

File identification Resolution  
of sanctioning procedure no. PS 22/2018, referring to the Care Center  
Primary (...), of the Catalan Health Institute

Background

1. En data 25/01/2018 va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per remissió de l'Agència Espanyola de Protecció de Dades, un escrit d'una persona pel qual formulava denúncia contra el Centre d'Atenció Primària (...) (hereafter, CAP), of the Catalan Institute of Health (hereafter, ICS), due to an alleged breach of Organic Law 15/1999, of December 13, on protection of personal data (hereinafter, LOPD). Specifically, the person explained that on 15/11/2017 a person from the CAP provided data relating to their health over the phone to their relatives, who were unaware of that data. The complainant added that on 17/11/2017 he submitted a complaint to the CAP for these events, which would not have been attended to.
2. The Authority opened a preliminary information phase (no. 45/2018), in accordance with article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of jurisdiction of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPAC), in order to determine whether the facts were likely 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.
3. As part of this information phase, by means of an official letter dated 01/30/2018, the reported entity was required to report, among others, on the reasons for which would have provided information about the reporting person to a different person.

The ICS responded to the previous request through a letter dated 02/13/2018, which set out, among others, the following:

- That on 11/15/2017 a midwife from the ICS called the complainant to inquire about her state of health due to her pregnancy.
- Who called the phones that the user indicated as a means of contact and not finding her on her mobile phone, he called the number she had given.
- That a female voice answered, and when asking for the reporting person (who was identified by his first and last name), the person answered yes, so the midwife thought it was the person user
- That the midwife only asked about his state of health.
- That at no time did the interlocutor say that she was not the person now reporting.
- That according to what the reporting person claims, that phone was his parents' and the person who answered the phone said that the reporting person was not there. This is not what the professional claims.

4. On 18/07/2018, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the ICS for an alleged serious infringement provided for in article 44.3.d) in relation to article 10 LOPD. Likewise, Mr. (...), an official of the Catalan Data Protection Authority, was appointed as the person instructing the file.
5. This initiation agreement was notified to the imputed entity on 07/23/2018.
6. In the initiation agreement, the accused entity was granted a term of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests.  
This deadline has been exceeded and no objections have been made.
7. On 25/07/2018, the ICS made objections to the initiation agreement.
8. On 11/10/2018, the person instructing this procedure formulated a proposed resolution, by which it was 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, all of them of the LOPD.

This resolution proposal was notified on 10/15/2018 and granted a period of 10 days to formulate allegations.

9. The deadline has been exceeded and no objections have been submitted.

proven facts

Of all the actions taken in this procedure, the facts detailed below are considered accredited.

A midwife from the CAP (...), managed by the ICS, called the complainant on 15/11/2017 on a landline phone that she had provided as contact information, along with her mobile phone number, which he had called in the first instance without receiving an answer.

In the call to the landline, the midwife was not attended to by the person with whom she wanted to contact, but by her mother, without the midwife carrying out any checks to ensure that her interlocutor was the person making the complaint here. This circumstance led the midwife to provide the mother of the complainant with information about her pregnancy.

## Fundamentals of law

1. The provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (from now on, LPAC), and article 15 of Decree 278 apply to this procedure /1993, of November 9, on the sanctioning procedure for application to the areas of competence of the Generalitat, according to what is provided for in DT 2a of Law 32/2010, of October 1, of the Catalan Authority of Data Protection. 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 accused entity has not made allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the most relevant part of the motivated response of the instructing person to these allegations.

The ICS argued in its statement of objections to the initiation agreement that it was the person making the complaint here who provided the landline number that was called, so it believed that: "If he did not want a third party to not know his state of health, he should not have accessed the telephone communications, as he did." He added that when the midwife called the complainant "Asking for her by name and surname, the other person answered yes, without saying at any time that it was not her, so the midwife understood that she was talking to the patient ."

As the instructing person explained in the resolution proposal, it must be made clear that there is no doubt in the present sanctioning procedure that health professionals can contact patients by telephone, in the exercise of their duties, although in the event of minimum precautions should be taken when disclosing information

in order to ensure that the interlocutor is the patient or the authorized person. It should be noted at this point that the telephone is not a means of absolutely guaranteeing that the interlocutor is precisely the person with whom you want to contact.

In the present case, it is proven that the midwife tried to contact the complainant by telephone using the mobile phone number that she had provided, with unsuccessful results. He then called the landline number that the complainant had also provided. According to the ICS, the midwife would have asked the person who answered that call if it was the person making the complaint, whom she would have identified by name and surname, and she would have answered in the affirmative.

Leaving aside the fact that this last statement made by the ICS in the statement of objections to the initiation agreement was not substantiated, it is clear that the verification that the midwife would have carried out to check whether the interlocutor was the person reporting here, would be insufficient. More if you take into account that the call was made to a landline, which meant that anyone living at that address could answer the call, unlike when calling a mobile phone, in which there is an expectation reasonable that the call will be answered by the person in charge. Also, the midwife was fully aware that in that conversation it was entirely foreseeable that she would reveal information relating to health, since the reason that originated it was the pregnancy of the person making the complaint. That is why extreme diligence had to be taken to verify the identity of the person calling, which would have been relatively simple.

Therefore, when the data controller has to establish a telephone conversation with an interested person, he is obliged to carry out the necessary actions tending to ensure the identity of the interlocutor, beyond asking for the person to whom identify with their first and last name. For example, the interlocutor could be asked to provide some data or set of data that, in principle, only he or she should know or have access to. Therefore, it must be concluded that the ICS did not act with the diligence required of it to verify who was the person answering the disputed call.

In its statement of objections to the initiation agreement, the ICS stated that if the person reporting "did not want a third party to not know their state of health, they should not have accessed the telephone communications". As indicated by the instructing person in the resolution proposal, the previous manifestation cannot be shared. The consent given by the user of the health service to the health professionals to contact them by telephone cannot in any case lead to the acceptance of the disclosure of personal data to third parties. And even less, of special categories of data. It is important to remember that it is the responsibility of the data controller (the ICS) to adopt the necessary technical and/or organizational measures in order to guarantee the

confidentiality of the data, and thus avoid unauthorized access, such as occurred in the present case.

In the last one, the ICS invoked in its statement of allegations against the initiation agreement that the mother would have acted in bad faith. In this regard, as argued by the instructing person in the resolution proposal, it is sufficient to warn that the possible bad faith of a third party does not serve to justify the illicit treatment of the health data of the person concerned. And in any case, what led to the illicit disclosure of data would not be this eventual bad faith of a third person, but the lack of diligence of the ICS.

3. In relation to the facts described in the proven facts section, relating to the duty of secrecy, 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 owner of the file or, where appropriate, with its manager."

As indicated by the instructing person, during the processing of this procedure the fact described in the proven facts section, which is considered to constitute 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 taken so that the effects cease or are corrected.

As indicated by the instructing person, in the present case, it is not proven whether the ICS has any protocol or instruction addressed to its employees in relation to the processing of data in the context of telephone calls made by healthcare professionals in the exercise of their functions, and which have as recipients patients (as happened in the present case).

Given the above and that article 32.2 of the RGPD requires that in order to determine the security measures to be applied, the risks posed by the treatment are taken into account, the ICS should be required so that as soon as possible, and at the latest within 3 months from the day after the notification of this resolution, draw up the aforementioned protocol or instruction. Once the measure has been adopted

corrective action described, within the indicated period, the ICS must provide the Authority with said protocol or instruction within the following 10 days.

In the event that the ICS had already prepared it, it should be required to provide it as soon as possible, and at the latest within 10 days from the day after the notification of this resolution .

resolution

For all this, I resolve:

1. Declare that the Catalan Health Institute has committed a serious infraction provided for in the article 44.3.d) in relation to article 10, all of them of the LOPD.
2. Require the ICS to adopt the corrective measures indicated in the 4th legal basis and certify to this Authority the actions taken to comply with them.
3. Notify this resolution to the ICS.
4. Communicate this resolution to the Síndic de Greuges and transfer it to him literally, as specified in the third agreement of the collaboration agreement between the Síndic de Greuges de Catalunya and the Catalan Data Protection Agency, dated June 23, 2006.
5. Order that this resolution be published on the Authority's website (www.apd.cat), from \_\_\_\_\_ 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)

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