

File identification

Resolution of sanctioning procedure no. PS 55/2022, referring to the Town Council of Vilafranca del Penedès.

Background

1. On 03/05/2021, the Catalan Data Protection Authority received a letter in which a person filed a complaint against Vilafranca del Penedès City Council, on the grounds of an alleged breach of the regulations on data protection of personal data.

Specifically, the person making the complaint stated that for some time he had been receiving, from the email address vilafranca_mail@jadesocial.cat, several emails with the subject "*Resum carga excel Generalitat - Vilafranca del Penedès*", which contained the name and surnames of people, together with their ID number. The complainant stated that on several occasions he had replied to these emails warning about this error, but that he had not received any response, and that he continued to receive them. He accompanied his written copy of the following emails:

- a. A first email sent on 01/27/2021 at 11:57 a.m. from the email address vilafranca_mail@jadesocial.cat to the private address of the person reporting (...@gmail.com), with the subject "*Excel load summary Generalitat-Vilafranca del Penedès*". The following was specified in the body of the mail:

"An Excel upload of the following files has been made to JADE:"

And then there was a list with the ID number followed by the first and last names of 9 people.

- b. A response email from the complainant, sent on 27/01/2021 at 12:26 from his email address (...@gmail.com) to the email address vilafranca_mail@jadesocial.cat, with the following content:

"Good afternoon,

As I have already warned you on several occasions, they are sending me these emails with personal data by mistake.

Please correct the error or I will be forced to finally bring it to the attention of the Spanish Data Protection Agency."

- c. A second email sent on 09/02/2021 at 13:22 from the email address vilafranca_mail@jadesocial.cat to the private address of the person reporting (...@gmail.com), with the subject "*Excel load summary Generalitat-Vilafranca del Penedès*". The following was specified in the body of the mail:

"An Excel upload of the following files has been made to JADE:"

And then there was a list with the ID number followed by the first and last names of 16 people.

- d. A third email sent on the same date (02/09/2021) at 1:41 p.m. from the email address `vilafranca_mail@jadesocial.cat` to the private address of the complainant (...@gmail.com) , with the subject " *Excel load summary Generalitat-Vilafranca del Penedès*" . The following was specified in the body of the mail:

"An Excel upload of the following files has been made to JADE:"

And then there was a list with the ID number followed by the first and last names of 19 people.

2. The Authority opened a preliminary information phase (no. IP 99/2021), 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. the Vilafranca del Penedès City Council was required to report on several issues relating to the events reported.

4. On 06/20/2022, Vilafranca del Penedès City Council responded to the aforementioned request in writing, accompanied by a report from the City Council's Head of Information Systems and New Technologies. In both writings, the following was stated, among others:

- That *"the jadesocial.cat email address corresponds to the JADE software, an application developed by Àmbar Informatica SL for the management of the dependency and the home care service with the Generalitat."*
- That *"The provider is identified by the Department of Social Welfare for the implementation and use of this type of tool in the period 2021-2023 to all social services of Catalonia. That according to this Service has found, sending data to the address (...)@gmail.com was not due to a malfunction of the application or systems, but to human error on the part of a user of this City Council when setting up the email account for notifications in the application, the correct one being (...)@vilafranca.cat."*
- That *" has contacted Àmbar Informatica SL, and its director Mr. (xxx) confirms to us that they have no traces of the year 2021 and that they delete the temporary files likely to store personal data. That once the error has been identified, the application has been configured so that the automated sending address of these emails is the correct one from the City Council and these erroneous mailings do not occur again."*
- That *"The data that could have been accessed in this hypothetical breach of the regulations do not in any case contain particularly protected data or that allow a clear identification of the affected persons, as it is limited to including the name and the ID ."*

5. the Vilafranca del Penedès Town Council was again required to provide additional documentation and information.

6. On 07/28/2022, the Vilafranca del Penedès City Council complied with this request by means of a letter stating the following:

- Regarding the entity responsible for the treatment in relation to the sending of the controversial emails: *"The Vilafranca del Penedès City Council is the entity responsible for the treatment of personal data."*
- Regarding the origin of the data that appeared in the controversial emails: *"The data comes from the Department of Social Rights of the Generalitat de Catalunya ."*
- Regarding the entity that sent the disputed emails:

"The e-mails were sent (sic.) from the JADE d'Ambar platform , which is on its servers. Mails are sent automatically by the application that connects to a mail server used exclusively by the JADE application for sending mail, without being shared with any other application.

In accordance with the above, it can be considered that it is Àmbar Informatica SL who sends the mails to the addresses configured in the application, even though they are automatic mails, without human intervention. The address from which they are sent is unique to each entity. The case of Vilafranca del Penedès Town Council is Vilafranca_mail@jadesocial.cat. This address is for shipping only. There is no inbox configured to receive mail destined for this address. The mails that the server receives to this address are automatically deleted when they are received. A trace of this reception and deletion remains in the server logs . These logs were kept for 1 month. As a result of the request received, JADE SOCIAL has increased the deadline for keeping the logs to 1 year, but the logs for January and February 2021 are not available . Therefore, on the date the request was received it cannot be confirmed whether any mail was received addressed to the address Vilafranca_mail@jadesocial.cat, as mentioned by the claimant, for the reasons previously stated."

- With regard to the number of emails with social service user data that would have been sent to the private address of the reporting person, as well as the time interval during which their email address would have been erroneously included in the JADE app:
 - *The user registered in the system on January 22, 2021 and at that time the notification for Excel uploads was activated. It was registered with the address (...)@vilafranca.org .*
 - *At an initial moment in the implementation of the JADE program he went configure in such a way that it sends this warning email to users where there had been some modification.*
 - *On February 25, 2021, notifications were deactivated excel loads with total security. It's likely to happen previously but in any case, from 25/02/2021 they no longer go send more emails with notifications when this one is disabled option, matching the dates of the emails provided by the claiming*
 - *It is not possible to know when the e-mail address was changed user in the database at the wrong address."*

Regarding the procedure processed by the City Council, in which the controversial emails are framed:

"Regarding the meaning of the title of the mails, it is an explanation to inform the public employees of the City Council that data from the Department of Social Services has been uploaded and that they have modified the file corresponding to the people listed in the list of the Home and Dependency Assistance Service. The JADE program is an internal software to manage files related to the users of this type of file, being the responsibility of the Social Services of this City Council.

All the people on the list (.sic) are residents of Vilafranca del Penedès and users of the Home Assistance Service (...) this was a notice at the internal level of the management software for employees of Social Services of the City Council regarding the fact that there had been a change in the person included in the list, once the data had been received from the Department of Social Services of the Generalitat of Catalonia."

The Vilafranca City Council did not respond to the question posed by the Authority regarding whether Àmbar informatics SL acted as data processor, and whether by virtue of the order it sent the controversial emails on behalf of the City Council. He also did not provide a copy of the data controller contract, despite having requested it for the case of an affirmative answer.

7. Also, on 13/09/2022 the Authority's inspector staff verified that the Register of Public Sector Contracts did not include any contract signed by the Vilafranca del Penedès City Council and Àmbar Informatica, SL .

8. On 09/22/2022 , the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against Vilafranca del Penedès City Council for two alleged infractions: an infraction provided for in article 83.4.a) in relation to article 28; another offense 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 City Council on 09/23/2022.

9. In the initiation agreement, Vilafranca del Penedès City Council 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.

10. On 10/10/2022, the Vilafranca del Penedès City Council made objections to the initiation agreement in writing, in which it stated its intention to enter into a data processor contract " *in the maximum term of 10 calendar days from the date of presentation of these allegations*".

However, in the period indicated, the City Council did not present any other letter to the Authority registration.

11. On 16/11/2022, the person instructing this procedure formulated a proposed resolution, by which he proposed that the director of the Catalan Data Protection Authority admonish the Vilafranca del Penedès Town Council as responsible for two infractions: an infraction provided for in article 83.4.a) in relation to article 28; another offense provided for in article 83.5.a) in relation to article 5.1.f); all of them from the RGPD.

This resolution proposal was notified on 11/16/2022 and a period of 10 days was granted to formulate allegations.

12. The deadline has been exceeded and no objections have been submitted. A copy of the contractor contract has also not been submitted.

proven facts

1. At the beginning of 2021, the Vilafranca del Penedès City Council started using the JADE application in the management of files processed by the municipal Home and Dependency Assistance Service, by virtue of its municipal powers in the matter of social services.

Àmbar Informatica SL was the private entity that had developed the JADE application, and on the occasion of its implementation at Vilafranca del Penedès Town Hall, Àmbar Informatica stored on its servers, among others, documents in format . x/s that the Administration of the Generalitat sent to the City Council with information regarding the users of the municipal Home and Dependency Assistance Service.

The processing of these personal data of users of social services by Àmbar Informatica SL was carried out without the City Council and this entity signing a data processor contract. Àmbar Informatica processed the data of these people throughout 2021, and would continue to process them, at least until 10/10/2022, given that this is the date of the letter of allegations in the 'initiation agreement, in which the City Council stated that it was "*proceeding the completion of the corresponding data processor contract*", from which statement it is clear that on the date of signature of the letter (10/10/ 2022) Àmbar Informatica would continue to process personal data of those users on behalf of the City Council.

2. As part of the management of this municipal social service, on 01/22/2021 the Vilafranca del Penedès Town Council introduced an electronic address to the JADE application so that, every time that information is received from the Administration of the Generalitat referring to people who use the municipal Home and Dependency Assistance Service ("*Excel uploads from the Generalitat*"), a notice is sent together with this information to the person from the City Council responsible for its processing . The e-mail address entered by the City Council was incorrect, as it corresponded to the address of the person making the complaint, and consequently this person received these e-mails, with the consequent disclosure of personal data of the users of this service .

Specifically, and among others, the reporting person received an email on 01/27/2021 and two emails on 02/09/2021 (precedent 1) that contained, in total, the name and surname and no. ID cards of 45 people, all of them residents of the municipality who were users of the home assistance service provided by Vilafranca del Penedès City Council.

This type of email was erroneously sent to the complainant during the period between 22/01/2021 and 25/02/2021, the latter date on which, as stated by the City Council, the configuration of the JADE app and stopped sending these email notices. However, the City Council did not detect the mistake made until receiving the Authority's request on 06/09/2022, as can be seen from both its response letter dated 06/22/2022 to the request of 'information from the Authority, in which it stated that: "*once the error has been identified,*

the application has been configured so that the automated sending address of these emails is the correct one of the City Council and these erroneous shipments do not occur again", as in the letter dated 10/10/2022 of allegations to the initiation agreement, in which the City Council has reiterated that: " Until the notification made by the APDCAT, this City Council did not have any kind of record of the facts exposed and which motivated the initiation of this Agreement."

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 Vilafranca del Penedès City Council has not made allegations in the proposed resolution, 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 its statement of objections dated 10/10/2022, the Vilafranca del Penedès City Council acknowledged the facts that have been imputed to it in the initiation agreement. Specifically, he stated the following:

"- Regarding the possible violation regulated in article 73 k) of the Organic Law 3/2018, of December 5.

This party acknowledges the facts alleged in the Initiation Agreement and therefore the conduct described fits with the typification carried out, as there is no contract or other act legal described as required by article 28.3 of Regulation (EU) 2016/679. In accordance with the above, this City Council is processing the realization of the corresponding data processor contract, committing to provide the same within the maximum period of 10 calendar days from the date of presentation of these allegations."

"- Regarding the possible very serious infringement in accordance with article 72.1 i) of the Organic Law 3/2018, of December 5.

This party acknowledges the facts alleged in the Initiation Agreement and therefore the conduct described fits with the typification carried out."

Next, the City Council referred to article 83.2 RGPD, relating to the criteria for the imposition and grading of fines, as well as to article 76.2 of the LOPPDGDD, relating to the grading criteria for fines, and based on the criteria provided for in these precepts, he made some considerations about the mitigating factors that in his opinion would be relevant in the present case.

With respect to these allegations, it should be noted, as was pointed out in the initiation agreement and in the proposal, that the sanctioning regime applicable to Vilafranca del Penedès City Council in matters of data protection, does not is the general regime provided for in article 83 of the RGD, but rather the regime established in article 77 of the LOPDGDD based on the provisions of article 83.7 of the RGD, which contemplates the possibility that each State member of the EU establishes whether or not administrative fines can be imposed on public authorities and bodies.

In accordance then with article 77.2 of the LOPDGDD, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD - among those listed as "entities that make up the Local Administration" (section c), which would include the City Council-, the competent data protection authority "(...) must issue a *resolution that sanctions them with a warning (...)*". Therefore, the sanction to be imposed on the City Council is not a fine or some administrative fines - the graduation of which is subject to the graduation criteria indicated in the precepts mentioned by the City Council - but a reprimand, which for its nature is not subject to graduation. This is without prejudice to the corrective measures that may be adopted to correct the effects of the violations committed, as set out in the 5th legal basis of this resolution.

3.- Legal qualification of proven facts.

In relation to the facts described in point 1 of the facts section tested , it is necessary to go to article 28 of the RGD, which determines the following:

"1. When a treatment is to be carried out on behalf of a person responsible for the treatment, he will only choose a person in charge who offers sufficient guarantees to apply appropriate technical and organizational measures, so that the treatment complies with the requirements of this Regulation and guarantees the protection of the rights of the interested party.

2. (...)

3. The treatment by the manager will be governed by a contract or other legal act in accordance with the Law of the Union or the Member States, which binds the manager with respect to the manager and establishes the object, the duration, the nature and purpose of the treatment, the type of personal data and categories of interested parties, and the obligations and rights of the person in charge. Said contract or legal act will stipulate, in particular, that the manager:

a) will treat personal data solely following the documented instructions of the person in charge, including with respect to the transfer of personal data to a third country or an international organization, unless it is obliged to do so by virtue of the Law of the Union or of the Member States that applies to the person in charge; in such a case, the manager will inform the person in charge of that legal requirement prior to the treatment, unless such Law prohibits it for important reasons of public interest;

- b) will guarantee that the persons authorized to treat personal data have committed to respect confidentiality or are subject to a confidentiality obligation of a statutory nature;*
- c) will take all the necessary measures in accordance with article 32;*
- d) will respect the conditions indicated in sections 2 and 4 to resort to another treatment manager;*
- e) will assist the person in charge, taking into account the nature of the treatment, through appropriate technical and organizational measures, whenever possible, so that he can comply with his obligation to respond to requests aimed at the exercise of the rights of the interested parties established in chapter III;*
- f) will help the manager to ensure compliance with the obligations established in articles 32 to 36, taking into account the nature of the treatment and the information available to the manager;*
- g) at the choice of the person responsible, will delete or return all personal data once the provision of the treatment services is finished, and will delete the existing copies unless the conservation of personal data is required under Union Law or member states;*
- h) will make available to the person in charge all the information necessary to demonstrate compliance with the obligations established in this article, as well as to allow and contribute to the performance of audits, including inspections, by the person in charge or another auditor authorized by said responsible*
- In relation to what is provided in letter h) of the first paragraph, the person in charge will immediately inform the person in charge if, in his opinion, an instruction infringes the present Regulation or other provisions in the area of data protection of the Union or the Member States. (...)*
- (...)*

9. The contract or other legal act referred to in sections 3 and 4 will be in writing, including in electronic format.”

During the processing of this procedure, the fact described in point 1 of the proven facts section has been duly proven, bearing in mind that on 09/13/2022 the Authority's inspector staff verified that in the Register of public sector contracts there was no contract signed by the Vilafranca del Penedès City Council and Àmbar Informatica, SL, and, especially, due to the fact that the City Council has recognized that the company Àmbar Informatica has processed personal data of users of the municipal assistance service omicilaria and dependency, and that he has done so without having signed a data controller contract with said company.

This proven fact constitutes an infringement according to the provisions of article 83.4.a) of the RGPD, which typifies as such the violation of " *the obligations of the responsible and of*

the manager pursuant to articles 8, 11, 25 to 39, 42 and 43” , among which there is that provided for in article 28 RGPD.

The conduct addressed here has been included as a serious infringement in article 73.k) 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:

"k) Entrust the processing of data to a third party without the prior formalization of a contract or other written legal act with the content required by article 28.3 of Regulation (EU) 2016/679."

4.- In relation to the conduct described in point 2 of the proven facts, regarding the sending of e-mails with identifying data of users of the Municipal Home Assistance and Dependency Service, it is necessary to refer to article 5.1.f) of the RGPD, which provides that personal data will be processed: *"in such a way as to guarantee adequate security of personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")."*

During the processing of this procedure, the fact described in point 2 of the proven facts section has been duly proven, taking into account the emails provided by the person reporting to the Authority, as well as the recognition by the City Council , both of the mistake made with the introduction of an incorrect email address in the JADE application, and ultimately of the fact imputed in the initiation agreement, regarding the erroneous sending of emails to the particular email address of the reporting person.

This behavior of the City Council is contrary to the principle of confidentiality, and consequently constitutes an infringement, according to the provisions of article 83.5.a) of the RGPD, which typifies as such the violation of: *"the basic principles for the 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 infringement in article 72.1.i) of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter , LOPDGDD), in the following form:

"The violation of the duty of confidentiality established in article 5 of this organic law."

5.- 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 similar terms 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 (...)"

By virtue of this power, the Vilafranca del Penedès City Council must be required to, as soon as possible, and in any case within a maximum period of 20 days from the day after the notification of this resolution, lead to term the following:

5.1. Regarding proven fact 1:

Sign with Àmbar Informatica, SL (or the entity that carries out the functions entrusted to Àmbar Informatica in 2021 in the management of the files processed by the Municipal Home and Dependency Assistance Service) a data controller contract, with the content provided for in article 28 of the RGPD.

5.2. Regarding proven fact 2:

In relation to the JADE application or the equivalent application, adopt technical and/or organizational measures to ensure that the electronic addresses entered in the application as recipients of the notices that are generated correspond to the corporate addresses in that subsequent communications must actually arrive (such as by setting the new address registration system to support only corporate email endings).

Once the corrective measures described have been adopted, within the period indicated, the City Council must, within the following 10 days, provide the Authority with the information and, where appropriate, documentation that accredits its adoption, without prejudice to the faculty of inspection of this Authority to make the corresponding checks.

Finally, the complainant should also be required to delete all emails received from the email address vilafranca_mail@jadesocial.cat to his private address (...@gmail.com), with the subject " Excel upload summary Generalitat-Vilafranca del Penedès, which contained data on users of the Municipal Service of Home Assistance and Dependency of the Vilafranca del Penedès Town Council.

For all this, I resolve:

1. Admonish the Vilafranca del Penedès City Council as responsible for two infringements: an infringement provided for in article 83.4.a) in relation to article 28; and another violation provided for in article 83.5.a) in relation to article 5.1.f), all of them of the RGPD.
2. To require the Vilafranca del Penedès City Council to adopt the corrective measures indicated in the 5th legal basis and to accredit before this Authority the actions taken to comply with them.

3. Require the reporting person to, as soon as possible, and in any case within a maximum period of 10 days from the day after notification of the request, delete all emails received in error and which have been the subject of of your complaint.
4. Notify this resolution to Vilafranca del Penedès Town Council .
5. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.
6. Order that the 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 sanctioned 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 sanctioned entity may file any other appeal it deems appropriate to defend its interests.

The director,