apdcat
Autoritat Catalana de Protecció de Dades

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RESOLUTION of sanctioning procedure no. PS 7/2018, referring to the Hospital Consortium (...).

Background

1.- On 02/06/2017 the Catalan Data Protection Authority received a letter in which a person filed a complaint against the Hospital Consortium (...) (hereinafter, CONSORCI), on the grounds of 'an alleged breach of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD).

Specifically, the complainant (Dr. (...)), who is currently in a situation of permanent disability (henceforth, IP) but who had provided services as a physician attached to the Unit (...) of the CONSORCI , set out the following facts related to a process of temporary incapacity (hereafter, IT) regarding his person:

- That on 29/09/2014 the complainant started an IT process for a common disease (non-specific allergy), when she was working as a doctor attached to the Unit (...) of the CONSORCI.
- That on 03/06/2015 the complainant submitted to the National Institute of Social Security (hereafter, INSS) a request for contingency determination. In that document, the complainant alleged that the IT process resulted from an occupational disease, specifically from exposure at his workplace to substances that act as irritants or toxics.
- That on 09/15/2016 the Disability Assessment Commission, based on the proposal issued by the Institute of Medical Assessments on 09/15/2016, ruled that the contingency of the initiated IT process on 09/29/2014 it resulted from occupational illness given the work-related nature of the process.
- That on 28/09/2016 the INSS decided that the IT process started on 29/09/2016 stemmed from an occupational disease. In this same resolution it was declared that the CONSORTIUM was responsible for the payment of the financial benefit and the healthcare derived from the IT.

- That on 04/11/2016 the CONSORTIUM filed before the Social Court a claim regarding the determination of contingencies, against the resolution issued on 28/09/2016 by the INSS. In the petition, the Court was requested to "order the INSS to declare that the Temporary Incapacity started on 09/29/2014 has its origin in a COMMON CONTINGENCY". That in relation to this procedure, the CONSORTIUM, by letter dated 05/12/2017, requested the Social Court no. 32 request for early proof.
- That the CONSORTIUM, which is a voluntary collaborator in the management of the IT, assumes direct responsibility for the payment of the financial benefit of the IT for professional contingencies, and common contingencies are borne by the INSS.

In parallel and related to the aforementioned IT process, the complainant had also initiated a procedure to have a surcharge recognized for IT benefits, in relation to which the following was reported:

- That the Inspectorate of Work and Social Security in Catalonia (hereinafter, ITSS) in January 2016, following an appearance by the person making the complaint, initiated inspection actions in order to elucidate whether the illness of the person making the complaint was from his

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exposure to chemical products present at their place of work at the CONSORCI. In relation to these actions, the ITSS issued a report (ref. no. exp. 8/(...)15) on 07/18/2016, by which administrative sanctioning proceedings were initiated against the CONSORTIUM. In this report, provided by the person making the complaint, the documentation that had been provided to the ITSS by the person making the complaint was specified, among other things:

- "Report on attendance at Urgencias dated 28.09.12 "Acute tracheobronchitis" and discharge report dated 02.10.12"
- "Medical report dated (...) and 30.04.14 "acute tracheobronchitis"

- That in an official letter dated 12/15/2016, the General Directorate of the Labor Inspectorate proposed to the NSS the initiation of a benefit surcharge file (30%), in relation to the work accident or illness professional of the person reporting here, caused by a lack of security measures.

- That on 04/13/2017 the CONSORTIUM filed a prior claim with the Management Provincial of Barcelona of the INSS against the resolution dated 03/06/2014 by which the General Directorate of the INSS maintained the 30% surcharge on the benefits that the complainant here would receive for the lack of security measures and hygiene in your workplace.

Finally, the complainant reported that, by letter dated 04/07/2017, the CONSORTIUM had filed a claim regarding permanent disability.

The reporting person provided various supporting documentation of the events related above.

In relation to the facts exposed, the complainant complained of the following:
a) "Illicit access by the own Prevention Service to the clinical history [of the CONSORCI] of the worker, as well as the transfer of this data to the employer (who logically had access in order to decide on the hiring of a lawyer for his defense) and to the lawyer". The complainant adds that "the company CONSORCI has obtained the worker's health data through access to her medical history that is in the company itself (as it is a hospital) without explicit consent of the same and for other purposes other than prevention and medical assistance". In order to prove these accesses, the complainant provided various documents, which, as he claimed, contained medical information that could only have been obtained by accessing his CONSORTIUM medical history:

- Copy of the demand formulated by the CONSORTIUM on 04/11/2016 before the Social Court in order for the judicial body to order the INSS to declare that IT started on 29/09/2014 had its origin in a common contingency . In this demand there is a "history of medical leave", which includes, among others, the following data:

  - "From September 16 to September 25, 2009, sick with pneumonia. On September 28, 2009, a report was issued stating that the worker is suffering from tracheobronchitis", In relation to this information, the complainant states that "the report corresponding to 09/28/2009 does not exist, that it is the day 28/09/2012, corresponding to an emergency assistance report from the hospital itself". The reporting person provides a copy of an "Emergency Assistance Report" issued by

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CONSORTIUM in relation to assistance received at this hospital on 09/28/2012, which includes the following information "DIAGNOSTIC GUIDELINE: acute tracheo-bronchitis"

- "(...) from May 12, 2014 to May 31, 2014, due to an acute respiratory infection. On May 30, a report is issued stating that the worker has a fever and acute tracheobronchitis of an infectious nature. It refers to a normal allergic state and the situation is generated by a viral process"

  In relation to this information, the complainant provided a copy of an "Assistance Report" issued by the CONSORTIUM on 04/30/2014. This report contains the following information regarding the reporting person: "presents "(...) fever"(...)
  DIAGNOSIS: acute tracheobronchitis",

In relation to this reported fact, the reporting person also submitted a letter formulated on 05/12/2017 by the CONSORTIUM before the Social Court no. 32 of Barcelona. In this letter, the legal representation of the CONSORCI stated that "this part, having analyzed the administrative file provided by the co-sued public entities, has been able to verify that the following are referred to as provided by the trabajadora in the Labor and Social Security Inspection Report reports: - Emergency assistance report dated 09/28/2012 (...) - Medical report dated (...) and 04/30/2014 (...) Well, these reports are not included in the administrative file of the INSS, the reason why it is totally impossible for this part to be able to analyze them (...). Therefore, this part, under the provisions of art. 82.4 and 90.3 LRJS, requests that the National Institute of Social Security provide, as advance evidence, the entire content of file 8/(...)15 with express detail of the document collected therein and that serves to issue the conclusions of the report contained in the files"

b) That the CONSORTIUM had accessed, without their consent, their shared clinical history (HC3) and the clinical history contained in the file of the primary health centers of the Catalan Institute of Health (hereinafter, ICS) .

The complainant stated that these accesses could be inferred from the content of some of the writings that the CONSORCI had made before different bodies, which included sufficiently explicit data relating to his health (such as the diagnosis
to which the leave from work obeys), when the copy of the leave from work provided to the company does not include the diagnosis. The disputed information would be the one contained in: a) "history of medical leave" that the CONSORTIUM includes in the demand formulated on 04/11/2016 before the Social Court; b) list of terminations which includes the previous claim made on 04/13/2017 before the National Institute of Social Security, claim of 04/07/2017 made before the Social Court (procedure (...)2017 against the absolute permanent incapacity), when it is specified that "since 2010 he has been in contact with both products and the losses he has suffered have always been of a viral and infectious nature, never chemical (...)". The reporting person provided a copy of the referred documentation.

c) Treatment of inaccurate health data by the CONSORTIUM. The reporting person explained, among others, that the list of work incapacity processes detailed by

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CONSORCI in certain writings (writing written on 11/04/2016 before the social jurisdiction and previous claim made by CONSORCI before the INSS on 04/13/2017) differed from those appearing in the primary care clinical history of the provided by the Primary Care Center of which you are a user. To prove this fact, the complainant provided a report dated 04/20/2017, issued by the Primary Care Center of (...), dependent on the ICS, which included "Relation of the Work incapacity processes that contained in the medical history" of the person making the complaint, being the following:

"(...)

09-15-2008 73 days	Diag: Threaten abortion
03-20-2009 42 days	Diag: Right radial tenosynovitis (intervention)
08-31-2009 8 days	Diag: Viral infection
09-16-2009 10 days	Diag: Laryngeal edema
01-13-2011 16 days	Diag: Avian Flu (culture+)
03-20-2013 24 days	Diag: respiratory infection
30- 05-2014 19 days	Diag: respiratory infection"

He also provided a "Medical notice of temporary disability leave due to common contingencies" dated 09/29/2014, issued by the CAP, in which copy for the worker the diagnosis is "non-specific allergy".

In relation to the letter that the CONSORCI made before the social jurisdiction on 04/11/2016, the complainant explicitly complained that the "history of medical leave" included does not correspond to the "real losses suffered by the worker and which are contained in a report made for these purposes by the worker's general practitioner". In the aforementioned letter of 04/11/2016, the following medical absences noted by the person making the complaint are included, among others, which do not correspond to the absences listed in the ICS files:

- On September 13, 2008, medical leave due to pregnancy (...)
- August 31, 2009 until September 7, 2009, due to Flu A (...)
- September 16 to September 25, 2009, sick of pneumonia. On September 28, a report was issued stating that the worker was suffering from tracheobronchitis (...)

- A year later, from 12/05/2014 to 31 May 2014, it caused an acute respiratory infection. On May 30, a report is issued (...)"

With regard to the leave of 13/09/2008, the complainant stated that "it has different start and end days (...)"

With regard to the diagnosis specified in the discharge of 08/31/2009, the complainant pointed out in his complaint that he was classified as influenza A, when this diagnosis "is wrong: there is a report from the Hospital (.. .)where it is reported that the smear for the influenza A virus is negative"

With regard to the discharge of 16/09/2009, the complainant stated that "they qualify as pneumonia, in reality it was facial angioedema and laryngeal edema. The report corresponding to the day 28/09/2009 does not exist, since it is the day 28/09/2012, corresponding to an emergency assistance report {from the CONSORTIUM]".

With regard to the absence corresponding to 12/05/2014 until 30/05/2014, the reporting person stated that "it corresponds to the absence that they themselves categorized as a first work accident due to exposure to dangerous chemical products in the worker's workplace. (...)

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The report they say is dated May 30, corresponds to a course (...) derived from a visit to the CONSORCI pulmonologist, in charge of assisting the worker during her working day on April 30 and 2014"

And, in relation to the leave of 29/09/2014, the complainant explained that the reason for it was due to "non-specific allergy, as stated in the part of the leave issued by the general practitioner".

In relation to the previous claim made by the CONSORCI before the INSS on 04/13/2017, the complainant stated in his complaint that in this document "the CONSORCI company has modified the health data obtained from access to the medical history [of the ICS] of the worker, changing dates, diagnoses, days of leave and the contingency of the same leaves (...). Despite this enumeration of medical leaves provided by the company, the actual leaves suffered by the worker and which appear in a report made for such purposes by the worker's family doctor, do not match the date or the diagnoses".

In this previous claim of 04/13/2017, among others, the following information is included:
"- As of September 13 [2008], this company has been dismissed due to a work accident, with an end date of September 25.
- On September 15, leave of absence begins, until November 26, 2008 due to previous maternity leave, due to common illness"(…)
- A year later, from May 12 to May 31, 2014, he was sick due to a common illness.

The complainant highlighted that "the company CONSORCI has manipulated the data obtained from the worker's medical history, distancing them from reality, with the sole reason of "generating reasons" to argue their claims to the detriment of the worker's interests and to discredit her"

2.- The Authority opened a preliminary information phase (no. IP 162/2017), in accordance with 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 (hereafter, LPAC), in order to determine whether the facts were susceptible to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances concurrent with each other.

As part of this information phase, by means of an official letter dated 06/22/2017, the reported entity was required to comply with the following:
- Provide the record of accesses to the person's CONSORCI clinical history here complainant, from 06/22/2015 to 06/22/2017.
- Identified by name and surname the users who had accessed the clinical history and reported the position they held in the organization.
- Justify each of the accesses made to the medical history of the reporting person in the specified period.

- Information on the origin of the medical information contained in the following documents formulated by the CONSORTIUM: a) claim formulated on 04/11/2016 before the Social Court; b)

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list of deregistrations that includes the previous claim made on 04/13/2017 before the National Institute of Social Security; and, c) demand of 04/07/2017 filed before the Social Court (proced. (...)2017.

The CONSORTIUM responded to the previous request through a letter dated 07/07/2017, together with which it provided the copy of the required access register. In this letter, the CONSORTIUM reported the following:

- In relation to the information contained in the access register:
  - That the accesses made by the administrative staff - which people were perfectly identified in the register - between 22/01/2016 and 23/03/2017, responded to the processing of a file against a traffic insurer in order to bill the 'assistance provided to the patient complaining here resulting from an accident. • That the specific access carried out by a nurse on 05/03/2016 corresponds to an "access

    error due to patient search".
  - That the two accesses made on 04/07/2017 and 04/24/2017 by Dr. (...), doctor of the joint prevention service of the CONSORCI, are "expressly authorized to defend the interests of the CONSORCI at the request of the lawyers in order to carry out an assessment of all the documentation, always starting from the consideration that this access is considered enabled by article 24 of the Spanish Constitution, which enshrines the right to effective judicial protection, and in particular its manifestation relative to the right of defense".

- That, regarding the origin of the medical information contained in the documents dated 04/11/2016, 13/04/2017 and 07/04/2017 "comes from the information that the interested party herself provided to the CONSORTIUM nurse in charge of support and follow-up of temporary incapacity, who prepares follow-up sheets to be able to carry out her duties". That, among others, this figure has as main functions: "to monitor the processes of temporary incapacity" and "to assess in a comprehensive and contextualized way the information provided by the person in a situation of temporary incapacity to detect possible therapeutic needs and psychosocial aspects of the patient".

- That "the data contained in the monitoring sheet are those to which the lawyer of the CONSORTIUM had access to formulate the first demand regarding the determination of the contingency of November 4, 2016; always considering that this access is considered enabled by article 24 of the Spanish Constitution, which enshrines the right to effective judicial protection, and in particular its manifestation relative to the right of defense".
- That "in all other subsequent writings (...) a reproduction containing the first demand of November 2016 is incorporated".
- That "respects the reasons that would justify each and every one of the discrepancies that the reporting person would have detected between the information relating to the incapacity processes that the CONSORCI states and those that appear in the primary care reports of the ICS is that the information provided by the CONSORTIUM comes from the information provided by the complainant herself to the nurse in charge of support and monitoring of the temporary incapacity to perform her own functions (support and monitoring), which in no case have an assistance purpose".

- That "the CONSORTIUM does not have access to the information from the primary care reports of the ICS".

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The reported entity provided various documentation with its letter.

3.- By means of an order dated 11/07/2017, the Department of Health was required to provide a copy of the log of access to the HC3 of the person reporting, from 22/06/2015 to 22/ 06/2017.

The Department of Health, through the Catalan Health Service, responded to the Authority's request by letter dated 07/18/2017, providing a copy of the required access register. In this register there is no access by any CONSORTIUM professional.

4.- By means of an order dated 24/07/2017 -reiterated on 19/09/2017-, the ICS, as responsible for the "Patient File of the Primary Care Division" was required to report if the CONSORTIUM had access to the same, and to provide a copy of the record of access to the medical history of the herein complainant included in this file from 06/22/2015 to 06/22/2017.

The ICS responded to the Authority's request by means of a letter dated 21/09/2017, in which it informed that "once the patient's HC access register was reviewed (...), it was not has found no access from the aforementioned Consortium" and provided a copy of the required access log in which no access by the CONSORTIUM was recorded.

5.- By letter dated 24/07/2017, the CONSORTIUM was required to answer certain questions related to the access made to the medical history of the person making the complaint by administrative staff. He was also required to provide a copy of the follow-up sheets drawn up by the nurse in charge of support and follow-up of temporary incapacity where the controversial information relating to the person making the complaint would be recorded.

By means of a letter dated 08/03/2017, the CONSORTIUM responded to this request, along with which it provided the required follow-up sheets. It is a document entitled "Management of incidents. List of deregistrations" of the "Company: Consorci Hospitalari (...)" referring to the complainant here, in which, apart from the information relating to the dates of deregistration and registration of each IT process , information is collected in a section entitled "Medical Commentary". Thus, among other information, the following is included:

- Leave from 20/03/2009 to 30/04/2009.
- Leave from 31/08/2009 to 07/09/2009. "Medical comment: 09/09/2009 Parlo Adm. Personal and they don't know anything. I talk to her, she's in Quir. And he sent the discharge by Fax and it was discharged on 09/07/2009 (...)
- Leave from 16/09/2009 to 25/09/2009. "Medical comment: 25/09/2009 (...) I called her and initially she had a fever, now she doesn't, she has been using inhalers and corticosteroids, initially it looked difficult, it was dismissed as Hashimoto's Thyroiditis, pupus, and lately it seems like a Atypical Pneumonia or Mononuclosis, he is doing ttº for Pneumonia, today he will talk to Dr. (...)"

- Leave from 13/01/2011 to 28/01/2011 “Medical comment: 17/01/2011: Tel. and he tells me that today he was discharged from H. (...) due to group A, Tachycardia and more complications, now he is better, he still has a fever, this afternoon visit for low IT (...)

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- Leave from 20/03/2013 to 12/04/2013 "Medical comment: 25/03/2013: Parleme is admitted to the (...) for Bilateral Pneumonia, she is still very covered up (...) 03/04/2013 : she's at home, new check-up next Monday, she's following ttº, she's very fit, she's lost weight (...)
- Leave 05/12/2014 to 05/31/2014 "Medical comment: 05/13/2014 (...) he tells me that he has been taking corticosteroids for 15 days, and he was visited urgently on (...), on 05/07/2014, he did ttº prescribed. It's very covered, Disney episodes, it says there will be saturations of 93%. She will visit the H. (...) of BCN, in pneumology, her husband will accompany her, he is a doctor and works at the H (...)"
- Leave 29/09/2014 to 30/09/2014 "Medical comment: 13/10/2014: Delivery left on the 29th, due to spotted fever, secondary to Rickettsia. 10/10/2014: Visit made on 07/10/2014 IT is extended, due to botulinum fever. 15/10/2014: Visited, still ttº, comments that it doesn't need anything, it's very airtight. (...) 28/10/2014 Visited the head office today, prolonging his leave it seems they are discarding Guillem-Barré, it is difficult for him to mobilize, he has skin paresis, he is ttº for Meningitis.(...) 06/11 /2014 Today he was discharged from (...). She is fatal, she tells me that it is due to a tick that bit her (..) She has no strength in her arms. She can't walk alone. (...) Loss of 10 Kg and will start RHB. Guillem Barre must be discarded. Hopefully it will improve before 2 months.(...) 28/11/2014 Let's talk, explain to me that clinically
  it cannot be proven, he had a Guillem-Barre. The tests have come out normal, she is undergoing treatment at (...). Treatment. Antiepileptics. 26/03/2015 (...)Expressa is tired of so many illnesses. Latest diagnosis is of sensitivity to chemical products, he says to the disinfectant of scoping devices, he says that for a long time he has been working without a hood. He visits them at (...)".

6.- By letter dated 09/09/2017, the CONSORTIUM was required to report on certain issues related to the processing of the data of the person reporting here.

The CONSORTIUM responded to this request on 11/10/2017, reporting the following:

- That "these monitoring sheets are not medical records, but monitoring sheets to carry out the task of support and follow-up of temporary incapacity".
- That no person providing services to the CONSORTIUM can access the files of Hospital patients (...).

7.- On 10/17/2017, certain clarifications were requested from the reporting person in relation to the reported events.

On 10/18/2017, the complainant answered this request for information, and provided, among other things, the following information: that "as a patient, he had a medical history at the CONSORCI with a history number (...). I used it myself to ask for evidence.
I was visited by specialists, including otolaryngologists, gynecologists, cardiologists. None of them in relation to the pathologies I currently have and which have conditioned my permanent disability".

8.- On 27/03/2018, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the CONSORCI, firstly, for an alleged

serious infringement provided for in article 44.3.h) in relation to article 9; secondly, for an alleged serious infringement provided for in article 44.3.c) in relation to article 4.3; and, thirdly, for an alleged very serious infringement provided for in article 44.4.b) in relation to article 7.3, all of them of the LOPD. Likewise, he appointed the official of the Catalan Data Protection Authority, (...) as the person instructing the file. This initiation agreement was notified to the imputed entity on 03/27/2018.

In the initiation agreement itself, the reasons why no charges were made with respect to other reported events were explained.

8.1.- First of all with respect to the fact reported consisting of improper access by the CONSORCI or the CONSORCI Prevention Service to the medical history of the CONSORCI complainant in order to use the health data contained therein for a purpose not related to medical assistance, but to use them in judicial and/or administrative processes that the CONSORTIUM had initiated against the complainant here.

Well, during the investigative actions carried out, no element or indication could be determined that would allow it to be maintained that the health data of the reporting person included in his medical history of the CONSORCI had been used for a different purpose to health care, which is why he proceeded to archive this reporting fact based on the principle of presumption of innocence provided for in article 53.2.b) of Law 39/2015.

8.2.- Secondly, regarding the eventual improper access by the CONSORTIUM to the clinical history file of the Department of Health (HC3) and the primary care patient file of the ICS.

This reported fact was filed since, as part of the previous information, both entities provided the log of access to their respective files, confirming that there had been no access by the CONSORTIUM to said files.

In the initiation agreement, the accused entity was granted a term of ten business days from the day following the notification to formulate allegations and propose the practice of evidence that it considered appropriate for the defense of its interests .

9.- The CONSORTIUM made objections to the initiation agreement by means of a letter dated 04/12/2018.

10.- On 10/07/2018 the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority declare that the CONSORTIUM had incurred, firstly, in a serious infringement provided for in article 44.3.h), in relation to article 9; and secondly, in a very serious offence
provided for in article 44.4.b), in relation to article 7.3, all of them of the LOPD. In this same proposal, in view of the documentation on file and the allegations made by the CONSORTIUM in the initiation agreement, it was decided not to maintain the imputation relating to the violation of the principle of quality - in its side of the accuracy of the data (44.3.c in relation to article 4.3 of the LOPD) - to the extent that the disputed data were subject

of discussion in administrative/judicial proceedings, so it should be the said instances that pronounce on this matter.

This resolution proposal was notified on 07/10/2018, and a period of 10 days was granted to formulate allegations.

11.- The CONSORTIUM sent a letter dated 11/16/2018, in which it did not properly formulate allegations to the proposal, but requested that the deadline be extended to implement the corrective measure proposed by the instructor (15 days from the day following the notification of the resolution), to the extent that it is considered insufficient, "and more so if the CONSORTIUM had to carry it out during the month of August".

Of all the actions taken in this procedure, the facts that are detailed below as proven facts are considered proven.

Proven Facts

1.- The head of the CONSORCI's Prevention and Environment Service was allowed access to the CONSORCI's clinical history file (different from the Prevention service's clinical history file), which includes the clinical history of the complainant here, when this access was not justified for the exercise of his duties. This situation would have remained until 14/09/2017, as stated by the CONSORTIUM in the statement of objections to the initiation agreement. Regarding the medical history of the complainant here, the head of prevention accessed it on 04/07/2017 and 04/24/2017, according to the access log of the provided CONSORTIUM clinical history file for this entity.

2.- The CONSORTIUM, and specifically the nurse in charge of supporting and monitoring the temporary incapacity of the CONSORTIUM staff, collected and processed the document entitled "Incident Management. List of Terminations", referring to the reporting person, data relating to their health, without having obtained their express consent. In particular, the CONSORTIUM collected, among others, the following data: - Leave from 20/03/2009 to 30/04/2009.

- Leave from 31/08/2009 to 07/09/2009. "Medical comment: 09/09/2009 Parlo Adm. Personal and they don't know anything. I talk to her, she's in Quir. And he sent the discharge by Fax and it was discharged on 09/07/2009 (...)
- Leave from 16/09/2009 to 25/09/2009. "Medical comment: 25/09/2009 (...) I called her and initially she had a fever, now she doesn't, she has been using inhalers and corticosteroids, initially it looked difficult, it was dismissed as Hashimoto's Thyroiditis, pupus, and lately it seems like a Atypical Pneumonia or Mononuclosis, he is doing ttº for Pneumonia, today he will talk to Dr. (...)"
- Leave from 13/01/2011 to 28/01/2011 "Medical comment: 17/01/2011: Tel. and he tells me that today he was discharged from H. (...) due to group A, Tachycardia and more complications, now he is better, he still has a fever, this afternoon visit for low IT (...)
- Leave from 20/03/2013 to 12/04/2013 "Medical comment: 25/03/2013: Parleme is admitted to the (...) for Bilateral Pneumonia, she is still very covered (...) 03/04/2013 : she's at home, new check-up next Monday, she's following ttº, she's very fit, she's lost weight (...)

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- Leave 05/12/2014 to 05/31/2014 "Medical comment: 05/13/2014 (...) he tells me that he has been taking corticosteroids for 15 days, and he was visited urgently on (...), on 05/07/2014, he did ttº prescribed. It's very covered, episodes of Disney, says inside saturations of 93%. She will visit the H.(...) of BCN, in pneumology, her husband will accompany her, he is a doctor and works at the H(...)"
- Leave 29/09/2014 to 30/09/2014 "Medical comment: 13/10/2014: Delivery left on the 29th, due to spotted fever, secondary to Rickettsia. 10/10/2014: Visit made on 07/10/2014 IT is extended, due to botulinum fever. 15/10/2014: Visited, still ttº, comments that it doesn't need anything, it's very airtight. (...) 28/10/2014 Visited the head office today, prolonging his leave it seems they are discarding Guillem-Barré, it is difficult for him to mobilize, he has skin paresis, he is ttº for Meningitis.(...) 06/11 /2014 Today he was discharged from (...). It is fatal, she tells me that it is due to a tick that bit her (..) She has no skin on her arms. She can't walk alone. (...)
  Lose 10 Kg and start RHB. Guillem-Barre must be discarded. I hope it gets better before 2 months.(...) 28/11/2014 Let's talk, he explains to me that clinically it cannot be proven, he has had a Guillem-Barre. The tests have come out normal, she is undergoing treatment at (...). Treatment.
  Antiepileptics. 26/03/2015 (...)Expressa is tired of so many illnesses. Latest diagnosis is of sensitivity to chemical products, he says to the disinfectant of scoping devices, he says that for a long time he has been working without a hood. He visits them at (...)".

In relation to this proven fact, it must be specified that the information that is considered to have been unlawfully collected is not that relating to the period of leave from work, but that which appears in the "medical comment" section of the "Incident Management" document. List of Discharges" and which would have been collected by the nurse in charge of supporting and monitoring the temporary incapacity of the CONSORTIUM staff following conversations held with the affected person.

Fundamentals of Law

1.- The provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereafter, LPAC), apply to this procedure; as well as in Decree 278/1993, of November 9, on the sanctioning procedure for application to the areas of competence of the Generalitat, as provided for in DT 2ª of Law 32/2010, of October 1, of the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2.- The accused entity has not made allegations against the proposed resolution to rebut its content, but has limited itself to requesting the extension of the proposed deadline to implement the corrective measures, a matter that will analyze in the foundation of law 6th. The CONSORTIUM had indeed made allegations against the initiation agreement, and it is considered appropriate to reiterate below the most relevant part of the reasoned response given by the instructing person to these allegations that the accused entity had made against the initiation agreement.

2.1.- On the "compliance by the CONSORTIUM with the measures of article 9 of the LOPD" (1st proven fact)

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The CONSORTIUM stated in its statement of objections to the initiation agreement that "since 09/14/2017 access to the clinical history file by the Head of the prevention and environment service has not been allowed of the CONSORTIUM, except in those cases in which the worker expressly authorizes it".

As stated by the instructor, it is necessary to assess positively that the CONSORTIUM has adopted the indicated measure, even before being aware of the initiation of this sanctioning procedure. However, this circumstance does not alter either the fact imputed, nor its legal qualification, without prejudice to the impact that this fact may have on the eventual requirement of corrective measures, a matter that will be addressed in the 6th legal basis.

2.2.- On the "express consent of the data collected by the nurse in charge of support and monitoring of temporary incapacity" (proved fact 2n).

In relation to this issue, the accused entity stated in its statement of objections to the initiation agreement that the work dynamics of the nurse in charge of support and monitoring of temporary incapacity is as follows: "is contacts people in a situation of temporary incapacity to carry out their functions, and always informs that the data that can be provided related to the temporary incapacity will be collected and processed. Faced with this information, the worker voluntarily discloses data to the nurse, in the terms that the worker himself decides (...). With which, there is the express (not written) and informed consent of the owner of the data".

In short, in this allegation the CONSORCI meant that the interested person would voluntarily provide their health data to the nurse in charge of managing the temporary incapacity - prior information from her that their data will be collected and treated by the CONSORTIUM-. That being the case, the CONSORTIUM considered that the collection of the information would have the express consent for the processing of their data, without it being required that said consent be recorded in writing.

On this issue (whether the fact of providing personal data voluntarily implies the provision by the affected person of his express consent for its collection and treatment) this Authority has had the opportunity to pronounce recently in the resolution issued in sanctioning procedure no. PS 20/2017, available on the website www.apd.cat.

Article 7.3 of the LOPD stipulates that, for the treatment of health data, the express consent of the affected person is required, which consent, in accordance with the wording of said precept, does not necessarily have to be in writing. Thus, in accordance with the provisions of this article, it is possible to admit the possibility that the manifestation of express consent
not recorded in writing. However, this possibility must be put in relation to the elements that make up the definition of consent included in article 3.h) of the LOPD, which defines the consent of the interested person as "any manifestation of the will, free, unequivocal, specific and informed, through which the interested party consents to the treatment of

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personal data concerning him". Of this definition, the extreme that the unequivocal, specific and informed expression of will is particularly relevant.

The jurisprudence has clearly defined what must be considered an unequivocal consent, and in this sense the recent sentence of the National Court of 05/12/2017 is pronounced in the following terms:

"The principle of expressed consent will therefore entail the need for the unequivocal consent of the affected person so that his personal data can be processed, thus allowing him to exercise effective control over said data and guaranteeing his power of disposal over them. Said consent may be given expressly, orally or in writing, or tacitly, through repeated and conclusive acts that reveal its existence.

Now, as this Chamber has repeatedly expressed, among others, in the Judgment of February 28, 2007 (RJCA 2007, 267) - appeal nº.236/2005, consent must necessarily be "unequivocal". Evident, in what is the same, that does not admit doubt or mistake, because this and nothing else is the meaning of the adjective used to qualify the consent.

On the other hand, the burden of proving the existence of "unequivocal consent", referred to in art. 6.1 of the LOPD, falls on the entity responsible for the file or in charge of the treatment of personal data, when its existence is denied by the owner of such data (Sentence of this Section of November 8, 2012 - appeal no. 789/2010). this and no other is the meaning of the adjective used to qualify consent".

On the other hand, the consent must be specific, that is to say, refer to a certain processing operation and for a specific, explicit and legitimate purpose. And for the consent to be given in an unequivocal and specific way, it is necessary that the affected person has been duly informed of the data processing that was planned to be carried out, in other words, the consent must be "informed". In this sense, letter a) of article 5.1 of the LOPD specifically mentions that the people whose data are collected must be informed of the purposes of their collection.

Consequently, the possibility of admitting an express consent that is not recorded in writing for the treatment of health data, is conditional on being able to prove that there is a free, unequivocal and specific expression of will, which is given once 'has become aware of specific information which must necessarily include the specific, explicit and legitimate purpose of the treatment that is intended to be carried out on the personal data of the affected person. Well, in the case we are dealing with, the CONSORTIUM has not proven the concurrence of these elements. In this regard, it should be noted that according to the sentence transcribed above, it is the person responsible for the treatment or the person in charge, who is responsible for certifying the consent for the collection and treatment eventually given by the affected person.

In accordance with the above, the allegations made by the CONSORTIUM against the initiation agreement cannot succeed.

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3.- In relation to the facts described in point 1 of the proven facts section, relating to the principle of data security, it is necessary to refer to article 9 of the LOPD, which provided for the following:
"1. The person in charge of the file and, where applicable, the person in charge of the treatment must adopt the necessary technical and organizational measures to guarantee the security of the personal data and avoid their alteration, loss, treatment or unauthorized access, taking into account the state of technology, the nature of the data stored and the risks to which they are exposed, whether they come from human action or the physical or natural environment.
2. Personal data must not be recorded in files that do not meet the conditions determined by regulation in relation to their integrity and security and those of treatment centers, premises, equipment, systems and programs.
3. The requirements and conditions that must be met by the files and the people involved in the processing of the data referred to in article 7 of this Law must be established by regulation.

This regulatory development, with regard to the security measures to be adopted, had been carried out through the RLOPD, and, specifically, with its Title VIII. Article 91 of the aforementioned regulation established as a basic level security measure, therefore applicable to any type of file:

"Access control
1. Users must have access only to the resources they need to perform their duties.

2. The person in charge of the file must ensure that there is an updated list of users and user profiles, and the authorized accesses for each of them.
3. The person in charge of the file must establish mechanisms to prevent a user from accessing resources with rights other than those authorized.
(...)"

Well, during the processing of this procedure, the fact described in point 1 of the proven facts section has been duly proven, which is considered constitutive of the serious infringement provided for in article 44.3.h) of the LOPD , which typified as such:
"Maintain files, premises, programs or equipment that contain personal data without the proper security conditions determined by regulation".

It is worth saying that at the time this resolution was issued, the precepts that contained the infringing rates applied here - in this legal basis and the following - have been repealed by Royal Decree-Law 5/2018, of 27/7 , of urgent measures for the adaptation of Spanish law to the regulations of the European Union in the matter of data protection. But since it is a sanctioning procedure already initiated before the validity of this rule, it must be governed by the previous regulation, to the extent that the new rule does not contain more favorable provisions for the entity concerned (DT 1st RDL 5/2018).

4.- With regard to the fact described in point 2 of the proven facts section, referring to the principle of consent, it is necessary to go to article 7.3 of the LOPD, which provided for the following:

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"Personal data that refer to racial origin, health and sexual life can only be collected, processed and transferred when, for reasons of general interest, this is provided by law or the affected party consents on purpose".

In accordance with the above, the fact recorded in point 2 of the section on proven facts, is considered constitutive of the very serious infraction provided for in article 44.4.b) of the LOPD, which typified as such: "Treating o transfer the personal data referred to in sections 2, 3 and 5 of article 7 of this Law except in the cases in which it is authorized by the same Law or violate the prohibition contained in section 4 of l "article 7".

5.- Aside from what has been advanced previously about the non-application in the present case of RDL 5/2018, it is worth saying that in the processing of this procedure the eventual application has also been taken into account in the present case as provided for in Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (RGPD). And as a result of this analysis, it is concluded that the eventual application of the RGPD would not alter the legal qualification that is made here, and specifically would not favor the data controller.

6.- Article 21 of Law 32/2010, in line with article 46 of the LOPD, provides that when the infractions are committed by a public administration, the resolution declaring the commission of an infraction must 'establish the measures to be adopted so that the effects of the infringement cease or are corrected. Based on this forecast, the appropriateness of requiring the appropriate corrective measures for each of the two infractions declared here is assessed below:

6.1 With regard to proven fact 1, as indicated by the instructor, it is considered that no corrective measures should be adopted in this respect, given that the CONSORTIUM has stated that since 09/14/2017 it is no longer allowed to 'access to the CONSORTIUM's clinical history file to the Head of Risk Prevention and Environment, unless expressly authorized by the employee himself by filling out a form to that effect.

In short, that with this action accredited by the CONSORTIUM, the main purpose pursued with the exercise of the inspection and sanctioning powers entrusted to this Authority, which is none other than to ensure compliance with the regulations, would have been achieved of personal data protection, and thus prevent this fundamental right from being violated again.

6.2 With regard to the 2nd proven fact, as indicated by the instructor, the CONSORTIUM must proceed with the cancellation/deletion of the data relating to the reporting person collected by the professional who manages the "Incident management" file. List of Terminations" -corresponding to the Occupational Risk Prevention Service-, through the conversations held with the person reporting here. This cancellation/deletion would not be necessary if the express and informed consent of the affected person is collected in order to keep said data, in accordance with what is stated in section 2.2 of the 2nd legal basis. Likewise, the CONSORTIUM must proceed with the cancellation/deletion of the data of all the CONSORTIUM staff who

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keep in the mentioned file that it has been collected in the same way described above, unless it obtains the express and informed consent of the people affected in order to keep them.

In relation to the collection of consent by the CONSORTIUM, it is not superfluous to point out here that the consent that may eventually be given by the affected persons, in order to be considered valid, must not only be express and informed, but must also to be "free". And consent cannot be considered to have been given freely in the case we are dealing with here, if this is required by the organization, or if the data subject to collection is required from the worker by the data controller. Regarding this question, it is of particular interest what is provided for in recital (43) of the RGPD - although this was not yet applicable when the declared facts proven in this procedure took place-: "For guarantee that the consent has been given freely, this should not constitute a valid legal basis for the treatment of personal data in a concrete case in which there is a clear imbalance between the interested party and the person responsible for the treatment (...)" ; as well as the doctrine of the Article 29 Working Group (consultative body of the Commission in matters of data protection and privacy, regulated in Directive 95/46 EC of the European Parliament and of the Council) expressed in Opinion 5/ 2011 and the document "Guidelines on consent according to Regulation 2016/679" of 28/11/2017 (last revised 10/01/2018).

Regarding the deadline for carrying out the corrective measure that is required here, the instructing person proposed a deadline of 15 days from the day following the notification of this resolution. As has been advanced, this term has been put into question by the CONSORTIUM in his letter of 16/07/2018 (11th precedent) to consider it insufficient, especially if the measure was to be adopted in the month of August. Well, taking into account that this procedure was resolved well into the month of September, and that the 15 days are working days (art. 30.2 of the LPAC) - which means de facto having three calendar weeks -, it is considered that the term proposed by the instructor of 15 days from the day following the notification, is sufficient to implement the required measure.

Once the corrective measure described has been adopted within the period indicated for the purpose, within the following 10 days the CONSORTIUM must report to the Authority, without prejudice to its inspection powers Authority to carry out the corresponding checks.

Making use of the powers conferred on me by article 15 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Government of Catalonia,

RESOLVED

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First.- Declare that the Hospital Consortium (...) has committed, in the first place, a serious infringement provided for in article 44.3.h) in relation to article 9; and, secondly, a very serious infringement provided for in article 44.4.b), in relation to article 7.3, all of them of the LOPD.

Second.- To require the Hospital Consortium (...) to adopt the corrective measures indicated in the 6th legal basis, and to accredit before this Authority the actions carried out to comply with them.

Third.- Notify this resolution to the Hospital Consortium (...)

Fourth.- Communicate this resolution to the Ombudsman, by means of its literal transfer, as specified in the 3rd Agreement of the Collaboration Agreement between the Ombudsman of Catalonia and the Catalan Data Protection Agency dated 23 /06/2006.

Fifth.- Order the publication of the Resolution on the Authority's website (www.apd.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority and 14.3 of Decree 48/2003, of 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, on an optional basis, 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 provisions of article 123 et seq. of the LPAC
or you can file an administrative appeal directly before the Courts of Administrative Disputes, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction. If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended under the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity may file any other appeal it deems appropriate for the defense of its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)