

## File identification

Resolution of sanctioning procedure no. PS 15/2022, referring to Vic City Council

## Background

1. On 11/08/2021 the Catalan Data Protection Authority received a letter in which a person (hereafter, complainant) filed a complaint against Vic City Council, on the grounds of an alleged non-compliance with the regulations on personal data protection. Specifically, the person making the complaint pointed out that there had been a publication on the electronic headquarters of the entity complained about, in relation to the selection process to fill an administrative position of the Autonomous Organization of Fairs and Markets of the file FIM/115/2020, the " *Report on the forecast of the restart of the selection process* ". In this regard, the complainant pointed out that the report identifies him, with his first and last name, as the person who filed a contentious administrative appeal against the final approval of the list of applicants admitted and excluded from the aforementioned selection process, and considered that, given that the purpose of the report is to communicate the resumption of the actions, it is unnecessary to disseminate your personal data.

The letter of complaint is accompanied by several screenshots in which it can be seen that the " *Report on forecast restart of the selection process* " published on the website of the City Council of Vic, identifies the now complainant, with first and last names, such as the person who filed the administrative contentious appeal of reference.

2. The Authority opened a preliminary information phase (no. IP 322/2021), 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. On 08/12/2021, the Authority's Inspection Area carried out a series of checks via the Internet on the facts subject to the claim. Thus, it was found that on the electronic headquarters of the Vic City Council there is published the " *Report on the forecast for the restart of the selection process* " which allows the download of the document, and which identifies the person who submitted the reference administrative contentious resource, with their first and last names.

4. In this information phase, on 01/24/2022 the reported entity was required to report, among others, on the following:

- Legal basis that would legitimize the publication on the City Council's electronic headquarters of the document " *Report on forecast restart of the selection process* " without anonymizing the identity of the person who filed an administrative appeal against the final approval of the list of admitted and excluded applicants.

5. On 31/01/2022, the City Council of Vic responded to the aforementioned request through a letter which communicates, in literal terms, the following:

*"First-. That there was a material error at the time of making the publication that is the subject of this claim (we attach a copy of it) by the OFIM revealing personal data of the*

*claimant (names and surnames) and current complainant before this Authority, without any basis of legitimization of those collected in art. 6 of Regulation (EU) 2016/679, of April 27, relating to the protection of data of natural persons.*

*Second-. For this reason OFIM has proceeded to withdraw the aforementioned publication.*

*Third-. The publication that is the subject of this claim was made on July 13, 2021".*

**6.** On 17/03/2022, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the City Council of Vic for an alleged infringement 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 processing of personal data and the free circulation of these (hereinafter, RGPD). This initiation agreement was notified to Vic City Council on 03/22/2022.

**6.** In the initiation agreement, the City Council of Vic 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 convenient for defend their interests.

**7.** On 04/04/2022 Vic City Council formulated the allegations in the initiation agreement which are transcribed below and which are addressed in the second section of the legal foundations:

- *That the infringement allegedly committed by Vic City Council is contained in art. 83.5 a) of Regulation (EU) 2016/679, of April 27, relating to data protection and art. 72.1 i) of Organic Law 3/2018, of December 5, on data protection and guarantee of digital rights (LOPDGDD).*
- *That as soon as it became aware of the existence of the publication made, this City Council withdrew the same".*

**10.** On 04/27/2022, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish Vic City Council as responsible of an infringement provided for in article 83.5.a) in relation to article 5.1. a), both of the RGPD. In this proposal, therefore, in view of the documentation relating to the proceedings and the allegations made, the initially imputed infraction, consisting of a violation of the confidentiality principle, is modified for a violation of the principle of legality; and this in accordance with article 89.3 of the LPAC.

This resolution proposal was notified on 04/27/2022 and a period of 10 days was granted to formulate allegations.

**11.** The deadline has been exceeded and no objections have been submitted.

### **proven facts**

On 07/13/2021, the City Council of Vic published on its electronic headquarters " *the Report on the forecast for the restart of the selection process* ", which identifies, with first and last name, the person who filed a administrative contentious appeal against the definitive list of those admitted and excluded from a selective process to fill an administrative position of the Autonomous Organization of Fairs and Markets.

### **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, apply to this procedure. 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 imputed entity has not formulated 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 essence, the allegations presented by the City Council showed that the "*Report on the forecast for restarting the selection process*" had been removed from the municipal website.

In this regard, it should be noted that neither the allegations made by the entity denounced in the agreement to initiate the sanctioning procedure, nor those presented in the preliminary information phase, question the veracity of the alleged facts, but rather they focus on attributing their commission to an error "*at the same time as making the publication that is the subject of this claim*" on the part of OFIM.

Well, certainly, Vic City Council acted wrongly, and outside of data protection regulations, by publishing the name and surname of the person who filed the administrative appeal in the reference report. This mistake, recognized by the City Council, does not allow him to be exonerated 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 intention to infringe, but rather lies precisely in carelessness and, in this specific case, in the lack of attention required by the entity in complying with data protection regulations. Certainly, in the present case, the publication on the municipal website of the identity of the person who filed a contentious administrative appeal allowed anyone who accessed the said Report to know that the now complainant had filed the reference judicial appeal.

Nevertheless, it should be noted that, although the City Council has alleged that the events occurred as a result of an error in the publication of the report, the truth is that the purpose of this document was to communicate to applicants that " *the reference selection process will not be restarted before the middle of September 2021* ", and given that to fulfill this purpose, that is to say, to provide this information, it was completely unnecessary to include in the content of the report the name of the person who filed an appeal against the final approval of the list of admitted and excluded applicants.

For all that has been said, it must be concluded that the reference publication is not protected by any legal basis provided for in article 6.1 of the RGPD, and that the allegations that highlight the lack of intentionality in the commission of imputed facts cannot prosper for the purposes of exonerating the imputed entity from responsibility.

3. In relation to the facts described in the proven facts section, it is necessary to go to article 5. a) of the RGPD, which provides that personal data will be treated " *in a lawful, fair and transparent manner in relation to the interested party ("lawfulness, loyalty and transparency")* ).

As indicated by the instructing person, during the processing of this procedure the facts described in the proven 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* " among which, the principle of legality is contemplated (art. 5.1 a RGPD).

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

*"a) The processing of personal data that violates the principles and guarantees established by Article 5 of Regulation (EU) 2016/679"*

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77 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 infraction given that the infringing conduct refers to a single fact already accomplished, the publication of the identity of the person who filed an administrative appeal, which, by its instantaneous nature, cannot be corrected by the application of a corrective measure.

Finally, it should be noted that the Vic City Council has already removed the publication of the " *Report on forecast resumption of the selection process* " from the municipal website.

For all this, I resolve:

**1.** Warn the City Council of Vic 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 Vic City Council.

**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.

The director,