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File identification

Archive resolution of the previous information no. IP 356/2021, referring to the Escola Martinet of the Department of Education.

Background

1. On 13/09/2021, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Department of Education, due to an alleged breach of the regulations on personal data protection.

Specifically, the complainant stated that, at the beginning of this 2021-2022 school year, the School (...) - dependent on the Department of Education - had given him a form to fill out in which they asked for "medical" data of their minor son, specifically, if
"had passed the disease of COVID 19 or in his case if he gave a positive result in some PCR and on what date was it", information that the reporting person considers that he should not provide the School. The complainant also informed this Authority that he had given the said form to the School, but that he had not provided his child's health information and at the same time he had expressly requested that he not be subjected to a PCR test without the his presence

Together with his complaint, the person making the complaint provided the standardized form (without filling in) that the School had given him, entitled *"Authorization for the procedure for managing cases and contacts of COVID-19 in educational centers"* with the heading from the Department of Health, in which the following information (and authorizations) is requested, apart from the student's data:

"Data of the father/ mother/ guardian or legal guardian or student over 16 years of age
First and last name _____
Contact telephone/s where to send the SMS in case of a negative result or where to contact by phone if positive _____ _____
_ *I authorize the sending of the negative result via SMS*
_*I authorize the carrying out of the PCR / antibody tests*
_*I do not authorize the carrying out of the PCR / antibody tests*
_ *The disease has already passed (PCR positive / IgG serology confirmed) Date:* ____/_____/_____
*Observations*_____
Place and date

Signature of father, mother or guardian student over 16 years old"

2. The Authority opened a preliminary information phase (no. IP 356/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure

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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 were capable of motivating the initiation of a sanctioning procedure.

3. On 09/28/2021, the Spanish Data Protection Agency transferred to this Authority, as a matter of its jurisdiction, the complaint that in similar terms the person making the complaint had lodged with that entity.

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 background story, it is necessary to analyze the facts reported that are the subject of this file resolution.

The complainant complained that the School collected minors' health data through a standardized form that parents/guardians had to fill out. In this form, entitled *"Authorization for the procedure for managing cases and contacts of COVID-19 in educational centers" (hereinafter,* "Authorization"), with the heading of the Department of Health, it was asked if the minor *"Already the disease happened (positive PCR / confirmed IgG serology)* and on what date.

Article 5.1.a) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27 of 2016, General Data Protection Regulation (RGPD), establishes that all data processing personal must be legal, loyal and transparent in relation to the interested party (principle of legality, loyalty and transparency).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, either the consent of the affected person (letter a), or any of the other bases provided for in the same precept , such as when 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" (letter* e).

As can be seen from Article 6.3 of the RGPD, the legal basis for the processing indicated in Article 6.1.e) must be established by the Law of the European Union or by the law of the Member States that applies to the responsible for the treatment. The referral to the legitimate basis established in accordance with

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internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the development rule, as it is a fundamental right, has the status of law.

In this sense, article 8 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD) establishes the legal scope of the enabling rule.

The twenty-third additional provision of Organic Law 2/2006, of May 3, on Education (LOE), modified by Organic Law 3/2020, of December 29, establishes the following:

"1. Teaching centers may collect the personal data of their students that are necessary for the exercise of their educational function. Said data may refer to the origin and family and social environment, to personal characteristics or conditions, to the development and results of their schooling, as well as to those other circumstances whose knowledge is necessary for the education and orientation of the students.

2. The parents or guardians and the students themselves must collaborate in obtaining the information to which this article refers. The incorporation of a student in a teaching center will involve the treatment of his data and, in his case, the transfer of data from the center in which he had previously studied, in the terms established in the legislation on data protection. In any case, the information referred to in this section will be strictly necessary for the teaching and guidance function, and cannot be used for purposes other than educational without express consent."

Therefore, this additional provision 23a of the LOE foresees a legal qualification for the processing of the data necessary for the exercise of the teaching and guidance function of the educational centers (6.1.e/ RGPD).

Nevertheless, for the processing of health data (art. 4.15 RGPD) to be lawful, it is not enough that there is a legal basis in article 6 of the RGPD, but that in accordance with art. 9.1 and 9.2 of this rule must meet a circumstance that lifts the prohibition of processing this special category of data.

Thus, article 9 of the RGPD provides that:

"1. The processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person.

2. Section 1 will not apply when one of the following circumstances occurs:

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(...)
g) the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party;
(…)
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 Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy.

(…)."

First of all, it must be said that the same additional provision 23a of the LOE could enable the processing of health data to the extent that its processing was necessary to adequately carry out the educational and guidance action, and in this sense this Authority pronounced in its opinion CNS 4/2017 (available on the Authority's website, www.apdcat.cat).

In this same line, it is necessary to cite article 21.n) of Law 12/2009, of July 10, on education (LEC), which expressly provides for the right of students to *"enjoy healthy conditions and accessibility in the educational field".* In this case, it is even more obvious that it is essential that the centers have the necessary data to be able to guarantee the right of their students to healthy conditions in the educational environment.

But beyond what is foreseen in the rules transcribed above that would enable, in general, the collection and processing of health data by the centers, provided that their collection is necessary to comply with the educational and guidance function and/or to guarantee students' rights; one cannot fail to notice the exceptional moment (2021-2022 academic year, still immersed in the midst of a pandemic) in which families are asked to fill in and hand in the controversial form through which it was possible for the centers to collect health data of minors

In this context, it is appropriate to mention Organic Law 3/1986, of April 14, on special measures in the field of public health, which determines in its article 1 *that: "the health authorities of the different Public Administrations may, within the scope of their competences, adopt the measures provided for in this Law when so required by health reasons of urgency or necessity".*

And article 3 of this same rule explains that: *"In order to control communicable diseases, the health authority, in addition to carrying out general preventive actions, may adopt the appropriate measures for the control of the sick, of people who*

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are or have been in contact with them and the immediate environment, as well as those that are considered necessary in case of risk of a transmissible nature".

In similar terms, Law 18/2009, on public health, in its article 55.1.j), provides that:

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:
a) Establish surveillance systems, communications networks and data analysis that allow detecting and knowing, as quickly as possible, the proximity or presence of situations that may have a negative impact on individual or collective health.
b) Establish the requirement for registrations, authorizations, prior communications or responsible declarations for facilities, establishments, services and industries, products and activities, subject to the conditions established by article 61 and, in any case, in accordance with the sector regulations . (…)
2. The measures referred to in section 1 must be adopted respecting the rights that the Constitution recognizes to citizens, especially the right to personal privacy, in accordance with what is established by the regulations for the protection of personal data and with the procedures that this regulation and the other applicable regulations have established, and having the mandatory authorizations."

Therefore, in matters of risk of disease transmission, epidemics, health crises, etc., the applicable regulations have granted *"the health authorities of the different Public Administrations"* the powers to adopt the necessary measures to safeguard essential public interests in situations public health emergency.

It will therefore be the competent health authorities who will adopt the necessary measures to safeguard essential public interests, and the various persons responsible for processing personal data must follow the instructions established for this purpose, even when this involves the processing of health data.

Resolution SLT/2751/2021, of September 9, which extends and modifies the public health measures to contain the epidemic outbreak of the COVID-19 pandemic in the territory of Catalonia - valid in 'beginning of this school year 2021-2022-, which left without effect, as far as it was opposed, Resolution SLT/1429/2020 of June 18, by which basic protection and organizational measures are adopted to prevent the risk of transmission and promote the containment of SARS-CoV-2 infection, determines in its section 13 that, among others, teaching activities *"must be carried out in accordance with the corresponding plans sectors approved by the Steering Committee of the PROCICAT Action Plan and related regulations, rigorously applying prevention and health protection measures".*

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The *"Action Plan for the 2021-2022 academic year for schools in the context of the pandemic",* drawn up by the Department of Education and the Department of Health, approved by the Plan's Technical Committee PROCICAT for emergencies associated with emerging communicable diseases with high risk potential, determines the following, in terms of case management:

"4.5. Case management

Current case management protocol will be applied when a positive case is detected or symptoms likely to be covid-19 in an educational center".

The document *"Management of covid-19 cases in educational centers. Course 2021-2022"* prepared by the Department of Education and the Department of Health, also approved by PROCICAT, determines the following:

"3. Definitions:

(...)
Complete vaccination schedule A
person is considered to have a complete vaccination schedule when:
- 14 days have passed since you received your last dose of vaccine (Pfizer, Moderna, AstraZeneca or Janssen);

- you have had covid-19 and subsequently received a dose of vaccine (and 14 days have passed since you received it, the same minimum period established for second doses);
(...)
11. Main changes compared to the last version of the procedure for the 2020-2021 academic year
(...)
Students or professionals from educational centers with symptoms compatible with covid 19 who have had a confirmed SARS-CoV-2 infection with a diagnostic test (ART or PCR) in the previous 90 days should not be considered suspected cases again, unless there is a high clinical suspicion that they are.

People from the educational field (students or professionals) who are close contacts and who are properly vaccinated or have passed the disease (with a diagnostic test confirmed by ART or PCR) in the 180 days prior to the last contact with the case, they do not need to quarantine (although they will need to follow scrupulous security measures)".

From the above it follows that case management depends, in part, on whether the student has received the complete vaccination schedule, and that this can be understood as having been received if the illness has passed and he has received a dose of vaccine In this regard, it should be noted that in order to apply the measure established in point 11 previously transcribed, it is reasonable for the center to request the controversial information.

In Annex 1 of this same document, a link is provided so that the centers can access the *"informative letters and authorizations to families" models,* which include the *"Authorization for the procedure"* model *of case management and covid-19 contacts in educational centers. Course 2021-2022"* object of complaint.

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And, last but not least, in relation to the collection of minors' health data relating to whether or not they have contracted the disease of COVID-19 -which is the reason for the complaint-, it is necessary to mention what is provided by 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 deal with the consequences of COVID-19, in specifically its article 8, which empowers the Department of Health to communicate to the management of the educational center the health data corresponding to the results of diagnostic tests for covid-19 of the students (data that Decree Law 20/2021, of 14 of September, amending Decree Law 41/2020, of 10 November, on extraordinary measures of a social nature in educational centers and in the field of leisure education and extracurricular activities to deal with the consequences of COVID-19 has extended to the communication of data of covid-19 vaccination). Therefore, if the school can access this specific information directly from the Department of Health

in accordance with the provisions of the aforementioned Decree Law, it would be incongruous to question whether parents/guardians can provide the same information that the school could already have through the Department of Health.

In short, in view of all the above, from the point of view of data protection, the collection and processing of the minor's health data through the controversial form is lawful on the basis of articles 6.1.e) and 9.2.g) ii) of the RGPD, in view of the public health and sectoral regulations examined.

3. In accordance with everything that has been set forth in the 2nd legal basis, and given that during the actions carried out within the framework of the previous information, no fact has been proven that could constitute any of the infringements foreseen in the legislation on data protection, it is necessary to agree on their archive.

Article 89 of the LPAC, in line with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions should be archived when the following is highlighted in the instruction of the procedure *"a) The non-existence of facts that could constitute the infringement".*

Therefore, I resolve:

1. File the actions of prior information number IP 356/2021, relating to the Escola Martinet of the Department of Education (Escola Martinet).

2. Notify this resolution to the Escola Martinet of the Department of Education and communicate it to the person making the complaint.

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.

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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 may file any other appeal it deems appropriate to defend its interests.

The director,

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