

## File identification

Resolution of sanctioning procedure no. PS 40/2020, referring to Campdevàrol Town Council

## Background

1. On 27/08/2019, the Catalan Data Protection Authority received a letter from a person who filed a complaint against Campdevàrol City Council, on the grounds of an alleged breach of the regulations on protection of personal data. In particular, the complainant stated that on 22/08/(...) he received the notification of the "Mayor's resolution agreeing on rebates on water and garbage fees (...)" (Decree of Mayor's Office (...)- (...), by which it was decided to approve or deny, for the year (...), the inclusion of a series of people identified by first and last name (( ...)), including the person reporting here, in the list of social water rates and the bonus of 95% of the garbage fee. In view of the above, the complainant expressed his dissatisfaction with the fact that in the notification of the resolution "all the people who have received the bonus and those who have not" are listed.

The person making the complaint provided a copy of the "Mayor's resolution agreeing on water and garbage fee bonuses (...)" (Mayor's Decree (...)- (...)).

2. The Authority opened a preliminary information phase (No. IP 2340/2019), in accordance with the provisions of Article 7 of Decree 278/1993, of November 9, on the sanctioning procedure for 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 09/26/2019 the reported entity was required to report on what is the legal basis that would legitimize that in the notification of the "Mayor's Resolution of agreement on fee bonuses of water and garbage (...)", practiced by the City Council, the identity of all the people whose inclusion in the list of bonuses on receipts for the supply service has been approved or denied of water and the fee for home collection.

4. On 10/10/2019, the City Council responded to the aforementioned request in writing in which it stated the following:

- That "the usual procedure for notification of all resolutions of the Mayor's Office, as well as those referring to the approval of bonuses on receipts for the water supply service and the fee for home collection of urban solid waste , are carried out individually for each interested person, excluding the data of the rest

of people listed in the resolutions and is done by the means established in the common procedure regulations, usually electronically, or by certified administrative mail."

- That "In the reported case, the entire referenced Mayor's Decree, complete with the list of persons interested in the procedure (name and surname), was erroneously inserted into the postal envelope in which the notification was sent, without to the notification protocol established by the Administrative Services of the City Council, according to which, as shown in previous files processed in previous years, only the resolutions of the Mayor's Office are notified individually, to each interested person, and only , record the data relating to each individual (..)".
- That "the information has not been communicated publicly to a discriminated group of interested parties by means of a digital official newspaper or bulletin or on an electronic board (...)".
- That "all the people included in the list hold the status of interested parties, in accordance with article 4 of Law 39/2015 (...)"
- That "these people, by virtue of Article 53 of Law 39/2015, have the "right to access and obtain a copy of the documents contained in the aforementioned procedures", so they would have the right to know the Mayor's Decree in its entirety ."

The reported entity attached various documentation to the letter.

5. On 07/13/2020, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against Campdevàrol City Council for an alleged violation provided for in article 83.5.a), in relation to article 5.1.f); 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 07/17/2020.

6. On 31/07/2020, the City Council made objections to the initiation agreement. The accused entity provided various documentation with its letter, in particular, the mayor's decrees on water and garbage tax rebates corresponding to the years (...), and a copy of the model of the individual notifications that were made to the beneficiaries of those bonuses in those years. Also, the certificate of the agreement by which the hiring of an external company was resolved as the entity's data protection delegate.

7. 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 Campdevàrol City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1 .f), all of them from the RGPD.

This resolution proposal was notified on 21/10/2020 and a period of 10 days was granted to formulate allegations.

8. On 04/11/2020, the accused entity presented a statement of objections to the proposed resolution.

#### proven facts

The City Council of Campdevàrol, on 22/08/(...), notified the person denouncing the "Mayor's resolution of agreement on rebates on water and garbage fees (...)" (Mayor's Decree (...)- (...), by which it was decided to approve or deny, for the year (...), the inclusion of a series of people identified by name and surnames ((...)), in the list of social water rates and the 95% bonus of the garbage rate. The complainant was identified in the list, among other beneficiaries of said bonus. In this regard, it should be borne in mind that information relating to the income level of the affected persons is inferred from the status of beneficiary or not of said bonus.

#### 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 lack of assessment of the documents provided

The reported entity invokes article 89.3 of the LPAC, and states that in the proposed resolution of this sanctioning administrative procedure, there is no pronouncement in relation to the documentation provided along with the allegations of the agreement d 'initiation, referring, specifically, to the mayor's decrees on water and garbage tax rebates corresponding to the years (...), and copy of the model of the individual notifications that were made to the beneficiaries of the said bonuses in those years.

Nor from the certificate of the municipal agreement in which, among others, it is decided to appoint a company as the entity's data protection delegate.

In this respect, the entity states that with said documentation, and also with the certificate certifying that the City Council has a data protection delegate, it wanted to make it clear that the City Council's usual way of acting is It complies with the data protection regulations and the common administrative procedure

Well, regarding this, it should be noted that the referenced documentation was incorporated into the file, as indicated in the 6th legal antecedent of the proposed resolution, and also that of this resolution. However, it should be emphasized that this is documentation that does not refer to the facts that are the subject of the resolution of the present procedure, which, it should be remembered, are limited to the notification of the "Mayor's resolution agreeing on bonuses of water and garbage rates (...), and not to notifications from previous years. In this sense, it must be said that the legal foundations of the resolution proposal focused on the analysis of the facts proven in this procedure, and not on how the practice of notifications was carried out in previous years or whether the entity had a data protection officer. This, without prejudice to pointing out that said documentation was indeed taken into account when determining that it was not necessary to propose corrective measures to the entity to prevent in the practice of future notifications could again violate the right to data protection, since the documentation verified that the notifications of previous years would have been correct So things are, without prejudice to the fact that this Authority positively evaluates any action of the entity aimed at complying with the data protection regulations, it is not appropriate to assess in this resolution the way in which the notifications of previous years were made effective or the fact that a data protection delegate is available, given that, as indicated by the entity itself, these are facts "immediately preceding the facts that are the subject of controversy in the management of such notifications", and therefore, not are the subject of the facts imputed here.

## 2.2 About the responsibility of the City Council

In the 2nd section of its statement of objections, the accused entity states that in the resolution proposal, when a response is given to the entity's allegation that qualifies the proven facts as a specific error "of human character" unintentional, the City Council's negligence is linked "solely to one parameter of a single result, the receipt at the hands of the accused of the controversial list", making an assessment of a solely objectivist type, avoiding any assessment of fault .

Well, regarding this, it is considered that the response that was given to the referenced allegation, regarding the eventual concurrence of an unintentional error in the commission of the imputed facts, was sufficiently explained that the intention was not constitutes a necessary requirement for a conduct to be considered guilty, and that in the present case, the imputed facts derive from the lack of diligence in the action of the City Council, which was not sufficiently diligent when notifying the "Mayor's resolution of agreement on water and garbage tax rebates (...)" . In this sense, it cannot be overlooked, as indicated by the instructing person, that the fact that the controversial list included in the notification of the resolution reached the hands of the person here reporting constitutes a

an element that in itself evidences the City Council's negligence when making the controversial notification and also with the custody of the personal data of the affected persons. Well, in the event that the person in charge of the notification had acted with the required diligence, access to the personal data of the person reporting here by unauthorized third parties would not have occurred.

In this regard, it is considered appropriate to reproduce here what was collected in the proposed resolution in relation to the principle of guilt. On this, this Authority has recalled in several resolutions (for all, the resolution of sanctioning procedure no. PS 52/2012, also cited by the entity in its pleadings) the jurisprudential doctrine on the principle of guilt, both of the Supreme Court and of the Constitutional Court. According to this doctrine, the sanctioning power of the Administration, as a manifestation of the "ius puniendi" of the State, is governed by the principles of criminal law, and one of its principles is that of guilt, incompatible with a regime of objective responsibility without fault. In this sense, the Supreme Court in several rulings, including those of 15/04/2016 and 24/11/2011, refers to the doctrine of the Constitutional Court when it quotes verbatim "objective responsibility does not fit in the scope of administrative sanctions or without fault, doctrine that is reaffirmed in sentence 164/2005, of June 20, 2005, under which the possibility of imposing sanctions for the mere result is excluded, without proving a minimum of culpability, even for mere negligence". In this sense, he considers that in order to attribute responsibility for the offenses committed to the author, the element of fault must be present, which includes actions or omissions committed due to "mere negligence".

Also the National Court, in the Judgment of 10/30/2017, precisely in matters of personal data protection, indicated, citing what it had already declared in previous judgments (for all, the judgment of 11/12/2010), the following: "But, as we have repeatedly been affirming in this matter, the sanctions do not require intentionality or malice but mere carelessness or lack of diligence is sufficient; in the words of this Court "the simple negligence or non-fulfilment of the duties that the Law imposes on the persons responsible for files or data processing is enough to exercise extreme diligence...", and this, even if no economic gain was obtained".

Likewise, the judgment of the Supreme Court of 25/01/2006, also issued in the area of data protection, is based on the required diligence and establishes that intentionality is not a necessary requirement for a conduct to be considered guilty. Regarding the degree of diligence required, the SAN of 14/12/2006 declared: "the Supreme Court considers that imprudence exists whenever a legal duty of care is neglected, that is, when the offending subject does not behave with diligence required And the degree of diligence required must be determined in each case in attention to the concurrent circumstances, such as the special value of the protected legal property, the professionalism required of the infringer, etc."

In short, it is necessary for the action to be imputed to have the element of culpability, but in order for culpability to exist it is not necessary that the facts have occurred with intent or intent, but it is sufficient that it has intervened negligence or lack of diligence. And the latter is what happened in the present case, therefore, if the City Council had acted with the required diligence, access to the personal data of the person reporting here by unauthorized third parties would not have occurred. In such a case, the entity would have acted in a different way to the one it proceeded at the time of drawing up the notifications of the "Mayor's resolution of agreement on water and garbage tax rebates (...)", and would have only included the personal data of each of the recipients, and not the full list of names and surnames of all the people affected. In this sense, note that negligence does not require a clear intention to infringe, but rather lies precisely in carelessness, and in this specific case, in the lack of attention required by the entity in fulfilling the duty of confidentiality to what article 5.1.f) of the RGPD refers to. At this point it should be emphasized that the duty of care is maximum when activities are carried out that affect fundamental rights, such as the right to the protection of personal data.

### 2.3 On the lack of motivation

In the last one, the entity invokes a lack of motivation due to the fact that, according to its criteria, it is not explained which elements of culpability assessment the Authority takes into account when resolving, when in some cases in the face of a "point error" it can motivate a file resolution, as is the case of the file resolutions cited as examples in the allegations in the initiation agreement, and in the present case, qualifies the City Council's action as "negligent conduct". He also expresses his disagreement with the use of the term "conduct" when referring to the practice of the controversial notification, since the term can derive "connotations of a certain regularity, plurality of actions or constancy in the time."

In this respect, first of all, note that, regarding the use of the term "conduct", this is used in relation to the facts imputed as a synonym for action, and beyond the linguistic term, in the proposed resolution it is not questioned at any time that the regular practice of notifications of the administrative acts of the Consistory are incorrect, and that is why the present resolution focuses solely on the notification of the "Mayor's resolution of agreement on water and garbage tax rebates (...)".

Having said that, as indicated in the resolution proposal, the criteria expressed in the archival resolutions of this Authority - IP 178/2015, IP 295/2018, IP 108/2017 are not applicable in the present case - invoked by the City Council to defend the subject from its exemption, and indicate that, regardless of whether the error, in view of the circumstances and particularities of the cited cases, has been an element to be taken into account in said filing resolutions, in the present case we are not faced with a simple mistake, nor do the same circumstances or consequences occur as the examples cited. In the present case we are facing one

action in which the accused entity did not act with the diligence that was required of it, and this lack of diligence led to the violation of the data protection of all the persons (...) who were identified by name and surname in the controversial list negligently incorporated in the notification of the resolution, and this led to the dissemination to third parties of information relating to the income level of the affected persons.

That being the case, the commission of the imputed infraction, unlike the cited cases, does not derive from an involuntary error that would have led to the violation of the principle of quality (error in a letter on the registration of a vehicle), as is the case of the archive resolution of IP 178/2015, or the violation of the principle of data accuracy (error in a letter of the email address), as is the case of the archive resolution of IP 295/2018. Nor is it analyzed here, as in the archive resolution of IP 108/2017, whether a valid consent was granted to process the personal data of the person concerned, by virtue of the principle of legality. But the legal qualification of the facts proven here is analyzed from the prism of a violation of the principle of confidentiality as a result of a lack of the necessary diligence in the actions of the City Council in the exercise of its functions that are his own as the person responsible for the treatment, which would have prevented the illicit disclosure of the personal data of the affected persons.

3. In relation to the facts described in the proven facts section, relating to the violation of the confidentiality principle, it is necessary to refer to article 5.1.f) of the RGPD, which provides for the following:

"1. Personal data will be: (...) f) treated in such a way as to guarantee adequate security for personal data, including protection against unauthorized or illegal treatment and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")."

This principle of integrity and confidentiality provided for by the RGPD must be complemented with the duty of secrecy contained in Article 5 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), which establishes the following:

"Article 5. Duty of confidentiality

1. Those responsible and in charge of data processing as well as all the people who intervene in any phase thereof are subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.
2. The general obligation indicated in the previous section is complementary to the duties of professional secrecy in accordance with the applicable regulations.
3. The obligations established in the previous sections remain even if the obligee's relationship with the person in charge or in charge of the treatment has ended.

Likewise, it is appropriate to mention article 13 of the LPAC, which lists a catalog of rights of people in their relations with public administrations, in which the right "To the protection of personal data, and in particular the security and confidentiality of the data contained in the files, systems and applications of public administrations".

As indicated by the instructing person, during the processing of this procedure the fact described in the proven facts section, which is constitutive of the infringement provided for in article 83.5.a) of the RGPD, has been duly proven, which typifies as such the violation of the "principios básicos para el tratamiento (...)".

The conduct addressed here has been included as a very serious infraction in article 72.1.i) of the LOPDGDD, in the following form: "i) The violation of the duty of confidentiality established by article 5 of this Organic Law."

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.

The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:

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

In the present case the infraction committed by the City Council obeys a specific event that exhausted its effects immediately in its commission, that is to say, when the notification of the "Mayor's Resolution of on water and garbage tax rebates (...)" (Mayor's Decree (...)- (...), at which time the disclosure of personal data concerning all the affected persons took place ,

among these, those of the complainant here. That is why it is not considered appropriate to require the adoption of corrective measures.

resolution

For all this, I resolve:

1. Admonish Campdevàrol City Council as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), both of the RGPD.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the legal basis 4rt.

2. Notify this resolution to Campdevàrol Town Council.

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

4. Order that this resolution be published on the Authority's website (apdcat.gencat.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003, of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with 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 the Law (...)/1998, of July 13, regulating 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,