

## File identification

Resolution of sanctioning procedure no. PS 55/2021, referring to the Foundation  
Concepción Juvanteny

## Background

1. En data 25/06/2020, va tenir entrada a l'Autoritat Catalana de Protecció de Dades, a través d'un trasllat de la Agencia Española de Protección de Datos, un escrit d'una persona pel qual formulava una denúncia amb reason for an alleged breach of the regulations on personal data protection against the Concepción Juvanteny Foundation (hereinafter, the Foundation).

At the time the events reported took place, the Foundation provided services as a collaborating family integration institution (ICIF) of the Catalan Institute of Reception and Adoption of the Department of Work, Social Affairs and Families, now Department of Social Rights.

The complainant stated that on 03/22/2020 he received a message through the WhatsApp mobile phone application from a person who identified himself as (...) and who was an integral member of one of the families that carried out a family reception managed by the Foundation. The purpose of the message was to inform that a group had been created to collect signatures and money to avoid the closure of the Foundation, to which the person reporting was registered as a foster family of (...). In this regard, he stated that the Foundation was the ICIF that had been in charge of monitoring his foster care case from the beginning until 25/03/2022. He added the person here complaining that his interlocutor did not want to inform him how he had accessed his personal data (telephone number and his status as a member of a host family and that the Foundation was his ICIF). Also, that he later called him and identified himself as (...). In the last one, he stated that he sent an email to the director of the Foundation (22/03/2020) setting out the reasons for his complaint, without the reply he received clarifying the origin of the communication of his personal data without consent, and a second email explaining the facts to the director of the Catalan Institute of Fostering and Adoption.

The reporting person provided various documentation relating to the events reported, among others, the following:

- copy of the conversation held by whatsapp between the reporting person and the person who identifies himself as (...), which is transcribed in part here:

"-Hello, I'm (...) and I'm part of the Juvanteny foundation, we created a group to try to help, I got your phone and if you're interested in being in the "Welcome" group, send me an ok as you want to access, I am attaching one

link that consists of getting signatures, there are two options: the one to pay and the one not to pay, don't panic when you see that you have to pay €5! (link of an electronic address).

-Hello (...), I would like to know how you got my phone. thank you

- I know that you were a host family and I tried to locate all the maximum phone numbers so as to be more, I'm sorry I can't tell you more. You decide if you are in the group.

- If you can't tell me, I'll assume that the Foundation has given you my phone number and that it's distributing my personal data without my consent (when I say Foundation, I'm talking about both employers and workers).

- Well... you simply have to leave if you don't agree... I'm sorry to bother you."

- copy of the email sent by the complainant to the Director of the Foundation complaining about the reception of the WhatsApp, and a copy of her reply stating the following:  
"I really don't know what you're talking about, I know that the families they have mobilized but I don't know anything else."

2. The Authority opened a preliminary information phase (no. IP 180/2020), 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 report on:

- If the person reporting here was listed as an integral member of a host family registered with the Foundation, and in this case, identified the people from the entity who would have had access to the personal data of the reporting person here, and the position or position they hold within the organization.
- If any employee of the Foundation had disclosed the content, or given a copy to third parties, of the register of personal data of the foster families managed by said Foundation, and specifically, the contact details of the person making the complaint.
- If the (...) is registered as a member of a foster family of the Foundation, and what are the reasons that would explain the access by this person to the contact details of the person making the complaint.
- Whether there was a response to the complaint emails that the complainant addressed to the head of the Foundation, and what actions were taken in relation to this matter.

4. On 15/10/2020, the Foundation responded to the aforementioned request through a letter in which, among others, it stated the following:

- That the reporting person "is in our records as a foster family, together with his partner."
- That "The people who have access to this Registry of Host Families are:
  - In total: the (...) of the entity, the (...) of the entity and (...), the (...), and the (...) (ICIF) .
  - Partially, only in the records corresponding to the families whose educational follow-up is carried out by contact: (...) in each case."
- That "knowingly, no disclosure or delivery of this data has been made to third parties."
- That the (...) is registered as a member of a welcoming family of the Foundation.
- That "about the possibility that this (...) had the data in its possession personal data of the reporting person may be due to different reasons:
  - The usual coincidence of our host families in different meetings and courses that our organization carries out, such as the annual trips to Port Aventura, or the work sessions that we held in the summer of 2019 where both families went attend.
  - The attendance of the majority of our families at a meeting called by our organization at the beginning of March this year where we informed them that the Generalitat had temporarily suspended (...), our actions as a Col Institution Family Integration worker. At this meeting, on the initiative of the families themselves, it was agreed to ask for all possible support to try to avoid this suspension. Without any intervention by any member (neither employee nor manager) of our Foundation, we know that some papers were passed asking for authorizations to relate to each other and most of them gave their full names, e-mails and telephone numbers in order to maintain contact with each other and decide and/or comment on possible actions that could be proposed and undertaken.
  - The day after this meeting, (...) asks us if we can confirm some telephone numbers that are not clear in the sheets that had been sent to the families. The only thing that our (...) did was to confirm whether the telephone numbers were correct or not, by means of a nominal collection where only the first name appears, at no time the surnames. At this point, and it would be a lot to assume, but it is the only option that has occurred to us, it may have happened that due to a coincidence of names, it was provided, completely involuntarily and mistakenly, if that is how it happened, the no. telephone number of the person reporting, which, if so, is very serious to us (...)"
- That "the complaint email was received and a response was given to facts that were completely unknown to us at the time and for which we had no responsibility."

The reported entity attached to the letter a copy of the thread of e-mails exchanged with the person reporting here and the (...) of the Foundation regarding the complaint regarding the reception of the controversial WhatsApp.

5. On 05/25/2021, also during this preliminary information phase, the inspector conducts the telephone conversation he has with (...), in order to obtain his testimony about the facts complainants In this regard, the witness states that the contact details of the person making the complaint have not been provided to him by the Foundation, but that he met the person making the complaint at a meeting of foster families organized by the Foundation, of which he does not remember exactly the date, but in any case prior to the date of the reported events, and there he obtained the contact details of the reporting person since the participating families exchanged them with each other.

6. On 17/11/2021, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Concepció Juvanteny Foundation for an alleged violation provided for in 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 11/18/2021.

7. The initiation agreement explained the reasons why no imputation was made regarding the facts subject to the complaint, regarding a possible leak of the personal data of the person making the complaint to the person sending the WhatsApp message.

Regarding this, in the section of reported facts not imputed in the initiation agreement, it was stated that the entity in its allegations pointed to the possibility that it had been the same reporting person who had filled out a list with their contact details during a meeting or course in which the host families participated during the year, and which were exchanged afterwards. This explanation also coincided with the version of the person who sent the controversial WhatsApp message, from whom this Authority required testimony. Therefore, all this led to not being able to rule out that it had been the same reporting person who would have agreed to fill out the list and give his phone number to the other participants. On the other hand, it was also pointed out that the reporting person's foster family status could be inferred from the mere participation in one of the meetings, meetings or courses organized by the Foundation for this group. It is for all the above, that it was considered that there were not sufficient elements to prove that the Foundation had been responsible for the eventual leakage of data of the person reporting, taking into account that the coincidence of the explanations given by the Foundation and the testimony about the source from which the data was obtained pointed to other more likely options. Therefore, based on the right to the presumption of non-existence of administrative responsibility, until the contrary is proven (art. 53.2.b LPAC), it was agreed to archive the facts analyzed in this section

8. 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.

9. On 01/12/2021, the Foundation made objections to the initiation agreement, which are addressed in section 2 of the legal foundations. The accused entity provided various documentation with its letter.

10. On 03/25/2022, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the Fundació Concepció Juvanteny as responsible of an infringement provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.

This resolution proposal was notified on 03/28/2022 and a period of 10 days was granted to formulate allegations.

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

proven facts

The Concepció Juvanteny Foundation, on an undetermined date but located between 03/01/2020 and 03/22/2020, carried out the task of checking whether the telephone numbers of members of foster families of the Foundation collected in a list that had been given to him by a third party, they matched the phone numbers registered by the Foundation, thus contributing to verifying, completing or correcting said list.

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.

The reported data processing falls within the competence of the Authority under the provisions of article 156.b) of the Statute of Autonomy of Catalonia (EAC) and article 3.h) of the Law 32/2010, to the extent that this treatment would have been carried out within the framework of the provision of a service that, at the time when the reported events occurred, the Foundation provided as a collaborating institution for family integration (ICIF) of

the Catalan Institute of Reception and Adoption of the Department of Work, Social Affairs and Families, now the Department of Social Rights.

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. On whether the proven facts are constitutive of an infringement

In the 1st section of its pleadings, the accused entity explained that the facts described in the proven facts section do not have the nature of an infringement in the field of data protection. In this sense, he argued that the initiation agreement resolved to file the reported facts relating to an eventual leak of personal data from the complainant here to the issuer of the controversial WhatsApp, and defended, in relation to the facts that motivated the initiation of the procedure, that the "mere verification of data does not constitute any disclosure or access to data carried out in favor of a third party nor does it constitute any operation related to the obtaining or processing of personal data".

Indeed, as the Foundation pointed out and it was collected in the antecedents of the proposal of resolution, as of this resolution, during the actions carried out in the previous information phase, it was not possible to verify that the Foundation had been responsible for the possible leakage of data of the person making the complaint, which is why, in the agreement to initiate this procedure proceeded to file these specific facts, based on the right to the presumption of non-existence of administrative responsibility, until the contrary is proven (art. 53.2.b LPAC).

However, the fact that the responsibility for the initial communication of the personal data of the complainant here cannot be attributed to the Foundation, does not imply that the subsequent action taken by the entity, to help check whether the contact details included in a list that was given to him by a third party, were correct and coincided with those registered by the Foundation, cannot be considered a data treatment that in itself motivates the initiation of a sanctioning procedure.

In this sense, it should be indicated that article 4 of the RGPD defines as data processing "any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission or diffusion or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction."

That being the case, there can be no doubt that the verification task carried out by the Foundation, based on the list created by a third party and given to the entity with the aim of verifying the data contained therein, it necessarily implied that the entity carried out a preliminary task of consulting the contact details of the families it had registered and from there verifying whether they corresponded with those contained in said list. Also, once the data was verified, the "mere verification" to the person creating the list of "if the phones were correct or not" was a way of communicating data to a third party, which contributed to that person could certify the validity of some data, and where appropriate, complete or correct them. All these actions would be included in the definition of "data processing", in accordance with article 4 of the RGPD, which entailed a violation of the principle of confidentiality provided for in article 5.1.f) of the 'RGPD. All this, without prejudice to the fact that, as the organization points out, the person who sent the WhatsApp message already had the names and telephone numbers of the host families.

## 2.2 On the penalty to be imposed

In this respect, it is necessary to start from the premise that the entity recognizes the commission of the alleged acts (The only thing that our (...) did was to confirm whether the telephones were correct or not), although it does not recognize them nature of infringement. However, in his allegations, he presents a series of mitigating factors that he believes should be taken into account, in the event that the proven facts are ultimately considered an infringement, all of them aimed at assessing the opportunity to sanction with a warning.

The analysis of the eventual imposition of a financial penalty, as well as the mitigating factors that could apply, will be carried out in the 4th legal basis.

3. In relation to the facts described in the proven facts section, 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, LOPDGD), 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 obligee's relationship with the person in charge or 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 applications of public administrations".

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 the violation of the "basic principles for the 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 in article 5 d "this Organic Law."

4. Since the Foundation is an entity that cannot qualify as a public sector foundation (not included in the Public Sector Register of the Generalitat of Catalonia), the general sanctioning regime provided for in article 83 of the RGPD.

Article 83.5 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, an amount equivalent to 4% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount. This, without prejudice to the fact that, in addition or as a substitute, some other of the measures provided for in article 58.2 RGPD may be applied, especially the one contemplated in sentence b), consisting of a warning.

For its part, article 83.2 of the RGPD determines the following, regarding the graduation of the amount of the administrative fine:

"2. Administrative fines will be imposed, depending on the circumstances of each individual case, as an additional or substitute for the measures contemplated in article 58, section 2, letters a) ah) yj).

When deciding the imposition of an administrative fine and its amount in each individual case, the following shall be duly taken into account:



- a) the nature, severity and duration of the infringement, taking into account the nature, scope or purpose of the treatment operation in question, as well as the number of interested parties affected and the level of damages and losses they have suffered;
- b) intentionality or negligence in the infringement;
- c) any measure taken by the person responsible or in charge of the treatment to alleviate the damages and losses suffered by the interested parties;
- d) the degree of responsibility of the person in charge or of the person in charge of the treatment, given the technical or organizational measures that have been applied by virtue of articles 25 and 32;
- e) any previous infringement committed by the person in charge or the person in charge of the treatment;
- f) the degree of cooperation with the control authority in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- g) the categories of personal data affected by the infringement;
- h) the way in which the control authority became aware of the infringement, in particular if the person in charge or the manager notified the infringement and, if so, to what extent;
- i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in relation to the same matter, the fulfillment of said measures;
- j) adherence to codes of conduct under article 40 or certification mechanisms approved under article 42, and
- k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as the financial benefits obtained or the losses avoided, directly or indirectly, through the infringement."

In turn, article 76.2 of the LOPDGDD provides that, apart from the criteria established in article 83.2 RGPD, the following can also be taken into account:

- "a) The continuing nature of the infringement.
- b) Linking the offender's activity with the practice of processing personal data.
- c) The profits obtained as a result of the commission of the infringement.
- d) The possibility that the conduct of the affected person could have led to the commission of the offence.
- e) The existence of a merger process by absorption subsequent to the commission of the infringement, which cannot be imputed to the absorbing entity.
- f) Affecting the rights of minors.
- g) Have, when it is not mandatory, a (...).

h) The submission by the person in charge or person in charge, voluntarily, to alternative conflict resolution mechanisms, in cases where there are disputes between them and any interested party."

In this case, it is considered appropriate to replace the sanction of an administrative fine with the sanction of reprimand provided for in article 58.2.b) of the RGPD. In this sense, of the criteria provided for in article 83.2 of the RGPD, some of them invoked by the Foundation as mitigating criteria, the following are taken into account:

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

- The specific nature of the infringement, its severity and duration, bearing in mind that the treatment operation carried out by the Foundation is a simple task of verifying data that was already in the possession of the person who alone request this verification. (art. 83.2.a RGPD)
- The lower level of damage suffered by the affected people, taking into account the fact that, to the extent that they had participated in joint meetings, the information about them being a foster family was already known (art. 83.2.a RGPD ).
- The lack of intentionality (art.83.2.b RGPD).
- There is no evidence that the Foundation has previously committed any infringement or been sanctioned in the field of data protection (art.83.2.e RGPD).
- The category of personal data affected by the infringement, taking into account that special categories of data were not treated (art.83.2.g RGPD).
- The way in which the Authority became aware of the infringement, taking into account that it was the Foundation itself that exposed the facts reported to this Authority, when in its response to the request it reported that, in relation to the controversial list, had only carried out a data verification task (art.83.2.h RGPD)
- The lack of benefits as a result of the infringement (art. 83.2.k RGPD and 76.2.c LOPDGDD).
- The nature of the Foundation, which is not for profit (art. 1 of its Statutes); and the recognition of the entity of the imputed facts (art. 83.2. k RGPD).

5. 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. However, in the present case, no measure should be required to stop or correct the effects of the infringement, given that it is an isolated and specific event, which would have consummated the effects of the infringement.

For all this, I resolve:

1. Admonish the Fundació Concepció Juvanteny 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 5th legal basis.

2. Notify this resolution to the Concepció Juvanteny Foundation

3. 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 interpose directly 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 13 July, regulator of 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 considers convenient to defend their interests.

The director,