

## File identification

Resolution of sanctioning procedure no. PS 4/2020, referring to the Municipal Finance Institute of Barcelona City Council.

## Background

1. En data 20/09/2018, 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'Institut Municipal of the Treasury of Barcelona City Council (hereafter, IMH), due to an alleged breach of the regulations on personal data protection. In particular, the complainant explained that the IMH published directly in the Official State Gazette (hereafter, BOE), acts corresponding to several traffic violations without having addressed the reporting person at his various documentation relating to the events reported.

2. The Authority opened a preliminary information phase (no. IP 270/2018), 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 11/07/2019 the reported entity was required to, among others, provide documentary evidence of the attempts to personally notify the administrative acts resulting from the disciplinary proceedings brought against the person reporting for the alleged commission of traffic violations, prior to the edict notification.

4. On 07/25/2019, the IMH responded to the aforementioned request in writing in which it stated, among others, the following:

- That the IMH sends traffic penalty notifications to the address listed in the systems of the General Directorate of Traffic (hereinafter, DGT), in accordance with what is provided for in the applicable regulations.
- That the address corresponding to the reporting person was wrongly listed in the DGT system, given that the street number appeared in the "Street" field and "SN" appeared in the "Number" field.
- That this circumstance resulted in the street number not being incorporated into the IMH information systems.
- That the address of the complainant had been changed, so that it was already in the complete IHM information systems.

The reported entity attached various documentation to the letter.

5. In this information phase, by means of an order dated 06/11/2019, the IMH was again required to certify, among others, that it had made two notification attempts in relation to the sanctioning files referring to the reporting person.

6. On 11/20/2019, the IMH complied with this request by means of a letter stating, among others, the following:

- That in relation to file numbers (...) and (...), in both cases the notification attempt was "*Incorrect address*".
- Given the above, notification was made through an announcement published in the BOE in accordance with article 44 of the LPAC.
- That in relation to file number (...), it was only attempted to notify both the complaint and the penalty once, in both cases the result was "*incorrect address*". Given the above, the notification was also carried out through an announcement published in the BOE.
- That the IMH became aware of the error in the address of the person reporting as a result of the request made by the Authority, which resulted from an integration error with the DGT's computer system.
- That said error had already been corrected in the City Council's databases.

The IMH provided various documentation.

7. On 13/02/2020, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the IMH for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.d); all of them from Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 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 02/17/2020.

8. On 02/03/2020, the IMH made objections to the initiation agreement.

9. On 06/02/2020, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish the IMH as responsible for a violation provided for in article 83.5.a), in relation to articles 5.1.a) and 6, all of them of the RGPD.

This resolution proposal was notified on 06/17/2020 and a period of 10 days was granted to formulate allegations.

10. On 07/01/2020, the accused entity submitted a statement of objections to the resolution proposal.

proven facts

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

On 17/04/2018, 02/05/2018 and 08/05/2018, the IMH initiated three sanctioning procedures against the complainant for an alleged traffic violation.

In accordance with article 90 of Royal Legislative Decree 6/2015, of October 30, which approves the revised text of the Law on traffic, motor vehicle circulation and road safety (hereinafter, RDL 6/ 2015), the IMH consulted the domicile of the person making the complaint, which was recorded in the records of the autonomous body of the Central Prefecture of Traffic, in order to practice the notification of the administrative acts derived from the aforementioned sanctioning files.

In the said traffic records, it was written in the "Via" field: "PASSEIG (...) 39". And in the "Number" field: "SN" [without number]. This information, automatically, was also incorporated into the IMH information system.

On the dates 02/05/2018, 22/05/2018, 01/06/2018, and 20/08/2018, an attempt was made to notify the denunciations relating to the three sanctioning procedures instituted, at the domicile of the person denouncing without specifying the street number. On all four occasions, the notifying agents stated in the certificate of impossibility of delivery that the notification was returned by "*Incorrect address*".

Despite these observations of the notifying agents, there is no evidence that the IMH carried out any other action tending to check the reason why in all the notification attempts it was stated that the address of the person making the complaint here was incorrect, or to find out the correct address, but went directly to the notification through announcements published in the BOE on dates (...), (...), (...) (in which the initiation of the three disciplinary proceedings) and of (...) (in which the resolution of the disciplinary proceedings initiated on 04/17/2018 was notified).

#### 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 made allegations both in the initiation agreement and in the resolution proposal. The first ones were already analyzed in the proposed resolution, but even so it is considered appropriate to mention them here, given that they are partly reproduced in the second ones. The set of allegations made by the accused entity are then analysed.

The IMH states in its statement of objections to the proposed resolution that it used the notification address that was in the systems of the General Directorate of Transit (DGT) in compliance with the applicable regulations (art. 90 RDL 6/2015), in which the street number was not included in the corresponding field. It adds that for this reason the notifications were addressed to the wrong address. In turn, the IMH considers that he did not act with a lack of diligence.

In the last one, the IMH explains that since the result of the notifications was "*incorrect address*" it proceeded, in accordance with article 44 of the LPAC, to the notification through an announcement published in the BOE.

Aside from the above, the IHM also points out that the four notifications subject to imputation did not refer to 4 sanctioning procedures as indicated in the resolution proposal, but to 3.

It is certainly necessary to admit this punctuation, which has been collected in the section of proven facts.

Having said that, as indicated by the instructing person in the resolution proposal, the error invoked by the IMH in the DGT database would be the cause of having practiced the notifications linked to the disciplinary proceedings instituted against the person reporting to an incorrect or incomplete address.

However, it should be noted that in each of the notifications specified in the proven facts section, the notification agents stated in the certificate of impossibility of delivery that the notification was returned by "*Incorrect address*".

So things are, if the IMH had acted with the diligence that was required of it, when observing the reason why all the notifications had been unsuccessful, it would have taken some action tending to verify the accuracy of the address of the person here denouncing that was in the records of the autonomous body of the Central Traffic Prefecture, which would have allowed it to catch the error that is now being alleged. Indeed, if he had checked the address in the DGT records, he would have found that the street number was there, although in the "*Street*" field, so he wouldn't have been there to the notification through announcements published in the BOE as provided for in article 44 of the LPAC.

In connection with this, it should be remembered here that jurisprudential doctrine considers notifications by edict or announcement invalid when "*the Administration does not sufficiently investigate the true address of the interested party before going to the edict notification*" (Judgment of the Supreme Court no. 3926/2011, of May 5)."

Having said that, it is considered appropriate to highlight the diligence of the IMH to correct or complete the address of the person making the complaint, as soon as it became aware of the inaccuracy following the request for information addressed to it by the Authority in the framework of the previous actions.

On the other hand, the IMH again invokes the high volume of notifications it practices, as a reason for exemption.

In this sense, as the instructing person pointed out in the resolution proposal, this Authority is aware that the facts imputed here do not derive from a structural breach of the IMH, but from an isolated case. However, when a large volume of personal data is treated, the degree of diligence required of those responsible for the treatment must be higher, without the high number of notifications carried out by the IMH justifying that in those cases where evidence that a notification has been unsuccessful, does not verify the cause and, in particular, does not carry out the relevant actions to obtain the exact address of the affected person before going to the notification through announcements published in the BOE. Even more so if it is taken into account that the administrative acts that were intended to be notified to the reporting person, due to the fact that they refer to procedures in which the sanctioning authority was exercised, could have a negative impact on the legal sphere of the alleged infringer .

In short, that in no way can the IMH justify the breach of its duty to check the correct address of the person to whom a sanctioning notification is addressed based on the volume of notifications it manages or the short deadlines of prescription. On the contrary, precisely because it is an institution that manages a huge volume of notifications, largely linked to data processing of natural persons and very often in unfavorable procedures, and therefore with a direct impact on effectiveness of the right of defence, the due diligence requires having control or verification mechanisms tending to ensure the accuracy of the data that is intended to be used (the address).

Also, it cannot be ignored that in accordance with the principle of proactive responsibility contemplated in article 5.2 of the RGPD, the IMH must comply with the principles relating to the treatment (among which, the principle of accuracy ), which involves applying the appropriate technical and organizational measures in order to guarantee and be able to demonstrate that the treatment complies with the RGPD.

Given the above, the allegations made by the IMH against the proposed resolution must be rejected.

3. The facts described in the proven facts section violate the principles of accuracy - article 5.1.d of the RGPD - and lawfulness of the data (article 5.1.ai 6 RGPD).

Firstly, article 5.1.d) of the RGPD regulates the principle of accuracy establishing that personal data will be *"exact and, if necessary, updated; all reasonable measures will be taken to delete or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed"*.

For its part, article 90.1 of RDL 6/2015, regarding the practice of reporting traffic complaints, provides the following:

*"1. The administrations with sanctioning powers in traffic matters must notify the complaints that are not delivered to the act and the other notifications that result in the sanctioning procedure to the road electronic address (DEV).*

*In the event that the accused does not have it, the notification must be made at the address that has been expressly indicated for the procedure and, if there is a lack, at the address that appears in the records of the autonomous body Prefecture Central Traffic."*

And, secondly, article 5.1.a) of the RGD regulates the principle of legality determining that the data will be *"treated in a lawful manner (...)"*.

For its part, article 6.1 of the RGD provides that the treatment is only lawful if at least one of the following conditions is met:

- "a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;*
  - b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;*
  - c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;*
  - d) the treatment is necessary to protect the vital interests of the interested party or another natural person;*
  - e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;*
  - f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.*
- The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions."*

In the present case, even though the notifying agents stated in the certificate of impossibility of delivery of the notifications referring to three sanctioning procedures instituted against the reporting person, that these were returned by *"Incorrect address"*, the IMH did not carry out any action to verify the accuracy of the domicile of the person making the complaint, but went directly to the notification through announcements published in the BOE provided for in article 44 LPAC, without fulfilling the requirements that enable the practice of this type of notification and, therefore, without supporting said treatment in a legal basis of article 6.1 RGD.

The facts described in the proven facts section are constitutive of an infringement provided for in article 83.5.a) in relation to articles 5.1.d); and also, of an infringement provided for in the same article 83.5.a) in relation to article 5.1.a) and 6; all of them from the RGD.

Article 83.5.a) of the RGPD, typifies as an infringement, the violation of the *"basic principles of the treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9"*, among which they contemplate both the principle of accuracy (art. 5.1.d RGPD), and the principle of legality (art. 5.1.ai 6 RGPD).

For their part, these behaviors have also been included as very serious infringements in articles 72.1.a) and 72.1.b) of the LOPDGDD, in the following form:

- "a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/679. (...)*
- b) The processing of personal data without any of the conditions for legality of the processing established by article 6 of Regulation (EU) 2016/679 being met."*

As indicated by the instructing person in the resolution proposal, it is considered that both violations are linked in the sense that one of the violations (the violation of the principle of accuracy) has led to the commission of the other (the violation of the principle of legality).

In this sense, article 29.5 of the LRJSP provides that *"When the commission of one offense necessarily leads to the commission of another or others, only the penalty corresponding to the most serious offense committed must be imposed ."*

In the present case, in which the two offenses are provided for in article 83.5.a) of the RGPD (which refers to both the violation of the principle of legality and the principle of accuracy), due to their link , it is only appropriate to punish for the violation of the principle of legality, as one of the infringing behaviors causes the other in the sense that the violation of the principle of legality derives from the violation of the principle of accuracy.

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 the provisions of current legislation on the regime*



*disciplinary of the staff in the service of the 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, as explained by the investigating person in the resolution proposal, corrective measures should not be required, given that the IMH rectified the address of the complainant in its databases.

resolution

For all this, I resolve:

1. Admonish the Municipal Institute of Finance of the Barcelona City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.a) and 6, 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 4th legal basis.

2. Notify this resolution to the IMH.

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.





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PS 4/2020

The director,

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