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 51/2019, referring to the City Council of (...).

Background

1. En data 16/07/(...) va tenir entrada a l'Autoritat Catalana de Protecció de Dades, provinent de l'Agència Espanyola de Protecció de Dades, un escrit d'una persona pel qual formulava una denúncia contra l City Council of (...), when she was a councillor, on the grounds of an alleged breach of the regulations on the protection of personal data. Specifically, the complainant explained that on 02/03/(...) he received in his current account a bank transfer for the amount of 212.50 euros ordered by this City Council, corresponding to the compensation for his assistance as a councilor at the session of a collegiate body of the City Council. His complaint was based on the fact that he did not want to receive any compensation, and indicated that he had expressed this to the City Council in a letter registered on 06/16/2015, in which he expressed his renunciation of receiving these compensations, and in any case, it detailed the entities to whom they were to be given. As a second reason for complaint, he pointed out that he had never communicated to the City Council the number of the current account where the payment had been made transfer, and of which her husband was co-owner. In order to substantiate his complaint, he provided a copy of the letter presented to the City Council on 06/16/2015 and of the bank receipt relating to the aforementioned transfer.

2. The Authority opened a preliminary information phase (no. IP 208/(...)), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applicable to the areas of competence of the Generalitat, and article 55.2 of the LPAC, to determine if the facts were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could to be responsible and the relevant circumstances that concurred.

3. In this information phase, on 02/08/(...) the City Council of (...) was required to report, among other issues, on the provenance of the current account number of the reporting person to whom the disputed transfer was made, which is the issue affecting the personal data protection regime.

4. On 13/08/(...) the City Council requested from the Authority an extension of the deadline to give an answer, which was granted by agreement of the same date.

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

5. On 12/09/(...), the City Council responded to the aforementioned request through a letter, in which he stated the following:

"1. The current account information appears in the City Council's information systems. The intervention of the City Council has no record of the origin of this data or the moment of its introduction into the systems, the most plausible explanation being that it was provided by the interested person himself. It is known that the councilor had been in previous legislatures, times when the Intervention staff was not the same as at present. In similar cases, prior to the application of the SEPA regulations, the councilors communicated this data to the Comptroller without the need to fill in forms approved by the Corporation, so in this case and in other similar cases it is not possible accurately document the date of incorporation into the City Council's information systems.

2. Until we received your communication, we had no record of any complaints from this person in relation to the use of this data. He had not exercised before the City Council the rights that the General Data Protection Regulation recognizes, such as those of access or rectification. Nor the limitation of treatment, as would be appropriate in this case in defense of your rights.

3. Instructions have been given to the Municipal Intervention so that this data is blocked until the procedure you are instructing is completed."

The City Council attached various documentation to the letter.

6. On 1/08/2019 the Authority again required the City Council to state, among other issues, whether it had responded to the request that the complainant had submitted to the council on 16/06 /2015, where he requested the waiver to receive compensation for attending collegial bodies of the City Council, and if the council had canceled the personal data of the person making the complaint that were no longer necessary - among them, the account current recipient of allocations for assistance to municipal government bodies-. He was also required to indicate whether the City Council had previously made a transfer to the same current account for identical reasons, or for other reasons.

7. Once the granted deadline had been exceeded, on 10/04/2019 the Authority reiterated the request.

8. On 11/10/2019, the City Council's letter of response was entered in the Authority's register, in which the following was noted:

- In relation to whether the City Council responded to the person's resignation request complainant:

"(...) Yes, they proceeded to answer (Doc 1.). In the same answer that was given to the person making the claim, it was agreed, among others, that "the amounts that the councilors receive as compensation are generated by the councilor himself for the effective assistance to the bodies to which he belongs, therefore her request cannot be understood as a resignation but as a donation of her assignment as a councilor". For this reason the request to perform

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

payments to third parties on behalf of the claimant were to be understood as a provisional situation and that, therefore, she could withdraw at any time given that it was personal compensation. The claimant sent the City Council monthly current accounts, both for individuals and legal entities, for the City Council to make the transfers. These accounts were indeed deleted by the City Council of (...) once the transfer had been made in accordance with the Data Protection law, in force at that time.

The claimant's current account was not deleted for several reasons:
• The claimant at NO time requested that this current account be deleted.
• The current account is part of a file of the City Council of (...) intended for the collection of taxes, given that the claimant lives in the municipality of (...).
• This data, like any other data available to the City Council, was only used to execute municipal agreements, in no case was it transferred, sold, communicated...to anyone other than the City Council itself. , at the same time, the custodian of collection and payment actions, both taxes and compensations for assistance to collegial bodies.
• The claimant could, at any time, change her mind and request that the compensation amount be deposited in her name and, therefore, in her current account. The City Council, therefore, had to keep this current account during the entire legislature (the claimant was still a councilor in the City Council at the time of presenting the claim) in order to proceed with the payment at the time when she requested it."

- In relation to what was the City Council's action in response to the request for resignation presented by the complainant:

"(...) The City Council of (...) accepted as an initial protocol the payment to third parties on behalf of the person attending collegial bodies. No previous protocol existed because this request had never occurred before. It hasn't happened again since. The most common, when it happens, is that the person waives the collection of these compensations but, even if he does, he can revoke this waiver at any time given that it is a right that extends throughout the term and while the person exercises as councilor."

- In relation to whether the City Council had previously made other bank transfers for the same reason to the indicated current account, or to another:

"No, no payments had been made for reasons identical to those described. In any case, refunds of guarantees, improperly collected taxes, tax collection could have been made..."

- In relation to whether the City Council changed its action protocol or instructions when it took place the disputed bank transfer:

"During the year (...) the municipal comptroller retired and the person who took his place believed that it was not possible and that, to some extent, it was illegal to make payments to third parties

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

people on behalf of a councillor. These third parties, physical or legal, had not earned any type of right with the City Council. At that time, according to the staff of the Intervention Department, the claimant was verbally informed that payments could not continue to be made to third parties and that either she had to resign if she thought it appropriate or well the payments would be made directly to her and she would give it to whomever she saw fit. At that time the claimant did not express any opposition to it being done in this way nor, in response to the second part of the inquiry, did she enter any written request that her data be deleted from the database.

- In the last one, the City Council added the following:

"• That the City Council of (...) has been in possession of the claimant's data both because of her status as councilor and because of her registration in the census of inhabitants of (...) with all the obligations and rights that this entails.
• That under no circumstances was this person's data misused, that is to say, they were not communicated to third parties, were not published and, not even, were they used to make collections but only to make the payment of a debt contracted by the City Council given her participation as councilor in collegial bodies. The City Council has the obligation, given that it comes from a Plenary agreement, to make the payment of these compensations for assistance to collegial bodies which, the claimant, did not renounce at any time.

• That as was related in the first letter, the claimant's data had been requested before the entry into force of the current data protection law in the terms described in that letter."

9. On 12/16/2019, the Authority carried out a series of checks via the Internet on the facts subject to the complaint, and found that the municipal website (www.(...).cat) contained published that the Plenary of the City Council of (...), in an ordinary session held on (...)(...), approved the remuneration and compensation of councilors, with effect from (...) . The third point of the agreement foresees for those members of the corporation who do not have exclusive or partial dedication, the perception of compensation in the amount of 250 euros (gross) for effective attendance at the Plenary sessions. On the other hand, it was also found that the minutes of the ordinary session of the Plenary held on (...), in which it was pointed out that the person making the complaint attended- there as councilor. From the result obtained, the corresponding due diligence was carried out.

10. On 23/12/2019, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the City Council of (...) for a serious infringement provided for in article 44.3.c) of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD), in relation to article 4.2 LOPD.

This initiation agreement was notified to the City Council of (...) on 12/23/2019.

11. In the initiation agreement, the City Council of (...) was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice

of evidence that it considers appropriate to defend its interests. This deadline has been exceeded and no objections have been made.

proven facts

On 02/03/(...) the City Council of (...) made use of a current account of which the complainant was joint owner with her husband, and which was included in a file of the City Council for tax purposes (tax collection, etc.) to make a bank transfer (with the concept: *"allocation councilors assistance to Government Bodies, January of (...)")* for an amount of 212, 50 euros, as compensation for the reporting person's attendance as a councilor in a session of a municipal collegial body, and therefore, for a purpose other than the tax initially planned and which had justified the collection by part of the City Council of that current account. The City Council made use of the current account for the indicated purpose without previously informing the person making the complaint or obtaining their prior consent.

Fundamentals of law

1. The provisions of Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations (hereafter, LPAC), and
article 15 of Decree 278/1993, according to what is provided for in 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. In accordance with article 64.2.f) of the LPAC and in accordance with what is indicated in the agreement initiating this procedure, this resolution should be issued without a previous resolution proposal, given that the City Council of (...) has not made any objections to the initiation agreement, which contained a precise statement on the imputed responsibility.

3. The City Council of (...) has not made any objections to the agreement to initiate the sanctioning procedure, which contained a clear imputation of the facts. Thus, to the extent that it has not questioned the imputed facts, which during the preceding previous information phase essentially recognized the data processing that is imputed -without prejudice to the different legal assessment-, the facts must be taken for granted imputed in the initiation agreement.

4. Legal qualification of the imputed facts.

With regard to the regulations applicable to the conduct described in the proven facts section, it should be borne in mind that article 26 of Law 40/2015, of October 1, on the legal regime of the public sector, provides for the application of the sanctioning provisions in force at the time of the occurrence of the facts, unless the subsequent modification of these provisions favors the alleged offender
(the City Council of (...)). In accordance with this rule, given that the facts alleged here were committed before 25/0572018, the LOPD should be applied. Likewise, it has been taken into account

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

that would not favor the alleged infringer (the City Council of (...)) the application of the rule in force from 25/05/2018, i.e. 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 circulation thereof (RGPD), and Organic Law 3/2018, of 5 December, on data protection personal and guarantee of digital rights (LOPDGDD).

Based on this, it should be borne in mind that one of the principles that regulated the LOPD was the principle of data quality provided for in article 4 of the same Law. The scope of this principle was one of the basic axes of the data protection system provided for in the LOPD - as it is also for the regime provided for in the RGPD and the LOPDGDD, although it is configured through other principles- .

Article 4.2 of the LOPD determined the following in terms of the quality principle related to the purpose of the treatment (principle of purpose):

> *"2. The personal data subject to treatment cannot be used for purposes incompatible with those for which the data were collected. The subsequent treatment of this data for historical, statistical or scientific purposes is not considered incompatible."*

These "purposes" referred to in article 4.2 LOPD must relate to the principle of relevance or limitation in the collection of data regulated in article 4.1 of the same Law, in which it was determined that the data of a personal nature can only be processed when *"they are adequate, relevant and not excessive in relation to the scope and the specific, explicit and legitimate purposes for which they have been obtained".*

Consequently, if the processing of personal data must be "relevant" to the purpose pursued and the purpose must always be "determined" and "explicit", it is difficult to admit a use of the data for a purpose " different" without incurring the prohibition of art. 4.2 of the LOPD, even if this precept uses the word "incompatible". The Constitutional Court reached this conclusion when, in Judgment 292/2002, of November 30, it reasoned as follows: *"the right to consent to the collection and processing of personal data does not in any way imply consent to the transfer of this data to third parties And therefore, the transfer of the same to a third party to proceed with a treatment for purposes different from those that originated the collection, even if they could be compatible with those, supposes a new possession and use that requires the consent of the interested party" .*

On the other hand, the National Court ruled on what should be understood by "incompatible purposes" in the Judgment of 03/17/04:

> *"When Art. 4.2 of Organic Law 15/1999 refers to this incompatible purpose using an expression inspired by art. 11.1.b) of Directive 95/46/CE of the Parliament and of the Council, of October 24, 1995, but the transposition of the term incompatibles is confusing and equivocal and as such has been embodied in Spanish law. Suffice it to point out that personal data collected for a specific purpose can be inappropriately used for another different activity*

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

which however is not strictly incompatible with that. Applying literalist article 4.2 of the Organic Law, it would be devoid of meaning and empty of content and to avoid this undesirable result this Chamber considers that what the precept prohibits is that personal data be used for a purpose other than that for which they have been collected."

In this sense, also the National Court in the Judgment of 02/11/04 reiterated the criteria already expressed in the SAN of 02/08/02:

"In relation to the interpretation of the expression incompatible purposes established by article 4.2 of Organic Law 15/1999, this Court cannot share the criteria postulated by the appellant, because article 4.2 of Organic Law 15/1999, in contraposition with article 4.2 of the Organic Law 5/1992, it no longer refers to "different purposes", but to "incompatible purposes", revealing an expansion of the possibility of using the data, however the systematic interpretation of the precept and the ambiguity of the term incompatible purposes support the interpretation made in the impugned administrative act. In effect, according to the dictionary of the Real Academy "incompatibility" means "repugnance that has one thing to unite with another, or of two or more people with each other", therefore a literal interpretation would prevent the use of the data for any purpose an indefinite and unlimited range of purposes, because it is very difficult to imagine uses that produce the repugnance that incompatibility evokes, so such an interpretation leads to the absurd and as such must be rejected."

In short, that, in accordance with the LOPD, personal data cannot be processed for purposes other than those that motivated its collection, since this would mean a new use that requires the consent of the person concerned .

Regarding the regulation of consent, article 6.1 of the LOPD established that the consent given by the affected person must be unequivocal. And on obtaining and proof of consent, article 12 of Royal Decree 1720/2007, of December 21, approving the LOPD Deployment Regulations (hereafter, RLODP), established the following :

"1. The data controller must obtain the consent of the interested party for the processing of their personal data, except in cases where consent is not required in accordance with the provisions of the laws.
The request for consent must refer to a specific treatment or series of treatments, with a delimitation of the purpose for which it is requested, as well as the remaining conditions that apply to the treatment or series of treatments. 2. (...)

3. It is up to the data controller to prove the existence of the affected person's consent by any means of evidence admissible in law."

Regarding the way to obtain consent, article 14 RLOPD established the following in sections 1 and 2:

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

"1. The person in charge of the treatment may request the consent of the interested party through the procedure established in this article, except when the Law requires him to obtain express consent for the treatment of the data.
2. The person in charge can address the affected person, he must inform him in the terms provided for in articles 5 of Organic Law 15/1999, of December 13, and 12.2 of this Regulation, he must grant him a period of thirty days for him to express his refusal to the treatment, and must warn him that, in the event that he does not express himself to this effect, it is understood that he consents to the treatment of his personal data (...)."

In this regard, the City Council of (...) has not proven that, before making the payment of the amount of the compensation in the referred current account of the person making the complaint, it had informed him about the ends provided for in article 5 of the LOPD, and in particular, on the purpose of the treatment that the City Council intended to carry out (art. 5.1.a LOPD). And, related to this, he has also not proven that he had the prior consent of the person making the complaint to use this email account of his to deposit the amount of the compensation.

Indeed, on this issue the City Council only stated in the preliminary information phase that preceded the present sanctioning procedure, that: *"according to what the staff of the Intervention Department has communicated to us... it was communicated verbally to the claimant that payments could not continue to be made to third parties and that either she had to resign if she saw fit, or that payments would be made directly to her and that she give it to whoever she saw fit... ").*

These statements, apart from making reference to statements by third parties and unsubstantiated facts, do not allow the imputed facts to be distorted, since it is not proven that the Intervention Department informed the complainant of the extremes provided for in art. 5 LOPD, and specifically that, in the event that she did not waive the amount of the compensation, it would be paid into a current account, and that this, if she did not report another, would be the account listed in the City Council files for tax purposes. And likewise, he has not demonstrated to this Authority that the reporting person consented to the use of this account of his for the purpose intended by the City Council - neither expressly nor by the means provided for in art. 14.2 RLOPD-, a matter of other logic, given that the non-consensual treatment of the current account constitutes the main reason for the complaint that is the cause of the present sanctioning procedure.

That's how things are, the use made by the City Council of (...), proceeding to make use of the current account of the person making the complaint that appeared in a council tax file,
to pay him the amount corresponding to the compensation for his attendance at the session of a collegial body, and therefore for a purpose different from that for which the reporting person would have provided the data , is contrary to the principle of purpose or quality of the data provided for in article 4 LOPD.

The imputed facts are constitutive of the serious infringement provided for in article 44.3.c) of the LOPD, which typified as such:

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

"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".

It is worth saying, for purely illustrative purposes, that this behavior has also been collected as a violation of the RGPD, and the LOPDGDD, although according to the latter rule the type of offender is qualifies as a very serious infraction, in line with the severity of the penalty provided for in the RGPD. Specifically, article 72.1.a) of the LOPDGDD establishes the following:

"1. Based on what is established in article 83.5 of Regulation (EU) 2016/679, infringements that involve a substantial violation of the articles mentioned in that article and, in particular, the following, are considered very serious and prescribed for three years.
a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/679...."

And article 5 RGPD establishes that:

"1. The personal data must be: (...)

b) Collected for specific, explicit and legitimate purposes and subsequently must not be treated in a manner incompatible with these purposes. In accordance with article 89, paragraph 1, the subsequent processing of personal data for archival purposes in the public interest, for scientific and historical research purposes or for statistical purposes is not considered incompatible with the initial purposes (limitation of the goal)."

5. Declaration of infringement.

Article 21 of Law 32/2010, in line with what was established in article 46 of the LOPD, provides that when the infractions are committed in publicly owned files (or in relation to treatments for which those responsible would be of files of a public nature), the sanctioning body will issue a declaratory resolution of the infringement.

In accordance with these precepts, it must be declared that the City Council of (...) has committed the serious infringement provided for in article 44.3.c) of the LOPD.

Also for purposes of illustration, it should be noted that with the regulations currently in force, article 77.2 LOPDGDD would be applicable, and a reprimand should be imposed. Specifically, this precept 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 appropriate measures to be adopted so that the conduct ceases or the effects of the offense that has been committed are corrected (...)".

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

Articles 21 of Law 32/2010 and 46 of the LOPD also provide that the resolution in which the infringement is declared will establish the measures to be adopted to correct the effects of the infringement.

In the present case, the fact constituting the infringement was specific, and it exhausted its effects at the same moment of its commission (by making the bank deposit in the current account jointly owned by the complainant and her husband) . So it is not considered appropriate to require the adoption of corrective measures.

Even so, it is considered necessary to make the following clarification. In the letter from the City Council that was received by the Authority on 11/10/2019, it was pointed out that the City Council had not deleted the current account of the complainant for various reasons, and among them mentioned the possibility that the reporting person would change his mind regarding the perception of compensation for future assistance to a collegial body of the City Council. Regarding
of these manifestations it is worth noting that, although the infraction that has been imputed here does not result from the obligation of the City Council to delete the aforementioned current account number that appears in the municipal file for tax purposes -to be treated- if it is a matter unrelated to the legal dispute, this current account cannot be collected in the file - or file - corresponding to the processing of the indicated compensations, nor obviously can it be treated for the purpose of paying these compensations, without complying with the requirements provided by the RGPD and the LOPDGDD. And it is not superfluous to add that, with the regulations now in force, the requirement for the consent of the interested person requires, unlike what the LOPD provided for these cases, a declaration or a clear affirmative action (art. 4.11 RGPD).

resolution

For all this, I resolve:

1. Declare that the City Council of (...) has committed a serious infringement provided for in article 44.3.c) in relation to article 4.2, both of the LOPD.

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 fifth legal basis, without prejudice to what is indicated there.

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

3. Communicate this resolution to the Ombudsman.

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 Agency for the Protection of

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

Data, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, d in accordance with the provisions of article 123 et seq
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,