

## File identification

Resolution of sanctioning procedure no. PS 14/2022, referring to the Eixample School Institute.

## Background

1. On 16/09/2021 the Catalan Data Protection Authority received a letter in which a person (hereinafter, complainant) made a complaint against the Institut Escola Eixample (hereinafter, the School), due to an alleged breach of the regulations on the protection of personal data.

In particular, the complainant stated that on 16/09/2021, he received an email, with the subject "Informations COVID", sent from the corporate address of the School <(...)>, without using the blind copy option and, therefore, the address of all recipients being legible. The content of the mail informed the parents of the students that an authorization had been given to the students that had to be returned signed to the educational center, for the purposes of being able to carry out tests to detect COVID-19.

The reporting person provides a copy of this email.

2. The Authority opened a preliminary information phase (no. IP 361/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts were susceptible to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 03/11/2021 the reported entity was required to report, among others, on the reasons why the copy option was not used in the aforementioned electronic submission hidden

4. On 16/11/2021, the School responded to the aforementioned request through a letter, through which it communicates, in literal terms, the following :

*"1. This is purely due to human error when pasting the email addresses, as this is a common submission that is always done via blind copy. We have reviewed all the e-mails that were sent to us that day and we have been able to verify that this was the only e-mail that, due to human error, went out that day without the BCC option."*

The same letter argues that, when e-mails are sent from the School, the blind copy option is always used, regardless of occasional errors that may occur. And, he adds:

*"As the management team of the center we will prioritize a series of actions and strategies in order to raise awareness again and ensure the responsible use of e-mail [...]. The center began operating as a public center on September 1, 2020. No written protocol has been developed regarding the use of email."*

*In the meetings with the administration and services staff and with the teaching staff, some recommendations are made on the good use of email based on the ACPD document <https://www.apda.ad/sites/default/files/2018-10/2754.pdf>*

*We understand the importance of this topic, and others that refer to data protection, we will make a request to the data protection of the CEB for some training capsules for all the staff of the center: teachers and PAS in order to minimize as much as possible human errors”.*

5. On 03/17/2022, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Eixample School Institute of the Department of Education for an alleged violation provided for in article 83.5.a ), in relation to article 5.1.f), 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 treatment of personal data and the free movement thereof (hereafter, RGPD). This initiation agreement was notified to the Eixample School Institute on 03/23/2022.

6. In the initiation agreement, the School was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of tests that it considered appropriate to defend their interests

7. On 02/04/2022, the School formulated the allegations in the initiation agreement which are transcribed below and which are addressed in section 2 of the legal foundations:

*"We reiterate what was stated in our letter dated 11/16/2021, presented in the preliminary information phase (no. IP 361/2021), and we want to record the following:*

*On September 16, 2021, an email was sent, due to human error, without using the blind copy option, with general information regarding the COVID protocols. (...) As (...) I am fully aware of the need for secure data management and throughout this 2021-22 academic year a series of measures have been implemented to facilitate secure work minimizing the margin of error. Some of these are:*

- *Tokapp application was purchased School to be able to make communications to families in a centralized and safe way, avoiding errors of this type.*
- *In the month of September, the percentage of families that had installed this application was very low and, prioritizing the protection of public health, it was decided to send these protocols by email to ensure that they reach all families in the center.*

*It is not a common practice of the center to make this type of shipment and currently all mass communications are done via application, therefore we do not expose ourselves to making any more mistakes of this type.*

*As (...), upon becoming aware of the error that had occurred, I sent a communication to all staff at the center reminding them of the importance and need to be rigorous with data protection. I am attaching the e-mail sent to all center workers with the manual for good use of e-mail. At the same time, the center's administrative staff have enrolled in training on electronic administration, and we have applied to be a pilot center for the implementation of electronic administration to facilitate that, in a job where it is increasingly immense data management, can be done securely.*

Among other documents, the letter of allegations is accompanied by the email dated 11/15/2021, which was sent to the workers by the School's management, for the purposes of

to inform them of the events that occurred, of the complaint procedure processed before this Authority, and to inform them of the obligation to attend a training session, in the matter of data protection.

8. On 20/04/2022, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the Institut Escola Eixample 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 04/22/2022 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**

On 16/09/2021, the School sent an email to the parents of the students at the school (a total of 115 people) without using the blind copy option, which led to all the recipients of the mail could access the email address of the rest of the people to whom the message was addressed. The content of the mail informed that the students had been given an authorization that had to be returned signed to the educational center, for the purposes of being able to carry out tests to detect COVID-19.

### **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 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.

The allegations presented in the agreement to initiate this procedure refer to those already made in the letter that the imputed entity presented to this Authority on 11/16/2021.

In essence, the allegations presented by the School in the preliminary information phase showed that the events reported occurred as a result of human error and added that, in order to minimize the risks, in the month of July 2020 the entity acquired the *Tokapp* application *School* in order to be able to carry out communications securely. However, since in the month of September 2020, the percentage of families that had downloaded the referred application was very low, the information related to the tests for the detection of COVID-19 was sent by email. In this regard, he emphasizes that the aforementioned application is currently used in order to make secure communications.

Well, it should be pointed out that, even if the reported event occurred as a result of a mistake, the lack of intention (human error), cannot exonerate the School from responsibility.

In this regard, it is necessary to take into account the doctrine of the principle of culpability, which highlights that 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 culpability, incompatible with a regime of objective responsibility without fault, and establishes that for the element of fault to occur, conduct is not required intentional but it is sufficient that the infringement occurred due to the negligence of its author. In this sense, the Supreme Court in several judgments, 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*".

Also the National Court, in the Judgment of 10/30/2017, in matters of personal data protection indicated, citing what it had already declared in previous judgments (for all, the judgment of 11/12/2010) the following: "*But, as we have repeatedly affirmed in this matter, the sanctions do not require intentional intent but mere carelessness or lack of diligence is sufficient; in the words of this Court "the simple negligence or non-fulfilment of the duties that the Law imposes on the persons responsible for data processing files is enough to exercise extreme diligence..." and even if no economic gain was obtained"*.

In short, negligence does not require a clear intent 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 referred to article 5.1.f) of the RGPD. 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. And in the present case, the sending of the controversial e-mail to all the parents of the students of the educational center, without using the option of the hidden copy, led to data processing by the School that violated the principle of confidentiality of the personal data of those affected, as it allowed all the recipients of the reference email to access the email address of the other recipients.

For all that has been said, it is considered that the statement of allegations, which highlights the lack of intentionality in the commission of the facts, cannot succeed in exonerating the accused entity from responsibility.

**3.** In relation to the facts described in the proven facts section, it is necessary to go to article 5. f) of the RGPD, which provides that personal data will be "*treated in such a way as to guarantee adequate security to personal data, including the protection against unauthorized or illegal treatment and against its loss, destruction or accidental damage, through the application of appropriate technical and organizational measures ("integrity and confidentiality")*".

As indicated by the instructing person, during the processing of this procedure the facts described in the proved facts section, which are constitutive of the offense provided for in article 83.5 a) of the RGPD, have been duly proven, which typifies the violation of "*the basic principles for treatment, including the conditions for consent, in accordance with articles 5, 6, 7 and 9*" which include the principle of confidentiality (art. 5.1.f 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:

*"j) 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 or (...) of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct it - 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 since the infringing conduct refers to a single fact already accomplished, the sending of an email, which, due to its instantaneous nature, cannot be corrected with the application of a corrective measure.

For all this, I resolve:

1. Admonish the Institut Escola Eixample of the Department of Education 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 4th legal basis.

2. Notify this resolution to the Eixample School Institute of the Department of Education.

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 (...) of the Authority Catalan Data Protection Agency, within one month from the day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction.

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

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

The director,

Machine Translated