apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 81/2020, referring to Barcelona City Council.

Background

1. On 01/24/2020, the Catalan Data Protection Authority received a letter from a person filing a complaint on the grounds of an alleged breach of the regulations on personal data protection. Specifically, the complainant claimed that Mrs. (...), Minister of Mobility and Accessibility of the District of (...) of Barcelona City Council, spread her image on the internet, as well as her name and health data. The reporting person certified that, through the social network Twitter ((...)), the councilor previously identified published on 17/01/2020 a tweet with the following content: *"I have been with the (...), resident of (...), taking a walk through (...) and I have several notes to improve the accessibility of the tram. The (...) has multiple sclerosis and a visual impairment".*

This tweet included a 17-second video. The complainant added that he had not given his consent for this data processing, but only for this councilor to use the photographs (without capturing his face) in order to make a report addressed to the Metropolitan Area of Barcelona .

The reporting person provided various documentation relating to the events reported.

2. The Authority opened a preliminary information phase corresponding to the complaint (no. IP 34/2020), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to 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 (from now on, LPAC), for to determine whether the facts 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 that were involved.

3. In this information phase, on 31/01/2020 the Barcelona City Council was required to report, among other aspects, on whether the person responsible for the treatment of the data published through Twitter was the Barcelona City Council (in the event that Ms. (...) had acted in her capacity as councillor), or Ms. herself. (...).

4. On 02/05/2020, the Barcelona City Council responded to the aforementioned request through a letter in which it stated that the *"The tweet of Ms. (...), despite identifying as a councillor, it is carried out in a private capacity, from a personal profile. There are no institutional twitter profiles for district councillors. The only institutional profile is that of the mayor".*

5. On 15/12/2020, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against Barcelona City Council for an alleged infringement, provided for in article 83.5.a), in relation in article 5.1.f); all of them from the Regulation (EU)

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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 (hereafter, RGPD). This initiation agreement was notified to the imputed entity on 12/21/2020.

6. On 08/01/2021, Barcelona City Council made objections to the initiation agreement.

7. On 18/02/2021, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish Barcelona City Council as responsible for 'an infringement provided for in article 83.5.a) in relation to articles 5.1.a), 6 and 9, all of them of the RGPD.

This proposed resolution was notified on 19/02/2021 and a 10-day deadline was granted to make objections, which has been exceeded without the City Council having submitted any objections.

proven facts

The Minister for Mobility and Accessibility of the District of (...) of the Barcelona City Council disseminated the name, image and health data of the person reporting through his personal profile on Twitter. She accessed this data due to her status as councillor, with the aim of preparing a report addressed to the Barcelona Metropolitan Area.

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.

2.1. In relation to the publication of health data.

With regard to the publication of health data, the accused entity alleged that in the published tweet only the name of the complainant appeared and that in the video she appeared with her back to the tram platform, but ruled out that there was no health data of the complainant. The content of the tweet dated 01/17/2020 published by the minister indicated: *"I have been with (...), a neighbor of (...), taking a walk through (...) and I have several notes for improve tram accessibility.*
The (...) has multiple sclerosis and a visual impairment". In this regard, as indicated by the instructing person in the resolution proposal, it was proven that the counselor did

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publish health data of the reporting person. In addition, the fact of indicating other personal data (that the affected person was a resident of the neighborhood and his name), together with the publication of his image in a wheelchair (albeit on his back), made it possible that it was perfectly identifiable.

In the initiation agreement, the reporting facts were incardinated in the violation of the principle of confidentiality (art. 5.1.f RGPD). At least, based on the actions taken and the careful evaluation of the documentation contained in the file, the investigating person considered in the resolution proposal that the facts had a better fit in the violation of the principle of legality, in the insofar as the publication of the controversial tweet by the Minister of Mobility and Accessibility of the District of (...) of Barcelona City Council, despite affecting the confidentiality of the data processed, was not due to a simple oversight but rather it was carried out consciously and intentionally, and without being able to rely on any of the legal bases provided for in article 6.1 of the RGPD, nor in any of the circumstances of article 9.2 of the RGPD which allow the processing of special categories of data, including data relating to health. That is why the proven facts were incardinated in the violation of the principle of legality (arts. 5.1.a, 6 and 9 RGPD).

Regarding this modification of the legal classification of the proven facts, it must be said that in accordance with article 89.3 of the LPAC it is in the resolution proposal when it is appropriate to set its legal classification, taking into account in addition to this modification, as indicated the instructing person, has not altered the seriousness of the infraction, since both the violation of the principle of legality and the principle of confidentiality, in addition to being closely linked in cases of illicit communication of data, are constitutive of the same offense (the one provided for in article 83.5.a of the RGPD).

2.2. About the responsibility of the City Council.

In relation to the responsibility of the City Council, said entity admitted that the publication of data was carried out without the express consent of the person affected, although it was not considered responsible for the alleged infringement arising from the publication made by the councilor , adding that the councilor did it through a private Twitter profile. In this same sense, the City Council argued that *"a public entity cannot be required to exercise a control function of such magnitude that it allows the commission of infringements in the field of data protection to be anticipated for the entire personnel who make it up and represent it, more so when said violation occurs in an area other than that of the municipal organization, that is to say outside of the procedural channels that allow possible violations or violations to be detected".* On the other hand, the City Council added that, *"it is no less true that it is up to the City Council to ensure that the people who represent it respect the confidentiality of the data to which they have access".*

Well, as considered by the person instructing this procedure, regardless of whether the Twitter profile through which the councilor disseminated the data of the person making the complaint was of a *"personal"* nature or not, which was obvious was that the person

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complainant went to Ms. (...)in her capacity as Minister of Mobility and Accessibility for the District of (...) of Barcelona City Council, in order to raise the mobility incidents she had detected in the said neighborhood, which required within the scope of his municipal powers, and with respect to which he wanted to ask for a solution. Therefore, the information regarding which the minister disseminated the subject of the present sanctioning procedure was not obtained as a private person, but because of her position as minister of Mobility and Accessibility of the District of (...) City Hall of Barcelona.

2.3. In relation to the lack of intentionality.

The City Council stated that the *"publication made by the councilor had no intention in terms of the dissemination of confidential data of the complainant, which were disseminated without the requisite prudence but from the constructive will to highlight the difficulties she was suffering the complainant to access the public tram service",* and in his defense he invoked
the existence of an involuntary error, misunderstanding or ignorance.

This invocation, as was already highlighted in the proposed resolution, must be traced back to the principle of guilt, and reference must be made to the jurisprudential doctrine of both the Supreme Court and the Constitutional Court on this principle. 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 accordance with what is provided for in article 28.1 of Law 40/2015, of October 1, on the legal regime of the public sector (hereinafter the LRJSP).

In this regard, the Supreme Court in several rulings, all of 16 and 22/04/1991, considered that from this element of culpability it follows that the action or omission qualified as an administratively punishable infraction, had to be in any case, imputable to its author, due to grief or imprudence, negligence or inexcusable ignorance. Also the National Court, in the Judgment of 06/29/2001, precisely in matters of personal data protection, declared that to appreciate this element of guilt *"simple negligence or non-compliance with the duties imposed by the Law is sufficient to the persons responsible for files or data processing to exercise extreme diligence...".* In this regard, as the instructing person pointed out in the proposed resolution, it was clear that the councilor did not act with the necessary diligence in the treatment of the controversial data, given that if she had done so, she would not have published the data of the reporting person on their Twitter profile, maximum when the publication included special category data, such as health data. Consequently, the culpability element required by article 28.1 of the LRJSP would also apply here. And it should also be emphasized that the duty of care is maximum when carrying out activities that affect

fundamental rights, such as the right to the protection of personal data, as declared by the SAN of 5/2/2014 (RC 366/2012) issued in matters of data protection, when it held that the status of data controller of personal data *"imposes a special duty of diligence when carrying out the use or treatment of personal data or its transfer to third parties, in what concerns the fulfillment of the duties that the legislation on protection of*

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natural persons, and especially their honor and personal and family privacy, whose intensity is enhanced by the relevance of the legal assets protected by those rules".

Likewise, the Supreme Court in its judgment of 01/25/2006, also issued in the area of data protection, alluded to the required diligence and established that intentionality does not constitute a necessary requirement for a conduct be considered guilty. What is necessary is that the conduct that is imputed includes the element of guilt, and in order to be able to appreciate the existence of guilt it is sufficient that the infringing acts are the cause of negligent conduct or attributable to simple non-observance. And the truth is that this duty of diligence was known to the City Council, as was made clear in its allegations in the initial agreement, by affirming that it was up to it *to "ensure that the people who represent respect the confidentiality of the data to which they have access".*

Based on the jurisprudential doctrine presented, and as maintained by the instructing person, the City Council's allegation regarding the lack of intentionality in the commission of the reported facts cannot succeed, since in this case it a lack of diligence that was required of him.

2.4. In relation to corrective measures.

The City Council listed a series of measures that, in its opinion, demonstrated its proactive responsibility, such as the creation of the Municipal Data Office and the figure of the Data Protection Delegate, the approval of the Instruction approved in 2019 by which the criteria for the application of the RGPD and Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereafter, LOPDGDD), are set, and of the Code of Ethics and Conduct (year 2017). He also invoked several circumstances (the time the tweet was published, the lack of intention, etc.) which, in his opinion, should be mitigating factors.

In this regard, as pointed out in the proposal, the extenuating circumstances invoked by the City Council and the measures of proactive responsibility, in any case, could have been taken into account in order to graduate the financial amount of the penalty in the event that it had consisted in the imposition of an administrative fine, in accordance with what is established in article 83.4 of the RGPD, but the sanctioning regime applicable to the City Council does not provide for the imposition of a financial penalty, but rather the warning of in accordance with the provisions of article 77 of the LOPDGDD, which by its very nature is not subject to graduation.

Finally, in agreement with what was stated by the instructing person in the resolution proposal, it is necessary to positively assess that the Twitter tweet where the image and video of the person making the complaint appeared has been removed; and that as a result of the facts that are the subject of this sanctioning procedure, the City Council has committed to improving the control processes and promoting the necessary training and dissemination mechanisms by the City Council's Data Protection Office intended for workers and members of the district, in order to avoid, in the future, new complaints regarding data protection.

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However, it is also necessary to point out that the adoption of measures to correct the effects of the infringement do not distort the imputed facts, nor do they modify their legal classification.

3. In relation to the facts described in the proven facts section, relating to the principle of legality, it is necessary to refer to articles 5.1.a, 6 and 9 of the RGPD.

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

For its part, article 6.1 of the RGPD provides for the following:

> *"1. The treatment will only be lawful if at least one of the following conditions is met:*
>
> *a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;*
> *b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;*
>
> *c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;*
> *d) the treatment is necessary to protect the vital interests of the interested party or another natural person;*
> *e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;*
>
> *f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.*
>
> *The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions."*

In turn, article 9.2 of the RGPD, regarding the treatment of special categories of data, states 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 Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;*

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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 Member States or a collective agreement in accordance with the Law of the Member States that establishes 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; 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, section 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, respect in the

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the right to data protection is essential and to establish adequate and specific measures to protect the fundamental interests and rights of the interested party."

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 offense provided for in article 83.5.a) of the RGPD, has been duly proven, which typifies the violation of *"the basic principles for the treatment, including the conditions for the consent to the tenor of articles 5, 6, 7 and 9",* among which the principle of legality is contemplated.

The conduct addressed here has been included as a very serious infraction in article 72.1.e) of the 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".

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, it is not considered appropriate to require the adoption of any corrective measures to correct the effects of the infringement, since the Twitter tweet in which the complainant's data was revealed has already been deleted.

For all this, I resolve:

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1. Admonish the Barcelona City Council as responsible for an infringement provided for in article 83.5.a) in relation to articles 5.1.a), 6 and 9, all of them of the RGPD.

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

2. Notify this resolution to Barcelona City Council.

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

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

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003 , of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction.

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

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

The director,