apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 38/2020, referring to Viladecavalls Town Council.

Background

1. On 12/19/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against Viladecavalls Town Council, on the grounds of an alleged breach of the regulations on protection of personal data. Specifically, the complainant stated that the City Council had implemented a biometric signature system in the registration office that could contravene 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 (hereafter, RGPD). The complainant provided various documentation.

2. The Authority opened a preliminary information phase (no. IP 341/2019), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 10/01/2020, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the complaint. Thus, the following was established, among others:

- That the following news had been published on the website of Viladecavalls Town Council on 09/10/2019: "NEW STEP IN THE DIGITALIZATION OF THE ADMINISTRATION WITH THE IMPLEMENTATION OF THE BIOMETRIC SIGNATURE".
- That in this news it was reported that "The biometric signature has been implemented in the Citizen Service Office, located on Carrer Antoni Soler i Hospital, with two devices (tablets), and a progressive deployment to other offices is planned and municipal services." And it was also indicated that "Thanks to the new system, citizens will be able to register instances and documentation in person without having to use electronic certificates."

- That the news was illustrated with the image of one of the two biometric signature devices located in the registration office of Viladecavalls Town Council. In turn, it was found that the device in the image and its software would have been supplied by the company Validated ID, SL.

4. On 01/20/2020, also during this preliminary information phase, the reported entity was required to, among others, specify which of the foreseen circumstances

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to article 9.2 of the RGPD to be able to treat special categories of data would apply in the present case; if an alternative to the biometric signature was offered; whether a data protection impact assessment had been carried out; as well as whether the corresponding data processor contract had been signed for the implementation of the electronic signature.

5. On 01/31/2020, the delegated entity for data protection of Viladecavalls Town Council responded to the above-mentioned request in writing in which it stated the following:

- That the biometric signature system implemented at Viladecavalls Town Hall allowed the unique identification of the signatories.
- That in the signature collection process the following characteristics were collected: the pressure, the angle or inclination of the writing, the speed and acceleration of the pointer, the formation of the letters and the direction of the strokes the signature Data was coded according to ISO/IEC 19794-7 and ISO/IEC 29109-7:2011.
- That the legitimate basis for processing the biometric signature was the consent of the affected persons, according to article 6.1.a) of the RGPD. This signature system had a mechanism to facilitate information and collect explicit consent, but this functionality was not implemented when this system was launched.

- That the processing of data of special categories, as is the case of the biometric signature, required the explicit consent of the person concerned, in accordance with article 9.2.a) of the RGPD.
- That the Viladecavalls City Council offered the following channels for face-to-face or telematic processing, accepting any of the forms of identification and signature of interested persons, recognized in articles 10 and 11 of the LPAC:
  - The face-to-face processing at the Office of Citizen Assistance (hereafter, OAC), where the citizens have paper forms.
  - The online presentation at the ICT point of the OAC, with the possibility of the public assistance manager accompanying the person interested in the presentation of the documents and in obtaining the IdCat or the mobile IdCAT.
  - The biometric signature system. The manager filled out the form directly in the computer program, according to what the citizen stated, and presented the final document on the electronic tablet for validation and signature by the interested person.

- That the Viladecavalls City Council had not carried out an impact assessment relating to the data protection, in relation to biometric signature processing.
- That by mayoral decree 77/2020, dated 01/24/2020, it had been agreed to suspend the use of the biometric signature system, as long as the corresponding impact assessment was not carried out.
- That the right to information about the processing of the signature had not been exercised biometric

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- That Viladecavalls City Council contracted the services offered by the company Validated ID, SL through PEAKWAY, SL, for the implementation of the biometric signature system.

Along with the written response, a copy of the data processor contract was provided.

6. On 08/07/2020, the director of the Catalan Data Protection Authority agreed to start a disciplinary procedure against the Viladecavalls Town Council for 3 alleged infringements: an infringement provided for in article 83.5.a) in relation to articles 5.1. and 9; another offense provided for in article 83.5.b) in relation to article 13; and a third offense provided for in article 83.4.a) in relation to article 35; 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 07/14/2020.

7. On 07/24/2020, the data protection representative entity of Viladecavalls City Council presented the allegations in the initiation agreement.

8. On 14/10/2020, the person instructing this procedure formulated a proposed resolution, for which it was proposed that the director of the Catalan Data Protection Authority admonish the Viladecavalls Town Council as responsible for three infringements: an infringement provided for in article 83.5.a) in relation to articles 5.1 .oh 9; another offense provided for in article 83.5.b) in relation to article 13; and a third violation provided for in article 83.4.a) in relation to article 35, all of them of the RGPD.

This resolution proposal was notified on 10/20/2020 and a period of 10 days was granted to formulate allegations.

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

proven facts

1. Viladecavalls City Council implemented a biometric signature system at the OAC that allowed the unique identification of the signatories, in order to "register instances and documentation in person without having to use electronic certificates." This system was operational until 01/24/2020.

Through this system, Viladecavalls City Council processed biometric data without any of the circumstances foreseen in article 9.2 RGPD allowing the processing of special categories of data.

In this regard, by means of a letter dated 31/01/2020, the City Council's delegated entity for data protection informed that the circumstance that would allow the processing of special categories of data was the explicit consent of the affected person, but it was admitted that during its implementation it had not been obtained.

2. In the collection of biometric data through said signature system, the City Council did not provide the information provided for in article 13 of the RGPD.

3. In relation to the processing of biometric data itself, the City Council did not carry out an impact assessment related to data protection (hereafter, AIPD) prior to the start of the processing.

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of DT 2a of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

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

In its statement of objections to the initiation agreement, Viladecavalls City Council claimed that it carried out the necessary actions for the suspension of the use of the biometric signature system in the OAC and that the 'impact assessment related to data protection, in relation to this treatment, was in the finalization phase.

Well, as the instructing person indicated in the resolution proposal, it must be made clear that the accused entity did not question the facts that were imputed to it in the initial agreement.

Having said that, it is also necessary to point out that the adoption of measures to correct the effects of the infringements do not distort the imputed facts, nor do they change their legal classification.

Having established the above, as indicated in the proposed resolution, the action of the Viladecavalls Town Council must be positively assessed, which following the request that the Authority made to it in the prior information phase, agreed in date 24/01/2020 the suspension of the use of the biometric signature system used at the OAC.

However, given that the statement of objections to the initiation agreement inferred the will to reinstate said biometric signature system once the impact assessment on data protection has been carried out, it should be pointed out that in the case of

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if the result of the evaluation results in a high-risk situation, a prior consultation with the Authority should be considered in accordance with the provisions of article 36 of the RGPD.

All this, without prejudice to the possibility of also consulting the Authority on the adequacy of the biometric signature system to the regulations on data protection, even if the result of the impact assessment is not enforceable.

3. In relation to the facts described in point 1 of the proven facts section, it is necessary to go to article 5.1.a) of the RGPD, which regulates the principle of legality of the data determining that the personal data will be " treated lawfully (...)".

For its part, article 9.2 of the RGPD, regarding the treatment of special categories of data, provides that the prohibition of their treatment does not apply if one of the following circumstances is present:

> "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; b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the
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> Member States or a collective agreement in accordance with the Law of the Member States that establish adequate guarantees of respect for the fundamental rights and interests of the interested party; c) the treatment is necessary to protect the vital interests of the interested party or another natural person, in the event that the interested party is not physically or legally able to give their consent; d) the treatment is carried out, within the scope of its legitimate activities and with due guarantees, by a foundation, an association or any other non-profit organization, whose purpose is political, philosophical, religious or trade union, provided that the treatment refers exclusively to current or former members of such organizations or persons who maintain regular contact with them in relation to their purposes and provided that personal data is not communicated outside of them without the consent of the interested parties; e) the treatment refers to personal data that the interested party has made manifestly public; f) the treatment is necessary for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function;

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> g) the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party; h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a healthcare professional and without prejudice to the conditions and guarantees contemplated in section 3; i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or health products, on the basis of the Law of the Union or of the Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy, j) the treatment is necessary for purposes of archiving in public interest , purposes of scientific or historical research or statistical purposes, in accordance with article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the fundamental interests and rights of the interested party."

As indicated by the person instructing, during the processing of this procedure the fact described in point 1 of the proven facts section, which is constitutive of the infraction provided for in article 83.5.a) has been duly proven RGPD, which typifies the violation of the "basic principles of treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9", which include the principle of lawfulness of the treatment of special categories of data (articles 5.1.ai 9 RGPD).

The conduct addressed here has been included as a very serious infringement in article 72.1.e) of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter , LOPDGDD), in the following form:

> "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 Law organic."

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4. With regard to the fact described in point 2 of the proven facts section, it is necessary to go to sections 1 and 2 of article 13 of the RGPD, which establish the following:

"1. When personal data relating to an interested party is obtained, the data controller, at the time it is obtained, will provide all the information indicated below:

a) the identity and contact details of the person in charge and, where appropriate, of their representative;
b) the contact details of the data protection officer, if applicable;
c) the purposes of the treatment for which the personal data is intended and the legal basis of the treatment;
d) when the treatment is based on article 6, section 1, letter f), the legitimate interests of the person in charge or of a third party;
e) the recipients or the categories of recipients of the personal data, as the case may be;
f) in its case, the intention of the person in charge to transfer personal data to a third country or international organization and the existence or absence of an adequacy decision by the Commission, or, in the case of the transfers indicated in articles 46 or 47 or article 49, section 1, second paragraph, refers to the adequate or appropriate guarantees and the means to obtain a copy of these or the fact that they have been provided.
2. In addition to the information mentioned in section 1, the controller will provide the interested party, at the time the personal data is obtained, the following information necessary to guarantee a fair and transparent data processing:

a) the period during which personal data will be kept or, when not possible, the criteria used to determine this period;
b) the existence of the right to request from the person responsible for the treatment access to the personal data relating to the interested party, and its rectification or deletion, or the limitation of its treatment, or to oppose the treatment, as well as the right to the portability of the data ;
c) when the treatment is based on article 6, section 1, letter a), or article 9, section 2, letter a), the existence of the right to withdraw consent at any time, without it affecting the legality treatment based on consent prior to its withdrawal;

d) the right to present a claim before a control authority;
e) if the communication of personal data is a legal or contractual requirement, or a necessary requirement to sign a contract, and if the interested party is obliged to provide personal data and is informed of the possible consequences of not providing such data;

f) the existence of automated decisions, including the creation of profiles, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information on the logic applied, as well as the importance and expected consequences of said treatment for the person concerned."

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In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 2 of the section on proven facts constitutes the violation provided for in article 83.5.b) of the RGPD, which typifies the violation of "the rights of interested parties pursuant to articles 12 to 22", among which is the right to information provided for in article 13 RGPD.

The conduct addressed here has been included as a very serious infraction in article 72.1.h) of the LOPDGDD, in the following form:

> "h) The omission of the duty to inform the affected person about the processing of their personal data in accordance with the provisions of articles 13 and 14 of Regulation (EU) 016/679 and 12 of this Organic Law."

5. With regard to the fact described in point 3 of the proven facts section, it is necessary to refer to sections 1 to 4 of article 35 of the RGPD, which establish the following:

> "1. When it is likely that a type of treatment, in particular if it uses new technologies, by its nature, scope, context or purposes, entails a high risk for the rights and freedoms of physical persons, the person responsible for the treatment will, before the treatment, an evaluation of the impact of the processing operations on the protection of personal data. A single evaluation may address a series of similar treatment operations that involve similar high risks.
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> 2. The data controller will seek the advice of the data protection officer, if appointed, when carrying out the data protection impact assessment.
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> 3. The data protection impact assessment referred to in section 1 will be required in particular in the event of:
> a) systematic and comprehensive evaluation of personal aspects of natural persons that is based on automated processing, such as the creation of profiles, and on the basis of which decisions are taken that produce legal effects for natural persons or that significantly affect them in a similar way;
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> b) large-scale processing of the special categories of data referred to in article 9, paragraph 1, or of personal data relating to convictions and criminal offenses referred to in article 10, or
> c) large-scale systematic observation of a public access area.
> 4. The control authority will establish and publish a list of the types of processing operations that require an impact assessment related to data protection in accordance with section 1. The control authority will communicate those lists to the Committee in question article 68."

In accordance with the provisions of article 35.4 of the RGPD, the Authority published on 06/05/2019 the "list of types of data processing that require impact assessment

relating to data protection" prior to its commencement. As indicated in said document, when the treatment meets two or more of the criteria included in said list, in principle it may be necessary to make an AIPD. The more criteria the treatment in question meets, the greater the risk this treatment entails and the greater the certainty of the need to carry out an AIPD.

In the present case, it is considered that the treatment met, at least, the following criteria:

- Treatments that involve the use of biometric data for the purpose of identifying unique way to a natural person (criterion number 5).
- Treatments that involve the use of new technologies or an innovative use of established technologies, including the use of technologies on a new scale, with a new objective or combined with others, so that it involves new forms of collection and use of data with risk for the rights and freedoms of people (criterion number 10).

In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 3 of the section on proven facts constitutes the violation provided for in article 83.4.a) of the RGPD, which typifies the violation of "the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43", among which there is that provided for in article 35 RGPD.

In turn, this conduct has been included as a serious infraction in article 73.t) of the LOPDGDD, in the following form:

> "t) The processing of personal data without having carried out the assessment of the impact of the processing operations on the protection of personal data in the cases in which it is required."

6. 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.
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> 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:

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

Given, as previously stated, that the City Council's statement of objections to the initiation agreement inferred the intention to reinstate said biometric signature system once the impact assessment on data protection, the Viladecavalls City Council should be required so that, in the event that it re-establishes the controversial system and does not previously make a query to the Authority about it (either voluntarily or because necessary in accordance with article 36 of the RGPD), provide a copy of the data protection impact assessment that has been carried out before starting said treatment; certify how the right to information is effective for the affected persons,

and how explicit consent is obtained for the processing of special categories of data.

resolution

For all this, I resolve:

1. Admonish the Viladecavalls City Council as responsible for three infringements: an infringement provided for in article 83.5.a) in relation to articles 5.1.a and 9; another offense provided for in article 83.5.b) in relation to article 13; and a third violation provided for in article 83.4.a) in relation to article 35, all of them of the RGPD.

2. Request the Viladecavalls City Council to, if applicable, certify the adoption of the corrective measures indicated, and in the terms set forth, in the 6th legal basis.

3. Notify this resolution to Viladecavalls Town Council.

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

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.

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 of

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replacement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with what they foresee 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,