apdcat
Autoritat Catalana de Protecció de Dades

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

File identification

Resolution of sanctioning procedure no. PS 11/2020, referring to the Catalan Health Institute.

Background

1. On 06/05/2019, the Catalan Data Protection Authority received a letter from a person making a complaint against the Catalan Institute of Health (hereinafter, ICS), on the grounds of 'a presumed breach of the regulations for the protection of personal data. Specifically, the complainant explained that his medical history contained a diagnosis that did not correspond to him ("mental disorders and behavioral disorders due to tobacco consumption").

2. The Authority opened a preliminary information phase (no. IP 172/2019), 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 Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereinafter, LPAC), 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 that were involved.

3. On 07/06/2019, the Authority forwarded the complaint to the data protection delegated entity of the ICS, in order for it to respond to the complaint within one month, and that communicated this response to the Authority, in accordance with the provisions of article 37.2 of Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD).

4. On 07/12/2019, the reported entity provided the Authority with a copy of the notice addressed to the reporting person of the resolution of 07/01/2019, by which it was informed to the reporting person, among other aspects, regarding the explanation of the descriptor of the diagnosis ("mental disorders and behavioral disorders due to tobacco consumption") that was included in "My Health" (hereafter, LMS) and of the actions that the Department of Health was carrying out consisting of developing a catalog of descriptions "more friendly and adapted to everyday language"; as he indicated that "we would be talking about an error in the registration of your medical history in the event that you are not a smoker or ex-smoker."

5. Given that from the previous response to the affected person, it could not be considered that the complaint had been resolved in the intended terms, the investigation actions initiated following the complaint continued to be processed, in accordance with that established in the second paragraph of article 37.2 of the LOPDGDD.

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

6. On 07/22/2019, as part of the prior information, the Authority required the ICS to, among others, certify that the aforementioned diagnosis that appeared in the medical history belonged to the reporting person.

7. On 23/09/2019, the ICS responded to the aforementioned request through a letter in which it stated, among other issues, that "In relation to the diagnosis, of the letter of 18/09 /2019 of the ICS, it is confirmed that the director of the AP team (...) spoke with the person making the claim and it was confirmed that the patient is not a smoker and therefore has proceeded to eliminate the HC the diagnosis of "mental disorders and behavioral disorders due to tobacco consumption".

The required entity provided various documentation.

8. On 02/06/2020, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the ICS for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.d); all of them from Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereinafter, RGPD).

9. On 06/26/2020, the ICS made objections to the initiation agreement.

10. On 07/09/2020, the person instructing this procedure formulated a proposed resolution, by which it was proposed that the director of the Catalan Data Protection Authority admonish the ICS as responsible, in the first place, for an infringement provided for in article 83.5.a) in relation to article 5.1.d), both of the RGPD. This resolution proposal was notified on 09/17/2020 and a period of 10 days was granted

The deadline has passed and no objections have been submitted.

proven facts

The ICS incorporated a diagnosis linked to the status of a smoker or ex-smoker into the reporting person's medical history. This diagnosis was inaccurate, given that the reporting person was not a smoker.

By means of a letter dated 09/16/2019, the ICS informed the complainant that it had removed from his medical history the diagnosis mentioned above, which had been incorporated "due to a registration error".

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 Authority

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

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.

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.

2.1. About the prescription.

In the 1st paragraph of its statement of objections to the initiation agreement, the accused entity stated that the alleged infringement would be time-barred, given that the data for which the complainant made the complaint appeared in the history clinic since 2014.

As the instructing person pointed out in the resolution proposal, in the present case we are dealing with a clear case of permanent infringement. In offenses of this nature, the conduct to be prosecuted is consummated in an instant, but the offense remains during the space of time in which the unlawful behavior lasts.

For its part, article 30.2 of LRJSP provides that "In the case of continuous or permanent infringements, the term begins to run from the end of the infringing conduct." Therefore, it is made clear that in the present case it is a permanent infringement, the limitation period does not start until the infringing action ceases.

So things are, the inaccuracy that the ICS indicated took place in 2014 when it was recorded in the medical history of the person reporting the diagnosis linked to their status as a smoker or ex-smoker, remained until around 09/16/2019 (date of the letter from the ICS addressed to the complainant informing him that the controversial diagnosis had been removed from his medical history), approximate date on which the calculation of prescription of the infringement. Likewise, in accordance with article 72.1 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD) the offense for having violated the principle of accuracy prescribes at 3 years (in the present case, therefore, it would not prescribe until September 2022).

2.2. About the diagnosis.

Subsequently, the accused entity stated in its statement of objections to the initiation agreement that the descriptions of the diagnoses that appear in the Clinical Care Center Primary (ECAP), used by primary care doctors, are associated with the terms of the International Classification of Diseases (ICD-10). In turn, the ICS added that the clinical diagnoses “Nicotine dependence, unspecified, without comp”, “Smoking” or “Smoker”, which the ICS doctor selects in the ECAP are related in LMS with the literal "Mental disorders and behavioral disorders due to tobacco use" from the catalog of diagnoses and procedures corresponding to CIM-10. As indicated by the ICS, this one

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

relationship occurs automatically and the apparent discordance of concepts that may exist from the point of view of the user could not be attributed to him since it is not the ICS that is responsible for the management of the LMS. That is why the ICS considered that it was only possible to talk about a registration error if the person concerned was not a smoker or ex-smoker.

Well, as the instructing person stated in the resolution proposal, it must be made clear that in the present sanctioning procedure, what is imputed to the ICS is that it assigned the person reporting an inaccurate diagnosis linked to the condition of smoker or ex-smoker, when it was recognized by the entity that the complainant was a non-smoker, an inaccuracy that the complainant was able to verify through LMS where the said diagnosis was listed as "mental disorders and behavioral disorders due to tobacco use" .

It should be noted that until its statement of objections to the initiation agreement, the ICS had not made it clear that the description of the diagnosis linked to the status of a smoker or ex-smoker that is stated in the ECAP ("Nicotine dependence, unspecified, unspecified", "Smoking" or "Smoker"), was not the same as shown through the LMS ("Mental disorders and behavioral disorders due to tobacco use") , information system that feeds, among others, the ECAP.

As an example, in the letter of 09/16/2019 addressed to the complainant, the ICS stated that "the doctor asked you some questions to verify that the diagnosis you mentioned "mental disorders and behavior disorders due to tobacco consumption" corresponded or not with a habit of yours" and that as a result of said conversation, "and given that you are not a smoker, the doctor eliminated the diagnosis that was in your history clinic due to a registration error."

In the same sense, in the letter of 23/09/2019 in response to the request that this Authority made to the ICS by official letter of 22/07/2019, it was reported that "in relation to the diagnosis, from the letter of 18/09/2019 from the ICS, it is noted that the director of the AP team (...) spoke with the person making the claim and it was confirmed that the patient is not a smoker and so much has been done to eliminate the diagnosis of "mental disorders and behavioral disorders due to tobacco consumption" from the HC."

Certainly, as detailed by the ICS in its statement of objections to the initiation agreement, the description of the diagnosis referring to the reporting person contained in the ECAP and LMS did not have the same description, but in any case, it also derived from the reporting person's status as a smoker or ex-smoker, which was inaccurate.

Having said that, in accordance with article 89.3 of the LPAC, the proven facts were adapted to reflect this circumstance relative to the descriptions of the diagnosis.

2.3. About guilt.

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

Finally, the ICS invoked the principle of culpability in its statement of objections to the initiation agreement, since the lack of guilt or fault excludes imputability.

Regarding this, this Authority has recalled in several resolutions (for all of them, the resolution of the sanctioning procedure no. 52/2012 - available on the website apdcat.gencat.cat, section resolutions-) the jurisprudential doctrine on the principle of culpability, both Supreme Court, like the Constitutional Court. According to this doctrine, the sanctioning power of the Administration, as a manifestation of the "ius puniendi" of the State, is governed by the principles of criminal law, and one of its principles is that of guilt, incompatible with a regime of objective responsibility without fault.

In this sense, the Supreme Court in several rulings, all of 16 and 22/04/1991, considers that from this element of culpability it follows that the action or omission classified as an administratively punishable offense must be in all case imputable to its author due to grief or imprudence, negligence or inexcusable ignorance. Also the National Court, in the Judgment of 06/29/2001, precisely in matters of personal data protection, has declared that to appreciate this element of culpability: "simple negligence or non-compliance with the duties that the Law imposes on the persons responsible for files or data processing exercise extreme diligence...".

The SAN of 08/10/2003 is also of interest, which stated the following:

> "Therefore, contrary to what is ordered in art. 11.1 of Law 15/1999, of December 13 on Protection of Personal Data, the appellant entity communicated personal data to a third party without the consent of the affected person, without meeting the causes established in section 2 of that article for that consent is not required, and without his conduct being covered by art. 12 of the same Law.
>
> SIXTH
>
> For what affects culpability, it must be said that generally this type of behavior does not have a malicious component, and most of them occur without malice or intentionality. It is enough to simply neglect or fail to comply with the duties that the Law imposes on the persons responsible for files or data processing to exercise extreme diligence to avoid, as in the case at hand, a processing of personal data without the consent of the person concerned , which denotes an obvious lack of compliance with those duties that clearly violate the principles and guarantees established in Organic Law 15/1999, of December 13, on the Protection of Personal Data, specifically that of the consent of the affected person."

Likewise, the judgment of the Supreme Court of 25/01/2006, also issued in the area of data protection, was based on the required diligence and established that intentionality is not a necessary requirement for a conduct to be considered guilty .

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

Regarding the degree of diligence required, the SAN of 14/12/2006 declared: "the Supreme Court considers that imprudence exists whenever a legal duty of care is neglected, that is, when the offending subject does not behave with diligence required And the degree of diligence required must be determined in each case in attention to the concurrent circumstances, such as the special value of the protected legal property, the professionalism required of the infringer, etc."

In short, it is necessary that in the conduct that is imputed there must be an element of culpability, but in order for culpability to exist it is not necessary that the facts have occurred with intent or intent, but it is sufficient that negligence has intervened or lack of diligence, as would be the case analyzed here. And it is worth saying that the duty of care is maximum when activities are carried out that affect fundamental rights, such as the right to the protection of personal data. This has been declared by the Judgment of the National Court of 02/05/2014 (RC 366/2012) issued in the matter of data protection, which maintains that the status of person responsible for processing personal data "imposes a special duty of diligence at the time of carrying out the use or treatment of personal data or its transfer to third parties, as regards the fulfillment of the duties that the legislation on data protection establishes to guarantee the fundamental rights and public liberties of people physical, and especially his honor and personal and family privacy, whose intensity is enhanced by the relevance of the legal assets protected by those rules."

In turn, it should be noted that the wording that article 28 of Law 40/2015 gave to the principle of responsibility or culpability, in which the mention of "simple non-compliance" was deleted, did not substantially alter the situation previous, in which the majority jurisprudential doctrine already had to be taken into account, in which the presence of the element of grief or guilt was already required, so that the idea of sanctioning based on a kind of of "objective responsibility". We have a sample of this jurisprudential doctrine in the judgment of the Supreme Court of 04/28/2016, in which art was obviously applied. 130 of the LRJPAC:

> "Regarding the absence of intent or guilt in the commission of the offense, and the concurrence of good faith, we must point out that guilt as a principle of the sanctioning power provided for in article 130 of Law 30/1992, entails that " only the physical and legal persons who are responsible for them, even for simple non-observance, may be sanctioned for acts constituting an administrative infraction.
> This requirement, in the exercise of the sanctioning power, supposes that the conduct to be deserving of a sanction must involve the will or fault of the subject to whom it is imputed, because we are not in a system of objective responsibility unrelated to culpability, as deduces from the indicated article 130, and according to which this Chamber is declaring with a reiteration that excuses the quote".

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

Based on the jurisprudential doctrine presented, as indicated by the instructing person in the proposed resolution, the lack of diligence required by the ICS in not accurately treating the data relating to health contained in the person's medical history complainant, attributing an inaccurate diagnosis.

Having said that, it is considered necessary to highlight that within the framework of the prior information phase, the ICS diligently corrected the inaccurate diagnosis that had been linked to the reporting person, which must lead to the unnecessary to require the ICS to take measures to correct the effects of the infringement.

3. In relation to the facts described in the proven facts section, it is necessary to go to article 5.1.d) of the RGPD, which provides that the personal data will be "accurate and, if necessary, updated; all reasonable measures will be taken to delete or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed ("accuracy")".

For its part, article 4.1 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), in relation to the accuracy of the data, establishes what:

> "1. In accordance with article 5.1.d) of Regulation (EU) 2016/679 the data must be accurate and, if necessary, updated."

As indicated by the instructing person, during the processing of this procedure the fact described in the section on proved facts, which is considered to constitute the infringement provided for in article 83.5.a) of the RGPD, has been duly proven, which typifies the violation of the "basic principles of treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9", among which is the principle of accuracy.

The conduct addressed here has been included as a very serious infraction in article 72.1.a) of the LOPDGDD, in the following form:

> "1. Based on what is established in article 83.5 of Regulation (EU) 2016/679, infringements that involve a substantial violation of the articles mentioned in that article and, in particular, the following, are considered very serious and prescribed for three years.
> a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/679."

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

> "(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.
>
> The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:

> "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, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for 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".

As the instructing person explained in the resolution proposal, corrective measures should not be required, given that the ICS regularized the irregular situation, deleting the inaccurate diagnosis corresponding to the person here denouncing that was included in his medical history.

resolution

For all this, I resolve:

1. Admonish the Catalan Institute of Health as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.d), both of the RGPD.

No need to require corrective measures to correct the effects of the violation, accordingly with what has been exposed in the 4th legal basis.

2. Notify this resolution to the ICS.

3. Communicate the resolution issued 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.

Carrer Rosselló, 214, esc. A, 1r 1a
08008 Barcelona

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,