, it is necessary to refer to article 5.1.c) of the RGPD which regulates it, which has already been transcribed before.

As has been advanced, in terms similar to the principle of data minimization that regulates the RGPD, the LOPD contemplated the principle of data quality, in its aspect of proportionality (article 4.1 LOPD).

As indicated by the instructing person, during the processing of this procedure the facts described in the section on proven facts have been duly proven. In this sense, the imputed conducts refer to 4 independent actions and each constituting an infringement: 3 of which were carried out with the publication in the BOE of these notifications by means of announcements (on dates (. ..)), when the previous LOPD was applicable; and the last action took place with the publication in the BOE of another notification through announcements dated (...), at which time the RGPD was already applicable (applicable from 25/05/ 2018).

However, as already advanced in the initiation agreement and reiterated in the resolution proposal, the facts described in the proven facts section are considered a continuing violation in accordance with what is established in article 29.6 of Law 40/2015, of October 1, on the legal regime of the public sector, which is why it is appropriate to sanction them with a single infraction as provided for in

article 83.5.a) of the RGPD, which typifies as an infringement the violation of *"the basic principles for the treatment (...)"*, among which is the principle of data minimization.

Without prejudice to the above, the conduct that is addressed here regarding the publications in the BOE made before the RGPD came into force (on dates (...)) had been collected as a serious infraction in the article 44.3.c) of the former LOPD, in the following form:

"c) Treat personal data or use them later in violation of the principles and guarantees established in article 4 of this Law and the provisions that deploy it, except when it constitutes a very serious infringement."

4. Article 83.7 of the RGPD provides that each Member State may establish rules on whether administrative fines can be imposed on authorities and public bodies, without prejudice to the corrective powers of the control authority under art. 58.2 of the GDPR. And adds article 84.1 of the RGPD that the member states must establish the rules regarding other sanctions applicable to the violations of this Regulation, in particular those that are not sanctioned with administrative fines in accordance with article 83.

In this regard, 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 this same sense, article 46 of the LOPD (valid until the entry into force of the LOPDGDD), provided that in the case of infractions committed by public administrations, in the resolution declaring the infringement proceed to establish the measures to be adopted so that the effects of the infringement cease or are corrected. This provision is similar to that of article 77 of the LOPDGDD.

In the present case, as the instructing person explained in the resolution proposal, no corrective measures should be required, given that it would be a *fait accompli*.

resolution

For all this, I resolve:

1. Admonish the City Council (...) as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.c); all of them from 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 4th legal basis.

2. Notify this resolution to the City Council (...).

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

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,