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File identification File resolution of
Prior Information no. IP 172/2018, referring to the Health Management Foundation of the Hospital de la Santa Creu i Sant Pau

Background

1. En data 02/07/2018, va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per remissió de l'Agència Espanyola de Protecció de Dades (en endavant, AEPD), un escrit d'una persona pel qual formulava a complaint against the Foundation for Health Management of the Hospital de la Santa Creu i Sant Pau (hereinafter, the Hospital), due to an alleged breach of the regulations on the protection of personal data. In particular, the complainant stated that on 05/31/2018 he gave

   to give birth to her daughter in the Hospital. She added that immediately after the birth, a certain doctor asked her for her consent to record a video, a request to which she agreed. The complainant stated that the next day she regretted it and expressed to the nurses and gynecologists her desire to withdraw the consent initially given, but that they were unaware of the possible existence of the video.

2. The Authority opened a preliminary information phase (no. IP 172/2018), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 07/16/2018 the reported entity was required to report, among others, on the actions that would have been carried out based on the reporting person's statement , the day after the birth, in the sense of revoking consent for the capture of the controversial video.

4. On 30/07/2018, the Hospital responded to the aforementioned request through a letter in which it stated, among others, the following:

   - That the professionals of the Hospital assisted in the expulsion of the daughter of the person reporting in the presentation of the above modality. As it was a rare and unique vaginal delivery in the care activity, it was considered to be a source of exceptional knowledge. For this reason, it was proposed to the patient to record the expulsive, solely and exclusively, for educational reasons.

   - That the legal basis that would legitimize the processing of data subject to complaint is the consent

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- That on 07/06/2018, the complainant sent a complaint via email to the Hospital's User Service area, stating that he had not received a response to his request addressed to the staff of nursing consisting of deleting the controversial video, as well as preventing its dissemination.

- That on the same date, from the Hospital's Customer Service Area, a certain doctor was contacted, who indicated that he had spoken to the complainant a few days ago, informing him the same as if he did not give permission, the video would not be used for the educational purposes for which it had been obtained, and would be destroyed.

- That on 27/06/2018 the doctor who treated the complainant during childbirth, visited her at the gynecology and obstetrics emergency service. During this visit the doctor told him that the video was "out of circulation".
- That on 07/05/2018 a burofax was sent to the complainant informing him that in accordance with the provisions of article 17.b) of 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 processing of personal data and the free movement thereof (hereafter, RGPD), in time and form, had become effective the his right and that his data had not been disseminated to third parties. He was also told that, following his request, the video had been deleted.

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Agency, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

2. Based on the account of facts that has been presented in the background section, it is necessary to analyze the facts denounced

2.1. On withdrawal of consent

As can be seen from the letter of complaint, this focuses on the possibility that the Hospital kept the video recorded during her birth, treatment for which she would have given her consent at the time, but which the next day would have withdrawn

That being the case, the legal basis that would legitimize the treatment in the present case was the consent of the affected person, as provided for in art. 6.1.a of the RGPD, or in art. 9.2.a) of the RGPD for the case of personal data of special categories - as would be the case of health data -, in which case consent is required to be explicit.
The RGPD defines consent as "any manifestation of free will, specific,

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08008 Barcelona

informed and unequivocal by which the interested party accepts, either by means of a statement or a clear affirmative action, the treatment of personal data that concerns him" (article 4.11). In accordance with the above, to be considered valid consent must be free, specific, informed and unequivocal; and in the case of health data, it is required to be "explicit". In the present case, the person reporting comes to recognize that he would have given his consent initially, but focuses the complaint on the fact that he would have revoked it the next day.

Indeed, after the affected person has consented to the processing of their data, in accordance with article 7.3 of the RGPD, the interested person has the right to withdraw said consent at any time, without affecting the legality of this withdrawal of treatment based on prior consent.

In this regard, the complainant states that he has expressed to the nursing staff his desire to withdraw the consent previously given, on 06/01/2018.

In the present case, the withdrawal of consent would have been expressed verbally. This circumstance means that it is not possible to specify the terms in which it was made, nor does it allow to record the date on which said request was made. In this last sense, the complainant stated in his letter of complaint that the withdrawal of consent was requested from the "nurses and gynecologists" of the Hospital. For its part, the Hospital admits in its written response to the Authority's request, that this request to withdraw consent

it would have been addressed by a certain doctor with the complainant, prior to 06/07/2018. According to the Hospital, this doctor would have indicated to the complainant that if he did not give permission, the video would not be used for the educational purposes for which it had been obtained; as well as it would be destroyed.

At this point it is necessary to analyze the question relating to the conditions under which consent can be withdrawn or revoked. In this regard, as recalled by this Authority in opinion CNS 19/2018, it should be borne in mind that the RGPD, despite being a rule of direct application (does not require transposition) and that enjoys supremacy with respect to the internal legal system, it does not formally repeal Organic Law 15/1999, of December 13, on the protection of personal data (hereafter LOPD), but only displaces the applicability of internal rules that oppose it. The same conclusion must be reached regarding the application of Royal Decree 1720/2007, of 21 December, which approves the Regulations for the deployment of the LOPD (hereafter, RLOPD).

So, you can go to art. 17 of the RLOPD, which regards the withdrawal or revocation of consent, provides the following:

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"1. The person affected must be able to revoke their consent through a simple, free means that does not involve any income for the person responsible for the file or treatment. In particular, the procedure in which said refusal can be carried out, among others, by means of a prepaid shipment to the data controller or by calling a toll-free telephone number or the public assistance services which this has established.

The cases in which the person in charge establishes as a means for the interested party to declare that processing is refused the sending of certified letters or similar shipments are not considered to be in accordance with the provisions of Organic Law 15/1999, of December 13, the use of telecommunications services that involve an additional charge to the person concerned or any other means that involve an additional cost to the person concerned.
2. The person in charge must stop processing the data within a maximum period of ten days from the receipt of the revocation of consent, without prejudice to his obligation to block the data in accordance with the provisions of article 16.3 of Organic Law 15/1999, of December 13.

3. When the interested party has requested from the person in charge of the treatment the confirmation of the cessation of the treatment of his data, he must expressly respond to the request."

This precept does not contravene what is established in the RGPD and, therefore, it is considered to remain in force after 05/25/2018, and was therefore applicable to the case raised here.

Having said that, in the present case it is inferred that the Hospital would have considered the request for withdrawal of consent made by the complainant as informed by a certain doctor before 06/07/2018, although the Hospital did not I would have communicated it in writing. In fact, according to the Hospital, the doctor who subsequently visited the complainant on 06/27/2018 reported that she was worried because she had not yet received an institutional response, uncertainty that would have led the affected person to present in date 07/06/2018 the complaint that has given rise to these actions. It is worth saying, however, that this uncertainty would have been resolved on 07/05/2018, the date on which the Hospital would have sent the affected person a burofax in which, as the Hospital has stated to this Authority, it was communicated that " your right has been exercised and that your data has not been disclosed to third parties. Also, as a result and in accordance with his request, that the recorded video has been deleted".

As has been advanced, the fact that the withdrawal request was made orally makes it impossible to ascertain whether or not the reporting person requested confirmation of the cessation of the processing of their data. The above also prevents addressing whether the Hospital would have breached the provisions of article 17.3 of the RLOPD, which only requires the person in charge to

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confirmation of the cessation of treatment, when the affected person has requested confirmation.

On the other hand, in accordance with article 17.2 of the RLOPD, the consequence of withdrawing consent is the cessation of treatment, which the Hospital would have done, according to what it has certified before this Authority.

In short, in accordance with everything that has been presented, within the framework of the present previous actions it has not been possible to verify a breach of the regulations on data protection on the part of the Hospital that should lead to the initiation of a sanctioning procedure.

2.2. About the right of deletion

By not receiving written confirmation of the cessation of treatment, the complainant would have sent an email on 06/07/2018 to the Hospital's Customer Service Area, from which it could be inferred that only requested the deletion of the aforementioned video.

It should be noted that this e-mail message was sent by the complainant, on the same day that he submitted the complaint to the AEPD. Although the letter of complaint does not expressly refer to this request for deletion, nothing prevents us from making considerations about it, taking into account the connection with the facts strictly reported.

As has been advanced, it is considered that through the aforementioned e-mail the complainant exercised his right of deletion, which is regulated in article 17 of the RGPD. Precisely, one of the circumstances in which the RGPD foresees that the right of deletion can be exercised, is when the interested person has withdrawn the consent on which the treatment was based, as happened in the present case (art. 17.1.b of the RGPD).

Well, the Hospital has claimed to have resolved this request, in an estimated sense, by means of a burofax sent on 07/05/2018. Specifically, how the Hospital has progressed would have informed the person complaining here that the controversial video had been deleted, as well as that the data contained there had not been disseminated. So it is inferred that the Hospital deleted the video for good.

In turn, the Hospital would have responded to the request to delete the data within a period of one month from the receipt of the request, as required by art. 12.3 of the GDPR.

3. In accordance with everything that has been set forth in the 2nd legal basis, and given that during the previous information it has not been proven that there are rational indications that allow imputation

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any fact that could constitute any of the violations provided for in the applicable legislation, it is necessary to agree on the archive of these actions. Article 89 of the LPAC, in accordance with articles 10.2 and 20.1 of Decree 278/1993, provides that it is necessary to file the actions when the following is highlighted in the instruction of the procedure: "c) When the proven facts do not constitute, in a manifest way, an administrative infraction".

resolution

Therefore, I resolve:

1. File the actions of prior information number IP 172/2018, relating to the Foundation of Health Management at the Hospital de la Santa Creu i Sant Pau.

2. Notify this resolution to the Hospital and communicate it to the person making the complaint.

3. 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 article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the denounced entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with the which provides for article 123 et seq. of Law 39/2015. 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.

Likewise, the reported entity can file any other appeal it deems appropriate to defend its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)