

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

#### File identification

Resolution of sanctioning procedure no. PS 48/2021, referring to (...) (Foundation (...)).

#### Background

1. On 21/03/2021, the Catalan Data Protection Authority received a letter from Mr. (...) for which he filed a complaint against (...) (hereafter, the school), on the grounds of an alleged breach of the regulations on the protection of personal data.

The complainant stated that her daughter has been a student at the school since 2018.

1.1 As I said, at the beginning of each year students are photographed, individually and in groups with the corresponding year (group photos are commonly known as "edge of the year"). That in the 2019-2020 school year, the center gave the students' parents a document that they had to fill out, regarding the authorization for the use and publication of images of students under 14 years of age (the document was provided). The complainant complained that the school did not wait to receive the authorization document and took the photographs of her daughter without knowing whether they had given consent.

The following year, at the beginning of the 2020-2021 school year, the school gave them said authorization again. In this case they decided to deny all the authorizations contained in the authorization document relating to the use of their daughter's image and personal data (provide the signed and dated document). Despite this, she explains, they included her daughter in the group photo and later sent copies to all the families in the same year in case they were interested in purchasing a copy. Upon learning of this fact, because the family also received a copy, they asked the school to remove all group photographs in which their daughter appeared. The school did so and all the families returned them.

On the other hand, the complainant pointed out that the authorization document did not ask for specific consent to take group photographs (border).

1.2 She also complained that her daughter's tutor used a document in which the school requested information on the continuity of students at the center, which families had to fill out and return to the center, to play pranks on the students. According to the whistleblower, the tutor: "I was reading the content out loud making a joke with the children, so that all the students in the classroom found out that some students continued or not at the school. (...) this document, which contains personal data of the students and

confidential information, it had to be properly guarded and its content kept secret".

Of the documentation provided on the first reporting incident, it is important to highlight the authorization document: "use of images, publication of personal data and material created by children under 14", which has the following content:

"Data of the student/ and parents or guardians.

I authorize: That the image of my child and/or his voice may appear in photographs and/or videos corresponding to educational, complementary and extracurricular school activities organized by the center and carried out inside or outside its facilities, published in:

- Different spaces within the center's facilities - Web pages and blogs
  - Social networks:
  - Magazines or publications published by the educational center
  - Magazines or publications not edited by the center (...)
- (...)"

The form is dated 09/14/2020, it is signed by the parents and all the boxes are marked in the sense that the parents do not authorize the use and publication of images of the minor in any of the cases described.

2. The Authority opened a preliminary information phase (no. IP 117/2021), 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 05/18/2021 the reported entity was required to report on certain issues:

a) Regarding the processing relating to the obtaining and dissemination of the photograph of the minor (individual and group photograph), which specified: the purpose of the processing, the legal basis that in his opinion would justify this processing of data, which provided evidence that families are informed about this treatment; as well as to specify whether the obtaining of the photographs had been entrusted to a company and, in such a case, to provide the contract for the person in charge of treatment.

b) Regarding the dissemination of the image of the minor: to indicate the reasons why, despite the fact that the parents of the minor did not authorize the dissemination of the image of their daughter,

the image of the minor was obtained and subsequently disseminated among the families of the students in the same year.

c) Regarding the disclosure of data relating to the continuity or not of the students at the School for the next school year by the guardian of the minor: that he indicate the reasons why this information was in the possession of the guardian, report on the procedure used for school/parent communication and the technical and organizational security measures implemented to exchange information; as well as indicating the reason why the minor's tutor presented the information in class about the minor's continuity or not at the center.

The request notification was rejected by the system without access to the content.

On 06/17/2021, the previous requirement was reiterated.

4. On 06/29/2021, (...) responded to the aforementioned request in writing in which he set out the following:

1. Regarding the processing of the photograph of the minor:

- That the purpose of the treatment is framed in the educational function. The group photograph (the border) is a commemorative memory of the school stage.
- That the specific rule that would protect the treatment is the Organic Law of Education and the legal relationship that is established with the enrollment of the student at the school.
- That the photographs were taken by the company (...). The commission contract of treatment.
- Regarding the reasons why the minor was included in the group photograph and which was later disseminated among the families of the minor's class, he says: "the photographs were not disseminated to third parties unrelated to the treatment, but which were shared with the families themselves in a similar way to when images are uploaded in the private area, online where families can access them".
- That it is true that the minor's parents did not give their consent for the treatments specified in the document. But that the treatment of images of the border was not in the list of treatments that had to be authorized through consent, given that it is a treatment that is part of the teaching and educational function of the center.
- That the school has updated the forms with a new box that specifies whether or not the obtaining of photographs is authorized for the border and the subsequent dissemination among the families of the corresponding course (provides the document).
- That when the family communicated to the school that they did not want other families to have their daughter's image, they asked all the families to return the photographs. And he adds, that: "all the families returned the border except for the complaining family that didn't pay for the photographs either." Once the photographs were received, they were destroyed, as were the negatives, and a new border was made without costing the minor.

- Finally, the school claims that the minor's family authorized the recording of videos with their daughter's image, specifically, the choral singing and Christmas activities (it provides the forms signed by the parents).

2. Regarding the disclosure of data relating to the continuity or not of students at the center, the school adds the following:

- The procedure that the school follows in this matter is that the students give the information to the tutors who, in turn, collect it and take it to the secretary where it is kept in a locked cupboard.
- That the tutor in question wanted to play a joke on the children and while collecting the applications he joked, saying: "you leave and you stay". According to his answer, the tutor did not read the documents, but said "you go, you stay" randomly, without revealing the information contained in the forms.
- That the school has taken measures in this regard, among others, has created a code of conduct for teachers

The reported entity attached various documentation to the letter.

5. On 13/09/2021, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against (...) 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 09/20/2021.

6. The initiation agreement explained the reasons why no imputation was made with respect to the other reporting event. Specifically, with respect to which the tutor would have revealed information about the students' continuity in the school the following school year, given that from the actions taken in the previous information phase no indications were found to suggest that the tutor of the minor had revealed the real content of the forms that the parents had filled out.

Thus, from the email dated 02/24/2020, provided by the complainant, which he addressed to the school management, it was inferred that at first the family described the events as an inappropriate and stupid comment , and wrote in the subject line of the email "Inappropriate joke". Likewise, the body of the message contained the comment of the person making the complaint, which said: "we are aware that this tutor has made other "jokes". And he added: "We are aware that relaxing the tension due to the health issue that surrounds us all can be a good tool in the educational field, but not everything works". The transcript of the message was the following:

"Our daughter (...) has told us that she has handed over to her tutor, (...), the ticket specifying the continuity for the next 2021-2022 school year. His tutor made a comment, addressing the whole class in a loud voice, saying (...) he will not continue next year at school!. Faced with this comment, our daughter replied that she would continue. The tutor immediately said it was a joke. What the tutor has called a "joke", he has also repeated it with other students, leaving them in doubt and then denying it was a "joke". We consider the comment, inappropriate and stupid, far from being considered a joke. We are aware that this tutor has made other "jokes" about which we have not said anything and which we also did not find correct. We are aware that relaxing the tension due to the health issue that surrounds us all can be a good tool in the educational field, but not everything works."

The school, for its part, denied that the tutor revealed the actual content of the forms, and explained that he only randomly said: "you leave, you stay...", without reading the forms .

The person reporting also provided an apology email that the guardian addressed to his family. This email also referred to an inappropriate joke. The specific content of the email was as follows: "The school management has already made me aware of the situation experienced yesterday. Comment that at no time was the intention to make an inappropriate joke. It won't happen again."

Well, it is not possible to know if the tutor read the content of the form or was simply joking with the students by randomly saying "you leave, you stay". In addition, according to the statements of the complainant, everything pointed to the fact that it was not the first time that the tutor had played a joke on his students.

This is the way things are, and given that during the preliminary information phase no rational indications were found that would lead to consider that the tutor had disclosed the data on the forms and, therefore, that an infringement had occurred from the perspective of the regulations on data protection, it was agreed to archive this specific fact reported

7. 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.

8. On 09/30/2021, the accused entity submitted a letter in which it assumed and acknowledged its responsibility for the alleged facts and asked that the following issues be taken into account in the resolution of the procedure:

- That the imputed facts were the result of a specific, isolated and involuntary error and that the school has not obtained any benefit.

- That the school has regulatory compliance mechanisms in data protection and has implemented appropriate action procedures. That the cause that led to the facts that are imputed to him is found in an anomaly in the operation of these procedures and, in no case, has it been due to negligent action or negligence.
- That when the school became aware of the facts, it acted diligently, asking the families to return the photographs. All the families returned the photographs except the reporting family.
  
- That all the protocols relating to the treatment of students' images have been reviewed and controls have been strengthened so that events similar to the one in question do not occur again.
- That during the past term, the school has undertaken a process of review and control of all the protocols and controls of the data protection regulations and has modified the forms for collecting and disseminating images so that no errors occur in a future

9. On 08/11/2021, the person instructing this procedure formulated a proposed resolution, by which it proposed that the director of the Catalan Data Protection Authority sanction (...) 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 08/11/2021 and a period of 10 days was granted to formulate allegations.

It should be clarified that the accused entity did not present allegations in the initial agreement and that a the "Formulation of objections" section of the initiation agreement expressly indicated that, if no objections were presented within the established period, the initiation agreement would be considered a proposal for resolution and the resolution of the procedure would be issued directly, in accordance with article 64.2.f) of the LPAC. However, since the section called "Applicable penalty" indicated that the determination of the amount of the fine would be carried out in the resolution proposal, to guarantee the rights of the entity imputed in this sanctioning procedure - and, in particular, the possibility of taking advantage of the reductions provided for in article 85 of the LPAC-, before dictating the resolution of the procedure, a resolution proposal was formulated, with the corresponding hearing procedure.

10. On 11/11/2021, the accused entity paid in advance 600 euros (six hundred euros), corresponding to the pecuniary penalty proposed by the investigating person in the resolution proposal, once the reductions provided for in article 85 of Law 39/2015 have been applied.

proven facts

The school "(...)" disseminated the image of the complainant's daughter among the families of the students in the minor's year, without having a legal basis to legitimize this data processing.

Specifically, the parents of the minor filled out a form that the school provided to the families of children under 14 regarding the use of images, publication of personal data and material produced by the students, and they refused the authorization so that the image of her daughter (photographs and videos) could appear in the educational, complementary and extracurricular school activities organized by the center and carried out inside or outside its facilities. The school did not take this into account and took the corresponding photograph at the edge of the course including the minor and, subsequently, gave it to all the families of the minor's course who had the option acquire it

Following complaints from the child's parents, the school asked all families to return the said photograph and then proceeded to destroy all copies and negatives.

#### 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.

Pursuant to article 3 of Law 32/2010, the scope of action of the Catalan Authority of Data Protection covers data processing:

"(...)

e) Entities governed by private law that meet at least one of the following three requirements in relation to the Generalitat, the local bodies or the bodies that depend on them: first. That their capital belongs mostly to the said public bodies. second That their budget income comes mostly from the said public bodies. third That in their management bodies the members appointed by said public bodies are a majority."

The Statute of Autonomy of Catalonia, in article 21.3 determines that private teaching centers can be supported with public funds in accordance with what is determined by law, in order to guarantee access rights under conditions of equality and teaching quality.

And, Law 12/2009, of 10 July, on education, in article 42 defines the Education Service of Catalonia and specifies the scope of action. Thus, in article 42.4 of the same law it is established that the financing with public resources of the private centers provided by the Catalan Education Service meets the sufficiency criteria established by the budgets of the Generalitat, and is based on the educational concert model. Regarding this, (...) is a charter school that is part of the Catalan Education Service.

2. In accordance with article 85.3 of the LPAC, both the recognition of responsibility and the voluntary advanced payment of the proposed monetary penalty lead to the application of reductions. The effectiveness of these reductions is conditional on the withdrawal or

the relinquishment of any action or appeal through the administrative route against the sanction. For both cases, sections 1 and 2 of article 85 of the LPAC provide for the termination of the procedure.

On 09/30/2021, the accused entity presented a letter in which it acknowledged its responsibility in the facts that were imputed to him.

On 11/11/2021, the accused entity paid in advance 600 euros (six hundred euros), corresponding to the monetary penalty proposed by the investigating person in the resolution proposal, once the reductions provided for in article 85 of Law 39/2015.

3. In relation to the facts described in the proven facts section, relating to the principle of legality of the treatment, it is necessary to go to article 5.1.a) of the RGPD, which provides that "Personal data will be: a) processed in a lawful, fair and transparent manner in relation to the interested party ("lawfulness, loyalty and transparency)". And in relation to the principle of legality, article 6.1 of the RGPD establishes that in order for the processing to be legal, one of the conditions specified in the same article must be met.

During the processing of this procedure, the fact described in the proven facts section, which constitutes the offense provided for in article 83.5.a) of the RGPD, which typifies the violation of "a) the basic principles for treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9".

The conduct addressed here has been included as a very serious infraction in article 72.1.b) of the LOPDGDD, in the following form:

"b) The processing of personal data without meeting any of the conditions for legality of the processing established in article 6 of Regulation (EU) 2016/679."

4. In the case of (...), a private law entity, the general sanctioning regime provided for in article 83 of the RGPD applies.

Article 83.5.a) of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 20,000,000 euros at most, or in the case of a company, of an equivalent amount to a maximum of 4% of the total global annual business volume of the previous financial year, opting for the higher amount. This, without prejudice to the fact that, as an additional or substitute, the measures provided for in clauses a) ah) ij) of Article 58.2 RGPD may be applied.

In the present case, as explained by the instructing person in the resolution proposal, the possibility of replacing the sanction of an administrative fine with the sanction



warning provided for in article 58.2.b) RGPD, given that the principle of legality has been violated in the processing of the data of a minor.

Once it has been ruled out that the penalty of an administrative fine should be replaced by a warning, the amount of the administrative fine to be imposed must be determined. According to what is established in article 83.2 of the RGPD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, as indicated by the instructing person in the proposed resolution, the penalty of 1,000 euros (one thousand euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, the concurrence of the following causes is observed:

- It is only recorded that the infringement has affected a person and it is not recorded that due to the treatment there has been any damage or prejudice to the affected person. In addition, the duration of the offense has not been extended in time, given that the photographs in which the minor appeared were destroyed immediately after the school received the parents' complaints (Article 83.2.a) RGPD).
- There is no evidence of intentionality or negligence in the commission of the offense (Article 83.2.b) RGPD).
- There is no evidence that the school has obtained benefits as a result of the infringement (article 76.2.c) LOPDGDD) nor that the infringement has a continuous nature (article 76.2.a) LOPDGDD).
- The school took measures to correct the damage caused, given that when it was warned by the parents of the minor, it immediately required the families to return the photographs and destroyed all copies and negatives (Article 83.2 .c) RGPD).
- There is no evidence that the school has committed any previous infractions (article 83.2.e) RGPD).
- The processed data are not of special categories (article 83.2.g) RGPD).

On the contrary, as aggravating criteria, the following elements must be taken into account:

- The rights of a minor have been affected by having included the image of the minor in the border of the course and then having disseminated it among the families of her course, without taking into account that the parents had made it clear that they did not authorize photographs of their daughter to be taken (article 76.2.f) LOPDGDD), although it must also be taken into account that it was a paper image and that its dissemination was in a limited environment, specifically , among the families of the minor.

5. On the other hand, in accordance with article 85.3 of the LPAC and as stated in the initiation agreement, if before the resolution of the sanctioning procedure the accused entity acknowledges its responsibility or does the voluntary payment of the pecuniary penalty, one should be applied

20% reduction on the amount of the provisionally quantified penalty. If the two aforementioned cases occur, the reduction is applied cumulatively (40%).

As has been advanced, the effectiveness of the aforementioned reductions is conditional on the withdrawal or renunciation of any action or appeal through the administrative route against the sanction (art. 85.3 of the LPAC, in fine).

Well, as indicated in the background, by means of a letter dated 09/30/2021, the accused entity acknowledged its responsibility. Likewise, on 11/11/2021 he paid 600 euros (six hundred euros) in advance, corresponding to the amount of the penalty resulting once the cumulative reduction of 40% has been applied.

6. Given the findings of the violations provided for in art. 83 of the RGPD in relation to privately owned files or treatments, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, empowers the director of the Authority for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected.

In this case it is not necessary to require corrective measures to stop or to correct the effects of the infringement, given that the school, without needing to be required by the Authority, requested the families that had the border with the image of the minor to be returned and subsequently destroyed all the photographs and negatives.

The school has certified that it has modified the forms for collecting parental consent relating to the processing of images of minors. In particular, he added a specific box for the authorization option for obtaining photographs for the border and the subsequent dissemination among the families of the corresponding course (provides the document).

For all this, I resolve:

1. Impose on (...) the sanction consisting of a fine of 1,000.- euros (one thousand euros) 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 6th legal basis.

2. Declare that (...) has made the advanced payment of 600 euros (six hundred euros), which corresponds to the total amount of the penalty imposed, once the percentage of deduction of 40% corresponding to the reductions provided for in article 85 of the LPAC.

3. Notify this resolution to (...).

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

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