

RESOLUTION of sanctioning procedure no. PS 15/2018, referring to the Catalan Health Institute.

Background

1.- On 19/9/2017, the Catalan Data Protection Authority received a letter from a person, in which he formulated a claim for the alleged neglect of the right of access to his personal data personal, which he had previously exercised before the Catalan Institute of Health (henceforth, the ICS), in relation to the information relating to the details of access to his clinical history (traceability). Said claim gave rise to rights protection procedure no. PT 54/2017, which was terminated by the resolution dated 22/3/2018 issued by the director of this Authority. In said resolution, which was notified to the ICS on 23/3/2018, the claim that had initiated that procedure was considered, and in the third point of the dispositive part, the opening of a preliminary information was ordered for having detected an alleged infringement of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD). Specifically, due to the facts mentioned in the 6th legal basis of said resolution, in which the following was determined:

"6.- As has been advanced, the ICS has expressly recognized that in the record of accesses to the operating data in the clinical history of the claimant here, there are at least eight accesses that would not appear to be justified, which could result in an offense under the LOPD. That is why it is considered appropriate to order the opening of a preliminary information, in order to clarify the circumstances of the events and the alleged responsible."

And in this regard, the letter that the ICS itself had sent to the person making the claim on 10/31/2017 was transcribed in the 4th legal basis of said resolution, in which it informed him for what is of interest here following: "Once the traceability of the professionals who have had access to your data and your clinical history in the aforementioned period has been reviewed, there are eight (8) accesses that do not correspond to your center and of which we have not been able to verify that they are linked to health professional visits. These accesses occurred on 11/25/2016.

We have proceeded to notify the Human Resources Department of these facts, in order to initiate a confidential investigation that will determine whether the aforementioned accesses can be justified or, on the contrary, may be the subject of a disciplinary offence.(...)"

2.- In compliance with the order in the resolution of procedure no. PT 54/2017, a preliminary information phase was opened (no. IP 92/2018), 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 document dated 04/12/2018, the ICS was required to report on certain issues relating to improper access to the person's medical history affected. The ICS has not complied with said information requirement.

3.- In the framework of the previous information it was also possible to verify that the ICS is responsible for the "Patient File of the Primary Care Division of the Catalan Health Institute", whose purpose is "guarantee the follow-up of the medical, health, socio-health and social treatment that the centers give to their users, patients or residents", and as uses: "facilitate information for the invoicing of the service provided and the obtaining of necessary information from the patient's clinical history and serve as a source of necessary information", and which is duly registered in the Data Protection Registry of Catalonia, dependent on this Authority.

4.- On 5/31/2018, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the ICS for an alleged serious infringement provided for in article 44.3.d.) in relation to article 10 LOPD. He also appointed an instructor of the file the employee of the Catalan Data Protection Authority, Mrs. (...). This initiation agreement was notified to the imputed entity on 6/4/2018.

This deadline has been exceeded without any objections being raised.

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

Proven Facts

In relation to the clinical history incorporated in the "Patient File of the Care Division Primary" of the ICS relative to the person who had requested guardianship procedure no. PT 54/2017, it is inferred that a person/s employed by the ICS, attached to the CAP Guineueta primary care center - of which the affected person is not a user - would have accessed through the ECAP (computerized primary care clinical history program), on 11/25/2016 to health data included in the medical history of the person making the claim without their consent and without these accesses being justified for any assistance or administrative action.

Specifically, the present imputation refers to the eight accesses listed below, which have been taken from the copy of the access register that the ICS had provided at the time, corresponding to the period between 14/10/ 2015 and 29/08/2017.

origin	module	Date of access	Category professional	Name of the Center	Justification (according to the initial analysis of the itself)
New Neighborhoods	GPIFG030-Referral reports i	25/11/2016 20:45	Assistant administrative	CAP Leaning fox	

	radiology				
New Neighborhoods	USUFG005- Maintenance of users and patients	25/11/2016 20:45	Assistant administrative	CAP Leaning fox	
New Neighborhoods	GPIFG030- Referral and radiology reports	25/11/2016 20:43	Assistant administrative	CAP Leaning fox	
New Neighborhoods	VISFG199- Consultation of visits	25/11/2016 20:40	Assistant administrative	CAP Leaning fox	
New Neighborhoods	USUFG005- Maintenance of users and patients	25/11/2016 20:40	Assistant administrative	CAP Leaning fox	
New Neighborhoods	ALEFG006- Patient notices/ pending tasks	25/11/2016 20:40	Assistant administrative	CAP Leaning fox	
New Neighborhoods	USUFG005- Maintenance of users and patients	25/11/2016 20:21	Assistant administrative	CAP Leaning fox	
New Neighborhoods	ALEFG006- Patient notices/ pending tasks	25/11/2016 20:21	Assistant administrative	CAP Leaning fox	

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.

As a preliminary consideration, it should be indicated that at the time this act was issued, the precept containing the infringing rate applied here has been repealed by Royal Decree-Law 5/2018, of 27/7, on 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 started earlier

of the validity of this rule - or in which the previous actions that had preceded it had started earlier - must be governed by the previous regulation (DT 1a RDL 5/2018).

Also, in this act, the eventual application to the present case of what is provided for in Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, regarding the protection of natural persons, has also been taken into account with regard to the processing of personal data and the free circulation of these (RGPD), which as of 05/25/2018 has displaced the LOPD in everything regulated by the RGPD. And as a result of this analysis, it is concluded that the eventual application of the RGPD would not alter the legal classification that is made here, and specifically would not favor the person responsible for the infringement.

2.- In accordance with article 64.2.f) of the LPAC, and in accordance with what was indicated in the agreement initiating the present procedure, the present resolution should be issued without the need to formulate the proposal beforehand of resolution, given that the imputed entity has not formulated allegations within the period granted for that purpose in the notification of the initiation agreement, which contained a precise statement on the imputed responsibility.

3.- In relation to the facts described in the proven facts section, relating to the principle of confidentiality, it is necessary to refer to article 10 of the LOPD, which provides for the following:

"The person in charge of the file and those who intervene in any phase of the processing of personal data are obliged to professional secrecy with regard to the data and the duty to save them, obligations that remain even after the end of their relations with the holder of the file or, where applicable, with its manager".

Well, it is considered accredited that a person/s employed by the ICS, attached to the Guineueta Primary Care Center accessed, through the ECAP (computerized program of clinical histories of 'primary care'), to health data included in a person's clinical history, in the time periods specified in the proven facts, without these accesses being justified by any assistance or administrative action.

This has been expressly admitted by the ICS in the letter dated 10/31/2017 addressed to the affected person in which this body informed him that: "there are eight (8) accesses that do not correspond to your center and of which no we have been able to verify that they are linked to professional health visits. These accesses occurred on 25/11/16. We have proceeded to notify the Human Resources Department of these facts, in order to initiate a confidential investigation that will determine whether the aforementioned accesses can be justified or, on the contrary, may be the subject of a disciplinary offence."

Everything that has been presented so far leads to the conclusion that several accesses to the medical history of the affected person were indeed carried out through the ECAP, without their express consent, and without it being justified by any assistance or administrative purpose. In this regard, it should be noted that the health legislation, when it regulates the uses of the clinical history, in relation to health professionals only contemplates access by those who assist the patient or who are involved in his diagnosis (art. 11 of Law 21/2000 and 16 of Law 41/2002), a circumstance that would not occur here in the accesses referred to in the section on proven facts, which therefore violated

the principle of confidentiality. This action is therefore considered constitutive of the serious infringement provided for in article 44.3.d) of the LOPD, which typifies as such:

"d) The violation of the duty to keep secret about the processing of personal data referred to in article 10 of this Law."

4.- 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. In the present case, but given the circumstances of the infringement that is proposed to be declared, relating to specific events already completed, it is not considered appropriate to propose the adoption of corrective measures.

On the other hand, it should be noted that article 21.2 of Law 32/2010, in accordance with the provisions of article 46.2 of the LOPD, foresees the possibility that the director of the Authority proposes the initiation of disciplinary actions, in accordance with what is established by the legislation in force on the disciplinary regime for staff in the service of public administrations. This is why this Authority considers it appropriate to propose to the ICS that the appropriate disciplinary proceedings be initiated against the person or persons employed by the ICS who would have violated the confidentiality of the data of the person affected here, given that although the ICS in its office dated 10/31/2017 addressed to the affected person highlighted that these facts had been notified to the Personnel Directorate in order for it to initiate a preliminary information phase, this Authority has no evidence of the opening of this phase nor of the result thereof.

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

First.- Declare that the Catalan Institute of Health has committed a serious infringement provided for in article 44.3.d.) in relation to article 10, all of them of the LOPD.

Second.- Notify this resolution to the Catalan Institute of Health.

Third.- 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.

Fourth.- 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 February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed 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 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)

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