

Carrer Rosselló, 214, Esc. A, 1r 1a
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RESOLUTION of the procedure for the protection of the rights of opposition and cancellation no. PT 28/2018, urged by Mr. (...) against the Department of Health (Catalan Health Service) of the Administration of the Generalitat

Background

1.- On 02/06/2018 the Catalan Data Protection Authority received a letter from Mr. (...), for which he formulated a claim for the alleged neglect of the rights of access, opposition and cancellation to your shared medical history in Catalonia (hereafter, HC3), which you had previously exercised before the Department of Health of the Administration of the Generalitat. The claimant provided various documents regarding the exercise of these rights.

The claim related to the neglect of the right of access led to the opening of rights protection procedure no. PT 29/2018, while the object of the resolution issued in the present procedure, are the rights of opposition and cancellation, in relation to which, the person claiming pointed out that the Catalan Health Service (hereinafter CatSalut) had considered their opposition and cancellation requests, but had not made them effective, despite eight months having passed.

2.- In accordance with article 117 of Royal Decree 1720/2007, of December 21, which approves the Regulation implementing Organic Law 15/1999, of December 13, on data protection of personal nature (hereafter, RLOPD and LOPD, respectively), by means of an official letter dated 06/11/2018, the claim was transferred to the claimed entity, so that within 15 days it formulated the allegations that you consider relevant.

With regard to the entity to which the claim was transferred, it should be noted that, although the General Secretariat of the Department of Health is the body responsible for the file "*Register of health information of patients*", where they are collected the personal data that are incorporated into the HC3, through Resolution SLT/2376/2015, of September 17, the Department of Health delegated to the Catalan Health Service (hereinafter, CatSalut) the taking into consideration, the management and attention to requests to exercise the rights of access, rectification, cancellation and opposition by citizens in relation to the data contained in the HC3. That is why the claim was transferred to CatSalut.

3.- CatSalut made allegations in a letter dated 07/08/2018, in which it set out, in summary, the following:

"First. On October 2, 2017, Mr. (...) requested the exercise of the right of access and opposition and cancellation in relation to four reports included in his shared medical history of Catalonia (HC3).

On October 26, 2017, the applicant received a reply indicating that, once his requests had been analyzed, the four reports would be unpublished if he gave his consent, which is dated November 3 2017. Attached is document no. 1.

On November 9, 2017, a letter was sent to the applicant stating that the entities responsible for the reports had been contacted in order to inform-

those who have accepted the requested right of opposition and proceed to the depublication of the clinical documentation of the HC3. You are also informed that the right of cancellation implies the blocking of the documents and that the legal deadlines provided for, which according to this documentation are 15 years, must pass in order for this blocking to take effect. Finally, the requested accesses are attached. It is attached as document no. 2.

The documents presented show that the right of access exercised by Mr. (...) was taken care of, that he was informed of the requirements of the right of cancellation and that the right of opposition was accepted and inform of the reasons why it cannot be implemented immediately.

second The HC3 is a repository that is nourished by the information and documentation provided by the healthcare entities that are members. Thus, the entities upload the information to the HC3 for publication. This means that the de-publication of a document must be carried out by the entity that published it.

2. Some of the reports requested by Mr (...) have been depublished in the exercise of the right of opposition granted. However, the unpublishing of others has run into some technical snags. On the one hand, it is not possible to unpublish a report by a different production unit (UP) than the one that made the publication, since, as indicated, only the entity that made the publication can unpublish . If you try to unpublish from another UP, the system prevents it.

On the other hand, the primary care management platform does not allow the publication of reports issued by a primary care center to which the patient does not belong.

These circumstances have caused the effective compliance of the right of opposition granted to Mr. (...) to be extended, despite the will to do so.

However, in this period of time, fluid communication has been maintained with the applicant in order to inform him that the matter was being worked on, while at the same time contact has been maintained with the affected centers in order to seek solutions that allow compliance. They are attached as document no. 3 several documents in this regard."

As document no. 3 various documentation was provided, including a letter dated 01/11/2018 from the CatSalut Citizen Service Department, addressed to the person making the claim, in which they informed him of the following:

"1.- We have again requested the cancellation of the reports dated January 23, 2015 to (...) and dated June 2, 2014 to Cap (...).

2.- We are attaching the access to your medical history, as you requested.

As you already know, with "LMS" - referring to the La Meva Salut portal - the accesses we observe and, according to the dates, are due to the checks carried out at the different centers to be able to cancel the documents .

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This fact occurs because some centers use the same information system, as is the case of the ICS, and their hospitals as other Primary Care entities.

We consider that they are not incorrect accesses, since the different actions that have to be carried out must be being checked. This could justify a report being inaccessible for a few days and then reappearing."

As document no. 3 also contained an email that the person making the claim here sent on 11/30/2017 to the CatSalut Public Service Department, in which he stated the following:

"(...) 3 of them have been removed - in reference to the reports in respect of which I exercised my rights -, and only the one of (...) dated 01-23-2015 remains. (...) If this file were unpublished, everything would be fine."

4.- Following various procedures carried out by the Authority, on 19/12/2018 a letter was received from CatSalut, complementary to the first one, accompanied by various information. In the written response, the following was pointed out, in what is of interest here:

- *"the right to cancel (depublish) the 4 reports (...) of the two documents pending depublication was accepted, at this moment there is one left. We have difficulty in unpublishing it, as it is carried out by another entity, and it is not your doctor. We could always get to manual de-publication, but it's complex."*

Among the documentation provided by CatSalut was also a copy of the access, opposition and cancellation requests made by the person making the claim, including three requests dated 10/02/2017 'opposition to the processing of data contained in the HC3, presented by the now claimant on 03/10/2017 before the CAP

(...) of the ICS, referring to the following four medical reports, regarding which he also requested in other documents submitted on the same date, their cancellation:

1. An emergency report dated 02/06/2014 issued by the Hospital of (...). The following was cited as the basis for the opposition request: *"one-off episode that has passed, excessive data, when I access my health it creates stress for me, there is no need for everyone who takes care of me to know these details"*.
2. Two follow-up and discharge reports at the Hospital of (...), dated 07/10/2014 and 01/23/2015, respectively. The following was pointed out as the grounds for the opposition request: *"one-time episode that has been overcome. Excessive data. My privacy is exposed, as is that of my family. It seems to me that it violates therapist-patient confidentiality."*
3. An emergency report dated 02/10/2017 issued by the CAP (...). The following was cited as the basis for the opposition request: *"one-off episode that has passed, excessive data, when I access my health it creates stress for me, there is no need for everyone who takes care of me to know these details"*.

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Fundamentals of Law

1.- The Director of the Catalan Data Protection Authority is competent to resolve this procedure, in accordance with articles 5.b) and 8.2.b) of Law 32/2010, of October 1, of the Catalan Data Protection Authority.

2.- At the time when this resolution is issued, Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the treatment of personal data and the free circulation thereof (RGPD). However, this resolution is issued in accordance with the provisions of the LOPD and the RLOPD, as these are the rules applicable at the time (before 05/25/2018) when the rights of opposition and cancellation had been exercised. lation that are here object of claim.

3.- As a first question, it is necessary to specify the right or rights exercised by the person making the claim before CatSalut, as well as to delimit the object of the two claims subsequently presented by this person to the Authority.

From the content of the various letters and e-mails that the claimant here and CatSalut exchanged after submitting their applications, it can be inferred that the complaint maintained by the now claimant from the beginning, or more specifically, since CatSalut notified him of the response to his requests, it was the fact that some of the four disputed medical reports were still published in the Claimant's HC3, even though CatSalut had estimated the request of the now claimant, and decided therefore its depublication.

With regard to the determination of the rights exercised and allegedly neglected, it should be borne in mind that the HC3 - where these reports appear - is a data repository that is nourished, through an automated system, from the data entered by the healthcare professionals in the clinical histories of the centers that offer public health care in Catalonia, so that the medical reports are also included in these other files (source files). The data included in the HC3 are published and can be consulted by the health professionals of the entities integrated into the public coverage network in Catalonia and which attend to the patient, as well as by the patient himself through the La Meva Salut portal.

In accordance with this configuration, the request for the depublication of a document or personal data from the HC3 assumes the exercise of the right of opposition, with respect to the files that contain the data of the clinical histories of the hospitals and centers primary care where a document or personal data of the applicant would initially have been incorporated. In other words, the claim made by the claimant here regarding the reports identified in the antecedents, should be considered as the exercise of the right of opposition regarding the data incorporated in the clinical history files for which they are responsible, respectively, the (...) (to which the Hospital of (...) belongs), (...) (to which the Hospital of (...) belongs), and the titular entity of the CAP Dr. (...).

But with respect to the HC3 file for which the Department of Health is responsible, to the extent - and in the understanding - that the depublication of a document or data entails

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the removal of the document from the HC3 - and therefore the deletion of the personal data contained in the HC3-, the claim of de-publication would fit into the right to cancel the data included in the HC3, if works before the Department of Health (or CatSalut), entity that holds the status of responsible for the treatment of the data contained in the HC3.

This double qualification of the same request could explain the answer given by CatSalut to the Authority in the hearing procedure, referring to the estimate of the cancellation, which materializes in the deletion of the medical reports of the HC3. And I would also explain the claimant's complaint about the non-cancellation based on the consideration that one or more of these reports are still published in their HC3.

In any case, from the terms in which the claimant formulates his claim consisting of the depublication of the HC3 reports, it is inferred that his estimate would not affect the preservation of the disputed medical reports in the corresponding source files by of the persons responsible for the corresponding treatment regarding the clinical histories of the different health centers from which each was issued (the Hospital of (...), the Hospital of (...) and the CAP (...)).

Taking into account the above, it is considered pertinent to resolve the present claim from the perspective of the opposition, although, for illustrative purposes, the regulations governing both the right of opposition and the right to cancel will be set out -lation

4.- Based on the considerations set out in the previous legal basis, below it is appropriate to refer to the precepts governing the right of opposition and the right of cancellation. The regulation referred to is that of the currently repealed LOPD, since as has been advanced in the 2nd legal basis, it is the rule applicable at the time when the person claiming here submitted the requests to the CatSalut, which took place on 03/10/2017.

4.1. Article 6.4 of the former LOPD regulated the right of opposition as follows:

"4. In cases where the consent of the affected person is not necessary for the processing of personal data, and as long as a law does not provide otherwise, the latter may object to its processing when there are reasonable and legitimate reasons for this to a specific personal situation. In this case, the person in charge of the file must exclude the data relating to the affected person from the processing."

Also, the regulation of the right of opposition and its exercise was completed with articles 34 and 35 of the RLOPD, in which the following was determined:

"Article 34. Right of opposition

The right of opposition is the right of the affected person so that the processing of their personal data is not carried out or that this processing ceases in the following cases:

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- a) *When your consent is not necessary for the treatment, as a result of there being a legitimate and well-founded reason, referring to your specific personal situation, that justifies it, provided that a law does not provide otherwise.*
- b) *When it comes to files whose purpose is to carry out advertising and commercial prospecting activities, in the terms provided for in article 51 of this Regulation, regardless of the company responsible for their creation.*
- c) *When the purpose of the treatment is the adoption of a decision referring to the affected person and based solely on an automated treatment of their personal data, in the terms provided for in article 36 of this Regulation.*

Article 35. Exercise of the right of opposition

1. *The right of opposition must be exercised through a request addressed to the data controller.*

When the opposition is made based on letter a) of the previous article, the request must state the well-founded and legitimate reasons, relating to a specific personal situation of the affected person, which justify the exercise of this right.

2. *The person in charge of the file must decide on the opposition request within a maximum period of ten days from the receipt of the request. After the deadline has passed without an express response to the request, the interested party can file the claim provided for in article 18 of Organic Law 15/1999, of December 13.*

In the event that it does not have the personal data of those affected, it must also notify them within the same period.

3. *The person responsible for the file or treatment must exclude from the treatment the data relating to the affected person who exercises his right of opposition or deny the interested party's request with reasons within the period provided for in section 2 d 'this article.'*

4.2. Article 16 of the LOPD, relating to the right of cancellation, determined the following:

"1. The person responsible for the treatment has the obligation to make effective the right of rectification or cancellation of the interested party within ten days.

2. *The personal data whose treatment does not comply with the provisions of this Law must be rectified or cancelled, where appropriate, and, in particular, when these data are inaccurate or incomplete.*

3. The cancellation results in the blocking of the data, and they must only be kept at the disposal of public administrations, judges and courts, for the attention of the possible responsibilities arising from the treatment, during the term of prescription of these responsibilities. Completion of this term, the deletion must proceed.

4. *If the rectified or canceled data has been previously communicated, the person in charge of the treatment must notify the person to whom they were communicated of the rectification or cancellation, in the event that the latter maintains the treatment, who must also proceed to cancellation.*

5. Personal data must be kept for the periods provided for in the applicable provisions or, where applicable, the contractual relationships between the person or entity responsible for the treatment and the interested party."

For its part, article 31.2 of the RLOPD, provided the following:

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"2. Exercising the right of cancellation results in the deletion of data that is inadequate or excessive, without prejudice to the blocking duty in accordance with these Regulations. (...)"

Article 32 of the RLOPD, sections 1 and 2, determined the following:

"1. (...)

In the cancellation request, the interested party must indicate which data they are referring to, and must provide the documentation that justifies it, if applicable.

2. The person in charge of the file must decide on the request for rectification or cancellation within a maximum period of ten days from the receipt of the request. After the deadline has passed without an express response to the request, the interested party can file the claim provided for in article 18 of Organic Law 15/1999, of December 13.

In the event that it does not have the personal data of the affected person, it must also be communicated within the same period."

Regarding the duty of conservation of the documentation integrated in the clinical history of the health centers where the care referred to in the controversial reports was provided, it will have to be what determines the health legislation that is mentioned in continuation

Article 12 of Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation, in its wording given by Law 16/2010, of 3 June, sets mandatory deadlines for keeping the documentation that forms part of the clinical history:

"(...) 4. The following documentation must be kept from the clinical history, together with the identification data of each patient, for at least fifteen years from the date of discharge of each care process : a) The informed consent forms. b) The discharge reports. c) Surgical reports and birth registration. d) Data relating to anesthesia. e) The reports of complementary explorations. f) The necropsy reports. g) Pathological anatomy reports. (...)

6. The documentation that makes up the clinical history not mentioned in section 4 can be destroyed once five years have passed from the date of discharge of each care process."

7. Notwithstanding what is established in sections 4 and 6, the documentation that is relevant to care effects, which must incorporate the document of advance wishes, and the documentation that is relevant, especially for epidemiological purposes, research or organization and operation of the National Health System. In the processing of this documentation, the identification of the affected persons must be avoided, unless anonymity is incompatible with the purposes pursued or the patients have given their prior consent, in accordance with current regulations on Protection of personal information.

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Clinical documentation must also be kept for judicial purposes, in accordance with current regulations.

8. The decision to keep the clinical history, in the terms established by section 7, corresponds to the medical management of the health center, at the proposal of the doctor, with the prior report of the unit in charge of managing the clinical history in each center. This decision corresponds to the doctors themselves when they develop their activity individually."

On the other hand, article 18 of the former LOPD, regarding the protection of the rights of access, rectification, opposition and cancellation, established in its sections 1 and 2 the following:

"1. Actions contrary to the provisions of this Law may be the subject of a claim by the interested parties before the Data Protection Agency, in the manner determined by regulation.

2. The interested party who is denied, in whole or in part, the exercise of the rights of opposition, access, rectification or cancellation, may bring this to the attention of the Data Protection Agency or, where applicable, of the competent body of each autonomous community, which must make sure of the validity or inadmissibility of the refusal."

In line with the above, article 16.1 of Law 32/2010, of the Catalan Data Protection Authority, provides the following:

"1. Interested persons who are denied, in part or in full, the exercise of their rights of access, rectification, cancellation or opposition, or who may understand that their request has been rejected due to the fact that it has not been resolved within the established deadline, they can submit a claim to the Catalan Data Protection Authority."

5.- With regard to the object of the claim, as a starting point it is appropriate to reiterate what has been indicated in point 2 of the antecedents, in the sense that, although the General Secretariat of the Department of Health is the body responsible for the file "Register of health information of patients" where the personal data that are incorporated into the HC3 are collected, through the Resolution SLT/2376/2015, of September 17, the Department of Health delegated to CatSalut the consideration, management and attention of requests to exercise the rights of access, rectification, cancellation and opposition from citizens in relation to the data contained in the HC3. Therefore, CatSalut is the one that had to answer the opposition requests made by the claimant here.

In this regard, it is not a disputed issue that CatSalut appreciated the claim of the claimant here. Specifically, by means of a letter dated 10/26/2017 from the CatSalut Citizen Service Department, you were informed that: *"the most appropriate thing would be to proceed with the depublication of the 4 reports that you request, with the aim that the rest of the information remains as it is at this time. If your agreement is expressed, we will proceed with the depublication of the documents"*. And the person here claiming gave his consent by mail sent to said Management on 3/11/2017.

The complaint refers to the fact that the depublication of the reports, or some of them, would not have been carried out, despite having appreciated the claim that had been made in this regard.

In the hearing procedure of the present guardianship procedure, CatSalut has stated the following about the depublication of the four controversial medical reports:

- In writing dated 08/07/2018 he stated the following:

"The depublication of some of the reports requested by the gentleman (...) in the exercise of the right of opposition granted has been carried out. However, the unpublishing of others has run into some technical snags. On the one hand, it is not possible to unpublish a report by a different production unit (UP) than the one that made the publication, since, as indicated, only the entity that made the publication can unpublish. If you try to unpublish from another UP, the system prevents it. On the other hand, the primary care management platform does not allow the publication of reports issued by a primary care center to which the patient does not belong. These circumstances have caused the effective compliance of the right of opposition granted to Mr. (...) to be extended, despite the will to do so.

- And on 12/19/2018 CatSalut stated the following:

"Of the two documents that were pending to be unpublished, at this moment there is one left. We have difficulty in unpublishing it, as it is carried out by another entity, and it is not your doctor. We could always get to manual unpublishing, but it's complex."

Regarding the reasons put forward by CatSalut to justify the non-publication of the controversial medical reports, it should be noted that, although understandable, they do not seem insurmountable, given the state of technology and current IT knowledge. Proof of this would be the same depublication of three of the four reports. The acknowledgment by CatSalut that on 19/12/2018 one of the four medical reports continues to be unpublished entails the estimation of the claim, since despite having formally estimated the claim of the claimant here, such decision is not would have been fully effective.

In this decision to estimate the present claim, the time that has passed since CatSalut estimated the de-publication request (02/10/2017) is taken into account, although this decision has not yet been fully implemented. It also takes into account the forecasts of CatSalut on the management of HC3 that are published on the Internet. Specifically, on the website of the Health Quality and Assessment Agency of Catalonia (AQuAS) the document entitled *"Protocol of action regarding the exercise of the rights of access, rectification, cancellation and opposition to the shared clinical history of Catalonia (HC3)"* has been published, revised in October 2015, in which the possibility is expressly provided for the affected person to object to their data being included in the HC3. Specifically, point 2.4 states, among others, the following:

"In the case of HC3, the right of opposition is based on the fact that the treatment of a patient's data may harm him in some way that must be justified.

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In this context, the right of opposition consists in the possibility that citizens have to express their wish that their health data, collected in their personal clinical history in a care center in Catalonia, not be put, through the HC3, at the disposal of other health professionals from other health centers, or that certain treatments are not carried out."

And in this case where the citizen submits a request for opposition in the terms indicated, point 6.1.4 provides that: *"The Department of Health [that is, CatSalut] must respond to the affected person. In the event that the requested opposition is granted, the Department of Health will notify the entity/care center so that it adopts the necessary technical measures to make it effective".* And in point 6.5 it is foreseen, for what is of interest now, that: *"If this right is exercised before the Department of Health and refers to data included in the HC3, this Department must respond to the affected in time and the way established by the data protection regulations. In the event that the requested opposition is granted, the Department of Health will notify the entities/care centers so that they adopt the necessary technical measures to make it effective".*

Finally, in view of the allegations made by CatSalut, we cannot fail to warn the Department of Health that, in light of the RGPD and Organic Law 3/2018, of December 5, of protection of personal data and guarantee of digital rights (LOPDGDD), the person responsible for the treatment is obliged to implement the technical and organizational measures that are necessary to give effective compliance to the exercise of the rights, and in particular with respect to the personal data of the patients listed in HC3. And this obligation includes the duty to exercise the right within the legally provided term, which in the present case was a maximum of ten days from the estimated resolution of the request, in accordance with article 35.3 RLOPD.

6.- In accordance with what is established in articles 16.3 of Law 32/2010 and 119 of the RLOPD, in cases of estimation of the claim for the protection of rights, the manager of the file must be required so that within the term of 10 days to make the exercise of the right effective.

In accordance with this, it is necessary to request the Department of Health so that within 10 days, counting from the day after the notification of this resolution, proceed to the depublication of the HC3 of the medical report referred to the person here claiming, who is still published in the HC3. Once such depublication has been made effective in the terms set out and the person making the claim has been notified, within the same 10-day period the Department of Health must give an account of it to the Authority.

For all that has been exposed,

RESOLVED

First.- Estimate the guardianship claim made by Mr. (...) against the Department of Health (CatSalut) of the Government of the Generalitat.

Second.- Request the Department of Health so that within 10 counting days from the day after the notification of this resolution it makes effective the right of opposition

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exercised by the claimant, in the manner indicated in the 6th legal basis. Once the right of opposition/cancellation has taken effect, within the same period of 10 days the claimed entity must report to the Authority.

Third.- Notify this resolution to the Department of Health, CatSalut and the person making the claim.

Fourth.- Order the publication of the Resolution on the Authority's website (www.apd.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 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the interested parties can file, as an option, an appeal for reinstatement before the director of the Catalan Data Protection Authority, in the period of one month from the day after its notification, in accordance with the provisions of article 123 et seq. of Law 39/2015 or directly file an administrative contentious appeal before the administrative contentious courts of Barcelona, 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. Likewise, the interested parties may file any other appeal they deem appropriate for the defense of their interests.

The director,

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)