apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 7/2020, referring to the Sant Gervasi Cooperativa School.

Background

1. On 10/06/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Escola Sant Gervasi Cooperativa (hereinafter, the School), on the grounds of an alleged breach of the regulations on the protection of personal data.

The person making the complaint complained, on the one hand, that the School was publishing images on the center's social networks without having the valid consent of the people affected, given that the document that would have been given to the parents for that purpose in the throughout last May, with the title "Document on data protection-Alfa Card", would not comply with the validity requirements required by the RGPD. In this regard, he complained, among others, that the request for consent was mixed with other terms and conditions, that it was conditional on the provision of a service by the educational center, and that specific consent was not requested for to the publication of images of minors on social networks.

And, on the other hand, he complained that in this same document/form the following was reported: "To facilitate control of access to the dining room, a biometric access control has been installed. This device collects some determining points of the print, but does not allow its digital reconstruction. This information will only be kept as long as you are a user of the service." In this regard, the complainant added that he was not sure if this control system was already operational.

The complainant provided as documentation, a copy of the referenced document entitled "Data Protection Document: Alfa Card", as well as the reference of a link that allowed access to the School's You Tube channel, and from where could view a video where a performance of underage students was observed on a stage.

2. The Authority opened a preliminary information phase (no. IP 177/2019), 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. On 10/24/2019, as part of this preliminary information phase, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to

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

complaint Thus, it was found that through the link referred to by the person making the complaint, it was possible to access the School's YouTube channel, from where a video with the title "(...)" could be viewed. posted on date (...), and where a performance of underage students was observed on a stage. The said video had been uploaded in "hidden" mode (so it can only be seen by users who have the link, and only those people can share it), and it had 82 views. In other words, the video did not appear in searches, recommendations and related videos, nor was it published among the videos that the School had uploaded to its YouTube channel in "public" mode.

Likewise, the instructor also accessed the School's YouTube channel (...), where you can view different videos of the students. Among these videos, you can access the video "(...)"), which was published "1 month ago" and has "1.2m views". The video contains a descriptive message that says "This is how P3 students experience school adaptation", and where you can see the entrance to school of the youngest students, focused on an individual basis, and his first day of class.

Finally, the instructor accessed the website of the Sant Gervasi Cooperativa School (https://www.santgervasi.org/), which presents the various links that the School has under its name to social networks (Pinterest, YouTube, Facebook and Instagram), which contain images of activities carried out by students at school.

4. In this information phase, on 10/25/2019 the reported entity was required to report on whether, indeed, the consent request form given to parents in order to be able to publish images in the center's social networks, such as YouTube, is what the complainant provided with his written complaint. Likewise, the School was required in relation to the alleged installation of a biometric data collection system for access control to the canteen, and specifically, whether the school would be effectively collecting and processing biometric data from students for the control of access to the dining room, and if so, to report on the following points: from which date said system would be used; what is the legal basis that would enable this data processing; what is the purpose pursued, what exact data of the students would be collected to achieve the purpose; whether a data protection impact assessment has been carried out in relation to the disputed data processing; and whether a risk analysis has been carried out to determine the measures to be applied to guarantee the security of the data.

5. On 11/11/2019, the School responded to the aforementioned request in writing in which it stated the following:

- That "the school's Alpha Card is a document that complies with the requirements of articles 7 and 13 of the RGPD (...)"

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

- That "in this document the legal representatives of the students are informed and they are expressly notified of the purposes and the ways in which the school processes personal data".

- That said document contains "a unilateral declaration by the students' legal representatives in which they express their agreement with the information received and give their consent for the school to process the data in the manner described. (...). If they do not sign it, they are offered the possibility to object to the treatment that has been proposed to them and can express their opinion. In these cases, the school attends to their proposals and, when there are cases in which they ask for special treatment (...) they are registered in the school's Robinson file kept by the director general and they are given the appropriate treatment to the needs raised".

- That when "it is considered worth uploading images, sound and/or voice to the networks, express, precise and unequivocal consent is requested because the purpose, in addition to the fact that they leave the purely internal scope of the school, the recordings will be exposed to the public"

- That "from the age of 14, anyone affected and/or interested can use the opposition form in the case that they want to participate in the activities, but do not agree with the data processing proposed by the school. (..)"

- That, in relation to the installation of a biometric data collection system for access control in the dining room, "the system has been in use since June 1, 2012"

- That "the legal basis that enables this data processing is (a) monitoring and control of students with food-related problems, (b) control of attendance and intrusion into dining services; (c) ensure compliance with the dining contract; (d) provide the contracted service to students; (e) control the invoicing of the service provided. Those who do not expressly consent will not be fingerprinted."

- That "the purpose pursued is to administer and manage the canteen's information and to give an account of it to those interested, especially to collaborate with people who have problems with food and to guarantee the safety of the students when they are inside the canteen's premises."

- That "student data is not collected. The machine anonymizes any information collected from the data (...)"

- That "all the alternative systems that have been used to administer and manage the kitchen service information (...), have not been effective in meeting the demands of the interested parties themselves and those derived from the number of canteen users. This procedure provides legal certainty and, in addition, guarantees the control system of absenteeism and trespassing."

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

- That "in 2012, it was not mandatory to carry out impact assessments". Regarding this, the allegations contain a separate section entitled "Impact assessment", in which it is concluded that "A systematic description of the planned treatment activity has been made. (...). Anonymized conservation is done in the system"; "An assessment has been made of the necessity and proportionality of the treatment with respect to its purpose.(...). It has been concluded that it is the only system that can efficiently guarantee that a user has used the dining service.(...)"; "A risk analysis has been carried out to see if the biometric control could affect the security of the data and/or the rights of the people involved, as if there could be a risk that the company responsible for managing the software could process personal data beyond the express authorization of management. No specific risk has been identified that needs to be taken into account."

The reported entity attached various documents to the letter, including the following:

- copy of the document entitled "Informed Consent Alfa Card"
- copy of the "Exercise of the right of opposition" form
- copy of the "Consent to record and upload images to the networks" -
copy of the "License Agreement"
- copy of the operating brochure of the device that collects the biometric data (fingerprints).

6. On 02/03/2020, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the School for two alleged infringements: an infringement provided for in article 83.5.b) in relation to article 12.1; another violation provided for in article 83.5.a) in relation to article 5.1.a) and 9; 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 03/13/2020.

7. On 08/06/2020, the School made objections to the initiation agreement.

8. On 09/10/2020, the person instructing this procedure formulated a resolution proposal, by which it proposed that the director of the Catalan Data Protection Authority sanction the Sant Gervasi Cooperativa School, firstly, with a sanction consisting of a fine of 2,000.- euros (two thousand euros), as responsible for an infringement provided for in article 83.5.b) in relation to article 12, both of the RGPD; and secondly, with a penalty consisting of a fine of 4,000.-euros (four thousand euros), as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.a) and 9, all of the RGPD.

This resolution proposal was notified on 12/10/2020 and a period of 10 days was granted to formulate allegations.

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

9. On 10/23/2020, the accused entity submitted a statement of objections to the resolution proposal.

proven facts

1. The Sant Gervasi Cooperativa School has been publishing images of the students through social networks, and especially through the School's YouTube channel, without having the valid consent of the people affected, given that the form that the month of May 2019 was given to the parents of the students for that purpose, with the title "Document on protection of data Card-Alfa", it did not meet the validity requirements required by the RGPD.

Specifically, said form does not meet the characteristics provided for in article 12.1 of the RGPD, according to which, the data controller must adopt the appropriate measures to provide the interested party with all the information indicated in articles 13 and 14 in a concise, transparent, intelligible and easily accessible form, with clear and simple language, in particular any information directed specifically at a child, as long as it does not allow selecting the different purposes that you want to select, nor know the legal basis or the final recipients for each purpose.

2. Since 1/06/2012, attendance control in the Sant Gervasi School canteen is based on the collection and processing of biometric data (fingerprint pattern) of students, which is a special category of data (art. 9 RGPD), which can only be processed if one of the exceptions provided for in article 9.2 of the RGPD applies.

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.

2.1 On the scope of action of the Catalan Data Protection Authority

First of all, the School alleges that it is a charter school, and that in relation to article 3.f) of Law 32/2010, of October 1, the Authority only has jurisdiction over

a part of the files and treatments. Specifically, those relating to the personal data of the students linked to the services that are provided under the modality of educational concert with the purpose of providing a public service with private means, that is to say, in their case, only on the information academic, socio-economic of primary and secondary school students and families. In relation to this, he points out as activities that would be outside the Authority's scope of action, those relating to the canteen service, extracurricular activities, sports club and high school.

Based on the above, the School alleges the impropriety of rectifying the model form that they presented together with their allegations in the initiation agreement, with the terms proposed in the resolution proposal: "with regard to the right to claim, indicate that it is necessary to refer to this Control Authority, in accordance with what is established in article 3.f) of Law 32/2010, of October 1, of "Catalan Data Protection Authority".

Well, it should be noted that in the guidelines for the modification of the new form model, contrary to what the School states, nowhere is it pointed out that "only" the Authority is the competent body in matters of data protection . What is pointed out there is that it is necessary to "reference this Authority", given that the only control authority indicated is the Spanish Data Protection Agency (hereafter, AEPD). In this regard, it is necessary to refer to the aforementioned article 3.f) of Law 32/2010, which determines that the scope of action of the Catalan Data Protection Authority includes the files and the treatments carried out by "The other private law entities that provide public services through any form of direct or indirect management, if it is files and treatments linked to the provision of these services." And, therefore, as indicated in the proposed resolution, in the form it is necessary to refer to this Authority, since the School, as a charter school,
deals with a large contingency of personal data linked to the public service provided under the school concert regime. This, without prejudice, if applicable, to maintaining the reference to the AEPD, in relation to those other data treatments for which consent is collected and which may fall outside the scope of action of this Authority.

Now, regarding the processing of the biometric data of the dining room users
school, which according to the entity would be outside the Authority's scope of action, the following must be said. The school canteen service is included within the Authority's scope of action by virtue of article 3.f) of Law 32/2010, given its close link with the educational service provided by school center, and they can hardly be separated from each other. Above all, taking into account that its users are the students themselves who are being provided with the agreed educational service. That being the case, there can be no doubt that if they were not students of the School, they would not be users of the dining service, given that their use is motivated by the school life of the students within the school center, and it is not is open to third parties external to the educational center. As an example of this link, article 40 of Law 17/2011, of July 5, on food safety and nutrition, which deals with special measures aimed at the school environment, determines a series of obligations aimed at to schools and the competent educational authorities relating to food and nutrition education, also referring to the school canteen service.

Also, article 35.3 of Law 12/2009, of July 10, on education, places school canteen services under the umbrella of the educational function of schools.

In the last, the entity appeals in general terms that the files of the access control to the school canteen service are treated "by the company that provides the maintenance and control service of the intrusion control machines in the dining room (...)". Regarding this, it should be indicated that article 4.8 of the RGPD defines the person in charge of the treatment as "the natural or legal person, public authority, service or any other body that processes personal data for account of the person in charge of the treatment". In accordance with this definition, the company that alludes to the entity, would be positioned as a data controller in front of the School, which is responsible for data processing.

For all the above, this allegation cannot succeed.

2.2. About the identity of the complainant and the absence of any complaint against the School

The entity states throughout its letter of allegations that, not knowing the identity of the person who made the complaint causes it to be defenseless, since it is not possible for it to prove whether the person making the complaint here signed the controversial consent form to the processing of personal data.

The School points out that it has not had any problems with any interested party, nor to state that "no one has asked for any changes" in the drafting of the form, and that when this happens they always try to find a solution. Also that "all users and those affected by the processing of their biometric data have given their consent and no one has objected or asked clarification". From all these manifestations it can be inferred that the School has obtained signatures on all the forms it handed in, and that no one has filed a complaint or formulated impediments to their signature.

Regarding this, it is necessary to indicate, first of all, that not knowing the identity of the person reporting here is not an element that has produced helplessness in the School, since the facts imputed in this sanctioning procedure do not focus on the existence or not of the form signed by the person making the complaint, but in the model form used by the School to collect the consent of the group of families in the centre, and which, as the entity explains, have been returned signed. In relation to this, it should be remembered that the School has been able to defend itself against the alleged facts through the presentation of allegations in the initiation agreement and the allegations that are the subject of analysis in this resolution .

In other words, the lack of exclusive consent of the person reporting here for the processing of their personal data that could be derived from the lack of signature of the form is not being sanctioned. Otherwise, what is sanctioned here is that said form, delivered in the month of May 2019 to the students' parents, with the title "Data protection document Card-Alfa", it was not a valid instrument to collect consent for

processing of the personal data of the affected persons, given that it does not meet the characteristics provided for in article 12.1 of the RGPD, according to which, the data controller must adopt the appropriate measures to facilitate the concerned all the information indicated in articles 13 and 14 in a concise, transparent, intelligible and easily accessible form, with clear and simple language, in particular any information directed specifically to a child.

On the other hand, the other fact sanctioned is the control of attendance in the School canteen through the collection and processing of a biometric data (fingerprint pattern) of the students, which is a category special data (art. 9 RGPD), which can only be the subject of treatment if one of the exceptions provided for in article 9.2 of the RGPD applies. In this case, it is also not an action that requires knowing the identity of the person making the complaint, or whether he signed the disputed form, but rather the source of the infringement is the form model used by the School, the which does not include a consent that meets the requirements to be considered valid to legitimize the data processing carried out, and is therefore considered to violate the principle of legality (art.5.1.a. and 9 of the RGPD), as well as , in a second term, the principle of minimization (art.5.1.c. RGPD).

Secondly, to point out that the eventual lack of complaint by the affected persons to the School cannot be interpreted as their compliance with the form used, nor does this prevent this Authority from exercising its sanctioning power, as an institution competent regarding 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).

Having said that, indicate that the lack of identification of the person reporting in this procedure is supported by the resolution issued by this Authority, by which the request to exercise the right of opposition made by the person reporting here so that their personal data is not revealed.

2.3. On transparency in data processing

The accused entity states that the form used by the School to collect and process students' personal data, entitled "Data protection document: Alfa Card", contains the information required by article 13 of the RGPD, since are personal data obtained from the holders themselves or legal representatives of minors, and meet the requirements established in article 12 of the RGPD, regarding the transparency of the information, insofar as the provision of the information to the interested parties through said form is concise, transparent, intelligible and easily accessible.

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

The first thing to say is that, in the proposed resolution, it was indicated that, although the concept of "transparency" is not defined in the RGPD, recital 39 of the RGPD is informative as to the meaning and 'effect of the principle of transparency in the context of data processing:

"For natural persons it must be completely clear that they are collecting, using, consulting or otherwise treating personal data that concern them, as well as the extent to which said data is or will be treated. The principle of transparency requires that all information and communication relating to the treatment of said data be easily accessible and easy to understand, and that simple and clear language be used. This principle refers in particular to the information of the interested parties about the identity of the person responsible for the treatment and the purposes thereof and the information added to guarantee a fair and transparent treatment with respect to the physical persons affected and their right to obtain confirmation and communication of the personal data that concern them that are the object of treatment. Natural persons must be aware of the risks, rules, safeguards and rights related to the processing of personal data, as well as how to assert their rights in relation to the processing. In particular, the specific purposes of the processing of personal data must be explicit and legitimate, and must be determined at the time of collection. (…)".

At this point, it should be noted that, as indicated in the proposed resolution, although article 5 of the RGPD does not include a definition as such of the concept of transparency, this concept is understood to be defined in relation with the provisions contained in articles 12, 13 and 14 of the RGPD. The reference made to the explanations given in recital 39 of the RGPD does not entail the existence of a violation of the principle of typicality of the offense provided for in article 83.5.b) in relation to article 12.1 of the RGPD, as stated by the entity. In this sense, indicate that the typification of the conduct described in the referenced articles is detailed with sufficient precision to consider that the reported facts have a place, without prejudice to the fact that the explanations in recital 39 may contribute to the more specific identification of the infringement .

Having said that, indicate that transparency in the processing of data is specified very clearly in the right of information that the interested party has, whether the data is collected directly or through third parties. When the data controller acts transparently, it is when it really empowers the interested parties to exercise control over their personal data, and in this way guarantees them, for example, the power to grant or withdraw informed consent or exercise their rights as interested parties . In other words, the duty to inform people about the processing of their personal data at the time of obtaining their consent, is an obligation derived from the principle of transparency that has particular relevance in those cases where consent is sole legal basis of the treatment, to the extent that the lack of transparency in the information requirements conditions the granting of an informed and, consequently, valid consent. In that

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

point, it should be remembered that article 5.1.a) of the RGPD establishes a direct relationship between the principles of transparency and legality. It is for all this that the duty of the data controller, in this case the School, to provide information on the processing of the personal data it collects, in a concise, transparent and intelligible format, is the necessary presupposition for be able to treat them.

In this sense, and linking to the mentioned article 5.1.a) of the RGPD which establishes a direct relationship between the principles of transparency and legality, it is relevant to highlight that the lack of transparency of the form has led to the collection of consent through the form cannot be considered a valid legal basis for the processing of personal data. This is so, because the form used by the School to collect and process the students' personal data does not meet the characteristics to be considered a form through which informed, free, specific and unequivocal consent can be collected, and for therefore, it would violate not only the principle of transparency, but also that of legality.
This point, the way to request and collect consent, will be developed more extensively in a later section. However, those considerations relating to the form are collected here which not only expose a problem of transparency, but of collecting consent.

In this sense, the form used by the School does not allow the option to select in a differentiated way the purposes for which you actually want or do not consent to your treatment, and both the recipients of the treatment and the legal basis of the treatment, s 'are listed together, without being specifically linked to the corresponding purposes, so that the person who receives the form cannot know which purposes have as a legal basis "a contractual relationship", "a legal obligation" or the "consent", nor the final recipients for each purpose.

In the form, in the "Purpose of treatment and retention period" section, a variety of information is collected on the different treatments of student data carried out by the center. From the installation of video surveillance cameras, the publication of images, sound and student work, to the fact that a biometric access control has been installed for users of the school canteen service, together with the different treatments that in the exercise of the school's educational and guidance function are made of the students' data. The description of all data processing is presented in a single block, and at the end of the document parents or legal guardians of minors are asked for their consent, without differentiating in which cases the School can collect and process personal data without need to require consent, in order to be covered by any of the legal bases provided for in article 6 of the RGPD, in cases where this consent must be specific and/or explicit. In this way, the person who receives the form can hardly distinguish which treatments of their personal data or those of their minor children require their specific consent to be treated, from the other treatments that the School can treat without the need for their consent From this format, the interested person can conclude that the consent is for all the purposes presented in the form, thus subjecting the provision of the educational services specific to the

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

school center, to consent to the collection and processing of personal data for all other informed purposes (control of access to the dining room through fingerprint, dissemination and publication of images on social networks and the web,. .).

On the other hand, as an effect of the lack of transparency in the form model, it should be added that the School states that, apart from the "Data protection document: Alfa Card", which it defines as a "maximum consent ", it also has other complementary forms relating to the "special treatments of personal data that are outside the scope of the files used to provide public services", to which you must add the
two other independent consent requests mentioned in the pleadings of the initiation agreement: the consent for the processing of the fingerprint biometric data and the dissemination of images of minors. Regarding this, as already indicated in the resolution proposal, it should be noted that the said system designed by the School leads to greater confusion, as it multiplies requests for consent for the same purposes that the affected person would have already authorized through the first form of the "Alfa Card". This overlapping of consents may place the affected person in doubt as to which treatment purposes he or she has previously consented to through the first form, and about the specific information of the authorized treatments. In relation to this, the Article 29 Working Group (GT29) recommends in the "Guidelines on transparency under Regulation (EU) 2016/679", that all information intended for interested parties must be found in one place or in a single complete document that can be easily accessed in case you want to consult all the information, among other recommendations.

Consequently, the requirement that the provision of information be concise, transparent, intelligible and easily accessible implies that the data controller must present the information efficiently and succinctly to avoid erroneous readings or conclusions, and must be understandable to the person concerned. Providing clear information to the parents or legal guardians of minors before obtaining their consent is essential to enable them to make informed decisions, understand that there are purposes of those set out in the form about which they are free to accept or reject the its treatment, and that the acceptance of one purpose does not necessarily entail the acceptance of all. It is necessary that the interested person can know and find the ordered information, and that each of the purposes of the treatment has related information that corresponds to it (legal basis, retention periods, recipients, as well as the rest of the points established in art. .13 GDPR).

And, in this sense, the form object of complaint, would not comply with the requirement of transparency, and could not be considered as a legal basis for collecting an informed, free and specific consent.

2.4 About the guidelines of a new form model

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

In the allegations to the proposed resolution, the entity reiterates its request for a model of the informed consent form prepared by this Authority. In this respect, it is necessary to point out again that it is not the object of this resolution to propose a model form, and in any case, remember that this Authority has a public service to address any doubt or approach that may arise in the area of data protection, and there is also the possibility of requesting the issuance of a more specific opinion before the Legal Department. Also, add that on the website of the Authority the document "Data protection guidelines for educational centers" has been published, which contains detailed and specific information that can help to resolve any doubts in the field of the collection and processing of data in schools, as well as the "Guide for the fulfillment of the duty to inform in the RGPD", where guidelines are given to comply with the obligation to inform the interested persons, under of the principle of transparency.

Having said that, it should be noted that it is positively valued that the School has redone some sections of the new model form presented with the allegations of the initiation agreement, following the observations made in the resolution proposal. However, not in its entirety. In this respect, and taking into account what has been said in the previous paragraph, about the advisability that for a more exhaustive examination, the School addresses the public attention service or requests a more specific opinion before the Legal Advice, they are reproduced

here are those observations that have not been implemented in the new form model: it is necessary to remove from the form any reference to the possibility of collecting and processing biometric data of students for the control and access to the school canteen, given that such an action would violate the principle of legality in the treatment of special categories of data and the principle of minimization (as will be explained in section 2.6), and, with regard to the right to claim, indicate that it is necessary to refer to this Control Authority, in accordance with the established in article 3.f) of Law 32/2010, of October 1, of the Catalan Data Protection Authority, as already explained in section 2.1 of this resolution.

2.5 On the way to request and collect consent

The entity also states in its statement of objections that the consent obtained through the controversial form meets all the requirements of Article 6 of Organic Law 3/2018, of December 5, on protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD). That is to say, that the consent that is collected there is a manifestation of free, specific, informed and unequivocal will by which the processing of your personal data and/or that of the minors represented is accepted.

The definition of what must be understood as "consent of the interested party", is defined with the same terms, so article 6.1. of the LOPDGDD, as in article 4.11 of the RGPD, to which the first article refers. Thus, in order to understand this consent granted, the data protection regulations require a series of requirements to be met, which contrary to what the reported entity states, would not be given in the consents that are collected through its consent form.

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

First of all, this manifestation of will must be free. This element implies that the person must have the possibility to freely refuse to have their data processed, must have real choice and control, and cannot be considered to be free if the consent is linked to harmful consequences (recital 42 RGPD) or the provision of a service (art. 7.4 of the RGPD). In this regard, as already pointed out in section 2.3, the terms in which the controversial form has been drawn up do not allow to consider that the affected person has clear information to have real control over his personal data and/or that of minor children.

Also, to add, that in the section of "Consequences of the refusal to grant consent", it states that "The refusal to provide us with the data we ask for, will prevent us from being able to manage the obligations that bind us to you and may condition the your participation in some activities". Regarding this, the entity defends that it is a measure that only applies when it comes to activities that are not included in the economic concert and that, in no case, consent is linked to the provision of the agreed service. Here, the reported entity punctuates the end of said sentence, the lack of consent only conditions participation "in some activities". However, the fact is that the use of these indeterminate terms and the non-definition of the activities to which it refers, does not provide more information, especially if it is clarified precisely in the form itself.

Be that as it may, the terms in which this consequence is presented and can easily condition the granting of consent, especially considering that the group it refers to are minors. To all this, it should be added that at the end of the controversial form, there is the space where the School requests consent for the processing of the data in general terms - "I request and authorize the data controller to process all the information provided and the one that is drawn up later" - and links it with the acceptance of conditions - "the conditions contained in this document". Thus things, on the one hand, prevent the interested person from being free to choose which purposes he accepts or rejects, and on the other, that he can conclude that the provision of his consent is linked to all the treatment announced, thus subjecting the provision of the school's own educational services, subject to consent for other purposes. Despite the fact that the entity has stated that this does not happen, such a perception could certainly be generated in the recipient of the request. If consent is given in this situation, it can be presumed that it is not freely given (recital 43 GDPR).

Nor can we accept the School's statement regarding the fact that a separate form is made available to interested parties, through which they can waive the processing of personal data for any of the purposes set out in the referenced "Protection document of data: Alfa Card". A free consent cannot be considered granted, if in order to renounce a treatment that the interested person no longer wants to consent to, as a premise, he must first authorize it.

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

Consent must also be specific. Article 6.1.a) of the RGPD confirms that the consent of the affected person must be given "for one or several specific purposes", and that the person concerned has a choice in relation to each of them. The requirement that consent must be specific aims to ensure a degree of control and transparency, and in this sense is strongly linked to the requirement of informed consent. Regarding this, we refer to section 2.3 of this proposal where it has been explained in detail that the form does not include an informed or specific consent, given that it includes a single consent for a multiplicity of purposes, with different legal bases, and not it is presented as a request for consent for each of the purposes on which the affected person has the freedom to consent or not, making it difficult for the person from whom consent is requested, understanding and control over the data personal The request for consent must refer to specific treatments and for a specific, explicit and legitimate purpose (art. 5.1.b RGPD), without generic authorizations being possible.

Also, in the allegations in the proposed resolution, the School invokes article 6.2 of the LOPDGDD, to defend that several purposes can be authorized with a single consent. Regarding this, it must be said that the aforementioned article refers to the cases in which the treatment must be based on consent, and in this sense, the interested party must know clearly the purposes for which the processing will be carried out this consent, in order to comply with the requirements required by the article: "which is stated in a specific and unequivocal manner". Such precept would be applicable only in those cases in which consent must be granted as a legal basis for the treatment, and not in those cases in which the treatment can be found enabled by other legal bases, such as, for example, a law. That being the case, it should be noted that, in the controversial form, these requirements are not met, and that the data treatments collected there have different purposes and legal bases.

Nor can we accept the School's allegation that "there is only one data treatment, not several treatments", so it cannot be questioned that the School carries out more than one data treatment when it carries out the management of the different activities and the provision of school services, taking into account the definition of the concept of treatment in article 4.2 of the RGPD, to which we refer. On the other hand, it is also not accepted that, in the present case, the different purposes of the treatment share the same legal basis and that is why they are presented together. As has already been explained throughout this resolution, the form brings together different purposes of treatments, which are enabled by different legal bases, and should have been presented in this way, defining each of the purposes of the treatment and linking - it with the legal basis that belongs to it. This way, control is granted to the affected person over the treatments that he is free to consent to, and those that are legitimized by other legal bases other than the granting of his consent. In the specific cases raised by the School, such as, for example, the dissemination of images of students which, when they are activities carried out within the school, have as a legal basis consent, and when they are activities open to the public where the image is accessory, has as its legal basis Law 1/1982, of May 5, on civil protection of the right to honor, to personal and family privacy and to one's image, it should be noted that it is not a reason for

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

avoid clear wording that allows the interested person to have control over what they can consent to and what is enabled by law. And so, in the rest of the examples he presents.

In accordance with what has been set out, it is estimated that this allegation cannot succeed.

2.6 On the use of biometric data to access the school canteen

The accused entity adds that article 9.2 of the RGPD provides that biometric data can be processed when there is explicit consent from the affected person, and that in the present case the consent is collected through two consent documents, the controversial form "Document protection of data: Alfa Card" and a second specific form to authorize the recording of the fingerprint of the student who stays for lunch in the school canteen.

In this regard, the referenced forms, which were provided together with the allegations in the initiation agreement, set out the following, in relation to the processing of biometric data:

- Data protection document, Alfa Card: "To facilitate control of access to the dining room, a biometric access control has been installed. This device collects certain points of the fingerprint, but does not allow its digital reconstruction. This information will only be kept as long as you are a user of the service"

- Specific consent provision document: "We inform you
that the School has a management program in order to control at all times and in real time the students who stay for lunch in the dining room.
In order to implement it, we need to scan your children's fingerprints.
The actual fingerprint is NEVER stored at the School. A numerical pattern is registered which is what the system uses to recognize the student.
Accordingly, we would need your authorization to record your child's fingerprint."

First of all, point out that the installation of an access control system to the school canteen based on the collection and processing of a fingerprint pattern of the boys and girls, the purpose of which is to "recognize the 'student', involves the processing of their personal data, given that personal data must be understood as "all information about an identified or identifiable natural person ("the interested party")" (art. 4.1 of the RGPD). In the present case, it is also a matter of data that must be qualified as biometric data, given that in accordance with article 4.14 RGPD they have this consideration when they have been "obtained from a technical treatment specific, relating to the physical, physiological or behavioral characteristics of a natural person that allow or confirm the unique identification of said person, such as facial images or fingerprint data". In this regard, it should be noted that this Authority has had the opportunity to examine in different opinions the nature of biometric data such as fingerprints,

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

among which, the opinion CNS 21/2020, in which it is made clear: "All in all, it can be said that biometric data, when subjected to a specific technical treatment with the purpose of identifying (recognize) or to uniquely authenticate (verify) a natural person, must be considered a special category of personal data and, therefore, that its treatment must be adapted to the specific regime established for this type of data in data protection legislation".

This means that, in accordance with Article 9.1 RGPD, the specific regime provided for the special categories of the RGPD must be applied to data relating to fingerprints. So things are, the processing of biometric data requires not only the concurrence of one of the legal bases established in article 6 of the RGPD but, in addition, it must meet one of the exceptions provided for in the article 9.2 of the RGPD that allows lifting the general ban on the processing of this type of data, including explicit consent, invoked by the School in its allegations.

However, the consent given must, in addition to being explicit, also comply with the characteristics established in article 4.11 of the RGPD. Regarding the problems posed by the "Data protection document: Alpha Card" form to understand it as a form that can collect a valid and duly informed consent, it is considered that this issue has already been addressed in previous sections, to which we refer each other To this, it must be added that with the terms in which the specific form for the processing of biometric data has been drawn up, it is inferred that the provision of the dining service to students is subject to granting consent to record their fingerprints. The data controller does not offer in any of the two forms (neither the general nor the specific) an alternative to those parents or legal guardians who do not agree that the provision of the school canteen service involves consenting to the processing of these data deserving of special protection. In this sense, it should be remembered that article 7.4 of the RGPD, relating to the conditions for consent, establishes the following: if, among other things, the execution of a contract, including the provision of a service, is subject to consent to the processing of personal data that are not necessary for the execution of said contract". In this regard, we cannot accept the School's argument that the fact of not knowing the identity of the person making the complaint did not allow them to offer an alternative, therefore, the alternative must be stated in the form itself, not under express request.

Having said that, note that the eventual obtaining of this consent would not, in any case, legitimize the processing of excessive or disproportionate data, in accordance with the provisions of article 5.1.c) of the RGPD, which regulates the principle of minimization 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 this respect, the principle of minimization implies that if a certain purpose can be achieved without having to process data of special categories, this option must prevail over other options that do involve the processing of these types of data. About this, the School in its response to

information request, presented the results of an impact assessment, according to which it had been concluded that the access control system was the most efficient system to ensure that the student used the dining service, and that the risk on data processing, was the ordinary and normal of all internal data processing. In this regard, point out that, based on the principle of minimization, it is considered that there are other less intrusive means in the right to the protection of students' personal data that, a priori, can be equally effective in controlling access to the school canteen , as for example it could be the control of access through a dining card, and that it cannot be accepted that the current control system has a place within the principle of minimization.

At this point, it should be noted that the School invokes legal report 65/2015 of the AEPD. The report concludes that a fingerprint recognition system for students in the school cafeteria would be in line with the principle of proportionality, but as long as the means of verification (algorithm of the student's fingerprint) is under the power of the student himself, and are not incorporated into the system. In this regard, he proposes a system in which the information collected and stored in the system itself would be incorporated into a smart card held by the student who, to access the facilities, would have to use the card and at the same time leave its mark on the reader. This is not the case in the present case, in which the information is not under the power of the student and the biometric data collection system differs from that presented in the AEPD report.

Having established the above, it is not superfluous to remember that the Catalan Data Protection Authority and the AEPD are related based on the principle of collaboration, without any kind of hierarchy or dependency between them, so that the decisions or AEPD reports do not bind this Authority, without prejudice to existing instruments for the purpose of coordinating criteria. On this, it should be added that the opinion of the AEPD was issued before the entry into force of the RGPD, and therefore, when biometric data did not yet legally have the special category of personal data (art. 9 RGPD).

On the other hand, the School also cites as a possible legal basis to legitimize the treatment of the fingerprint biometric data, the risk prevention law in the sense of knowing "how many people are in a certain place" "to facilitate the 'effective evacuation in case of emergency', and the existence of a contractual relationship between the School and the families, to whom the School must justify "that underage users have attended the dining service ". In relation to this, it should be noted that since none of the exceptions provided for in Article 9.2 RGPD apply, the invocation of any legal basis provided for in Article 6 RGPD is not sufficient to lift the prohibition of the processing of biometric data provided for in article 9.1 RGPD. What's more, according to what has been said, it also cannot be accepted that the center's arguments in relation to the aforementioned legal bases can justify the current biometric access control system in the school canteen, given the existence of alternatives available to achieve the purpose pursued, less intrusive and that offer more guarantees for the right to data protection.

In accordance with what has been set out, it is estimated that this allegation cannot succeed.

3. In relation to the facts described in point 1 of the proven facts section, relating to the form "Document on protection of data Card-Alfa", it is necessary to refer to article 12.1 of Regulation (EU) 2016/679 of the Parliament European and Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereafter, RGPD), which provides for the following:

"The person responsible for the treatment will take appropriate measures to provide the interested party with all the information indicated in articles 13 and 14, as well as any communication pursuant to articles 15 to 22 and 34 relating to the treatment, in a concise, transparent, intelligible and easily access, with a clear and simple language, in particular any information directed at a child. The information will be provided in writing or by other means, including, if appropriate, by electronic means. When requested by the interested party, the information may be provided verbally as long as the identity of the interested party is proven by other means."

As indicated by the instructing person, during the processing of this procedure the fact described in point 1 of the proven facts section, which is considered constitutive of the offense provided for in article 83.5.b) has been duly proven of the RGPD, which typifies as such the violation of "the rights of the interested parties pursuant to articles 12 to 22"

The conduct addressed here has been included as a minor infraction in article 74.a) of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), in the following form:

> "a) Breach of the principle of transparency of information or the right to information of the affected person by not providing all the information required by articles 13 and 14 of Regulation (EU) 2016/679"

At this point, it is necessary to indicate that the facts described in point 1 of the proven facts section would not only constitute the infringement provided for in article 83.5.b) of the RGPD, but that, as has been exposed throughout this resolution, the form used by the School to collect consent for the processing of personal data would also violate
the principle of legality provided for in article 5.1.a) of the RGPD, because it is not an instrument through which it is allowed to give free and specific consent, and consequently, it would constitute a second infraction provided for in article 83.5.a) of the RGPD, which typifies as such the violation of "basic principles of treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9" .

Now, in this specific case, taking into account the direct relationship between the lack of transparency of the form and the violation of the principle of legality, since the lack of the former has meant that the consent collected with the form violates the principle of legality, it is considered appropriate to impute a single infringement for the facts described in point 1 of

the section on proven facts, typified in article 83.5.b), as a violation of "the rights of the interested parties pursuant to articles 12 to 22", in relation to the breach of the principle of transparency of information , considered as a minor infringement in article 74.a) of the LOPDGDD.

4. With regard to the fact described in point 2 of the proven facts section, regarding the control of attendance in the School canteen based on the collection and processing of a biometric data (fingerprint) of the students, it is necessary refer, to article 5 of the RGPD, of the principles relating to the treatment, on the one hand, to article 5.1.a) in relation to article 9 of the RGPD relating to the principle of legality in the treatment of special categories of personal data, and on the other, in article 5.1.c), relating to the principle of data minimization.

Firstly, article 5.1.a) of the RGPD regulates the principle of legality determining that the data will be "treated in a lawful manner (...)".

The processing of biometric data requires not only the concurrence of one of the legal bases established in article 6 of the RGPD but, in addition, one of the exceptions provided for in article 9.2 of the RGPD must meet which allows lifting the general prohibition of the processing of this type of data established in article 9.1 of the RGPD. In this respect, article 9.2 of the RGPD provides that the prohibition of its treatment does not apply if, among other circumstances, the following occurs:

> "a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;
>
> (…)"

And, secondly, article 5.1.c) of the RGPD regulates the principle of minimization establishing that personal data will be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated."

In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 2 of the proven facts section constitutes two infringements, as provided for in article 83.5.a) of the RGPD, which typifies as such, the violation of the "basic principles of treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9", which include both the principle of minimization (art.5.1. c RGPD), as the principle of lawfulness of the processing of special categories of data (art. 5.1.ai 9 RGPD).

In turn, this behavior has been included as a very serious infringement in article 72.1.a) and article 72.1.e) of the LOPDGDD), in the following form:

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

"a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/679.
(...)
e) The processing of personal data of the categories referred to in article 9 of Regulation (EU) 2016/679, without any of the circumstances provided for in the aforementioned precept and article 9 of this Organic Law occurring ."

In the present case, however, it is considered that these two behaviors due to their link should only be sanctioned for the violation of the principle of legality, since the violation of the principle of minimization would be subsumed by the first violation.

5. As the School is a chartered school, the general penalty regime provided for in article 83 of the RGPD applies.

Article 83.5 of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 20,000,000 euros at most, or in the case of a company, an amount equivalent to 4% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount. This, without prejudice to the fact that, as an additional or substitute, the measures provided for in clauses a) ah) ij) of Article 58.2 RGPD may be applied.

1.1. Regarding the proven fact 1st (form does not meet the characteristics provided for in article 12.1 of the RGPD)

In the present case, as explained by the investigating person in the resolution proposal, the possibility of replacing the administrative fine with the reprimand provided for in article 58.2.b) RGPD should be ruled out, given that the fact that the "Alfa Card" form does not meet the characteristics provided for in article 12.1 of the RGPD affects the essence of collecting duly informed consent for the processing of personal data of the affected persons. It should also be borne in mind that this lack of transparency conditions the validity of the consent granted through said form.

Once the application of the reprimand as a substitute for the administrative fine has been ruled out, the amount of the administrative fine to be imposed must be determined.

According to what is established in articles 83.2 RGPD and 76.2 LOPDGDD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, as indicated by the investigating person in the proposed resolution, the sanction should be imposed of 2,000 euros (two thousand euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, the concurrence of the following causes is observed:

- The lack of intentionality (83.2.b RGPD).
- The non-existence of a previous infringement committed by the School (83.2.e RGPD).
- The degree of cooperation with the Authority with the aim of remedying the infringement and mitigating the possible adverse effects of the infringement - which is reflected by the presentation of a new consent request form model. (83.2.f GDPR).
- The lack of benefits as a result of the commission of the offense (arts. 83.2.k RGPD and 76.2.c LOPDGDD).

On the contrary, as aggravating criteria, the following elements must be taken into account:

- Affecting the rights of minors (art.76.2.f LOPDGDD)
- Linking the activity of the infringing entity to the practice of processing personal data (arts. 83.2.k RGPD and 76.2.b LOPDGDD).
- The existing link between the principles of transparency and legality that affects the validity of the consent, when a form is used that does not guarantee the transparency of the information, and consequently affects the legal basis of the treatment. (art. 83.2.k RGPD).

4.2 Regarding the 2nd proven fact (the collection and processing of biometric data)

In the present case, it is also necessary to rule out the possibility of replacing the sanction of an administrative fine with the sanction of reprimand provided for in article 58.2.b) RGPD, given that the imputed infraction affects the processing of special categories of data of minors age

Once the application of the reprimand as a substitute for the administrative fine has been ruled out, it is necessary to determine the amount of the administrative fine sanction that corresponds to impose In accordance with article 83.2 of the RGPD and the principle of proportionality, as proposed by the instructing person in the proposed resolution, a penalty of 4,000 (four thousand euros) should be imposed. This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, the concurrence of the following causes is observed:

- The lack of intentionality (83.2.b RGPD).
- The non-existence of a previous infringement committed by the School (83.2.e RGPD).
- The lack of benefits as a result of the commission of the offence, taking into account, specifically, that the infringing conduct did not bring the School any financial benefit (arts. 83.2.k RGPD and 76.2.c LOPDGDD).

On the contrary, as aggravating criteria, the following elements must be taken into account:

- The nature and seriousness of the infringement (art. 83.2.a RGPD).

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

- The categories of personal data affected by the breach - given that affects biometric data - (art.83.2.g RGPD).
- Affecting the rights of minors (art.76.2.f LOPDGDD)
- Linking the activity of the infringing entity to the practice of processing personal data (arts. 83.2.k RGPD and 76.2.b LOPDGDD).

6. Given the findings of the violations provided for in art. 83 of the RGPD in relation to privately owned files or treatments, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, empowers the director of the Authority for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected. By virtue of this power, the School should be required to amend the model form as soon as possible, and in any case within 10 days from the day after the notification of this resolution request for consent with the terms indicated in section 2.4 of this resolution, and disable access control to the school canteen through the collection and processing of biometric data. It should be noted that persistence in maintaining the access control system to the dining room through the collection and processing of biometric data, or the non-modification of the form, are aggravating criteria that may be taken into account in the event in the event that, later on, the School is again considered the subject of a new administrative sanctioning case.

Once the corrective measure described has been adopted within the period indicated, within the following 10 days the School must inform the Authority, without prejudice to the Authority's inspection powers to carry out the corresponding checks.

resolution

For all this, I resolve:

1. Impose on the Escola Sant Gervasi Cooperativa the sanction consisting of a fine of 2,000.- euros (two thousand euros), as responsible for an infringement provided for in article 83.5.b) in relation to article 12 , both of the RGPD.

2. Impose on the Escola Sant Gervasi Cooperativa the sanction consisting of a fine of 4,000.-euros (four thousand euros), as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1 .a) and 9, all of the RGPD.

3. Require the Sant Gervasi Cooperativa School to adopt the corrective measures indicated in the 6th legal basis and certify to this Authority the actions taken to comply with them.

4. Notify this resolution to the Sant Gervasi Cooperativa School.

5. 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.

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

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 what they provide
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,