

## File identification

Archive resolution of the previous information no. IP 267/2021, referring to the Catalan Public Health Agency of the Department of Health

## Background

1. On 07/05/2021, the Catalan Data Protection Authority received a letter from Mr. personal

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Specifically, the complainant stated that, on 02/07/2021, as part of a campaign by the Department of Health to promote vaccination against Covid-19, the company where he provided services had offered him the possibility of get vaccinated. The complainant stated that, considering that he had not been vaccinated until that date, he suspected that the Department of Health would have sent his health data to the company where he worked (specifically, his lack of vaccination against Covid-19), and that it was on the basis of this information improperly provided by the Department of Health to the company, that it offered him the possibility of vaccination.

2. The Authority opened a preliminary information phase (no. IP 267/2021), 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 06/08/2021 the Authority sent a letter to the person making the complaint in order to identify the company where he provided his services, and to which, allegedly, the Department of Health would have provided his health data, related with the vaccination against Covid-19.

4. On 12/08/2021, in response to the request for information indicated in the previous antecedent, the reporting person informed the Authority that the company where he provided services was (...).

5. In this information phase, on 31/08/2021, the Department of Health was required to confirm whether it provided (...) information regarding the vaccination status of the workers of this company and, specifically, of the complainant here. Likewise, the Department was also required to specify the circumstances in which such communication took place, as well as the legal basis that would have given cover to the said processing of personal data.

6. On 01/10/2021, given the lack of response from the Department of Health, the Authority reiterated the request for information indicated in the previous antecedent.

7. On 07/10/2021, the Department of Health responded to the request indicating the following:

*"In order for there to be a communication of data between the Department of Health and, in this case, the company of the complainant, there should be a legitimization basis that would allow it. Given that the aforementioned legitimating basis is not*

*available, the Department of Health has not communicated the vaccination data of any worker".*

**8.** On 11/10/2021 the Authority sent a letter to the company (...) to report on whether the Department of Health or any related entity provided it with information regarding the vaccination status against Covid -19 of all your staff or of any person working in the company and so that, if so, indicate the information that was provided to you, the person who received the information, the date of the communication, and the circumstances specifics of this .

**9.** On 29/10/2021 (...) he responded to the request for information in the following terms:

*" We received an offer from the Public Health Agency to take internal action to achieve a higher level of vaccination. Logically we acceded to it. We wanted to proceed very quickly and safely, and for this reason we directly affected those who had not done so based on the information provided to us. Without any intention of pressuring anyone they were informed of the possibility, which had a massive following, mainly in the younger segment. For our part, the management was carried out from the people area and, of course, no list is preserved from that time which, on the other hand, would not have any validity today given that there are constantly new additions".*

**10.** In view of the incomplete response given by the company, on 02/11/2021 the Authority wrote to it again to complete the information that had been requested.

**11.** On 10/11/2021, the reference company responded to the request for information indicated in the previous antecedent, in the following terms:

*"We confirm to you that we received, from the ASPCAT, a week before the vaccination that took place on July 7, 2021, the list of active personnel at that time in the company (including temporary ones) indicating those who did not they would have received neither total nor partial vaccination to date".*

**12.** On 29/11/2021 the Department of Health was required to confirm whether the Public Health Agency of Catalonia (hereinafter ASPCAT) provided (...) a list that included the relationship of staff who did not have the complete vaccination schedule against Covid-19. And, if so, he was required to provide information relating to the date on which the communication would have taken place, the specific circumstances in which said information was provided, and the legal basis that legitimized this data processing personal

**13.** On 13/12/2021 the Department of Health requested the extension of the deadline granted to provide the required information, given the need to manage different matters related to the health situation at that time, and the complexity of the matter

**14.** On 14/12/2021 the Authority agreed to extend the deadline granted to the Department of Health to respond to the request, under article 32 of Law 39/2015, of 1 October , of the common administrative procedure of public administrations.

**15.** On 12/23/2021, the Department of Health presented a letter to the Authority, which was accompanied by another letter drawn up by the Secretary of Public Health (body to which the ASPCAT is attached), through the which reported the following:

- *That, "(...) within the framework of Catalonia's vaccination strategy and at a time of vaccine shortage, a vaccination campaign was launched in the meat sector which, due to the circumstances in which it is carried out, had presented outbreaks of Covid with a greater impact than other work environments. The vaccination operation was carried out by the ASPCAT South Girona Public Health Service (hereafter SSP Girona) with the company's occupational risk prevention service (...). The relationship between the SSP Girona and the company (...) was limited to the request for the census of workers in accordance with article 2 of Decree-law 12/2020, of April 10".*
- *That, "The list of people likely to be vaccinated was sent by the SSP Girona to the person responsible for the company's occupational risk prevention service (...). In the framework of the collaboration of this service with the SSP Girona, in accordance with article 57 of Law 18/2009, of 22 October on public health".*
- *That, " According to what is stated in the attached document, the SSP Girona sends the list to the person responsible for the company's occupational risk prevention service on July 1, 2021. (...)"*

In this regard, the Department of Health invoked recitals 46 and 52, both 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 treatment of personal data and the free circulation thereof (hereafter, RGPD), and pointed out that the legal basis that legitimizes the aforementioned communication of personal data is that provided for in article 6.1 e) RGPD, as well as in sections g) ii) of article 9.2 of the RGPD. Likewise, the Department also argued the following:

- *That, "The internal regulations on which these circumstances are based in relation to the communication made to the company's occupational risk prevention service are found in article 57 of Law 18/2009, of October 22 public health (...)"*
- *That, " The census of workers of the company provided by it in accordance with the provisions of article 1 of Decree Law 8/2021, of February 16, was compared with the information contained in the Clinical History (HC3) in relation to the Covid vaccination . The comparison of information was carried out by sending the SSP Girona the census of workers to the Deputy Director of the ABS of Cassà de La Selva in order to carry out the contrast of information, which carried out the action and returned to the SSP Girona a list of the people in the company likely to be vaccinated ."*

And, in relation to the above, the Department of Health added that the Secretary of Public Health is considered a health authority and, in accordance with this condition, article 41 of Law 16/2003, of 28 of May, of cohesion and quality of the National Health System attributes to it the following powers:

- "1. The health authorities in order to ensure the best protection of the health of the population may require, in the terms established in this article, reports, protocols or other documents for the purposes of health information from the health services and professionals.*
- 2. The Health Administrations will not need to obtain the consent of the affected persons for the treatment of personal data, related to health, as well as their transfer to other Public Health Administrations, when it is strictly necessary for the protection of the health of the population .*

*3. For the purposes indicated in the two previous sections, public or private persons will transfer to the health authority, when so required, the personal data that are essential for decision-making in public health, in accordance with the established in Organic Law 15/1999, of December 13, on the Protection of Personal Data."*

The Department of Health also invoked article 16.3 of Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in matters of information and clinical documentation, as well as article 3.2 a) of Decree Law 48/2020, of December 1, on measures of an organizational nature in the health, social and public health field, to deal with the health crisis caused by Covid-19 and amending the Decree Law 30/2020, of August 4, and Decree Law 41/2020, of November 10.

Ultimately, the letter drawn up by the Secretary of Public Health, which accompanied the letter from the Department of Health, contained, among others, the following statements:

- That, "*this campaign was aimed at the main meat industries in Catalonia with a high volume of workers. This action responded to the history of the epidemiological evolution of Covid in this type of company. These are companies that, due to the typology of the environment (humidity and temperature conditions), had had outbreaks of Covid with a greater impact than other work environments and which subsequently affected the community related to the workers. (...)*"
- That "*Of the initial census of 377 people, there were 194 candidates for vaccination. This figure made it possible to make a more accurate estimate of the necessary resources. On 01/07/21 the SSP sends the list to the person responsible for the company's Occupational Risk Prevention Service as part of the collaboration of this Service with the Secretary of Public Health (...) From from here the day and time when the AB would travel to the company to vaccinate the people who were interested is agreed upon*".

## **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, his vaccination status) from the Department of Health to the company in which he provided services. Well, these transfers of information are 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 whether a person has been vaccinated constitutes data on their 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 identity of a company's staff and their health, in order to consider the treatment reported here lawful, it is necessary to count on one of the exceptions provided by the 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:*

*a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;*

*(...)*

*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 healthcare 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 can be seen, on the one hand, that the ASPCAT collected the data relating to the company's employee census (...) - as part of a vaccination campaign against Covid-19 – and, on the other hand, that, on 01/07/2021, the ASPCAT communicated to the Services for the Prevention of Occupational Risks (hereinafter, SPRL) of the aforementioned company, the list of personnel who did not have the guideline complete vaccination against Covid-19.

In this regard, it should be noted that, in accordance with article 41 of Law 16/2003, of 28 May, on the cohesion and quality of the National Health System, the health authorities may require public or private persons - as is the case – the personal data that are essential for decision-making in matters of public health, in accordance with data protection regulations. The same precept stipulates the obligation of these people to provide the health authority in question with the data that is required.

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.

In turn, Law 31/1995, of November 8, on the prevention of occupational risks (hereinafter, LPRL) foresees, on the one hand, the duty of the employer to ensure, at all times, the safety and health of its workers, in all aspects related to work, and, on the other hand, the right of workers to obtain effective protection in matters of safety and health at work. In literal terms, article 14.2 of the LPRL establishes that the employer " *must guarantee the safety and health of the workers in his service in all aspects related to work. For these purposes, within the framework of his responsibilities, the employer must carry out the prevention of occupational risks through the integration of preventive activity in the company and the adoption of all the measures that are necessary for the protection of the safety and health of workers (...)*". I, in this sense, article 31 of the LPRL attributes to the SPRL the functions of carrying out

prevention activities, with the aim of guaranteeing adequate protection of the safety and health of workers.

Well, both the occupational risk prevention regulations and the public health regulations are clear when, on the one hand, they provide for the employer's duty to collaborate with the health authorities and when, on the other hand, establish the power of these to require natural and legal persons for the data they find essential for making decisions in matters of public health. In accordance, then, with this regulation, the collection by the ASPCAT of the census of working people provided by the SPRL of the company was lawful based on article 6.1.c) of RGPD

Having established the above, it is then necessary to analyze whether the communication by the ASPCAT to the SPRL of the company, of the workers who did not have the complete vaccination schedule against covid-19, was an action in accordance with the regulations of Data Protection. In this regard, it is necessary to bring together the legal basis contained in Opinion CNS 38/2021, of this Authority, which, based on the interpretation of Organic Law 3/1986, of April 14, of measures special provisions on 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 (...)" .*

Well, articles 1, 2 and 3 of Organic Law 3/1986, of April 14, establish the power of the health authorities, in the face of urgent or necessary health situations, to adopt "recognition" *measures , treatment, hospitalization or control when rational indications are appreciated that allow the existence of a health hazard due to the specific health situation of a person or group of people or because of the health conditions in which an activity is carried out . And, with respect to the control of communicable diseases - such as that caused by the Covid-19 virus - article 3 of the aforementioned Law empowers the health authorities to adopt the measures deemed necessary in case of risk of transmission.*

In turn, article 10 of the LPRL determines that it corresponds to the competent public administrations in health matters, among others: " a) *The establishment of adequate means for the evaluation and control of the actions of health type that the active prevention services carry out in companies. To do so, they must establish the guidelines and action protocols, once the scientific societies have been heard, to which the aforementioned services must be submitted*". I Royal Decree 39/1997, of January 17, which approves the Prevention Services Regulation, which establishes in article 37 that: "Health surveillance will be *subject to specific protocols or other existing means with regarding the risk factors to which the worker is exposed. The Ministry of Health and Consumer Affairs and the Autonomous Communities, hearing the competent scientific societies, and in accordance with the provisions of the General Health Law regarding the participation of social workers, will establish the periodicity and specific contents in each case.*"

Likewise, article 55 of the LSP, in the wording given by Decree 27/2020, of July 13, amending Law 18/2009, of October 22, on public health, and of adoption of urgent measures to deal with the risk of outbreaks of COVID-19 which, for what is of interest here, provided the following (the emphasis is ours):

*"1. The health authority, through the competent bodies, can intervene in public and private activities to protect the health of the population and prevent disease. To this end, you can: (...)*

*j) Adopt measures of medical examination, treatment, hospitalization or control if there are rational indications of the existence of danger to the health of people due to a specific circumstance of a person or a group of people or by the conditions in which an activity is carried out. Measures can also be adopted for the control of people who are or have been in contact with the sick or the carriers.*

Well, during the preliminary information phase, the ASPCAT has justified the need to know the universe to be vaccinated, in a context of vaccine shortage and "at a time of low availability of vaccines *in which it was not possible not spoiling a single dose*". Likewise, he also pointed out that the aforementioned vaccination campaign focused on the meat sector, in which, due to its particular working conditions, there had been outbreaks of Covid-19 with a greater impact than others work environments

Regarding these manifestations of the ASPCAT, it should be borne in mind that, as stated in Resolution SLT/2048/2021, of June 30, which extends and modifies the public health measures for the containment of the epidemic outbreak of the Covid-19 pandemic in the territory of Catalonia - valid at the time of the events reported here -, administrative intervention in public and private activities was considered necessary to face the health crisis situation, in a context in that there was increasing community transmission of the virus, and insufficient group immunity. In addition to the above, it is important to consider the importance of knowing which workers did not have the complete vaccination schedule against Covid-19, taking into account the high incidence of transmission of the virus at that time, the possibility of particularly vulnerable groups without vaccination, as well as the working conditions of companies in the meat industry.

In accordance with the above, the legal basis that legitimized the treatment of the disputed data by the ASPCAT was the fulfillment of a mission carried out in the public interest or the exercise of public powers conferred on the person responsible for the treatment (article 6.1 e) of the GDPR). Well, as we have seen, in compliance with the aforementioned public health and occupational risk prevention regulations, the health authorities can establish collaboration mechanisms with the SPRL, in order to prevent, in this case, the spread of diseases transmissible. 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)".*

From what was presented by the Department of Health, it follows that the objective of communicating vaccination data from the ASPCAT to the company's SPRL was to act as quickly and efficiently as possible in order to avoid the spread of the virus in a sector in which there was a high incidence of contagion given the working conditions. Thus, there is no doubt that in view of this objective, said communication was an appropriate measure (allows the proposed objective to be achieved), and also necessary and weighted, since the eventual impact on the right to data protection of the here denouncing the communication by the ASPCAT of his vaccination data, he had to face the general interest of avoiding the spread of the virus at a time of high incidence and scarce health resources, and in which the health authorities had to act with maximum 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 the actions of prior information number IP 267/2021, relating to the Public Health Agency of Catalonia of the Department of Health.
- 2.** Notify this resolution to the Public Health Agency of Catalonia 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,

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