

## File identification

Resolution of sanctioning procedure no. PS 76/2020, referring to Balenyà City Council.

## Background

1. On 09/26/2019, the Catalan Data Protection Authority received a letter from a person for which he filed a complaint against Balenyà Town Council (henceforth, the Town Council), with reason for an alleged breach of the regulations on the protection of personal data. Specifically, the complainant stated that the City Council uses a "Vigilum" computer program, through which it processes personal data of the municipality's citizens. In relation to this, the complainant stated that:

1.1 The affected people had not been informed about the treatment or treatments carried out through the "Vigilum" program.

1.2 The affected persons had not given their consent for the treatment.

1.3 The processing of the data through the "Vigilum" program was carried out by a third party unrelated to the City Council.

2. The Authority opened a preliminary information phase (no. IP 255/2019), 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 14/10/2019 the reported entity was required to report on:

- If at the time of the collection of personal data the right to information was complied with. In the event that you have informed, that you document it.
- The purpose or purposes of the processing of personal data managed by the "Vigilum" computer program
- The legal basis that would legitimize the processing of personal data carried out through the aforementioned computer program.
- If the management of the computer program is carried out by the City Council itself or, conversely, by a third party in charge of the treatment.

4. On 10/30/2019, the City Council responded to the above-mentioned request in a letter stating that:

- The "Vigilum" program is the police management software used by municipal vigilantes, specifically it is used to manage police reports and investigations, management of traffic violations, management of gender violence files, as well as the management of the routes of the municipal guards.

- The legal basis of the treatments carried out is the public interest or the exercise of public powers, as well as a legal obligation applicable to the person responsible for the treatment.

- The computer program is managed directly by the municipal police.

- They are currently in the process of implementing procedures and policies to comply with personal data protection regulations.

5. On 07/20/2020, the reported entity was requested again because it had not reported whether, at the time of the collection of personal data, the right to information was complied with and, if so, that documentary evidence.

6. On 10/30/2020, the City Council responded to the aforementioned request through a letter in which it reiterated what it had stated in its response of 10/30/2019. However, it did not answer the question of whether at the time of the collection of the data of the persons affected by the treatments carried out through the computer program, specifically, the treatment activities relating to the attestations and police proceedings, the management of traffic violations, the management of gender violence cases, etc.; information regarding data protection was provided to them. He also did not provide any document attesting to having informed them when their data was collected, such as providing one of the completed forms used for data collection that incorporated the information clause.

7. On 15/12/2020, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Balenyà City Council for an alleged violation provided for in article 83.5.b), in relation to article 12); 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 12/21/2020.

8. The initiation agreement explained the reasons why no charges were made with respect to other reported facts.

Firstly, the complainant stated that the City Council processes personal data without obtaining the consent of the affected persons. Regarding the legality of the treatment, article 5.1.a) of the RGPD provides that the data must be treated in a lawful manner and article 6 of the same legal text establishes the conditions that the treatment must fulfill in order to be lawful. Accordingly, all data processing must comply with one of the legal bases established in this article. These legal bases include the consent of the affected person (Article 6.1.a) RGPD). However, this is not the only one

legal basis that legitimizes the processing of personal data. In fact, when a public administration carries out data processing in the exercise of its powers, the legality of the processing is not based on the consent of the person concerned, but on the fulfillment of a mission in the public interest or the exercise of public powers (article 6.1.e). Having said that, the City Council carries out treatment activities within the scope of the powers attributed to it by Article 13 of Law 16/1991, of July 10, on the local police. Consequently, the legal basis that legitimizes data processing in this case is not the consent of the affected person, but the fulfillment of a mission in the public interest or in the exercise of public powers.

Secondly, regarding the management of the "Vigilum" program by a person outside the City Council, the complainant did not provide any evidence to support his claim. And according to the City Council's statements, the computer program is managed directly by the local police. Consequently, there is no sufficient evidence to allow the City Council to be charged with the commission of any of the violations provided for in the data protection regulations in relation to this fact.

9. In the initiation agreement, the accused entity was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests.

10. On 12/31/2020, the City Council's Data Protection Officer accepted as reproduced the statements made in his response letter dated 10/30/2020 and made objections to the agreement of initiation, which are addressed in section 2 of the fundamentals of law.

The imputed entity provided with its writing a document dated 05/21/2020. In accordance with the index of contents, heading no. 1 entitled: "*Información Ajuntament de Balenyà Protection of Data. Identification of the Person Responsible for the Treatment*"; and heading no. 2 is entitled "*Registry of Treatment Activities and Informative Clauses*". In the section corresponding to the description of the 2nd point you can read: "*In this document the information related to the protection of data that we will link to the website is contemplated. In the same sense, it contemplates the Registry of Treatment Activities, in addition to the informative clauses*". The analysis of this document will be addressed in section 2 of the fundamentals of law.

11. On 11/03/2021, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish the Balenyà City Council as responsible for 'an infraction provided for in article 83.5.b) in relation to article 12, 13 and 14; all of them from the RGPD.

This resolution proposal was notified on 03/17/2021 and a period of 10 days was granted to formulate allegations. The deadline has been exceeded and no objections have been submitted.

proven facts

The City Council, in the scope of its powers related to the municipal watchmen, which is attributed to it by article 13 of Law 16/1991, of July 10, on the local police, carries out various data treatments. Specifically, it processes data in relation to the security of the municipality and the scope of compliance with regulations, ordinances, as well as aid and civil protection. With respect to these treatments, the City Council has not certified that it has implemented any mechanism to guarantee the principle of transparency in the information it must provide to those affected, so that personal data is collected and processed without the City Council informing the affected by the content of articles 13 and 14 of the RGPD.

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.

On the duty to inform in accordance with articles 12, 13 and 14 of the RGPD.

In its statement of objections, the accused entity stated that it complied with the duty to inform through the transparency portal on its website. [http://www\(...\)](http://www(...)). With regard to the information published on the City Council's transparency portal, it should be noted that the purpose of this information is to comply with the provisions of Law 19/2014, of December 29, on transparency, access to information public and good governance, which has as one of its main objectives guaranteeing the transparency of public activity. The purpose then

of this law is to establish a relationship system between people and the public administration and the other obliged subjects, based on the knowledge of public activity, the encouragement of citizen participation, the improvement of the quality of public information and administrative management and the guarantee of the retention of accounts and responsibility in public management.

However, in the case we are dealing with, this authority has not questioned compliance or not with the regulations on transparency of public information, but only compliance with the duty of transparency established by the data protection regulations.

The obligation of transparency in Article 12 of the RGPD regarding the processing of personal data is a global obligation of the RGPD that applies to three fundamental areas: "1) *the provision of information to interested parties in relation to equitable treatment*; 2) *how those responsible for the treatment communicate with the interested parties regarding their rights under the RGPD*; and 3) *how those responsible for the treatment facilitate that*

*interested parties exercise their rights*" (WP260rev.01 of the Article 29 Working Party, Guidelines on transparency under Regulation (EU) 2016/679). In turn, article 12 of the RGPD in section 1 provides that the data controller must take the appropriate measures to provide the interested party with all the information indicated in articles 13 and 14 of the RGPD. In particular, it must provide the persons affected by the treatment with information on the identity of the person responsible for the treatment, the purpose or purposes of the treatment, as well as relative information on the exercise of data protection rights, information on the recipients of the data, among others.

Regarding the moment in which the information must be provided to the people affected by the treatment, articles 13 and 14 of the RGPD establish that it will be in the initial phase of the treatment. Specifically, when article 13 applies, the information will be provided at the time the data is obtained. And when article 14 is applicable (when the data is not obtained from the interested party) the general term established is "within a reasonable period", once the data is obtained and, in any case, within the term of one month. Likewise, the principle of transparency is not only applied at the time of collection of personal data, but throughout the life cycle of the treatment. That is why when there are substantial or important changes in the treatment that may have an impact on the persons holding the data, it will be necessary to communicate these changes.

In accordance with what has been explained, it is the responsibility of the City Council to adopt all the appropriate measures in order to supply the information on the data treatments it carries out. This implies that you must take into account all the circumstances of the collection of the data and the treatment that is intended to be carried out in order to decide the modality and format for supplying this information. It should be emphasized that the transparency requirements and the duty to inform of articles 13 and 14 of the RGPD apply regardless of the legal basis applicable to the processing.

In this case, the City Council was required twice by the Authority (on 14/10/2019 and 20/07/20) to certify that it had fulfilled the duty of information in accordance with articles 13 and 14 of the RGPD, in relation to the processing of data relating to the security of the municipality, compliance with regulations, ordinances and civil protection. And, in the event that the obligation to inform has been effective, he was asked to provide documentary evidence. However, the City Council did not provide an answer to this question nor did it at any time prove that it had carried out its duty to inform. In fact, during the preliminary information phase, on 10/30/19, the City Council stated to the Authority that it was in the process of *"implementing procedures and policies to comply with the personal data protection regulations"*. In accordance with this, it is inferred that the City Council had not established any mechanism to comply with the principle of transparency in relation to the duty to inform established in articles 13 and 14 of the RGPD. It is for this reason that this plea is held to fail.

About the document relating to the "Register of Treatment Activities and Information Clauses.

In section 2on of the document, in the point relating to the informative clauses, you can read verbatim:  
*"Informative clauses: In accordance with "Article 13 Information that must be provided when personal data is obtained from the interested party" of the RGPD (EU ) 2016/679 when we process personal data we must provide the interested party with a series of information required by the current data protection regulations, this required information is also covered in the legal texts shown below, it is also mentioned in continuation: Contact details of the person in charge; If you have a Data Protection Officer, provide their contact details; legal basis and purpose of the treatment; the categories of personal data that will be processed. Recipients in the event that there are transfers of data, in addition to the intention of AJUNTAMENT DE BALENYA to carry out international transfers. In addition to the above, in order to guarantee that the treatment is fair and transparent, it will be provided to the affected person, mainly: The data retention period. The right to ask AJUNTAMENT DE BALENYA for access, rectification or deletion, opposition limitation and data portability. In addition, to submit a claim to the control authority. Origin of the personal data in case of not collecting the information of the affected person.*

The LOPDGDD 3/2018, in "Article 11 Transparency and information to the affected", gives us the possibility to provide this information with the methodology information by layers. In the first layer we will provide the basic information that marks the current regulations and we will inform you how to access the second layer by facilitating the link to this web section. The basic information (first layer) referred to in the previous section must contain, at least:

- a) The identity of the person responsible for the treatment and his representative, if applicable.
- b) The purpose of the treatment.
- c) The possibility of exercising the rights established in Articles 15 to 22 of Regulation (EU) 2016/679.

Likewise, in the second layer we will offer all the remaining information that we specify Article 13 of the RGPD.

Below is detailed information that will allow AJUNTAMENT DE BALENYA to comply with the obligations established in articles 13 and 30, as well as articles 11, 31 and 77 of the RGPD and the LOPDGDD respectively" (the bold is ours):

The following pages of the document, up to the end, contain the Activity Register of the different Treatments (hereinafter, the RAT) carried out by the City Council, among which are those related to the treatment activities relating to the "Local Police ". As specified, the purposes of these treatments are: *"Management, action and intervention of the Local Police"* and the categories of interested parties: *"Parents/ Tutores, Citizens"*. It should be added that, despite the fact that information clauses are alluded to, these are not included. Only the reference transcribed above is included, that is to say, the description of the generic content that the said clauses must contain. Taking into account the above and the sentence that says: *"the information that will allow AJUNTAMENT DE BALENYA to comply with the obligations established in articles 13 and 30" is detailed,* everything suggests that from the information contained in the RAT will proceed



to draw up the informative clauses relating to each specific treatment. Therefore, on the date of preparation of the document, 21/05/2020, (first version), the City Council was in the process of preparing the data protection clauses. In addition, it should be emphasized that the date of filing the complaint is 09/26/2019, well before the aforementioned document.

Consequently, in accordance with the aforementioned document, on the date of filing the complaint (26/09/2019), the City Council had not drawn up the data protection clauses to inform the persons affected by the processing of data relating to the "Local Police", which have been the subject of this complaint (certificates, police investigations, management of traffic offences, management of gender violence files, etc.). The Authority, as has already been said above, required the City Council twice in order to provide documentary evidence that it informed those affected at the time of the collection of their data in relation to these treatments, and the City Council did not provide any evidence to prove that he had reported. He could have provided, for example, the data collection forms used for some of these treatments (certificates, management of traffic violations, police investigations, etc.), bearing in mind, in addition, that the City Council stated which was in the process of implementing procedures and policies to comply with personal data protection regulations. That is why all the indications lead to the conclusion that at the time of the filing of the complaint the City Council did not give effect to the right of information to the people affected by said data processing. Therefore, this contention cannot succeed.

2. In relation to the facts described in the proven facts section, related to the principle of transparency of the information that must be provided to the interested person, it is necessary to refer to article 12 of the RGPD, which provides that *"The person in charge of the treatment must take the appropriate measures to provide the interested party with all the information indicated in articles 13 and 14, as well as any communication in accordance with articles 15 to 22 and 34 relating to the treatment. This information must be provided in a concise, transparent, intelligible and easily accessible manner, in clear and plain language, especially if it is specifically aimed at a child. The information must be provided in writing or by other means, including, where appropriate, electronic means (...)"*.

Sections 1 and 2 of article 13 of the RGPD establish the following:

*"1. If the personal data is obtained from the interested party, at the time of obtaining it, the data controller must provide the following information:*

- 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 representative, if applicable.*
- c) The purposes and legal basis of the processing for which the personal data are intended.*

*d) If 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, if applicable.*

*f) If applicable, the intention of the person in charge to transfer personal data to a third country or an international organization, and whether or not there is a decision on the adequacy of the*

*commission In the case of the transfers mentioned in articles 46 or 47 or in article 49, section 1, second paragraph, he must inform you of the appropriate guarantees and the means to obtain a copy of them, or of the place where they are available .*

*2. In addition to the information mentioned in section 1, when obtaining the personal data, the data controller must provide the interested party with the following information, necessary to guarantee fair and transparent data processing:*

*a) The term during which the personal data will be kept. If this is not possible, the criteria used to determine this term.*

*b) The right to request from the person in charge of the treatment access to the personal data relating to the interested party, to rectify or delete them, to limit the treatment or to oppose it, as well as the right to data portability.*

*c) When the treatment is based on article 6, paragraph 1, letter a) or on article 9, paragraph 2, letter a), the right to withdraw consent at any time. This does not affect the lawfulness of processing based on consent before withdrawing it.*

*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, as well as if the interested party is obliged to provide personal data and is informed of the possible consequences of not doing so .*

*f) The automated decisions referred to in article 22, sections 1 and 4, including the creation of profiles. In these cases, it must provide significant information about the logic applied and about the importance and expected consequences of the treatment for the interested party.*

And parts 1 and 2 of article 14 of the RGPD, which establishes the following:

*"1. When personal data have not been obtained from the interested party, the data controller must provide the following information:*

*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 representative, if any.*

*c) The purposes and legal basis of the processing for which the personal data are intended.*

*d) The categories of personal data that are processed.*

*e) The recipients or the categories of recipients of the personal data, if applicable.*

*f) If applicable, the intention of the person in charge to transfer personal data to a third country or an international organization, and whether or not there is an adequacy decision by the Commission. In the case of the transfers mentioned in articles 46 or 47 or in article 49, section 1, second paragraph, he must inform you of the appropriate guarantees and the means to obtain a copy, or of the place where he has them available*

*2. In addition to the information mentioned in section 1, the data controller must provide the interested party with the following information, necessary to guarantee fair and transparent data processing:*



- a) *The term during which the personal data will be kept. If this is not possible, the criteria used to determine this term.*
- b) *When the treatment is based on article 6, section 1, letter f), the legitimate interests of the person responsible for the treatment or a third party.*
- c) *The right to request from the person in charge of the treatment access to the personal data relating to the interested party, to rectify or delete them, to limit the treatment or to oppose it, as well as the right to data portability.*
- d) *When the treatment is based on article 6, paragraph 1, letter a) or on article 9, paragraph 2, letter a), the right to withdraw consent at any time. This does not affect the lawfulness of processing based on consent before withdrawing it.*
- e) *The right to present a claim before a control authority.*
- f) *The source from which the personal data come and, where applicable, whether they come from publicly accessible sources.*
- g) *The automated decisions referred to in article 22, sections 1 and 4, including the creation of profiles. In these cases, it must provide significant information about the logic applied and about the importance and expected consequences of the treatment for the interested party.*

During the processing of this procedure, the fact described in the section on proven facts has been duly proven, which is constitutive of the violation provided for in article 83.5.b) of the RGPD, which typifies the violation of "b) Rights of interested parties, in accordance with articles 12 to 22" which include the right to information provided for in articles 12, 13 and 14 of the 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".*

3. 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 infractions committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must dictate*

*a resolution that declares the infringement and establishes 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".*

As reported by the City Council, it is currently in the process of implementing procedures and policies to comply with the personal data protection regulations.

By virtue of the power that article 21.2 attributes to the Director of the Authority, it is required the City Council so that as soon as possible, and in any case within a maximum period of one month from the day after the notification of the resolution issued in this procedure, to give effect to the right of information of the persons affected for the processing of data related to the processing activities carried out by the municipal supervisors.

Once the corrective measure described has been adopted, within the specified period, the City Council must inform the Authority within the following 10 days, without prejudice to the inspection powers of this Authority to carry out the corresponding checks .

For all this, I resolve:

1. Admonish the City Council of Balenyà as responsible for an infringement provided for in article 83.5.b) in relation to articles 12, 13 and 14, all of the RGPD.
2. Require the Balenyà City Council to adopt the corrective measures indicated in the 3rd legal basis and accredit before this Authority the actions carried out by fulfill them
3. Notify this resolution to Balenyà City Council.
4. Communicate the resolution to the 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 for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from

from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director,