

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 67/2022, referring to the City Council of (...).

Background

1. On 07/22/2021, 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 breach of the regulations on personal data protection .

The complainant stated the following:

1.1 That the City Council of (...) transferred members of the trade union section (...) (hereafter, (...)) to which it belongs, Decree number (...) issued on (...) (hereafter, the Decree) by the deputy councilor of the Economy and General Services Area in the context of a complaint for psychological harassment (file (...)), in which the person here complainant had the status of alleged stalker. That the transfer of this resolution was contemplated in point 9 of the dispositive part of said Decree (" *Give transfer of this resolution to the person denouncing and denounced, and to the rest of the representative members of the trade union (...) to the "City Council of (...), inviting them to issue a public apology"*).

1.2 That this transfer was carried out without anonymizing or pseudonymizing neither their personal data, nor those of the person who had filed the complaint for alleged psychological harassment, so that they were identified as the alleged harasser and the allegedly harassed person, respectively.

1.3 That, in accordance with section 7.4.b) of the Protocol for the resolution of relational conflicts and the prevention and handling of possible situations of psychological harassment, it was not appropriate to adopt any corrective measures. This precept of the protocol establishes that:

" 7.4 Actions / resolution

According to the report drawn up by the Commission of Inquiry, the mayor's office or whoever it delegates, must issue a resolution of the case containing the results of this report, which may be:

a) That there is sufficiently proven evidence of the existence of a situation of harassment:

- Initiation of disciplinary proceedings for a proven situation of harassment i

- Adoption of corrective measures (of an organizational nature, such as a change of place or work center and, if appropriate, the opening of a disciplinary file, stating the fault and the degree of the sanction).

b) That there is no sufficiently proven evidence of the existence of a situation harassment:

• Archive of the communication."

Along with his complaint, he provided the aforementioned Decree and Protocol.

2. The Authority opened a preliminary information phase (no. IP 294/2021), 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 08/23/2021 the City Council was required to report on the following points:

- The legal basis that legitimized the transfer of the aforementioned Decree to members of the trade union section (...).
- What was the condition provided for in article 9.2 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 (henceforth, RGPD) which allowed the treatment (communication) of health data of the allegedly harassed person contained in said resolution.
- The reasons why it was necessary for the Decree to address the members of the trade union section (...), identifying the people allegedly harassing and harassed.

4. On 08/30/2021, the City Council responded to the aforementioned request through a letter in which it set out the following:

- That in the context of a complaint of a situation of psychological harassment in the workplace, presented by the alleged victim to the City Council of (...) and against the person making the complaint, the City Council applied the Protocol for the resolution of relational conflicts and the prevention and handling of possible situations of psychological harassment.
- That the alleged harasser was a member of the Union (...).
- That in the framework of the investigation carried out by the Monitoring and Investigation Commission and based on the evidence provided by the victim himself, there was a publication in (...) made by the Union itself and emails sent by the allegedly harassing person.
- That the people who intervened in the interview process found that there was a conflict situation with the alleged harasser, but also with more people from the union itself and that the alleged victim referred to a plurality of members of the Union that participated in the reported actions.
- That in the final conclusions set forth in the Decree, it was determined that, as no alterations were found in the psychological and/or physical state of the alleged victim and there was no recidivism in intimidating behavior or reprisals of any kind, the circumstances of the situation reported by the alleged victim did not correspond to a case of psychological harassment, but to a situation of labor conflict attributable to more than one member of the Union.

- That it was considered a situation that could entail psychosocial risk and, in the event of a repetition of the conduct by the members of the Union, could trigger a situation of psychological harassment and moral persecution that could lead to the initiation of a disciplinary file.
- That in application of Article 7.4 of the Protocol, he transferred said Decree " *to the president of the Union so that he could intervene and manage the working climate in view of the statements made by the affected person and the witnesses who intervened in the process of interviews on the plurality of people part of the Union who took part in the conflicting situation in question.*"
- That " *the said protocol was approved by the Safety and Health Committee and by the occupational risk prevention delegates and, therefore, by the personnel delegates among whom is the President of the Trade Union Section of (...).* "
- That " *as it does not correspond to a situation of psychological harassment and in accordance with the establishment of corrective measures to prevent it from happening in the future and in the face of the perceived risk to the working climate and the duties of the Union in defense of workers, it is identified the parties to be able to refer to the actions and acts in question .*"
- That the Decree did not contain data of special categories " *only names and surnames of the person denounced and the complainant as well as names and surnames of the people who intervened in the preparation of the report* ".

5. On 08/31/2021, the Authority again required the City Council to specify what was the specific legal basis that legitimized the reported treatment, both with respect to the alleged harasser and the harassed, question that had not been answered with his letter of 08/30/2021.

In this request office, this Authority highlighted that the Decree in question included health data in the terms provided for in article 4.15 and recital 35, both of the RGPD, which is why it was again required in the GDPR City Council to indicate which of the circumstances provided for in article 9.2 of the RGPD would allow the processing of these special categories of data.

6. On 09/13/2021, the City Council complied with this request by means of a letter stating the following:

- That " *the legitimizing basis of the treatment is found in the legal obligation of the City Council of (...) as responsible for the treatment to comply with Law 31/1995, of November 8, on the prevention of occupational risks (LPRL) .*"
- That, with respect to the communication made to the president of the union, who at the same time holds the position of prevention delegate, the communication was covered by articles 18, 23 and 36 of the LPRL and that " *prevention delegates may have access to the health data that are strictly necessary to comply with the monitoring and control functions of article 36.4 LPRL .*"

- That the health data were communicated based on the exception of section b) of article 9.2 of the RGPD.

7. On 3/11/2022, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the City Council, and the initiation agreement highlighted the facts that could be constitutive of two alleged violations of article 83.5.a), in relation to article 6.1 and 5.1.a); and 9.2, all of them of the RGPD , noting the existing link between both infringements.

8. On 12/19/2022, after carefully assessing the documentation of the file and analyzing the applicable regulations, the person instructing this procedure considered it more in line with the law to qualify the imputed conduct as constituting a single violation of the principle of legality, since the communication of personal data, both identifying and health, derives from a single fact which is the transfer of the Decree to the president of the trade union section, without having any of the legal bases foreseen in articles 6.1 nor any of the exceptions in article 9.2 of the RGPD, respectively.

Based on what was said, he formulated a proposal for a resolution, by which he proposed that the director of the Catalan Data Protection Authority admonish the City Council of (...) as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.a), 6.1 and 9.2, all of them of the RGPD.

This resolution proposal was notified on the same date, 19/12/2022 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

The City Council of (...) transferred to the President of the trade union section of the Union of (...), to which the person making the complaint here belongs, of Decree number (...), of (...), by virtue of which he became aware of the identity and condition of the alleged harasser of the person making the complaint here, and of the identity and health data of the alleged harassed person.

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.

In the statement of objections to the initiation agreement, the City Council has acknowledged that it transferred Decree number (...), of (...), not only to the two interested parties, but also to the president of the trade union section to which the person making the complaint and alleged harasser belongs. This treatment led to the violation of data protection regulations by

having revealed the status of alleged harasser of the person reporting here , and the identity and health data of the alleged harassed person. In addition, the Decree also identified other people who had intervened in the procedure.

The City Council alleged that the alleged harasser was not the only one involved in the alleged acts of harassment. He considered that, based on the interviews carried out during the investigation, *'more people were indirectly involved in the investigations in the case of harassment in question'* and, based on this, he defended the existence of a plurality of recipients of the Decree with the aim of providing a solution to a conflicting labor situation.

However, the Decree itself determined which were the only two persons who had the status of interested parties in the procedure and, consequently, the only persons to whom the Decree resolving the file had to be notified of the complaint for harassment and that they could be aware of its content.

On the other hand, the City Council also invoked section 7.4 of the Protocol for the resolution of relational conflicts and the prevention and handling of possible situations of psychological harassment (reproduced in background 1.3), to justify the transfer of the Decree to the president of the trade union section, as well as the precepts of Law 31 /1995, of November 8, on the prevention of occupational risks, given that the president of the union section held the position of prevention delegate, a position that entails access to health data that is strictly necessary to fulfill the functions of surveillance and control of article 36.4 of the aforementioned law.

Nevertheless, the City Council's allegations must be refuted given that the transfer of the Decree that resolved the file of the complaint to persons other than those interested in the procedure, and that the same Decree identifies (the alleged harasser and harassed), is not protected by any legal basis, nor in section 7.4 of the Protocol , considering that this instrument has no legal status and, moreover, it only provides for " *the archiving of the communication when there is no there is sufficiently proven evidence of the existence of a situation of harassment* ", as is the case analyzed here.

With regard to the invoked authorization of Law 31/1995, of November 8, on the prevention of occupational risks to justify the communication of the Decree, with the consequent disclosure of personal data it contained, to the president of the trade union section, for the fact that he also held the position of prevention delegate, it must be said that this argument contradicts the City Council's own statements when it stated that the purpose of transferring the Decree to it was to manage and solve the work climate, and it is clear that this purpose corresponds to his union functions and not to those related to the position of health prevention delegate.

On the other hand, the City Council considered that " *the categories of personal data affected by the alleged non-compliance with the regulations fall on basic data and do not affect health data from the moment that, based on the investigations carried out by the City Council for find out the facts reported by the allegedly harassed party, it was determined that this situation does not fit into psychological harassment*".

Well, the fact that the investigations carried out by the City Council concluded that the situation did not fit into a case of psychological harassment, is not an impediment to concluding that the Decree, in view of its content, contained health data of the person

allegedly harassed. Thus, in section f) of said Decree, relating to the aggravating circumstances observed, it literally referred to "*- The person allegedly harassed (...). As mentioned during the interview. - It is not established that (...)*". Next, it confirmed the existence of a high intensity relational conflict which could mean ' (...)'

In this sense, article 4.15 RGPD is particularly relevant, which provides for "*<< health-related data>>: personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about your health status;*" in relation to recital 35 which states: "*Among the personal data relating to health must be included all data relating to the state of health of the interested party that provide information on their past, present or future physical or mental health status. It includes the information about the natural person collected on the occasion of his registration for health care purposes, or on the occasion of the provision of such assistance, in accordance with Directive 2011/24/EU of the European Parliament and of the Council (9); any number, symbol or data assigned to a natural person that uniquely identifies him for health purposes; the information obtained from tests or examinations of a part of the body or a body substance, including that from genetic data and biological samples, and any information related, for example, to an illness, a disability, the risk of suffering from diseases, the medical history, the clinical treatment or the physiological or biomedical state of the interested party, regardless of its source, for example a doctor or other health professional, a hospital, a medical device, or an in vitro diagnostic test*".

In accordance with the above, it must be concluded that the Decree contained a series of information on the state of health of the person allegedly harassed, specifically, when reference is made to (...). Consequently, just as for the communication of the identity of the parties involved, the treatment of health data also required having a legitimizing legal basis of those provided for in the RGPD, and the concurrence of some of the circumstances provided for to article 9.2 RGPD, without applying the circumstance provided for in section b) of said article, given that in order to comply with its legal obligations, in this case, the processing of a procedure for the resolution of a relational conflict and the prevention of harassment, it was not necessary to disclose the data in question to non-interested third parties.

In accordance with all the above, and there being no legal basis in Article 6.1 of the RGPD that legitimizes the transfer of the Decree with the personal data included there to the president of the trade union section (...), believes that the City Council's allegations cannot be successful or, therefore, distort the imputed facts.

3. In relation to the conduct described in the section on proven facts, regarding the principle of legality, it is necessary to go to article 5.1.a) RGPD, which provides that personal data will be "*treated in a lawful, fair and transparent manner in relation to the interested party*".

In turn, article 6.1 RGPD provides that:

"1. The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes;

- b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;*
- c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;*
- d) the treatment is necessary to protect the vital interests of the interested party or another natural person;*
- e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge of treatment;*
- f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child. (...)."*

Likewise, with regard to the communication of health data, article 9.2 of the RGPD must also be taken into account, which provides for the exceptional circumstances in which special category data can be processed, in the case which deals with health data, and which are:

- "a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;*
- b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union 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;*
- c) the treatment is necessary to protect the vital interests of the interested party or another natural person, in the event that the interested party is not physically or legally able to give their consent;*
- d) the treatment is carried out, within the scope of its legitimate activities and with due guarantees, by a foundation, an association or any other non-profit organization, whose purpose is political, philosophical, religious or trade union, provided that the treatment refers exclusively to current or former members of such organizations or persons who maintain regular contact with them in relation to their purposes and provided that personal data is not communicated outside of them without the consent of the interested parties;*
- e) the treatment refers to personal data that the interested party has made manifestly public;*
- f) the treatment is necessary for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function;*
- g) the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party;*

h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a health professional and without prejudice to the conditions and guarantees contemplated in section 3;
i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or sanitary products, on the basis of the Law of the Union or of the Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy,
j) the treatment is necessary for archival purposes in the public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the fundamental interests and rights of the interested party."

During the processing of this procedure, the fact described in the proven facts section, which constitutes the offense provided for in article 83.5.a) in relation to articles 5.1.a) and 6.1, has been duly proven. and regarding the communication of health data, article 9.2 of the RGPD.

Article 83.5.a) of the RGPD typifies as an infringement the violation of the "*basic principles of treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9*", which include both in principle of legal treatment (articles 5.1.ai 6 RGPD), like the legal regime applicable to special category data (article 9.2 RGPD).

In turn, this conduct has been included as a very serious infringement in article 72.1.b) of Organic Law 3/2018, of December 5, on the protection of personal data and guarantees of digital rights (LOPDGDD), in the following form:

"b) The processing of personal data without any of the conditions for legality of the processing established by Article 6 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. 77.1 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."*

And section 3 of art. 77 LOPDGDD, establishes that:

"3. Without prejudice to what is established in the previous section, the data protection authority must also propose the initiation of disciplinary actions

when there are sufficient indications to do so. In this case, the procedure and the sanctions that must be applied are those established by the legislation on the disciplinary or sanctioning regime that is applicable.

Also, when the infractions are attributable to authorities and managers, and the existence of technical reports or recommendations for the treatment that have not been properly attended to is proven, in the resolution in which the penalty is imposed, to include a warning with the name of the responsible position and it must be ordered to be published in the "Official Gazette of the State" or the corresponding regional newspaper.

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 the present case, the City Council should not be required to adopt corrective measures in order to correct the effects of the infringement since it is a one-time event that has already been completed.

For all this, I resolve:

1. Warn the City Council of (...) as responsible for an infringement provided for in article 83.5.a) in relation to articles 5.1.a), 6.1 and 9.2, all of them 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 fourth legal basis.

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,

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