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File identification

Archive resolution of the previous information no. IP 77/2020, referring to the General Directorate of Medical Assessments (Catalan Institute of Medical Assessments -ICAM-).

Background

1. On 02/03/2020, the Catalan Data Protection Authority received a letter from a union for which it lodged a complaint against the General Sub-Directorate of Medical Assessments (Catalan Institute of Medical Assessments - ICAM -), on the grounds of a suspect non-compliance with the regulations on personal data protection. Specifically, the complainant union complained about the following: a) access by the medical assessment staff of the ICAM to the clinical histories of the users, without their explicit consent and without having complied with the right to information ; and, b) that the nursing staff has ", so that they can access the health data included in the e-cap (clinical history management application of the primary care centers).

The complainant provides facts that may consider a "violation of security personal data"

2. The Authority opened a preliminary information phase (no. IP 77/2020), 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 03/10/2020 and 11/26/2020, the reported entity was required to report on the following:

- The legal basis that would legitimize access to the clinical histories of ICAM users, by the medical assessment staff.
- If the access by the medical assessment staff of the ICAM is made to the clinical histories contained in the e-cap (clinical history management application of the primary care centers).
- If the system limits the access of the medical assessment staff to those clinical histories relating to people who are immersed in a process of incapacity; and, in turn, also limited to the clinical course - and associated diagnoses - related to the injuries or diseases that have given rise to that process.
- What is the entity or body that provides ICAM healthcare professionals with privileges to access clinical histories; and if such privileges are provided, not only to the medical staff, but also to the nursing staff. In this sense, it is necessary to detail the privileges assigned to each of these groups.

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- The way in which ICAM complies with users' right to information, especially with regard to eventual access to your medical history.

4. On 11/06/2020 and 14/12/2020, ICAM responded to the above requests through separate written statements that set out the following:

- a) What "the medical staff of the ICAM access it, in a differentiated way, both the e-CAP and the clinical history of the Catalonia, keeping the record and traceability of all the accesses made by the professional and confidentiality.

Traceability is maintained a both accesses (E-head and clinical history) in accordance to the role of the medical staff of the ICAM, which is to provide the medical staff with the necessary information to exercise the full

- b) What access if there is a file can not exercise the full essential for and the

the

strict compliance with
in the issued medical

Likewise, the ICAM must have generated access it, so it can be the subject of the procedure". is not

- c) That the legal basis that legitimizes the treatment of the data contained in the clinical histories is that provided for in article 6.1.e) and 9.2.b) 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 movement thereof (hereafter, RGPD), in relation to what is provided for in article 71.3 of the Consolidated Text of the General Social Security Law, approved by Royal Legislative Decree 8/2015, and Royal Decree 625/2014.

- d) With regard to access to clinical records by the nursing staff, it is reported from following:

d.1) That on 08/11/2019, following the presentation of a claim, the Data Protection Delegate of the Department of Health issued a resolution in which recommended opening a of previous analysis relative to the possible accesses no phase justified by the nursing staff of the Sub-directorate general", so that at that time the General Directorate of Health Planning and Regulation - on which the ICAM depends - temporarily blocked access by the nursing staff to the clinical data (including the clinical course) contained in the clinical histories d.2) What

"until is resolve the issue raised".

"of the research actions carried out, the e-cap is it follows that the accesses would have been only through its capacity and to the point of the health system is a single proposal is the provided for in

in the management

of validated by the medical inspector. The actions carried out are framed by Royal Decree 625/2014 on the control of 665 days of capacity processes during the

the in

And the channel used is the only channel of communication with assistance

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via which communication is established between the ICAM and the nursing staff, as

Regarding the data that they

a for the nursing staff and, so does the staff of the

tasks rest as

Sub-directory

General who performs administrative tasks, access in accordance with what is provided for in article 11 of the

Law 21/2000, of 29 December, on the rights of information concerning the patient's health and

autonomy, and clinical documentation, basic regulation of the patient confidentiality and information obligations of 1/2002, in

what they have access^a that are subjected

d.3) What to "the situation caused by the pandemic has caused the ICAM to consider the increase in actions one incapacity processes in which article 1 of the is

support for the medical staff evaluating the

ICAM for the nursing staff, part of December the organizational nature of the health, social and public Decree-law 48/2020, for health field measures to deal with the health crisis caused by the

a

COVID-19 and modification of Decree

Law 30/2020, of August 4, and of Decree-law 41/2020, of December 10, qualifies nurses attached a the to the ICAM to access processes a the clinical histories

of temporary disability due in procedure, while Action plan of PROSECUTED to associated emergencies a emerging communicable diseases with high risk potential".

e) That, with regard to compliance with the right to information, the ICAM "considers that it could exempt the obligation to inform interested parties in accordance with the Royal Decree 625/2014.5.c) of the Regulation, and ; but that nevertheless

in order to bring transparency to its performance, the user's right to information is being complied with through the inclusion of an information clause in the subpoena offices, and also with the exposure to the dependencies of the ICAM of an informative document.

The reported entity provided the following documentation: a) a summons form that contains an informative clause that contemplates certain extremes of those provided for in article 13 of the RGPD; b) the document, which according to the ICAM, is exposed in its dependencies, and which includes an informative clause drafted in similar terms to that included in the aforementioned subpoenas.

5. Based on the antecedents that have been related and the result of the investigative actions carried out within the framework of the previous information, on today's date an agreement is also issued to initiate disciplinary proceedings regarding the conduct reported related to the access carried out by ICAM nursing staff to the clinical data included in the primary care clinical histories of people immersed in a process of incapacitation, from an undetermined date until 08/11/2019, the date on which this staff's access to this information was temporarily blocked.

The rest of the behaviors reported are addressed in this file resolution.

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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 set out in the background section, it is necessary to analyze the reported facts that are the subject of this file resolution.

2.1.- About the access by the ICAM medical evaluation staff to the clinical histories.

The complainant union complained about the access by the medical evaluation staff of the ICAM to the clinical histories of the users, without their explicit consent.

This access to the clinical history by the ICAM medical evaluation staff was the subject of analysis by this Authority in opinion CNS 61-2015 (which can be consulted on the website www.apdcat.cat), in the which concluded that, in accordance with the regulations in force at that time (in particular, what was provided for in article 40 of the revised text of the General Social Security Law approved by Royal Legislative Decree 1/1994, of 20 June; and RD 625/2014), the medical inspector staff of the ICAM, in the temporary incapacity (IT) processes, could access without the consent of the affected persons, the clinical documentation of primary and specialized care of people working in an IT situation. This access, however, was subject to the following conditions:

"a) Access must be necessary for the exercise of its medical inspection functions.

Access must be limited to data related to ailments suffered strictly related to the injuries and the interested party that are relevant to the resolution of the procedure. It cannot, therefore, include other information that, despite the medical history situation of affected persons, is relevant in relation to the recognition of the maintenance of the IT situation.

ok) Affected persons must have the possibility to object to communication. This reference a this one the possibility to oppose the one to be understood as a personal data protection right of opposition based on a specific personal situation, but article 6.4 of the Law a organic 15/1999,

based and legitimate relative justification that it will be sufficient for the affected persons to oppose it without

For this reason, the access to these data is the one that is required. It is important that with prior nature of this possibility to oppose it".

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In summary, in the aforementioned opinion it was concluded that "The medical the ICAMS you have la inspector's consideration staff may have already said this in his report. The ICAMS you have la that are relevant to the resolution of the procedure, and the person's express written opposition from the

Well, the analysis carried out in the aforementioned opinion -prior to the application of the RGPD-, would maintain its validity from the perspective of the RGPD, with full application from 05/25/2018, d according to what is explained below.

According to the RGPD, the processing of health data requires the concurrence of a legal basis from those provided for in its article 6; and, in addition, that some of the exceptions established in article 9.2 of the same rule are given.

The RGPD also stipulates that the legal basis must be established in the law of the member state that applies to the controller or the law of the European Union which, in any case, must determine the purpose of the treatment. With regard to the quality of this rule, it must fulfill an objective of public interest and must be proportional to the aim pursued (art. 6.3 if/).

Regarding the scope of the domestic law, Recital 41 of the RGPD states that "When the present Regulation makes reference it a legal basis oh a legislative measure, this is not necessarily requires one legislative act adopted by the one parliament, without prejudice requirements of conformity of the constitutional order of the Member State in question."

It must be taken into account in this regard that, in Spanish law, the rule that establishes the treatment must be a rule with the status of law, as follows from Article 53 EC, to the extent that it involves the limitation of a fundamental right. In this sense, article 8.2 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD) establishes that

"The processing of personal data can only be carried out in the fulfillment of a mission carried out by the person in charge of public Regulation (LR) on public interest out in 2016/679, when derived from law with rank a competence attributed for the article in one

". Article 9 of the LOPDGDD is pronounced in similar terms regarding the processing of data from special categories of data, such as health data.

Article 66.1.a) of the Consolidated Text of the General Social Security Law approved by the RDLEG 8/2015, determines that it corresponds to the National Institute of Social Security (INSS), the management and administration of the economic benefits of the Social Security system and, in this sense, this entity manages the economic benefits of temporary incapacity ,

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permanent incapacity and death and survival, with prior determination of the contingency from which the situation of need arises.

The INSS - management entity attached to the Ministry of Labour, Migration and Social Security - is therefore entrusted with the management and administration of certain financial benefits of the Social Security system, in accordance with what is established by Royal Decree 2583/1996 , of December 13, on the organic structure and functions of the INSS and partial modification of the General Treasury of the Social Security. Among the procedures necessary to realize the recognition of these benefits are those of the medical control of temporary disability allowances, among others.

The Administration of the Generalitat of Catalonia, in accordance with the provisions of Royal Decree 1517/1981, of July 8, on transfers of Social Security services to the Generalitat of Catalonia in the field of Social Security (INSALUD and INSERSO) is competent to provide Social Security Health Assistance and, through its public health service practitioners, extend the medical parts of leave, confirmation of leave and discharge that establish the start and duration, with general, of the IT processes in its territory and, through the Medical Inspection (General Subdirectorate of Medical Assessments) of the Department of Health, participate in the responsibility of managing and controlling the provision together with the managing and collaborating entities of the Social Security in accordance with RD 625/2014.

Decree 6/2017, of January 17, on the restructuring of the Department of Health establishes, among the functions performed by the General Sub-Directorate of Medical Assessments, the inspection, evaluation and monitoring of medical and health processes corresponding to benefits of the Social Security system in the matter of work disabilities

On December 5, 2017, the Ministry of Labor and Social Security (INSS) and the Administration of the Generalitat of Catalonia, through the Department of Health, signed a collaboration agreement, for the control of temporary incapacity during the period 2017 to 2020, for which

The INSS commissioned the Generalitat de Catalunya to carry out medical checks on IT processes, so that after the first 365 days, the INSS or the Social Institute of the Navy (ISM) in each province issues the corresponding resolution .

In accordance with the aforementioned regulations, the legal basis that would enable the processing of the data of the people immersed in a process of incapacitation by the ICAM medical evaluation staff would be that foreseen in article 6.1.e) of the RGPD (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 data controller).

On the other hand, article 71.3 of Royal Legislative Decree 8/2015, of October 30, which approves the revised text of the General Social Security Law (drafted in identical terms as DA 40a of RDLEG 1/1994, rule cited in the Authority's opinion no. CNS 61-2015, and repealed by RDLEG 8/2015), provides that:

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"In the procedures for the declaration of permanent incapacity, the effect of the corresponding financial benefits of the Social Security, as well as with regard to the recognition of benefits due to temporary disability, is not affected by the procedure of the permanent incapacity of the injured person, and the health of family assignments by child to legal representative, clinical documentation
diseases suffered by the interested party, the positive or negative record the
(...)."

Based on the previous precept, and with regard to access to the clinical history by the ICAM medical evaluation staff, the exception provided for in article 9.2.h) of the RGPD is given here, which enables the processing of health data for the purposes of occupational preventive medicine, evaluation of the degree of disability, medical diagnosis, provision of the basis for the treatment assistance, or
Right of Union of the States members virtue of in and
of one healthcare professional without prejudice to the guaranteed conditions and section 3" contemplated

It must be said that, in accordance with what is required by the transcribed precept, the ICAM has informed that this access by the evaluating medical staff, is only carried out in relation to those clinical histories relating to people who are immersed in a process of disability; and, in turn, also limited to the clinical course - and associated diagnoses - related to the injuries or diseases that have given rise to that process.

Having said that, it should be emphasized that precept 71.3 of RDLEG 8/2015 also establishes that this access to the medical history cannot be carried out in the event that there is express opposition from the affected person. So, as gathered in the opinion of this Authority no. 61/2015, although this possibility of opposing it cannot be understood as the exercise of the right of opposition regulated in the data protection regulations; it is important that in these cases where consent is not requested, the affected persons are informed of this possibility to object prior to access.

2.2.- In relation to the right to information.

First of all, it must be said that, contrary to what was stated by the ICAM in the previous information (letter e/ of the preceding 4th), the duty to inform the users would not be exempted by article 14.5 .c) of the RGPD [obtaining the communication is expressly established or the
the legitimate interests of the interested party, responsible for the data that establishes adequate measures to protect
and this because the exception foreseen there would occur in those cases in which the

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information is not collected directly from the affected people, which is not the case in the case at hand.

Now, the ICAM has stated that, while understanding that the exception of article 14.5.c) of the RGPD met, for "transparency" it complied with the right to information through the subpoena office for to a medical examination, and also through posters displayed at their headquarters - a copy of which he provided to this Authority - in which an information clause was included. Well, once the specific information provided in these documents is analyzed and also the way in which it is provided, it must be said that the ICAM would not scrupulously comply with the right to information provided for in the article 13 of the RGPD, provision applicable to the present case, and this for what is explained below.

Certainly, both in the service of summons and in the poster displayed at the ICAM headquarters, the basic information required by article 11 of the LOPDGDD is provided, among other things; and, as this precept also provides, an electronic address is provided through which the interested person can access the rest of the information. Now, to this additional information -

specifically, the one relating to the retention period of the data and the right to submit a claim to the control authority (art. 13 of the RGPD, letters d/ and/) - is not accessed in the manner prescribed by the quoted article 11 of the "simple and immediate" , LOPDGDD, but through other documents and links that are provided and to which the interested person must access in turn if he wants to obtain this information (specifically, in the register of processing activities - by which is the retention period - and on the website of the Catalan Data Protection Authority - regarding the right to claim). However, this Authority considers that this irregularity does not have the sufficient entity to justify the initiation of a sanctioning procedure against the ICAM, without prejudice to making it clear that this body must proceed to facilitate the affected persons, of in a clear and transparent way, all the information collected in article 13 of the RGPD, either by providing it directly to the subpoena office and on the posters located in its premises

in a complete way, either by providing the minimum basic information in the aforementioned offices and posters - in accordance with what is indicated in article 11 of the LODGDD - and the rest of the information through an electronic address or another link that allows easy and immediate access to it.

3. In accordance with everything that has been set out in the 2nd legal basis, and since during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have addressed in sections 2.1 (regarding the access by the evaluating medical staff to clinical records), and 2.2 (regarding the right to information), no fact constituting an infringement of the legislation on data protection or with the entity sufficient to agree on the initiation of a sanctioning file, it is necessary to agree on the archive of these actions

For all this,

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RESOLVED

1. File the actions of prior information number IP 77/2020, referring to the Sub-Directorate General of Medical Assessments (ICAM), regarding the right to information and access to the clinical history by the staff of this body, in accordance with what is set out in the 2nd legal basis.
2. Notify this resolution to the General Sub-Directorate of Medical Assessments (ICAM) and communicate it to the complainant union.
3. Order the publication of the resolution 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 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. An administrative contentious appeal can also be filed directly 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, governing the contentious administrative jurisdiction.

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

The director,