

In this resolution, the mentions of the affected population have been hidden in order to comply with art. 17.2 of Law 32/2010, given that in case of revealing the name of the affected population, the physical persons affected could also be identified.

File identification Resolution of  
sanctioning procedure no. PS 20/2018, referring to the Hospital (...) of the Catalan Health Institute

#### Background

1.- On 20/11/2017, the Catalan Data Protection Authority received a written complaint by a person (identified in the prior information phase that preceded this procedure) against the Catalan Health Institute (hereinafter, ICS) - Hospital (...) (hereinafter, the Hospital), due to an alleged breach of data protection regulations. Specifically, the person making the complaint complained of unjustified access to his medical history, specifically, on January 5, February 10 and May 9, 2017. The person making the complaint also complained that the person who would have unjustified access to the medical history, "divulged" its content without authorization.

In order to substantiate the facts reported, the affected person provided, among others, a letter dated 07/12/2017 that had been sent to him by the head of the Hospital's Communication and User Care Unit in relation to reported accesses. This letter stated the following: a) that "once the traceability of the professionals who have had access to your data and your medical history in the requested period has been reviewed, there are accesses to your medical history of which we have not been able to verify are linked to professional health visits. These accesses occurred on January 5, February 10 and May 9, 2017"; ib) that the Human Resources Unit had been notified of these facts, so that they could assess whether they could be the subject of a disciplinary offense that would justify the initiation of an information procedure reserved for the personnel who made the accesses referred to

2.- The Authority opened a preliminary information phase (no. IP 366/2017), 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, the ICS was required by official letter dated 12/21/2017 to comply with the following:

- Provide a copy of the log of accesses to the medical history of the reporting person corresponding to January 5, February 10 and May 9, 2017. And, in relation to this log: a) point out the accesses that were not linked to professional visits, in accordance with what was indicated in the letter of 12/07/2017 that the Hospital addressed to the complainant; b) identify the users who made each of the controversial accesses to the medical history and report the position they held in the organization when the accesses occurred.
- Indicate whether the reporting person had been or was being treated in the service or unit where these people provided service on the dates when the accesses
- Report if the Hospital has initiated a confidential information or disciplinary procedure regarding unauthorized access. If so, provide a copy of the documentation listed there.

The ICS responded to the previous request through a letter dated 01/10/2018, which set out, among others, the following:

- That "the complainant is a janitor of the Hospital and his ex-partner is a clinical assistant"
- That "according to the worker, her ex-husband asked her to go into history on repeated occasions to make specific inquiries. Later, he wanted to restart his romantic relationship and when the worker refused, he threatened her with "consequences".
- That "no disciplinary proceedings have been initiated so far, although it is being studied by human resources".

The reported entity provided, among other documents:

- 1) Copy of the record of access to the medical history of the reporting person using the SAP application (computer program for access to the hospital medical history). In this register are the following accesses that the ICS had indicated as not "linked to professional health visits", all of them carried out by Mrs. (...), with nursing assistant profile:
  - Day 05/01/2017 at 08:33:26 hours
  - Day 10/02/2017 at 09:10:20 hours
  - Day 09/05/2017 at 08:59:42 hours
- 2) Letter directed by Ms. (...) to the Hospital's Head of Communication and User Services in relation to the circumstances that would explain their access to the medical history of the person making the complaint. This letter includes the following text: "Mr. (name of the person here reporting) has been my husband until last day 6 of (...) of 2017 (...). During the time we were married and even after our divorce, Mr. (name of reporting person)

He has asked me on several occasions to consult his clinical history either to check the medical visits he had pending or to look at the medicine he had been prescribed (...). Therefore, if I have ever accessed the clinical history of Mr. (name of the reporting person) has always been not only with his consent, but at his personal request. (..) However, to reiterate that at no time have I accessed the clinical history of Mr. (name of the complainant here) without his consent, but in the few times that I have acceded to it, it has been at his request, and I am very afraid that the origin of this request is nothing more than an attempt by Mr. (name of the complainant here) of wanting to punish me for not wanting to start a romantic relationship with him again”.

3.- Also during this phase of prior information, on 15/01/2018, the reporting person was requested to provide some type of element that substantiated the fact reported regarding the disclosure, by the person who had unjustified access to their medical history, personal data included there.

Until the date of initiation of this procedure, this information has not been provided by the complainant.

4.- On 18/07/2018, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against the Hospital de l'ICS for an alleged serious infringement provided for in article 44.3.d) in relation to article 10 of LA Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD). Likewise, he appointed Mrs. (...), an employee of the Catalan Data Protection Authority, as the person instructing the file.

5.- This initiation agreement was notified to the imputed entity on 07/23/2018.

6.- The initiation agreement explained the reasons why no charge was made with respect to the fact reported relative to the possible disclosure of data relating to the health of the reporting person to third parties, by the person who would have access to your medical history. Reference is made below in what is considered most relevant and which was set out in the section of reported facts not imputed in the initiation agreement.

"It is worth saying that the reporting person, along with his report, did not provide any element to substantiate this reported fact, and he did not provide it subsequently when the Authority specifically requested it. Therefore, as a result of the actions taken, and in particular of the statements made by the nursing assistant who would have carried out the unauthorized access for professional reasons, it is concluded that there is no element that allows this fact to be imputed specifically denounced, not even circumstantial, so it is necessary to agree on its archive based on the principle of presumption of innocence provided for in article 53.2.b) of the LPAC.

Article 89 of the LPAC, in line with articles 10.2 and 20.1 of Decree 278/1993, foresees that the actions will be archived when the following is revealed in the instruction of the procedure: "a) The non-existence of the facts that may constitute the infringement; b) When the facts are not proven".

7.- In the initiation agreement, the accused entity was granted a period of 10 working days from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests.

8.- On 09/08/2018, the ICS sent a letter to the Authority in which they did not question the alleged facts, but merely informed that given the specific circumstances of the case "it has been decided not to open a sanctioning procedure although he has been warned [the professional who materialized the controversial accesses, Ms. (...)] that it was not possible to access foreign HC without being authorized or without the express written consent of the interested party. In view of her allegations, it is considered that the professional acted in good faith and therefore no sanctions are imposed". The ICS also provided a letter from the Personnel Director of the Territorial Management (...) of the ICS in which it was made clear that after having met with Ms. (...) concluded that this person was "being harassed by Mr. (name of the reporting person), ex-partner from her and in the recent process of separation at that time. For this reason, he gave truth to his explanations that access to the clinical history had been made by Mr. (name of the reporting person)".

9.- On 05/11/2018, the person instructing this procedure formulated a resolution proposal, by which it proposed that the director of the Catalan Data Protection Authority declare that the ICS had committed a serious infringement provided for in article 44.3.d), in relation to article 10 of the LOPD.

This resolution proposal was notified on 06/11/2018 and granted a period of 10 days to formulate allegations. This deadline has passed and no objections have been submitted.

proven facts

A person who provided his services as a nursing assistant at the Hospital (...), who had been the partner of the person reporting here, accessed through the SAP (computerized hospital clinical history program) on three occasions to the medical history of the person reporting here, without these accesses being justified by any assistance or administrative action. Specifically, the unauthorized accesses were as follows: 05/01/2017 at 08:33:26, 10/02/2017 at 09:10:20 and 09/05/2017 at 08:59 :42 hours.

## Fundamentals of law

1.- The provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), and article 15 of the Decree apply to this procedure 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, according to what it provides

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 before the validity of this rule - or in which the previous actions that had preceded it had started before -, it 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 regarding 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 classification that is made here, and in particular would not favor the presumed person responsible for the infringement. In any case, it is worth saying that the facts imputed in application of the LOPD would also be so if the RGPD were applied to the case.

2.- The imputed entity has not made any objections to the resolution proposal. Nor did it formulate them in the initiation agreement since, in the face of this agreement, the ICS sent a letter to the Authority in which the facts alleged there were not questioned, and it was limited to making it aware of Authority that, given the specific circumstances of the case, had decided not to open a disciplinary procedure against the person who had accessed the medical history of the person making the complaint; a circumstance that, as explained by the instructor, does not alter either the facts imputed here or their legal qualification.

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".

As indicated by the instructing person, during the processing of this procedure it was duly certified that a person who provided services as a nursing assistant at the Hospital, dependent on the ICS, through his user code that allowed to have access to the SAP application (management of clinical histories of the hospital), he accessed on three occasions the clinical history of the person making the complaint, without this access being justified for any healthcare reason. 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 Law 21/2000 and 16 Law 41/2002), a circumstance that would not occur here in the accesses referred to the section of proven facts, which therefore violated the principle of confidentiality, action which in turn is considered constitutive of the serious infringement provided for in article 44.3.d) of the LOPD, which typifies as such:

"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 offenses are committed by a public administration, the resolution declaring the commission of an offense must establish the measures to be adopted so that the effects cease or are corrected, In the present case, as indicated by the instructing person, given the circumstances of the infraction declared here, it is not considered appropriate to require the adoption of any corrective measures, as it is a matter of specific facts already accomplished.

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 actions disciplinary, in accordance with what is established by current legislation on the disciplinary regime for staff in the service of public administrations. In this regard, it should be noted that, although in similar cases it has been proposed to the entity responsible for the treatment to initiate disciplinary actions against the person who materially had unjustified access to the clinical history, in the present case there are singular circumstances detailed in the antecedents, which precisely have led the ICS not to initiate such actions, as it has expressly stated to this Authority.

Indeed, this Authority also takes these circumstances into account in order not to propose the initiation of disciplinary actions against this person.

resolution

For all this, I resolve:

1.- Declare that the Hospital (...) of the Institut Català de la Salut has committed a serious infringement provided for in article 44.3.d) in relation to article 10 of the LOPD.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the 4th legal basis.

2.- Notify this resolution to the Catalan Health Institute.

3.- Communicate this resolution to the Ombudsman and transfer it to him literally, as specified in the third agreement of the Collaboration Agreement between the Ombudsman of Catalonia and the Catalan Data Protection Agency, of date June 23, 2006.

4.- Order that this resolution be published on the Authority's website ([www.apd.cat](http://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 Data, within one month from the day after its notification, in accordance with what they provide

article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal 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, 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 in the terms provided for in article 90.3 of the LPAC.

Likewise, the imputed entity can file any other appeal it deems appropriate to defend its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)