File identification

Archive resolution of the previous information no. IP 164/2021, referring to the Department of Health

Background

1. On 04/16/2021, the Catalan Data Protection Authority received a letter from a person for whom he was filing a complaint, due to an alleged breach of the regulations on personal data protection .

Specifically, the person making the complaint stated that he underwent a diagnostic test for the detection of Covid-19 in a private center, the result of which was negative, and he complained that the Department of Health had communicated the result of this test , at the educational center where it provides services, through the "traçacovid" application. In this regard, the complainant explained that he had submitted to the aforementioned test because, despite not having any symptoms associated with Covid-19, he was undergoing medical treatment " *and by protocol it is required to pass the test",* and respect added that " *I will have to do more antigen test and again, without presenting symptoms compatible with covid. I consider that my privacy is completely violated since I do not have to share my personal life with the management of my company if I do not wish to, since, when the result is negative the operation of the company is not is affected and therefore, it is personal information that they should not have".*

2. The Authority opened a preliminary information phase (no. IP 164/2021), 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. On 04/05/2021 the Authority sent a letter to the person making the complaint in order to identify the educational center to which the Department of Health would have communicated the result of the aforementioned diagnostic test for the detection of Covid-19, and because indicate the date on which such communication would have occurred.

4. On 04/05/2021, in response to the notice indicated in the previous antecedent, the reporting person communicated to the Authority the name of the educational center to which his health data would have been communicated, as well as the dates of communications. In this regard, the reporting person explained that on 04/12/2021 and 04/21/2021 he would have undergone two antigen tests at a private center, and that on 04/14/2021 and 04/23 /2021, respectively, the Department of Health would have communicated the results of the tests to the educational center where he works. Regarding these facts, the complaining party pointed out that " *given the repeated situation of the communication to the school of my negative result in the antigen test, I had to communicate to the management of the center the reason why I have to undergo when taking the test. The fact that it has not allowed me to keep confidential a private matter that I did not want to share".*

5. In this information phase, on 04/06/2021, the educational center of reference was required to provide a copy of the document through which the Department of Health would have communicated the result of the tests antigens to which the reporting person was exposed.

6 . On the dates 06/08/2021 and 06/11/2021, the educational center of reference responded to the information requirement indicated in the previous antecedent, indicating that the results of the diagnostic tests for the detection of Covid-19 they receive through the "traçacovid" application. It also provided a screenshot, which showed that on 04/06/2021 the application informed the said educational center of the negative result of the antigen test to which the person making the complaint had undergone.

7. In this information phase, on 30/06/2021 the Department of Education was required to report, among others, on the operation of the "traçacovid" application, indicating the personal data that the centers educational institutions can view through this application, and to indicate the entity that entered the result of the referred diagnostic test in the application, bearing in mind that the test was carried out in a private center.

8. On 07/14/2021 the Department of Education responded to the aforementioned request through a letter in which it set out the following:

- That the "traçacovid" application incorporates two types of data: the identifiers of students, staff, stable coexistence groups and educational centers; and those relating to the results of diagnostic tests.
- That, the management of the centers have had access to the application from the beginning and, at first, they were responsible for entering and updating the data in the application.
- That, from April 2021, the data is incorporated directly from the Department of Health database.
- That the data entered in the application include the following blocks : " *1. Student data and the configuration of stable coexistence groups. 2. Identification of cases, where the diagnostic tests carried out with positive results are specified. 3. The data related to the confinement of groups, students and center staff".*
- That, the managements of the educational centers are the only ones that have access to the individual data of students and professionals.

Likewise, the Department of Education invoked article 8 of Decree Law 41/2020, of November 10, on extraordinary measures of a social nature in educational centers and in the field of leisure education and activities extracurriculars to deal with the consequences of Covid-19, and explained that the information related to the diagnostic test is incorporated directly into the information systems of the Department of Health, indicating only the positive or negative result, and the date of completion . In this regard, they argued that the application does not include either the reason or the location of the test and, therefore, the management of the centers do not have access to this information.

Ultimately, regarding the circumstances that would justify the controversial communication, the Department of Education argued the following:

- That, " *the complexity and diversity of the educational system in Catalonia, which includes 5,469 teaching centers of which 3,816 are public (owned by the Department of Education, local administration, other authorities) and 1,653 private (concerted and non-*

concerted) made clear the divergences in compliance with this aspect of the protocols established for the management of covid-19 cases in schools, during the first months of the 2020-2021 school year. They also highlighted the need for the application to directly incorporate data from the Department of Health".
- That, in a pandemic context, it was absolutely necessary to know not only the positive results of the diagnostic tests but also the negative results, in order to achieve "the robustness *of the system of prevention and protection of health measures".*
- That, *"we were working with the Department of Health in order to make it possible from a technological point of view, the communication of the results of the diagnostic tests for Covid-19 (...) which produced an improvement substantial in the control of the pandemic within educational centers to be able to have a much more faithful picture of the situation at every moment. (...) The existence of numerous asymptomatic cases of infected people required an exhaustive control of all positive and negative diagnostic tests, which were carried out in order to minimize as much as possible the entry of the virus into the educational centers"*

9. On 07/28/2021, the Authority required the Department of Health to report, among others, on the operation of the "traçacovid" application, indicating which would be the entities and centers that provide the information of the what the application is based on, and to report the specific circumstances in which the results of the complainant's diagnostic tests were entered into the application, as well as the reasons that would justify communicating the results of the tests to the educational centers Covid-19 diagnoses, especially when these are negative.

10. On 09/08/2021 the Department of Health requested an extension of the deadline granted, under article 32 of the LPAC.

11. On 09/08/2021 the Authority granted the extension of the aforementioned deadline.

12. On 09/22/2021 the Authority made a second request for information addressed to the Department of Health given the lack of response to the request indicated in the 9th precedent.

13. On 15/10/2021 the Department of Health responded to this Authority's request for information through a letter in which it stated the following (the emphasis is ours):

- That, *"the action of the schools in relation to the pandemic is managed through the Protocols for the management of cases of COVID-19 in educational centers in relation to the academic year, currently in force 2021-2022. These protocols are applied within the framework of the set of prevention and health protection measures included in the Action Plans for educational centers in the context of the pandemic and in the Action Procedure against cases of infection by novel coronavirus SARS-CoV-2. This action has been defined jointly between the Department of Health and the Department of Education. The Protocol refers to Traçacovid and its operation (...).*
- That, *"As we have mentioned previously, the participation of the Department of Health in Traçacovid consists in making available to the Department of Education the information related to the results of the diagnostic tests carried out in order to avoid transmission in the school environment and preserve as much as possible the achievement of educational and pedagogical objectives. This action is carried out by accessing the information systems that contain the data of the results of the diagnostic and vaccination tests in compliance with the provisions of Decree Law 41/2020 (...)*

- That, *"The Sub-Directorate General for Surveillance and Response to Public Health Emergencies has highlighted on several occasions the need to register both the positive and negative results of the diagnostic tests for covid-19, since not registering the negatives makes the study of outbreaks from Public Health much more complex, since it will not be possible to determine whether the person has not been tested or has been tested and is negative."*

In this regard, the Department of Health invoked article 25 of Law 2/2021, of March 29, on urgent prevention, containment and coordination measures to deal with the health crisis caused by covid-19, relating to the communication of data from diagnostic tests, to justify the fact that the epidemiological surveillance register of the Department of Health incorporates the data of the positives and negatives of all the diagnostic tests carried out in the population.

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 Catalan Authority of Data Protection, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the Director of the Authority is competent to issue this resolution Catalan Data Protection Authority.

2. As explained in the background, the complainant complained about the communication of his health data (specifically, the result obtained from two diagnostic tests for the detection of Covid-19) from the Department of Health to the educational center in the one who provided services. And, in this regard, he pointed out that the mentioned tests were carried out in a private center. Well, this transfer of information is considered not to have contravened data protection regulations based on what is set out below.

As a preliminary matter, it should be noted that the data referring to the result obtained in an antigen test for the detection of Covid-19, constitute data about your health, in accordance with article 4.15 of the RGPD. This precept describes the data relating to health in the following terms:

"personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health"

In relation to the above, article 6 of the RGPD provides that the processing of personal data is lawful provided that 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 responsible for the 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 a child is interested.*
The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions.

On the other hand, to the extent that the disputed data refer to the health of the employee of an educational center, in order to consider the treatment reported here lawful, it is necessary to count on one of the exceptions provided for in article 9.2 of the RGPD, which lift the general prohibition of treatment contemplated in article 9.1 of the RGPD for the special categories of personal data.

For what is of interest here, article 9.2 RGPD provides, among others, the following exceptions:

"Section 1 will not apply when one of the following circumstances occurs:
(…)
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,
and fundamental rights of the interested party.
(…)

In turn, the seventeenth additional provision of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights. (LOPDGDD), in relation to the treatment of health data, provides the following:

"1. The treatments of health-related data and genetic data regulated by the following laws and their provisions of deployment:
a) Law 14/1986, of April 25, general health.
b) Law 31/1995, of November 8, on the prevention of occupational risks.
c) Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in the field of information and clinical documentation.
(...)
g) Law 33/2011, of October 4, general public health.
(…) "

From the antecedents transcribed it is clear that the complainant underwent two diagnostic tests for the detection of Covid-19 in a private center, that the results obtained in these tests were communicated by this center to the Department of Health, and that he, through the "traçacovid" application, informed the management of the educational center where the complainant here provided his services.

Well, article 23 of Law 2/2021, of March 29, on urgent prevention, containment and coordination measures to deal with the health crisis caused by Covid-19, establishes the obligation to facilitate the 'competent public health authority - in this case, the Department of Health -, all the data necessary for the monitoring and epidemiological surveillance of Covid-19, and specifies that this obligation applies to all public administrations, as well as any center, body or agency dependent on them, and any other public or private entity, whose activity has implications in the identification, diagnosis or monitoring of Covid-19 cases.

That being the case, regarding the communication of the results of the diagnostic tests, by the reference center to the Department of Health, article 25 of Law 2/2021, of March 29, which provides for the following (the underlined is ours):

> " *Laboratories, public and private, as well as centers, services and health establishments that carry out diagnostic tests for COVID-19 using PCR or other infection diagnostic techniques, must send daily to the health authority of the autonomous community in which the data of all the tests carried out through the Information System established by the respective administration are found (...).*

According to the cited article, public and private establishments that carry out tests to detect Covid-19 have the obligation to send, on a daily basis, the results of the tests carried out to the health authority.

For its part, Law 33/2011, of October 4, General of Public Health (hereafter, LGSP) in its article 33, provides that health action in the field of occupational health will be developed in a coordinated with employers and workers' representatives. And, in relation to this, he points out that coordination mechanisms will be established in the case of pandemics or health crises, for the development of preventive and vaccination actions. Also in this sense, Law 18/2009, of October 22, on public health (hereafter, LSP) in its article 57 provides for the duty of collaboration of private and private entities with the health authorities and their agents , when necessary for the effectiveness of the measures adopted.

Well, both the public health regulations, as well as the regulation of urgent prevention, containment and coordination measures to deal with Covid-19, are clear when they establish the duty of natural and legal persons to collaborate with the health authorities. And, in this regard, article 25 of Law 2/2021, previously transcribed, specifies the obligation of centers and establishments that carry out tests to detect Covid-19, to send the results of all tests performed. Thus, in accordance with this regulatory framework, it must be concluded that the communication of health data, carried out by the establishment where the reporting person underwent the referred tests to the Department of Health, was lawful based on the article 6.1.c) of the RGPD, in connection with sections h) and) of article 9.2 RGPD, which lift the prohibition to treat health data provided for in article 9.1 RGPD.

Having established the above, the reasons why the communication by the Department of Health to the said educational center, through the "traçacovid" application, of the results of the covid-19 detection tests, were an action in accordance with data protection regulations.

For what is of interest here, Article 8.4 of Decree Law 41/2020, of November 10, on extraordinary measures of a social nature in educational centers and in the field of leisure education and extracurricular activities to cope to the consequences of the Covid-19 determines that, the Department of Health " *within the framework of the functions attributed to it in the pandemic situation referred to, will communicate to the director of the educational center through the established information systems, the health data corresponding to the results of diagnostic tests for COVID-19 so that the relevant measures can be taken in accordance with established protocols. The director of the educational center must maintain the duty of secrecy and confidentiality regarding the information to which he has access, even after the end of the health emergency situation."*

The Decree-Law constitutes a rule with the rank of law which, for these purposes, is suitable for enabling the processing of personal data, such as the one reported here. That being the case, the said precept enables the controversial communication of personal data by the Department of Health to the directors of educational centers, corresponding to the results of diagnostic tests for Covid-19 of teaching staff. In these terms, the Decree does not distinguish between whether the test results are negative or positive, so, in the present case, the communication referring to the results obtained in an antigen test carried out by the person reporting, in a private center , would remain enabled by Decree 41/2020.

Along the lines of the above, it is necessary to bring together the legal basis that is contained in Opinion CNS 38/2021, of this Authority, which, based on the interpretation of Organic Law 3/1986, of 14 April, of special measures in matters of public health, as well as the LSP, and the LGSP established the following:

> *"it is up to the competent authorities in matters of public health of the different public administrations to safeguard the essential interests in the field of public health and, to that effect, to adopt the necessary measures provided for in these laws for, in the face of a public health emergency (such as the one currently caused by Covid19), to protect the health of the population and prevent its contagion. That being the case, the different data processors (both public and private) will have to follow these measures, and this will also entail, where appropriate, the authorization to carry out the necessary data treatments, even when this involves a treatment of data relating to the health of natural persons (...)"* .

In this regard, both the Department of Health and the Department of Education have justified the need to share the information related to the results of the tests for the detection of Covid-19, whenever this information allowed to obtain "a truer picture *of the situation at every moment".* In relation to the above, this Authority cannot ignore the complexity and diversity of centers that make up the education system of Catalonia that would have evidenced the need to implement the "traçacovid" application for the effects that the managements of the educational centers obtained directly the data relating to the results of the diagnostic tests for the detection of Covid-19.

Regarding the manifestations of the Department of Health and the Department of Education, it should be added that, by way of example, Resolution SLT/1392/2021, of May 7, recognized that administrative intervention in public and private activities was necessary to face the

health crisis situation, in a context in which there was community transmission of the virus, and insufficient group immunity. In addition to the above, we should consider the importance of knowing which people had undergone an antigen test, and had a negative result, in order to minimize as much as possible the entry of the virus into educational centers, taking into account the existence of asymptomatic people who could infect other groups.

According to the above, the legal basis that legitimized the communication of the controversial data by the Department of Health was the fulfillment of a mission carried out in the public interest or the exercise of public powers conferred on the data controller (article 6.1 e) of the GDPR). Well, as we have seen, in compliance with the aforementioned regulations on extraordinary measures to deal with the consequences of Covid-19, the health authorities had to communicate to the managements of the educational centers the results of the diagnostic tests for the detection of the Covid-19. Also, to the extent that the communication referred to health data, it should also be pointed out, the concurrence of the exceptions provided for in article 9.2 sections g) ii) of the RGPD, which enable the treatment reported here.

Finally, it is not superfluous to point out that the treatment of the aforementioned health data was proportionate, given the circumstances and the time frame in which they were carried out - in the midst of a pandemic. In this sense, the judgment of the Constitutional Court 207/1993 provided that, in order to check whether a measure is restrictive of a fundamental right, it must pass the judgment of proportionality, defined in the following terms: "it is necessary to verify if it meets *the three following requirements or conditions: if such a measure is likely to achieve the proposed objective (judgment of suitability); if, in addition, it is necessary, in the sense that there is no other more moderate measure for the achievement of such purpose with equal effectiveness (juicio de necesidad); and finally, if the same is weighted or balanced, more benefits or advantages can be derived from it for the general interest than damages on goods or values in conflict (proportionality judgment in the strict sense)".*

The communication of the results of the diagnostic tests for Covid-19, by the Department of Health, to the managements of the educational centers, obeyed the need to act as quickly and efficiently as possible, in order to avoid the spread of the virus in the educational field. As things stand, there is no doubt that, in view of this objective, the aforementioned communication was an appropriate measure - it allowed the proposed objective to be achieved - and also necessary and weighted, since the eventual impact on the right to protection of data from the complainant here, had to decline in the face of the general interest in preventing the spread of the virus at a time when both the health authorities and the educational authorities had to act with the utmost speed in order to 'avoid new epidemic outbreaks.

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 been addressed in this resolution, no fact that could be constitutive of any of the infractions provided for in the legislation on data protection, should be archived.

Article 10.2 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, provides that "(... *) no charges will be drawn up and the dismissal of the file and the archive of actions when the proceedings and the tests carried*

out prove the non-existence of infringement or responsibility. This resolution will be notified to the interested parties" . And article 20.1) of the same Decree determines that dismissal proceeds " *a) When the facts do not constitute an administrative infraction."*

Therefore, I resolve:

1. Archive previous information actions number IP 164/2021, relating to the Department of Health.

2. Notify this resolution to the Department of Health and the reporting person.

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,