

File identification Resolution
of sanctioning procedure no. PS 23/2018, referring to the Catalan Health Institute

Background

1. On 02/05/2018 the Catalan Data Protection Authority received a letter from a person for which he filed a complaint against the Catalan Institute of Health (hereinafter, ICS), on the grounds of an alleged breach of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD).
In particular, the complainant stated that he had received several telephone messages (SMS) from the ICS referring to reminders or cancellations of visits by third parties. Along with his letter of complaint, he certified the receipt of the following SMS to the following mobile numbers that were owned by him:
 - 1.1. The mobile number "(...)47" proved to have received the SMS detailed in next:
 - 1.1.a. On 04/02/2018, at 20:39: "Reminder to EAP RAVAL NORD 1E for [user person 1] on 04/05/18, 11:08, visit from Family Medicine. Tel. cancellations: (...)."
 - 1.1.b. On 04/17/2018, at 20:46: "Reminder at RAE RAVAL NORD - H MAR for [user person 1] on 04/24/18, 10:00, Ophthalmology visit. Tel. cancellations: (...)."
 - 1.1.c. On 20/04/2018, at 20:34: "Reminder at RAE RAVAL NORD - H MAR for [user person 2] on 27/04/18, 10:16, Ophthalmology visit. Tel. cancellations: (...)."
 - 1.1.d. On 20/04/2018, at 20:34: "Reminder to EAP RAVAL NORD 1E for [user person 2] on 23/04/18, 08:34, visit of Extra. Tel. cancellations: (...)."
 - 1.2. The mobile number "(...)76" (which the complainant provided when contacting the EAP Raval Nord in order to expose the problem related to the messages received) proved to have received the following SMS detailed below :
 - 1.2.a. On 27/04/2018, at 09:18: "ICS: [user person 3] we inform you that the VISIT to GYNECOLOGY on 5/6/18 has been changed to 7/6/18 at 12:45 p.m.
Thanks"
 - 1.2.b. On 04/30/2018, at 21:34: "Reminder at ASSIR GARRAF for [user 3] on 05/02/18, 12:00, Midwife visit. Tel. cancellations: (...)."

2. The Authority opened a preliminary information phase (no. IP 122/2018), in accordance with article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPAC), in order to determine whether the facts were susceptible of motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant concurrent circumstances in each other.
3. As part of this information phase, by means of official notice dated 05/10/2018, the reported entity was required to report, among others, on the reasons why the reporting person received SMS reminders or cancellations of visits corresponding to several users of the ICS; as well as on the actions that had been taken to correct the reported situation.

The ICS responded to the previous request through a letter dated 01/06/2018, which set out, among others, the following:

- That "it is a human error but measures have been taken so that it does not happen again."
- That number "(...)47" has been removed from the "security" menu of the administrative eCAP program that was linked to user person 1 and the three children of this person (among them, the user person 2).
- That on 21/11/2017 the person reporting contacted the EAP Raval Nord to explain that he was receiving messages referring to the user 1. At that time, the telephone that was included in the data of the user was deleted in the "User and patient maintenance" screen of the eCAP. In addition, the correction was also communicated to the central register of insured persons.
- That at that time the "Security" screen of the eCAP program was not checked, given that there was the conviction that, when changing the telephone number in the user's data section, the "Security" screen it was updated directly with the new modified data. For this reason, the reporting person continued to receive SMS referring to user 1.
- That in relation to the children of user 1, it has also been verified that the telephone number had been modified some time ago on the "User and patient maintenance" screen of the eCAP program, but that this data had not been updated automatically in the "Security" menu.
- Regarding user 3, it has been verified that the mobile number "(...)76" it does not correspond to this one, so it has been replaced by the correct mobile number in the eCAP program (the mobile numbers of user 3 and the reporting person were identical except for one digit).

The reported entity provided various documentation with its letter.

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.c) in relation to article 4 of the 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 was exceeded without any allegations being made.

7. On 11/10/2018, 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 incurred a very serious infringement provided for in article 44.4.b) in relation to article 7, both of the LOPD.

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

8. The deadline has passed and no objections have been submitted.

proven facts

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

The ECAP program is used to manage the medical records of people treated in the ICS primary care network. This software contained the mobile phone numbers of the person reporting here, as a phone number linked to five ICS users.

The person reporting received during an undetermined period of time (one year according to the latter), but which in any case would include between the month of November 2017 and 04/30/2018, several SMS reminders or cancellations of visits to three users, in accordance with the SMS provided with their complaint.

On 11/21/2017, the complainant contacted the EAP Raval Nord by telephone to explain that he was receiving messages referring to user 1. The actions that the EAP would have taken then to correct this situation did not prevent that the reporting person continued to receive more messages referring to that user.

Finally, on 01/06/2018 the ICS has informed that in the ECAP program the mobile phone numbers of the complainant here have been disconnected from the 5 users of the ICS, regarding whom this data was erroneously included .

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 facts described in the proven facts section, as set out on a provisional basis in the initiation agreement, could be constitutive of the serious infringement provided for in article 44.3.c), in relation to the article 4, both of the LOPD. However, as indicated by the instructing person in the resolution proposal, it is considered that this inaccurate treatment of the mobile number linked to five users of the ICS also led to the illicit treatment of personal data relating to the health of ICS patients, as the whistleblower (unauthorized third party) was able to access them. This treatment of specially protected data would constitute a very serious infringement provided for in article 44.4.b), in relation to article 7.3 of the LOPD.

Article 29.5 of Law 40/2015, of October 1, on the legal regime of the public sector, referring to the principle of proportionality, provides the following:

"5. When the commission of an infraction necessarily leads to the commission of another or others, only the penalty corresponding to the most serious infraction committed must be imposed."

Given the above, on the basis of the facts that were imputed in the agreement to initiate the procedure, which remain unchanged, it is considered that the commission of the serious infringement due to violation of the principle of accuracy, entailed the commission of the very serious offense of treating health data unlawfully, having facilitated access by an unauthorized third party. In accordance with the provisions of art. 29.5 of Law 40/2015, it is considered appropriate to declare the commission of the very serious offense provided for in article 44.4.b) of the LOPD, which typifies as such:

"b) Treat or 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 the section 4 of article 7."

For its part, article 7.3 of the LOPD to which the previous precept refers, establishes that:

"3. 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 for by law or the affected person expressly consents ."

3. 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. In the present case, as has been advanced, by means of a letter dated 01/06/2018 the ICS informed that the ECAP program had disconnected the mobile phone numbers of the complainant here from the 5 users of the ICS, regarding whom this data was erroneously recorded. Given that the accused entity has corrected the effects of the infringement, as explained by the instructing person in the resolution proposal, no corrective measures should be required.

resolution

For all this, I resolve:

1. Declare that the Catalan Institute of Health has committed a very serious infraction provided for in article 44.4.b) in relation to article 7, all of them 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 legal basis 3r.

2. Notify this resolution to the ICS.
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, dated June 23, 2006.
4. 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)