

In this resolution, the mentions of the affected population have been hidden in order to comply with art. 17.2 of Law 32/2010, since in case of revealing the name of the population affected, the physical persons affected could also be identified.

File identification

Resolution of sanctioning procedure no. PS 12/2021, referring to the City Council of (...).

Background

1. On 03/25/2020, the Catalan Data Protection Authority received a letter in which a person filed a complaint against the City Council of (...), on the grounds of an alleged breach of the regulations on personal data protection.

The complainant stated that, as part of the *procedure (...) salary supplements* (file (...)), the City Council had notified the full content of proposed resolution no. (...) dated (...)/2020, relating to the maintenance of the special time factor, to all interested persons, who were identified in the dispositive part of the proposal, with the consequent disclosure of data between all them Specifically:

- In the first point of the dispositive part of the proposed resolution, the following was indicated: *"maintain until December 31, 2020 the special hours factor, within the specific supplement, for the following public employees in the service of this City Council, in accordance with the complement of destination that is indicated in each case"*, and then there was a list of 102 public employees, who were identified by their first and last names, followed by the number of the complement of destination assigned in each case
- In the second point of the dispositive part of the proposed resolution, the following was indicated: *"TO STOP PAYING the following employees of this City Council, with retroactive effect from January 1, 2020, the "time factor special", within the specific supplement, which represents a saving of €(...) per year, according to documents AD accountants with deconcentration numbers (...)".* Next, there was a list of 4 municipal employees, who were identified by their first and last names, and regarding which the following was noted: *"the improper payments corresponding to the months of January and February of this staff, are will be reinstated to the corresponding payrolls for March 2020".*

2. The Authority opened a preliminary information phase (no. IP 101/2020), 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 were capable of motivating the initiation of a sanctioning procedure.

3. In this information phase, on 04/02/2021 the City Council of (...) was required to indicate whether it had notified the resolution proposal with its full content to all the people identified in the same proposal, and to point out the legal basis that in his opinion would protect such communication.

4. On 02/17/2021, the City Council responded to the aforementioned request in writing, in which it stated, among others, the following:

- *"Notification of the full content of the resolution was carried out, by electronic notification, by AUPAC (municipal records manager, for internal use only), making it available to all interested parties. However, 38 employees accessed the notification.*

This resolution has not been published on the City Council's website, nor on the transparency portal, nor on the City Council's electronic headquarters, nor in any other publicly accessible channel."

- *"(...) in the register of personal data processing activities of the City Council of (...), there is treatment 1.1 of "Administrative management of public workers". The legality of the aforementioned processing activity is based, by virtue of article 6.1 c), on the application of the revised text of the Law on the basic statute of the public employee, approved by Royal Legislative Decree 5/2015, of 30 October and, for this specific case, in article 24 section b) which determines that the complementary remunerations are those that remunerate certain factors such as the special dedication of the public employee. However, the special hours factor is provided for in the collective agreement of our City Council, and is granted to jobs that have certain conditions and/or that must be carried out in a time longer than the working day ordinary work*

On the other hand, the resolutions issued by the City Council are notified to those interested in application of article 40.1 of Law 39/2015 of October 1, of the Common Administrative Procedure, also taking into account that any interested person must have the possibility to lodge an appeal against the resolutive administrative acts if they consider it so ."

- *"Article 7 of Royal Decree 424/2017, of April 28, which regulates the legal regime of internal control in local public sector entities, with respect to the different phases of the specific intervention function which will include the following: (...). Article 19 of the same legal text, regarding the content of the checks, determines that the intervenor unit must check, among others, that the documents evidence of the obligation conform to the applicable legal and regulatory provisions. In any case, the documentation must include:
1.- Identification of the creditor.
2.- Exact amount of the obligation.
3.- The benefits, services or other causes from which the payment obligation arises.
(...)
Consequently, with the regulations set out, the content and wording of the resolution, with the determination of the names and surnames and complement of destiny of the people*

interested parties derives from the conditions established by the Municipal Intervention Inspection Unit to proceed with the prior inspection in accordance, before the approval of this resolution, an essential requirement to proceed with the payment of the special hours factor as a retributive concept in the payroll of the persons concerned."

- *"We were aware that we could come into contradiction with the Personal Data Protection regulations, however it must be borne in mind that the individual notification of a single resolution to each of the 106 interested persons, with masking or deletion of the identification of the other 105 identified persons, would involve an administrative action that cannot be carried out in an automated way, requiring manual deletion in each notification of the rest of the interested persons, which would involve excessive hours of work . In this particular case, the result is considered disproportionate, when dealing with the people concerned, working staff of the City Council known to everyone, as well as their corresponding complement of destiny is also known.*
- *"In view of the above and in view of the fact that the data contained in the resolution are merely identifying, this City Council considers that at no time has the right to data protection of the public employees contained in the resolution. However, and so that no employee considers that their right to the protection of their personal data has been violated, for the next notifications in which the names and surnames of different public employees are included, their anonymization."*

5. On 04/03/2021, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the City Council of (...) for an alleged infringement provided for in article 83.5.a) , in relation to article 5.1.a); both of 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 09/03/2021.

6. In the initiation agreement, the accused entity was granted a term 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.

7. On 03/23/2021, the City Council of (...) made objections to the initiation agreement.

8. On 20/04/2021, the person instructing this procedure formulated a proposed resolution, by which he proposed that the director of the Catalan Data Protection Authority admonish the City Council of (...) as responsible for an infringement provided for in article 83.5.a), in relation to article 5.1.a), both of the RGPD.

This resolution proposal was notified on 04/20/2021 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

In the framework of the *procedure (...) salary supplements* (file (...)), the City Council of (...) issued the proposed resolution no. (...) dated (...)/2020, relating to the maintenance of the special time factor, which in its dispositive part contained a list of 106 municipal employees, identified by first and last name, together with the following data:

- In the case of 102 female employees, it was proposed to maintain the "special time factor" within the specific supplement. The destination add-on number they were assigned was also indicated.
- In the case of 4 employees with respect to whom it was proposed to stop paying the amount of the specific supplement corresponding to the "special hourly factor", the amount corresponding to the sum of the amounts paid to all 4 employees for this was identified factor, together with the qualification as "improper payment" of the subscriptions made in their payrolls for the months of January and February 2020, and the proposal to make refunds in the payrolls for the month of March 2020.

The City Council carried out the notification of this proposal electronically, making it available to the 106 interested people.

Fundamentals of law

1. The provisions of Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations (hereafter, LPAC) and article 15 of Decree 278/1993, in accordance with 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 City Council of (...) has not formulated allegations in the proposed resolution, 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.

With regard to the regulations that the City Council pointed out in its statement of objections to the initiation agreement as the legal basis that would legitimize the treatment (art. 6.1.c RGPD), it should be noted that such regulations it does not protect the communication of data carried out, and this for the reasons set out below.

In the present sanctioning procedure it is not disputed that within the framework of the procedure (...) *salary supplements* the City Council had processed the indicated personal data, both for the purpose of determining the maintenance or not of the aforementioned salary supplement for the affected employees, as well as to send the necessary information to the City Council's auditor.

The infraction that is imputed is due solely to the fact that in the proposed resolution that the City Council notified to the interested parties, it included personal data without legal authorization and without any other legal basis, violating the duty of confidentiality.

In other words, compliance with the regulations indicated by the City Council could have been carried out without disclosing those personal data to the rest of the workers affected, so, to give an example, the proposed resolution and the subsequent resolution could have included in an attached document all the personal data of the affected persons, but at the time of the notification of each act to each of these persons, having included only the personal data of the recipient of the notified act .

In its statement of objections to the initiation agreement, the City Council also alluded to the duty to notify administrative acts provided for in article 40.1 of the LPAC. But as the council itself pointed out, the same precept establishes in section 5 that: *"The Public Administrations may adopt the measures they consider necessary for the protection of the personal data contained in the resolutions and administrative acts, cuando éstos tengan por destinatarios to more than one interested party"*.

In accordance with the provisions of article 40.5 of the LPAC, if, as in the present case, the act to be notified contained personal data of third parties, the City Council should have adopted the necessary technical measures to guarantee the protection of the personal data of all the people interested in the administrative procedure indicated, and this without disproportionate efforts, as the City Council points out, given the current state of knowledge and new technologies.

It could be questioned whether the people to whom this data was communicated could also have accessed it due to their status as interested persons, and whether this is relevant to the illegality of the facts. Well, the right of access to the administrative file that provides for the regulations applicable in cases like the present (art. 53.1 to LPAC and art. 26 of Law 26/2010), also require that this access be respectful of the right to data protection, so that, prior to the 'access, it is necessary to take into account the principle of minimization (art. 5.1.c RGPD), according to which, it is necessary to limit the scope of access to personal data that is necessary to fulfill the purpose pursued with the access This necessarily requires a weighting of the rights in conflict, to assess in each specific case whether the reason for the access would justify the communication of personal data derived from the access. But in the present case, the City Council disseminated this personal data right from the start, without having received any request for access, and without previously carrying out any judgment of proportionality.

In addition, the data that was communicated with the resolution proposal was not merely identifying, as the City Council maintains, but there was also some that had a retributive nature, such as the information regarding the fact that the 106 municipal employees they received a specific remuneration supplement linked to the special hourly factor, and which was proposed to be maintained in the case of 102 people. And particularly in the case of 4 people, with the proposal that was made in the resolution not to continue paying them the salary supplement, additional information was implicitly revealed, such as the fact that they were receiving a salary supplement due to a special schedule that they did not actually perform, and that consequently they had had undue income, and it was proposed to claim them. This information that the City Council disseminated with the proposed resolution, went beyond the mere identification of these people, and due to the type of information it was about, it required a prior weighting of the conflicting rights.

Lastly, in the statement of objections, the City Council referred to article 23.c) of Law 30/1984, of August 2, on measures for the reform of the Public Service - reference that must be understood as made in the third section of this precept, that is to say, art. 23.3.c)- referred to the productivity supplement, and then pointed out the following: *"This article establishes, in relation to the productivity supplement, that it is intended to reward special performance, extraordinary activity and interest or initiative with which the official develops his work. Determines that in any case, the amounts received by each official for this concept will be public knowledge of the other officials of the department or interested body of the union representatives"*. And following its letter, the City Council cited a resolution issued by the Spanish Data Protection Agency (AEPD) in procedure E/0146/2008, which would consider an appeal for reinstatement, and revoke a sanctioning resolution based on the following considerations that the City Council transcribes:

"In the case at hand, it has been proven that a disclosure of the salaries of City Hall officials (...) has been made, by job position, omitting their number and last name, but being identifiable in the case that only one person occupies the position, including productivity.

It should be noted that the wording of Article 23 of Law 20/1984 of August 2, on Measures to Reform the Public Service explicitly provided for public knowledge of the productivity supplement and was applicable at the time the events occurred .

Law 30/1984 establishes that the amounts that each official receives for the concept of productivity are known by the other officials and Union representatives.

Along with that, it should be considered that the Bulletin has diffusion, mainly among the officials of the City Council, for which - although it is a conduct that should have been avoided in the judgment of this Agency - it cannot be concluded beyond doubt that the Union has violated the duty of secrecy with regard to the imputed facts ."

It should be said in this regard that the part of this resolution that the City Council transcribed in its statement of objections would not be applicable to the present case, since it refers to the dissemination of the productivity supplement, while in the case present the infraction that is imputed obeys, on the one hand, the dissemination of information linked to the destination complement number of 102 people, and on the other hand, with regard to 4 people, to the dissemination of information about the eventual

perception of undue income to consider that they did not perform the special schedule. But aside from that, from the transcribed content it can also be inferred that in the case analyzed by the AEPD, the name and surname of the employees of the town hall were not included, but only the amount they perceived as to supplement productivity, while in the present case in the proposed resolution that was notified, the first and last names of the 106 public employees were included, so that the information included referring to these people could easily be linked to each one of them.

In accordance with what has been explained, it is estimated that all the allegations made by the City Council cannot succeed.

3. In relation to the facts described in the proven facts section, it is necessary to refer to article 5.1 a) of the RGPD, which enshrines the principle of lawfulness of treatment, and provides that personal data: "a) *They must be treated lawfully, loyally and transparently in relation to the interested party (lawfulness, loyalty and transparency)*".

In this sense, the RGPD provides that all processing of personal data must be lawful (article 5.1.a) and, in relation to this, establishes a system for legitimizing the processing of data which is based on the need for some of the legal bases established in its article 6.1.

The facts described in the proven facts section are considered to be proven, both by the documentation that the person making the complaint provided with their letter of complaint, and by the City Council's own statements, acknowledging the notification of the proposal with the indicated content, and specifically making it available to the 106 municipal workers affected, of whom 38 accessed its content.

Therefore, these proven facts, relating to the dissemination of personal data without a valid legal basis, are constitutive of an infringement according to the provisions of article 83.5.a) of the RGPD, which typifies as such the violation of "*the basic principles for the treatment (...)*".

The conduct addressed here has been included as a very serious infringement in article 72.1.a) of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), in the following form: "*The processing of personal data in violation of the principles and guarantees established in article 5 of Regulation (EU) 2016/679*", in relation to the principle of legality established in article 5.1.a) thereof RGPD

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 similar terms to the LOPDGDD, article 21.2 of Law 32/2010, determines that: *"In the case of infractions committed in relation to publicly owned files, the director of the Catalan Authority for the Protection of Data must issue a resolution declaring the infringement and establishing the measures to be adopted to correct its effects (...)"*.

In the present case, given that the imputed infraction obeys the commission of a specific event, which exhausted its effects when the act of notification of the proposed resolution to the interested parties took place, it is considered unnecessary to require the adoption of corrective measures.

For all this, I resolve:

1. Admonish the City Council of (...) as responsible for an infringement provided for in article 83.5.a), in relation to article 5.1.a), 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 4th legal basis.

2. Notify this resolution to the City Council of (...).

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.



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PS 12/2021

The director,

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