apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 30/2019, referring to the Hospital (...) of Barcelona

Background

1. On 12/07/2018 the Catalan Data Protection Authority received a letter from a person for which he made a complaint against the Hospital (...) of Barcelona (hereinafter, the Hospital), due to an alleged breach of the regulations on the protection of personal data. In particular, the complainant explained that on 09/07/2016 he requested a doctor from this Hospital, who attended to him following a health problem, for a brief report in which the cause was strictly stated and the duration of its treatment in order to present it to your company (University of (...), hereinafter (...)), and for this purpose, provided the email address of your superior to the (...) so that said report could be forwarded to him. His complaint lies in the fact that, instead of sending the report in the terms he states he requested, the Hospital sent (approximately 09/12/2016) *"a progress report in which many more data (and many subjective impressions) than had been requested (...)."*

The reporting person provided various documentation relating to the events reported.

2. The Authority opened a preliminary information phase (no. IP 190/2018), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of the LPAC, to determine if 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 that concurred.

3. In this information phase, on 07/20/2018 the Hospital was required to state the reasons why the report would have been sent in the terms indicated. He was also asked to provide a copy of the office or email through which the medical report subject to the facts reported to (...) would have been sent, and also provide a copy of the medical report.

4. On 31/07/2018, the Hospital responded to the aforementioned request through a letter in which it stated the following:

> *"First. Regarding the identity of the complainant and the time when the events described took place.*
> *(...) the events described happened, as indicated by the accused herself, approximately on September 12, 2016, that is to say almost two years ago. In this regard, we want to highlight two facts, the need to assess the case according to the regulations*
> *applicable at that time, and the need to assess a possible expiration of the*

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infringements that can allegedly be attributed to the Hospital (...) of (...) due to the prescription of the same.

second Regarding the reasons that generated the sending of an email with the information requested by Ms. (...) in your company.

The reason why the report was sent to the e-mail address of the company where the patient worked was because the patient herself requested it, as she herself acknowledges in the complaint. Below we detail the circumstances in which the report was sent to Ms. (...):

Ms. (...) she was diagnosed with a serious illness so she was referred to Dra. (...)to assess the start of treatment prior to the surgery to which he had to undergo. At the visit on September 7, the patient asked for a report on the illness, indicating that she needed a complete report because otherwise she would not receive 100% of the salary and she needed it to be detailed that it was a serious illness because they paid 100%. It was explained to him that the report could not be made at that time as there were more patients referred and that making a full report takes time. However, Dra. (...) he undertook to make the report to him preferentially given the urgency of the case.

Ms. (...), he accepted it, and at no time did he present any problem, nor at any time did he state that a simple proof of visit was enough (proof of this is that these types of documents are made in moment), but on the contrary he asked for a complete report (...) to justify his termination of employment.

It was then that the patient stated that she did not want us to send the report to her, but to an email address that she indicated herself and that corresponded to her company.

At this moment, and as we will indicate in the next point, this is not the official way to send the reports, but given the urgency of the patient, Dra. (...), and for the reason of facilitating his situation he agreed to make the shipment. At this point we want to reiterate that the complaint is in relation to the sending of a report that is too extensive at the discretion of Ms. (...), not for the purpose of sending the information to your company, since this was a request from the patient herself.

third Regarding the security measures and confidentiality protocols implemented at the Hospital (...) of (...).

As indicated in the previous point, the shipment was made to the address indicated to us by Ms. (...), is not the usual circuit that is followed at the Hospital (...) of (...), but was done in response to the repeated requests of Mrs. (...), and to do him a favor and avoid an administrative problem that could cause him financial damage, such as not being able to collect 100% of his leave.

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All the professionals at the Hospital (...) take special care of their patients' data and know their obligations in terms of confidentiality.

The Hospital (...) of (...), has placed a special emphasis so that its professionals know the consequences and meaning of their duty of confidentiality, and in this sense has carried out the following actions: ...).

RESPONSE TO THE REQUESTS MADE BY THE CATALAN AUTHORITY OF DATA PROTECTION

FIRST.- In relation to the provision of a copy of the office or email through which the medical report subject to the facts reported to (...) was sent, and a copy of the medical report sent.

As indicated in the previous allegations, almost two years have passed since the facts that are the subject of the procedure occurred, which is why the Hospital (...) of (...), it has not been possible to locate the email that was sent to the company where the patient worked. Where a copy is attached to the report as Document 3.

SECOND.- In relation to the justification of the reasons why the medical report subject to the reported facts was sent, and it was not done in the terms that it had allegedly requested.

As indicated in the second preliminary consideration, the report was sent to the email address requested by Ms. (...), because she requested it that way, and given the situation and the economic damage that, always according to Ms. (...), he stated to Dra. (...), he could assume not to receive that information.

A report was prepared, not a supporting document, since as repeatedly stated by the Mrs. (...) I needed a complete report.

In this sense, the content of the medical reports is not random, but follows the minimum content established by Law 21/2000, of December 29, regarding information rights concerning the patient's health and autonomy, and the clinical documentation(...) and Royal Decree 1093/2010, of September 3, which approves the minimum set of data for clinical reports(...) in the National Health System, in this sense also 'professional associations, such as the Association of Doctors of (...) have stated on several occasions that the antecedents are part of the mandatory content of a report, for example in the relative Book of Good Practice to the clinical reports(...) published in February 2005, or the Council of Medical Associations of Catalonia, in its PROFESSION magazine number 12 of April May 2012, relating to medical reports and certificates.

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That is to say the fact of putting the background in a medical report, it is not a unilateral decision of Dra. (...), but responds to the express request of Ms. (...) to obtain a complete report and not a certificate, and the legal and Good Medical Practice obligation, that medical reports include the patients' relevant antecedents.

Therefore, we can affirm that Dra. (...) it limited itself to drawing up a report in accordance with what is established by the regulations, and with the mandatory content that it establishes. The report was sent by email to the address of Ms. (...) (outside what is the usual circuit), as it acknowledges in its writing, since the claim is not for the shipment itself, but for the content of the report, content that by other side was limited to that established in the aforementioned regulation.

The Hospital (...) of (...) wants to highlight that Dra. (...), acted at all times trying to attend to the requests of Ms. (...), and with the best possible predisposition to facilitate and avoid any unnecessary procedure (...)."

5. On 08/31/2018, (...) was required to report on the date (approximately, around 9/12/2016) on which he received the medical report from the aforementioned Hospital relative to the reporting person. He was also required to provide a copy of the letter or email received from the Hospital through which the aforementioned medical report was sent, as well as a copy of the medical report actually received.

6. On 07/09/2018, the (...) responded to the aforementioned request through a letter signed by the secretary general and responsible for the files of the (...), in which he stated the following in relationship with the reporting person:

"(...) the Director of Organization and Human Resources, in an email dated September 6, states that,

"After reviewing the files of the indicated reference date (September 2016), we do not have any medical report from the Hospital (...) of the person identified with no. IDENTITY CARD (...)."

7. On 09/09/2019, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the Hospital (...) of (...) for an alleged very serious infringement provided for in article 44.4.b), in relation to article 7.3, both of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD).

This initiation agreement was notified to the Hospital (...) on 09/10/2019.

8. The initiation agreement granted the Hospital (...) a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of tests that deemed appropriate to defend their interests.

9. On 18/09/2019, the Hospital (...) made objections to the initiation agreement.

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10. On 01/30/2020, 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 Hospital (...) had committed a very serious infraction provided for in article 44.4.b)
in relation to article 7.3, both of the LOPD.

This resolution proposal was notified to the Hospital (...) on 01/30/2020, and a period of 10 days was granted to formulate allegations.

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

proven facts

Based on all the actions taken in this procedure, the following are considered proven facts.

On 09/07/2016 the complainant requested a medical report from a doctor at the Hospital (...) of (...), who attended to him following a health problem to present it to his company - (...)-, so that his leave of absence did not reduce the salary he was receiving. And for this purpose, he provided the e-mail address of his hierarchical superior to (...) so that said report could be sent directly to him.

A few days later, on 12/09/2016 or on another date close to this date but in any case later, the aforementioned doctor sent the (...) the requested email, which contained a medical report entitled " progress report", signed on 12/09/2016, which included -
mainly in the personal history section - different health data or not linked to the cause (1) and duration (2) of the treatment,

In relation to the communication to a third party ((...)) of these other health data not linked to the cause and duration of the treatment, the Hospital has not certified that, prior to sending the full report to the (...), subject to the express consent of the reporting person.

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of 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.

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2. The Hospital (...) 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.

2.1. On the existence of express verbal consent.

In the 1st section of its statement of allegations, the Hospital (...) stated that there was express verbal consent from the person making the complaint, and justified it by pointing out that: *"the patient herself acknowledges that she asked to be 'send a medical report to the address she herself provided to Dra. (...)".*

These allegations cannot be favorably received for the purposes intended by the Hospital, because there is no doubt that the complainant requested that a medical report be sent to the email address of his superior, but that it was sent including health data that exceeded the cause of the medical leave and the duration of the treatment, which, according to the complainant, are the only ones he asked to be included in the report.

Article 7.3 of the LOPD established, for what is now of interest, that personal data that refer to health *"can only be collected, processed and transferred when, for reasons of* general interest, *a law so provides or the person affected expressly consents to it".* With regard to the concurrence of the express consent of the person making the complaint, she has stated that she asked the Hospital (...) for a brief report, informative only of the cause of the medical leave and the expected duration of the treatment. This point, however, has not been substantiated by the complainant, and the Hospital, for its part, denies that the complainant asked for a brief report, but without having provided any evidence to support her statements.
That being the case, the only fact that can be considered true is that the Hospital has not proven that the affected person expressly consented to the communication of all the health data that appeared in the medical report that was sent to the (...).

At this point, it should be noted that article 12.3 of the RLOPD established that: *"it is up to the data controller to prove the existence of the consent of the affected person by any means of evidence admissible in law".* With respect to the requirement provided for in this precept, it is important to point out that proof of the existence of consent includes the scope of what is consented to.

With regard to the cause of the medical leave and the duration of the treatment, the acknowledgment made by the complainant in the written complaint that he has submitted, makes it unnecessary for the Hospital to certify that he expressly consented to communicate this information to the (...). The same cannot be said for the rest of the health data that appear in the medical report sent, especially taking into account the expressions of disagreement made by the person making the complaint.

And on this, it must be insisted that in the course of the present sanctioning procedure the Hospital has not proven that the doctor who sent the medical report to the (...) had the express consent of the person making the complaint regarding the set of health data that exceed those referred to

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medical reason for the absence from work and the duration of the planned medical treatment. In this sense, the allegations made by the Hospital referring to the prescriptive content of a medical report do not prevent sustaining the imputation of the infringement committed here.

2.2. On the eventual prescription of the infringement.

Subsequently, Hospital (...) alleged in the statement of allegations that the alleged infringement would have prescribed, given that the alleged events took place on 09/12/2016 and *"it was not until September 12, 2019 that the H(...) has been able to learn that a sanctioning procedure has been initiated against him, that is to say, three years and one day after the events that motivated the initiation of this sanctioning procedure. The form of communication of the start of the procedure to the H(...) was through EACAT, a platform that sent the message communicating that there was a document available for the H(...) on September 11 at 6 a.m., a public holiday and therefore not a working day. Therefore, the document initiating the sanctioning procedure against H(...)was not known to H(...)and accessible until September 12, 2019, one day after the three-year limitation period".*

The allegations made by the Hospital cannot be favorably received. Article 47 of the LOPD, applicable to the acts charged, established a three-year limitation period for very serious infringements, as is the case with the infringement charged here (art. 44.4.b LOPD).

With regard to the determination of the *days a quo* or starting date of the three-year calculation, that is, the date that the doctor at the Hospital (...) sent the mail with the medical report to the (...), the reporting person referred to 12/09/2016 as the approximate date of the shipment *("...tras unos días de insistencia...dicha Doctora, approximación el día 12 de septiembre, remitión to the Administrator of the Center of the faculty of (...) and Campus of the University of the (...),...to your mail, not the requested report but a "development report"...").* Considering that the disputed medical report is dated 12/09/2016, it must be understood that how soon it was sent on that date. In any case, if it was a different date it would be later than 09/12/2016.

With regard to the determination of the *days ad quem* or date on which the 3-year term ended, according to what has been explained, it would be -as soon as possible- on 09/12/2019.

Well, in the receipt of the electronic register (ref. (...)-2019) corresponding to the notification to the Hospital (...) of the agreement to initiate the sanctioning procedure, it appears that this agreement had entry in the Hospital's electronic register at 11:05 a.m. on 09/10/2019, and that day was a working day. Therefore, the notification of the agreement took place on 10/09/2019, when the statute of limitations for the infringement had not yet expired. And notification of the agreement to the interested party (the Hospital (...)) interrupts the limitation period for infringements (art.30.2 Law 40/2015, LRJSP). The fact that the EACAT platform - through which the notification was sent - sends an email to certain people in the recipient entity the day after the entry of a document in its electronic record, for in order to notify him, it does not alter the date of notification of the same.

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And in any case it would not have prescribed in the denied case of considering that the notification took place on the 12th, given that the terms indicated by years (art. 30.4 Law 39/2015, LPAC), as is the case of prescription, they end on the same day of notification, and not the day before.
3. In relation to the legal classification of the facts described in the proven facts section, it should be borne in mind that article 26 of Law 40/2015, of October 1, on the legal regime of the public sector, foresees the application of the sanctioning provisions in force at the time of the occurrence of the facts, unless the subsequent modification of these provisions favors the alleged infringer.

In accordance with this rule, since the facts alleged here were committed before 05/25/2018, the LOPD should be applied. Likewise, it has been taken into account that the application of the rule in force from 05/25/2018, i.e. Regulation (EU) 2016/679 of the European Parliament and of the Council, would not favor the alleged infringer 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (RGPD), which became fully applicable after the facts that are declared here as constituting an infringement .

Based on this, it should be reiterated that article 7.3 of the old LOPD determined that: *"personal data that refer to racial origin, health and sexual life can only be collected, processed and transferred when, for reasons of general interest, a law so provides or the person concerned expressly consents to it".*

With regard to the concurrence of the consent of the affected person - which, in the case of health data, had to be express -, the Hospital has not proven that it has the express consent of the person making the complaint to communicate to the (.. .) those health data of his that appeared mainly in the personal history of the submitted report, and that went beyond the medical cause of the absence from work and the duration of the planned medical treatment. And as noted, it is up to the person responsible for the treatment - the Hospital - to prove the existence of the affected person's consent (art. 12.3 RLOPD).

The communication of health data without the express consent of the affected person constitutes a very serious offense provided for in article 44.4.b) of the LOPD, which typified 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".*

4. In relation to the penalty to be imposed by the commission of the imputed offence, article 21.2 of Law 32/2010 determined the following, in line with what is provided for in article 46 of the LOPD:

> *"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . In addition, it can propose, if necessary, the initiation of disciplinary actions in accordance with what*

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establishes the legislation in force on the disciplinary regime of personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any."

In accordance with the indicated precept, it is necessary to declare that the Hospital (...) has committed a very serious infringement, provided for in article 44.4.b) of the LOPD, for having communicated to the (...) health data of the reporting person, without their express consent.

With regard to the adoption of measures to cease or correct the effects of the offense committed, in the previous information phase the (...) stated before the Authority that they did not have the report in their files doctor referred by the Hospital (...), relating to the person making the complaint. That's the way things are, considering the communication made by the Hospital was an isolated and specific event, and having deleted the (...) the medical report that contained the health data of the person making the complaint, it is not considered necessary to require the adoption of corrective measures.

resolution

For all this, I resolve:

1. Declare that the Hospital (...) of Barcelona has committed a very serious infringement, provided for in article 44.4.b) of the LOPD, in relation to article 7.3 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 fourth legal basis.

2. Notify this resolution to the Barcelona Hospital (...).

3. Communicate this resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

4. Order that this resolution be published on the Authority's website (apdcat.gencat.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 the provisions of 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.

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

The director,