

## File identification

Resolution of sanctioning procedure no. PS 33/2021, referring to the Public Employment Service of Catalonia (Centre of Innovation and Occupational Training of Hospitalet de Llobregat).

## Background

1. On 07/08/2020, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Innovation and Training Center Occupational of Hospitalet de Llobregat (hereafter CIFO Hospitalet), dependent organically from the Public Employment Service of Catalonia (SOC), due to an alleged breach of the regulations on the protection of personal data.

The person making the complaint stated that, on 07/07/2020, he received at his personal email address (...) an email with the subject "CIFO Hospitalet Programació 2020", sent from a corporate address of the CIFO Hospitalet ([inform@privat.cifo.hospitalet.cat](mailto:inform@privat.cifo.hospitalet.cat)) and copy option, and therefore the address of all of them being legible. The email announced the CIFO Hospitalet course schedule for the year 2020. It also provided as attached documentation an image of the reference email.

2. The Authority opened a preliminary information phase (no. IP 195/2020), 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 09/29/2020 the reported entity was required to, among others, report on the reasons why in the electronic submission of 07/07/2020 it was not he used the blind copy option, and if normally in the rest of the electronic mailings in advertising matters and of a nature similar to that which is the object of the complaint, the blind copy option is used. In this regard, the entity was also asked if it had any protocol or instruction on the use of e-mail.

4. On 10/14/2020, the SOC responded to the above-mentioned request in writing, in which it set out, among others, the following:

- That "the hidden copy option was not used, we confirm that it was due to an error by the public worker in charge of making the shipments to publicize the

CIFO Hospitalet schedule for 2020. Once the error was detected, the following shipments were all made correctly, that is, with hidden copy."

- That "All electronic mailings with multiple recipients, whether advertising or not, issued by CIFO Hospitalet de Llobregat are made with a blind copy."
- That "The SOC does not have a specific protocol or instruction on the use of e-mail. It was a one-off mistake and to this day we have not considered it necessary."
- That "The person working at the CIFO de l'Hospitalet who made the mistake, in that at the same time, he communicated it to his superior and for this reason a verbal reminder was given to all the rest of the staff."
- That "on July 7, 2020, at 2:29 p.m., from the mail (...), this incident was notified. Subsequently, on July 10, 2020, an apology was requested for the error and it was communicated that corrective measures were being taken so that it would not happen again."

5. On 04/06/2021, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the CIFO de l'Hospitalet del Servei d'Ocupació de Catalunya, for an alleged violation provided for in the 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 08/06/2021.

6. In the initiation agreement, the accused entity was granted a period of 10 working days to formulate allegations and propose the practice of evidence that it considered appropriate to defend its interests.

7. On 06/21/2021, the SOC made objections to the initiation agreement.

8. On 09/16/2021, the person instructing this procedure formulated a proposed resolution, by which it was proposed that the director of the Catalan Data Protection Authority admonish the CIFO de l'Hospitalet del Servei d'Ocupació de Catalunya, as responsible for an infringement provided for in article 83.5.a ) in relation to article 5.1.f), both of the RGPD.

This resolution proposal was notified on 16/09/2021 and a period of 10 days was granted to formulate allegations.

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

proven facts

The Hospitalet CIFO sent on 07/07/2020, from a corporate address ([preinscripciones\\_cifo\\_hospitalet.soc@gencat.cat](mailto:preinscripciones_cifo_hospitalet.soc@gencat.cat)), an email with the subject "CIFO Hospitalet Programació 2020", to numerous private recipients (99), without using the blind copy option. This allowed all the recipients of said email, including the complainant, to access the private email address of the rest of the people to whom the message was addressed.

Fundamentals of law

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

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

In this regard, it must be said that the allegations made were not allegations in themselves tending to distort the reality of the facts that motivated the initiation of the procedure or the legal qualification established in the initiation agreement, but rather they referred, in general terms, to the response that the entity gave to this Authority's request in the prior information phase, and they mainly focused on exposing the measure

corrective action implemented by the entity in order to alleviate the fact of not having until date "a specific protocol or instruction on the use of e-mail". In this sense, the entity stated that in order to prevent similar events from being repeated, the "Manual for the good use of e-mail" had been published on the SOC intranet. Guide for working people for the protection of privacy in the use of e-mail",

prepared by this Authority, and "Instruction 8/2020, of November 24, on the use of information and communication technologies in the Administration of the Generalitat of Catalonia", prepared by the former Department of Politics Digital and Public Administration, now Department of the Vice-Presidency and Digital Policies and Territory.

As indicated in the proposed resolution, this Authority positively values the measure adopted by the entity, which provides the entity's employees with direct access to information on the proper use of e-mail, but it should be noted that the adoption of this measure does not distort the imputed facts or their qualification legal

On the other hand, the entity referred in general terms to the response it gave to this Authority's request for information, in which it explained that the cause of the controversial sending of the email had been "a one-off mistake" by the public worker in charge of making the submissions on the programming of the CIFO Hospitalet for 2020. In this regard, it should be noted that this Authority has recalled in several resolutions (for all, the resolution of the 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".

In this regard, 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. Certainly, in the present case, the sending of the controversial e-mail without using the hidden copy option, entailed data processing that violated the principle of confidentiality of the personal data of those affected, as it allowed all recipients from said e-mail they could know the private e-mail addresses of the rest of the recipients, and, at the same time, infer information relating to the fact that all of them were in a similar job-seeking situation.

3. In relation to the facts described in the proven facts section, relating to the sending of an email without using the blind copy option, it is necessary to refer to article 5.1.f) of the RGPD, which provides for the following:

"1. The personal data will be:

(...)

f) processed in such a way as to guarantee adequate security for personal data, including protection against unauthorized or illegal processing and against accidental loss, destruction or damage, through the application of appropriate technical and 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 relationship of the obligee with the person in charge or person 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

public administration applications".

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.a) of the RGPD, which typifies as such the violation of the "basic principles for treatment (...)", in relation to article 5.1.f) of the same RGPD.

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, it becomes unnecessary to require corrective measures for the effects of the infringement given that the infringing behavior refers to a single and already accomplished event, the sending of an email, which due to its instantaneous nature cannot be corrected with the application of corrective measures. What's more, it should also be noted that the organization has published on its intranet both the manual and the instruction referenced in the 2on legal basis, to facilitate access to its employees to information related to the proper use of e-mail , and thus prevent similar incidents from happening here in the future.

For all this, I resolve:

1. Admonish the Hospitalet CIFO of the Employment Service of Catalonia 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 CIFO de l'Hospitalet of the Employment Service of Catalonia.

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 what they provide

article 123 et seq. of the LPAC. You can also file a contentious appeal directly

administrative 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,

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