

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 53/2022, referring to the City Council of (...).

## Background

1. On 12/28/2021, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the City Council of (...), on the grounds of an alleged non-compliance of the regulations on personal data protection .

The complainant presented the following relevant facts:

- 1.1. That in the past (...), as a result of a temporary incapacity, his doctor gave him medical leave and that same day, he sent it by email to the City Council where he worked.
- 1.2. That at 9:59 a.m. (...), he received a call from a woman who identified herself as a nurse from the company (...) and that when she asked who the company was (. ..) which he had never heard of, she told him that it was a '*company of the City Council of (...)*'. Next, the complainant asked her how the City Council had obtained her consent to transfer her health data to (...) and she replied that '*this is something I should discuss with the City Council, cutting immediately after saying this the call*'.
- 1.3. That, subsequently, he became aware that the company (...) is an external company contracted by the City Council.
- 1.4. That at 12:13 a.m. (...), he received a *certified SMS in the name of SME AJ. (...)*' in which his name, surname and ID were stated and he was summoned to go to the company (...) on 12/3/2021, at 11:30 a.m. '*with the medical reports you have* .
- 1.5. That, as a result of the above events, he sent an email to the Occupational Risk Prevention technician (the (...)) and another to the head of Human Resources (the (...)) complaining that he did not know who the company was (...) and that he wanted to know who had given his consent to transfer his personal and medical data. In response, both workers informed him about said company and the service it was providing.
- 1.6. That on (...) at 11:55 a.m., he received another phone call, this time from a man who identified himself as a doctor from (...), who reminded him who had an appointment at 11:30.

Based on the facts presented, he presented the complaint because the City Council had provided his personal and health data to an external company '*without permission or consent, or knowledge of the person appearing either as an individual or as a union representative*'.

Along with the complaint, he provided 3 images of screenshots to prove the calls and the SMS message received by the company (...), and the emails (from (...) and (...)) crossed with the Occupational Risk Prevention technique and the head of Human Resources.

2. The Authority opened a preliminary information phase (no. IP 525/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure for application 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 05/05/2022 the denounced City Council was required to report on what was its legal relationship with the company (...) and indicate whether a contract existed between both parties or similar legal act regulating the transfer of data from the City Council's staff to the company (...) and, in said case, a copy of said document.

4. On 9/05/2022, the City Council of (...) responded to the request by providing the following documentation:

- Resolution awarding the file (...), by virtue of which the management, control and reduction of work absenteeism service is awarded from the City Council to the company (...), signed for both parties, the City Council and the awarded company.
- Document consisting of '*Data Protection Annex, Confidentiality and Data Protection Clauses*' signed by both parties, the City Council and the awarded company.

5. On 05/19/2022, also during this preliminary information phase and in view of the documentation provided, it was considered necessary to have more information in order to clarify the circumstances of the events reported, reason for which the Authority's Inspection Area once again requested the City Council to confirm whether it had an employment agreement authorizing it to process personal data in order to carry out a control of work absence and that, in such case, provide a copy.

6. On 06/30/2022, the City Council complied with this requirement by means of a letter of which it is worth noting:

- The existence of an '*Agreement on working conditions (...)*', of which the preliminary section should be highlighted in order to determine its purpose and the parties that subscribe to it: '*This Agreement, regulating the (...) of (...) has been negotiated by the representatives of the City Council and the unions (...), in (...)*'.
- This agreement included as annex 1, the '*Circular of (...), approved by Decree (...)*' which has as its object '(...)'. Likewise, its additional provision provides: '*(...)*'.
- In addition, he points out that '*the City Council only provides [the company that provides the service] with the name and surname of the municipal staff, their place of work and their contact details in order to be able to follow up as referred to in the Additional Provision. Under no circumstances are staff medical data provided, nor does the*

*company receive any data on the staff's health status or the reasons for their leave. Only the company provides information on the possible duration of the medical leave.' And it justifies the importance of this information to be able to anticipate possible staff replacements to cover the length of time off and to provide optimal care to citizens.*

- Finally, confirm ' *Therefore, there is a labor agreement within the framework of the current Working Conditions Agreement of the City Council of (...) which enables the control and monitoring of medical leaves.'*

**7.** On 07/06/2022, the Director of the Catalan Data Protection Authority issued a resolution by which she archived the actions of prior information no. 525/2021, to the extent that the treatment of the health data of City Council officials by the company (...) - company awarded a contract for the management, control and reduction of the 'absenteeism at work' - was made within the framework of a treatment contract between said company and the City Council. In the same resolution it was indicated that the processing of the health data of civil servants for the purpose of controlling work absenteeism was enabled by articles 6.1.c) and 9.2.b) of Regulation (EU) 2016/679 of the European Parliament and 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 (hereafter, RGPD), based on the signature, between the unions and the City Council, of *the Agreement on working conditions (...)*, and the circular of (...) (incorporated as Annex 1).

This filing resolution was notified on 07/07/2022 to the data protection delegate of the City Council of (...), and to the complainant on the same date.

**8.** On 07/21/2022, the complainant filed an appeal for reinstatement against the filing resolution of 07/06/2022, in which he informed the Authority that the Working Conditions Agreement ( ...) that the City Council invoked as the enabling title for the reported data processing, had never been published in any official bulletin.

**9.** On 22/07/2022 this appeal was transferred to the data protection delegate of the City Council of (...) so that, within ten days, he could formulate the allegations he considered relevant

**10.** On 27/07/2022, the City Council submitted a statement of objections.

**11.** On 31/08/2022, the Director of the Catalan Data Protection Authority issued a resolution by which it considered the appeal for reinstatement filed against the archive resolution of 07/06/2022, notified in City Council on 2/09/2022, canceling the file of file IP 525/2021 and agreeing to proceed with the previous information and, where appropriate, to initiate disciplinary proceedings. In that resolution it was concluded that the Agreement on working conditions (...) and the circular of (...) (incorporated as Annex 1), although it was endowed with validity and effectiveness for the signatory parties of that agreement, it could not be considered an instrument suitable for the purposes of complying with the requirement of article 9.2.b) RGPD, since it would lack the formal requirement of its publication, without which it would have no normative value and " *erga omnes* ".

**12.** In accordance with the antecedents that have been related so far and with the estimated resolution of the appeal, on 09/15/2022, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the City Council of (...) for an alleged

infringement provided for in article 83. 5.a), in relation to article 6.1 and 9.2; all of them from the RGPD.

**13.** On 12/01/2023, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority warn the City Council of (...) as responsible for an infringement provided for in article 83.5.a) in relation to article 6.1 and 9.2, both of the RGPD.

This resolution proposal was notified on the same date, 12/01/2023, and a period of 10 days was granted to formulate allegations.

**14.** On 01/25/2023, the City Council's data protection officer submitted a letter in which no objections to the proposal are formulated. On the contrary, they are limited to providing a letter signed by the company administrator (...) (also dated 01/25/2023) in which, for what is of interest here, he declares *that "(... ) at the express request of the City Council of (...), we stop providing this service [management, control and reduction of work absenteeism of the staff of the City Council of (...)] when it comes to civil servants and it will only be executed in the cases of personnel under employment regime."*

#### **proven facts**

The City Council of (...) has processed special category personal data of the complainant (specifically, health data), career official of said City Council, with the purpose of carrying out a work absence control, without any of the exceptions provided for in article 9.2 of the RGPD.

In this sense, and with regard specifically to the exception provided for in article 9.2.b) of the RGPD, the Working Conditions Agreement (...) and the circular of (...) (incorporated as Annex 1), it would not be an instrument suitable for the purposes of complying with the requirement of said precept, since it would lack the formal requirement of its publication, without which it has no normative value and "*erga omnes*".

#### **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 , as has been advanced in the 14th antecedent, has not formulated allegations in the proposed resolution, limiting itself to providing a document, issued by (...), in which the said company declares that, following the City Council's instructions, it ceases to provide the service of management, control and reduction of work absenteeism in relation to the City Council's official staff; which will be the subject of analysis in the 4th legal basis when analyzing the desirability of requiring corrective measures.

Despite the fact that the entity has not presented allegations against the resolution proposal, it did so in the initiation agreement, which is why it is considered appropriate to reiterate below the most relevant of the person's motivated response instructor to these allegations.

The City Council alleged, in summary, that ' *the Working Conditions Agreement (...)* , on the basis of which the legitimacy of the treatment was based, was negotiated with the union representation of the City Council and was approved by the Plenary of the City Council; and that this agreement had been applied since its approval despite the lack of publication. He considered that the publication of the agreement is not a constitutive but a declarative act, and argued that " *the lack of publication of the agreement does not mean the loss of effectiveness, given that it is not an essential requirement for its validity, because the Article 90 of the Workers' Statute mentioned by the appellant only sanctions the nullity of agreements that have not been formalized in writing, so that there being a written form, the lack of registration and publication does not deprive the Agreement of legal effects arising from the negotiation activity of the interested parties between which it maintains effectiveness* " .

Likewise, it pointed out that the controversial treatment was negotiated and subsequently ratified by the Plenary of the City Council, and that, therefore, Article 38.3 of Royal Decree 5/2015, of 30 October, by which the revised text of the Law on the Basic Statute of the Public Employee (hereinafter, TRLEBEP) is approved. Based on this, it considered that said agreement was fully valid and effective despite the lack of publication in the official gazette and invoked articles 6.1.f) and 9.2.h) of the RGPD as a legitimate basis for the processing of the data health of civil servants in order to control absenteeism.

Well, in relation to the legal basis invoked by the City Council referring to the existence of a legitimate interest (6.1.f of the RGPD), the first thing to say is that, as the instructor highlighted to the resolution proposal, it is not applicable in the case at hand since, in accordance with the indicated precept " *Lo dispuesto en la letra f) of the first paragraph will not apply to the treatment carried out by the authorities public in the exercise of their functions* ". Having said that, it should be noted that in the present case, the enabling legal basis that would apply would be that provided for in article 6.1.c) RGPD. Indeed, the data processing carried out by the City Council has been carried out within the framework of its functions, as referred to in the agreement provided (Annex 1), literally: 'it was an instrument that contributes to *guaranteeing the compliance with the working day by the staff at the service of the town hall (...)*' .

It should be borne in mind, however, that due to the processing of special category data, as is the case with health data, in the first place it becomes necessary to count on the concurrence of one of the exceptions provided for in article 9.2 RGPD. Article 9.2.h) of the RGPD, invoked by the City Council, provides as an exception that " *the treatment is necessary for the purposes of preventive or occupational medicine, assessment of the worker's work capacity, medical diagnosis, provision of "sanitary or social assistance or treatment, or management of health and social assistance systems and services"*. In this regard, the accused entity did not add in its statement of objections to the initiation agreement any rule with the rank of law that legitimizes said treatment, nor did it refer to any of the cases provided for in letter h ) considered applicable. And it is that, as evidenced by the instructor, there is no assumption in the aforementioned precept in which the purpose of monitoring the absence from work of working people can be accommodated.

On the other hand, it should be remembered that, as was collected in the estimated resolution of the appeal for replacement, the exception provided for in letter b) of article 9.2 RGPD was not applicable to the controversial treatment either . This precept legitimizes the processing of special category data when this is necessary for the fulfillment of the

obligations of the data controller and " *to the extent that it is authorized by the Law of the Union or of the Member States or a collective agreement pursuant to Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party*. In other words, in order to carry out the processing, it is required that a rule with the status of law or a collective agreement (or equivalent labor agreement in the field of public service) provides for it and this to comply with the article 53 EC, to the extent that it entails the limitation of a fundamental right, as recognized by the constitutional jurisprudence included in Opinion 17/2020 of this Authority (SSTC 292/2000, SSTC 76/2019, STJUE 08.04.2014 , *Digital Rights Ireland* , among others).

In this sense, in the field of labor personnel, the provision of article 20.4 of the Workers' Statute enables the data controller to process personal data in order to verify the state of health of labor personnel. Literal: " *The employer can verify the state of health of the worker who alleges it to justify absences from work, by means of a medical examination. The refusal of the worker to these recognitions can determine the suspension of the economic rights that may be due to the employer for these situations*". However, in the case at hand, in which the complainant has the status of a career employee, it is necessary to refer to the civil service regulations, in which there is currently no provision with the status of law that enables the processing of data health of employees (whether career or temporary) for the purpose of monitoring work absenteeism.

Faced with the lack of regulatory provisions, the City Council had to have " *a collective agreement in accordance with the law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party*" that contemplated the controversial treatment . In effect, it must have had a labor agreement that established all the appropriate guarantees of respect for the fundamental rights and interests of the interested parties, an extreme that is not given in the present case. As pointed out in the resolution of 08/31/2022 of this Authority that resolved the appeal against the archive resolution of the actions of prior information no. 525/2021, the lack of publication of the Agreement - provided for in article 38.6 TRLEBEP - means that it is considered an extra-statutory agreement, and that it has no normative value and "erga" *effects omnes* ", reason why it cannot be considered an appropriate instrument for the purposes of complying with the requirement of article 9.2.b) of the RGPD.

In accordance with what has been explained, the allegations made by the City Council in the course of this procedure cannot succeed.

**3.** In relation to the fact described in the section on proven facts, relating to the principle of lawfulness of treatment, it is necessary to go to article 5.1.a) RGPD, which provides that "Personal data will be: a) *processed in a lawful manner, loyal and transparent in relation to the interested party (<<lawfulness, loyalty and transparency>>)* " in relation to article 6.1 and 9.2, also of the RGPD.

During the processing of this procedure, the fact described in the proven facts section, which considers that the treatment of the health data of civil servants for the purpose of monitoring work absences, has no relevance of the exceptions provided for in article 9.2 of the RGPD, and in particular, in the one contemplated in letter b), which enables the treatment when this "is necessary *for the fulfillment of obligations and the exercise of specific rights of the responsible treatment or of the interested party in the field of labor law and social security and protection, to the extent that this is authorized by the Law of the Union or of the Member*

*States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party"*

This proven fact is considered constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies the violation of the "*basic principles of the treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9*", which include the principle of legality.

The conduct addressed here has been included as a very serious infringement in article 72.1.e) of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter , LOPDGDD), in the following form: "*The processing of personal data of the categories referred to in article 9 of Regulation (EU) 2016/679, without any of the circumstances provided for in that provision and in the article 9 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 . (...)"*

As has been progressed, as part of this sanctioning procedure, the City Council has presented a document in which (...) states that, following the City Council's instructions, they are no longer providing the management, control and reduction service of absenteeism in relation to City Hall staff. This action would be in line with the measure proposed by the instructor in the proposed resolution, and with which the City Council would adapt the data processing linked to the control of work absences to the data protection regulations. This is why it is not necessary to require the adoption of any corrective measures in this resolution.

For all this, I resolve:

1. Admonish the City Council of (...) as responsible for an infringement provided for in article 83.5.a) in relation to article 6.1 and 9.2, 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 4.

2. Notify this resolution to the City Council of (...)
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,