apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 13/2020, referring to the Mutual Aid Foundation of Terrassa.

Background

1. On 05/16/2019, the Catalan Data Protection Authority received a letter in which a person filed a complaint against the Terrassa Mutual Aid Foundation (hereinafter, the FAMT), on the grounds of an alleged breach of the regulations on personal data protection. Specifically, the complainant stated the following:

- That on 05/13/2019 he had gone to the Primary Care Center (CAP) located on Rambla d'Egara in Terrassa - managed by the FAMT - in order to undergo an extraction.
- That *"there they have the custom of, once the doctor's request for the analysis has been deposited in a mailbox, to make you wait for a while in a room where there are easily 40 to 50 people and call you to megaphone by name and surname to go to one of the access doors to the module intended for extraction",* which he considered could violate the data protection regulations.

2. The Authority opened a preliminary information phase (no. IP 151/2019), 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 (henceforth, LPAC), to determine whether the facts they 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 involved.

3. During this investigation phase, on 06/06/2019 an inspector from this Authority went to CAP Rambla and found the following:

a) That this CAP has a separate space (from now on "room") where those people who are waiting to be subject to an extraction stay. This room is surrounded by several numbered doors through which you would access rooms where the extractions would be carried out.

b) That at 8:04 a.m. there were about 35-40 people in this room.
c) That people are called over the public address system by their first and last names, followed by the door to which they should go. d) That, as reported to the inspector at the information desk, users must to request in advance the day and time for the extraction.

The corresponding minutes were drawn up from this face-to-face performance, to which were incorporated the images captured by the instructor that left graphic evidence of the explicitness in the preceding letters a), b) and c).

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

4. By means of a letter of 12/06/2019, the reported entity was required to report on the following:

- About what is the procedure established to proceed with an extraction at the CAP Rambla. Among others, information on: a) whether it is necessary to pre-schedule the day and time for the extraction; b) if once the user goes to the CAP on the day and time scheduled to undergo the extraction, he/she must go to a counter to notify of his/her presence, or he/she must to deposit the analysis request in a mailbox, etc.
- If the FAMT has received any complaints regarding the users of the CAP Rambla called by their first and last names when being subjected to an extraction.
- If the FAMT has assessed alternatives to calling users of the CAP Rambla extraction service by their first and last names. If so, what those alternatives would have been and the reasons why they would not have been implemented should be reported.

5. On 27/06/2019, the FAMT responded to the aforementioned request in writing in which it set out the following:

- That *"the programming of the day and time to proceed with the extraction is done in person at the information desk of the CAP (...). On the day designated for the extraction, the user must go directly to the Extractions waiting room, and there deposit the analysis request in a mailbox at the laboratory reception, to which only the health professionals of Mútua de Terrassa who carry out the extractions have access (...). Through the public address system in the waiting room, the relevant user is notified, calling them by name and surname, with an indication of the box number in which the extraction will be carried out".*
- That *"we are not aware of any complaint or claim"* because the people in the room waiting to be called by their first and last name
- That *"Mútua de Terrassa will assess the installation of a warning system to users using alphanumeric codes. However, it would be a system that would entail a high installation cost (...). However, Mútua Terrassa would like to emphasize that many times even this automated system would not allow the person to be called in certain exceptional cases (e.g. blind people or people of advanced age or with certain limitations to read). Therefore, weighing pros and cons, we understand that the current system is the most beneficial for the interests of users".*

6. On 02/06/2020, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the FAMT for an alleged infringement provided for in article 83.4.a), in relation to the article 32; both of 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). This initiation agreement was notified to the imputed entity on 06/15/2020.

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

7. In the initiation agreement, the accused entity was granted a period 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.

8. On 06/30/2020, the FAMT made objections to the initiation agreement. The accused entity provided, together with its statement of allegations, a document entitled *"Risk analysis report",* dated 06/13/2019, which had been drawn up following the initiation by this Authority of the prior information period.

9. On 14/10/2020, the instructor of this procedure formulated a resolution proposal, by which she proposed that the director of the Catalan Data Protection Authority admonish the FAMT as responsible for an infringement provided for in article 83.4.a) in relation to article 32, both of the RGPD.

This resolution proposal was notified on 29/10/2020 and a period of 10 days was granted to formulate allegations.

10. The deadline has passed and no objections have been submitted to the proposed resolution.

proven facts

The CAP Rambla - managed by the Terrassa Mutual Aid Foundation - has a room where those people who are waiting to be subject to an extraction stay. This room is surrounded by several numbered doors through which you can access the corresponding box where the extraction is carried out.

The people who remain in this room, when their turn comes, are called by megaphone by their name and two surnames, followed by the door number to which they should go.

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.

2. The accused entity has not made allegations in the resolution proposal, but it did so in the initiation agreement. In this regard, it is considered appropriate to reiterate below the most relevant part of the instructor's motivated response to these allegations.

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

2.1. On the expiry of the sanctioning procedure.

In the 1st section of its statement of objections to the initiation agreement, the accused entity highlighted that since it became aware of the opening of the previous information (13/06/2019) and respond to this Authority's information request (06/27/2019), until he was notified of the initiation of the present sanctioning procedure (06/13/2020) a year had passed. Regarding this, the FAMT considered that *"although the jurisprudence considers that, in general terms, the beginning of the previous actions of article 55 LPAC 39/2015 does not count towards the calculation of the expiration date of the administrative procedure sanctioning body, (...) the Supreme Court has pointed out in repeated judgments (among others, the STS of 13/05/2019 -RC 2415/2016- and the STS of 06/05/2015 -RC 3438/2012) that, in certain cases, the period of prior information may be taken into account (…)"* specifically, when *"this period of prior information has a manifestly inappropriate duration or that offers indications that it has been prolonged unnecessarily in violation of the law" .*

Regarding this allegation, it is first necessary to remember that Royal Decree 463/2020, of March 14, which declares the state of alarm for the management of the health crisis situation caused by COVID-19 provided, in its additional provision 3a, the suspension of the terms and the interruption of the terms for the processing of administrative procedures; suspension that was not lifted until 06/01/2020, in accordance with the provisions of article 9 of Royal Decree 537/2020 of May 22, which extended the state of alarm. Therefore, in the case at hand it cannot be said at all, as the accused entity claims, that the preliminary information phase has been extended for approximately one year; rather, the duration of this has been approximately nine months, if you take into account, as it cannot be otherwise, the aforementioned suspension of administrative procedures.

In the second place, indeed, as FAMT has highlighted in its statement of objections, there is repeated jurisprudence of the Supreme Court in which it maintains that the calculation of the expiry period begins with the formal act of initiation of the procedure, without counting the duration of the previous investigative actions. And in this regard, the aforementioned court clearly stated in its judgment of 04/21/2016:

"The expiration, with extinguishing effect of the expediente deslinde -not, obviously, of the exercise of the power to effect it, which is not subject to possible decay- operates for the duration of the time to resolve the procedure, but computable from the date of the agreement of initiation, so the previous or preparatory actions of the procedure, aimed at determining, with a preliminary character, if the circumstances that justify the initiation of the termination procedure do not count within this maximum expiration date. The previous proceedings - and this Court has consistently and repeatedly declared it so - do not affect the calculation of the expiration date of the procedure because the day to which, it must be reiterated once more, is determined by the adoption of the initiation agreement and his notification, without going back in time to moments when that preliminary activity was carried out.
In the present case, therefore, the expiration has not occurred, since the termination procedure was initiated by resolution of August 11, 2008, being approved by

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

Ministerial order of June 17, 2010. It should be added to the above that this is the univocal criterion of this Supreme Court, expressed in various judgments such as those of April 25, 2014 (appeal appeal nº 5603/2011), November 11 of 2015 (appeal appeal nº 971/2014) and November 13, 2015 (appeal appeal nº 560/2014) - to name only a few of the most recent ones - all of which place in the formal act of the initiation of the procedure the days a quo for the calculation of the expiration date, without attention to the preliminary actions".

The Supreme Court itself, in a previous judgment of 13/10/2011, had ruled on the consequences that could have previously excessively extended information:

"Well, once these previous actions have been carried out, the time it takes for the Administration to agree on the initiation of the procedure - in the case we are examining the initiation agreement was adopted on November 24, 2003 - may have the consequences that proceed as to the calculation of the prescription (extinction of the right); but it cannot be taken into consideration for the purposes of expiry, because this figure aims to ensure that once the procedure has been initiated, the Administration does not exceed the time it has to resolve".

This consolidated jurisprudence has been nuanced in the two judgments invoked by the FAMT in its allegations. Thus, in its judgment of 06/05/2015, the Supreme Court is pronounced in the following terms:

"an administrative action such as the one that occurred in the present case - extended period of prior verification and opening of the non-compliance procedure when the Administration has already practically carried out an instruction sufficient to appreciate that non-compliance exists - would only be objectionable if it can be proven that it has a deviant purpose of replacing the non-compliance procedure with a less guarantee activity,
if yes presumably only there would be nullity as of right - subject to the specific circumstances without which it is impossible to make general statements - in the event of an effective defenselessness or complete absence of procedure, in accordance with what is established in the article 62.1.a) and) of Law 30/1992. Secondly, as it is natural and we have already pointed out, there will always be the formal initiation of a non-compliance procedure before the irregularity has prescribed.
(...)
Thus, a period of prior information that has a manifestly inappropriate duration or that offers indications that it has been prolonged unnecessarily can lead to what the plaintiff intends in the present case and to consider that it has been part of the file properly as such, even before the formal opening agreement of the same"

And in the most recent judgment dated 05/13/2019, the Supreme Court ruled as follows:

"The appellant argues that if the denunciation act contained all the elements to sanction, such denunciation should be the starting point of the expiration date, apart from the date on which the formal initiation agreement was subsequently adopted; and this is because the complaint must be assumed

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

the initiation of the disciplinary proceedings given that it must include a brief statement of the facts with the circumstances and data that contribute to determining the type of infraction, as well as the place, date and time of the same, so that, completed conditions, although formally it cannot be spoken of as a procedure, but there is materially, when all the objective and subjective elements necessary for it come together. Therefore, the reasoning concludes, the initial day for calculating the time limit for the processing and resolution of the sanctioning procedure will be the date of the complaint and the 6-month period must be calculated since the Administration knows the existence of the violation and they have finalized the proceedings aimed at clarifying the facts, because otherwise the Administration will be granted an unlimited time to initiate the procedure.

The approach of the appellant cannot be accepted.
From the provisions in articles 42.3.a of 30/1992, of November 26, and 20.6 of Royal Decree 1398/93, of August 4, it is clear that, for the purposes of the possible declaration of the expiry of the procedure, the calculations of the period of time that the Administration has to resolve this with the agreement to initiate the file, therefore excluding from said calculation the period of time that has elapsed prior to the initiation of the file, that is, from the date of notice of the infringing event and, in its case, the employee in the so-called previous actions.

The appellant maintains that with that interpretation the Administration is being granted an unlimited period to initiate the procedure. However, this Chamber has declared that the period prior to the initiation agreement "... must necessarily be brief and not cover up an artificial way of carrying out acts of instruction and masking and reducing the duration of the subsequent proceedings" (judgment of 6 of May 2015, cassation appeal 3438/2012 FJ 2º, where a previous pronouncement on the same line of reasoning is cited, in turn).
That being the case, in the case before us the appellant party has not justified, or even alleged, that the time elapsed between the notification of the infringement and the agreement to initiate the proceedings was artificially used to carry out acts of instruction that were removed from the calculation of the expiry date. Thus, it is recorded in the administrative file that the events occurred on December 18, 2013; the Civil Guard's SEPRONA complaint (which includes an annex with a photographic report and a photographic map of the area) was formalized on February 13, 2014; and the agreement to initiate the disciplinary proceedings is dated March 19, 2014.
It cannot be affirmed, therefore, that the period prior to the initiation of the procedure was excessive or that during that period of time covert acts of instruction were carried out in order to subtract them from the calculation of the expiration date.

In summary, in accordance with the jurisprudential criteria contained in these last two judgments, the period of prior information can only be taken into account for the purpose of expiry of the procedure if it has been artificially extended in time in order to carry out acts of covert investigation and thus reduce the duration of the sanctioning file itself; a circumstance that will have to be analyzed case by case, without it being possible to establish a general criterion.

Well, as the instructor explained in the proposal, it is considered that the FAMT has not justified that, in the case at hand, the time elapsed between the beginning of the information and the initiation of the sanctioning procedure (as has said, approximately nine months), has been

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

artificially taken advantage of by this Authority so that, in the words of the Supreme Court, there has been a denaturalization of them or their deviant use in substitution of the sanctioning procedure for a less guaranteeing action.

It is for this reason that this plea is held to fail.

2.2. About the applicable penalty regime.

Next, the accused entity stated that to the extent that *"the data processing that has motivated the proposed sanction is carried out by the FAMT in the capacity of data processor on behalf of the Catalan Health Service (CATSALUT) , in the framework of the public assistance services provided by FAMT to CATSALUT insured persons due to the concert for the management of primary health care services of CatSalut in the area of ABS Terrassa",* must be applied to the FAMT of the special sanctioning regime provided for in article 77 of the LOPDGDD, which foresees not imposing financial sanctions on certain categories of persons responsible (or in charge) of treatment who have violated the regulations.

In this regard, it must be said that the list of entities cited by this legal precept is a closed list that does not allow an application by analogy. If the legislator had wanted the entities that act as in charge of the treatment of a public administration, whatever their legal form, to be subject to the regime provided for in article 77.1 LOPDGDD, they would have expressly included them in this closed list.

In accordance with what has been set out, it is estimated that this allegation cannot succeed.

2.3. About the penalty to be imposed.

In its latest plea to the initiation agreement, the FAMT listed a series of mitigating factors that, in its opinion, should be taken into account when setting the penalty.

The analysis of mitigating factors will be carried out in the 4th legal basis, which indicates the penalty to be imposed in this procedure.

3. In relation to the facts described in the proven facts section, it is necessary to refer to article 5.1.f) of the RGPD, which regulates the principle of integrity and confidentiality determining that personal data will be *"treated as in such a way that an adequate security of personal data is guaranteed, including protection against unauthorized or illegal treatment and against accidental loss, destruction or damage, through the application of appropriate technical and organizational measures".*

For its part, article 32.1 of the RGPD, regarding data security, provides the following:

> *"1. Taking into account the state of the art, the application costs, and the nature, scope, context and purposes of the treatment, as well as risks of*

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

variable probability and seriousness for the rights and freedoms of physical persons, the person responsible and the person in charge of the treatment will apply appropriate technical and organizational measures to guarantee a level of security adequate to the risk, which if applicable includes, among others:
a) pseudonymization and encryption of personal data;
b) the ability to guarantee the confidentiality, integrity, availability and permanent resilience of the treatment systems and services;
c) the ability to quickly restore availability and access to personal data in the event of a physical or technical incident;
d) a process of regular verification, evaluation and assessment of the effectiveness of the technical and organizational measures to guarantee the security of the treatment."

In the present case, the risks involved in the treatment of the data of the users of a health center in the terms described in the proven facts, must determine the need to implement the necessary technical and organizational measures to prevent unauthorized access authorized, objective expressly established in article 5.1.f) of the RGPD.

As indicated by the instructor, during the processing of this procedure the fact described in the proven facts section, which constitutes the offense provided for in article 83.4.a) of the RGPD, has been duly proven, which typifies the violation of *"the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43",* among which there is that provided for in article 32 RGPD.

The conduct addressed here has been included as a serious infraction in article 73.f) of the LOPDGDD, in the following form:

"f) The lack of adoption of technical and organizational measures that are appropriate to guarantee a level of security adequate to the risk of the treatment, in the terms required by article 32.1 of Regulation (EU) 2016/679."

4. When the FAMT does not fit into any of the entities provided for in article 77.1 of the LODGDD, the general sanctioning regime provided for in article 83 of the GDPR applies.

Article 83.4 of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 10,000,000 euros at most, or in the case of a company, an amount equivalent to 2% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount. This, without prejudice to the fact that, as an additional or substitute, the measures provided for in clauses a) ah) ij) of Article 58.2 RGPD may be applied.

In the present case, in accordance with what is established in articles 83.2 RGPD and 76.2 LOPDGDD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, and as explained by the instructor in the resolution proposal, it is appropriate to replace the sanction of an administrative fine with the sanction of admonition provided for in article 58.2.b) RGPD. In this sense, among the criteria provided for in article 83.2 of the RGPD, the following are taken into account: not having

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

proof of having caused harm or damage (art.83.2.a RGPD); FAMT's adherence to the code of conduct of the Catalan Hospitals Union (art. 83.2.j RGPD); the lack of benefits obtained as a result of the commission of the offense (art. 83.2.k RGPD and art. 76.2.c LOPDGDD); and, especially, the fact that the FAMT had already begun, even before the preliminary information that preceded this procedure was initiated, to implement in other centers of its organization measures to avoid events such as those that gave rise to the initiation of this procedure (art. 83.2.k RGPD).

5. Given the findings of the violations provided for in art. 83 of the RGPD in relation to privately owned files or treatments, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, empowers the director of the Authority for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected.

At this point, the document entitled *"Risk analysis report",* dated 06/13/2019, which the FAMT provided together with its statement of objections to the initiation agreement, should be brought to the table , which analyzes the measures that could be adopted in order to comply with the regulations.

"Implantation of an automated shift management system ("PLEXUS")
The system consists of the installation of the necessary elements to be able to manage the flow of patients in a pseudonymized manner (printers, pedestals, information screens and signage elements)"

The FAMT explained that this system had already been implemented in other centers of the entity, but that its installation at the CAP Rambla, which was planned for 2020, due to the current pandemic situation will be delayed until 2021. Given the previous one, the entity was analyzing the feasibility of implementing other measures of a provisional nature until the installation of the aforementioned "Plexus" system:

- Grouping of the extraction service or the External Consultations of the Station building (Pl. Rights Humans), where the "Plexus" automatic queue management system is implemented:
Provisional measure assessed, while managing the implementation of the automated queue system at CAP Rambla.
March 20: This measure has been temporarily discarded for health reasons, which impose capacity restrictions due to COVID19.
- Delivery of numbered tickets at the entrance of the extraction room, with the number noted on the request document that is deposited or the mailbox:
Measure discarded for organizational reasons, to consider that it has a large margin of human error in the annotation of the number in the request (the average age of the users is very high in this CAP).

- Assignment of a number when arranging the visit:
Measure discarded for organizational reasons, women it is not technically possible to coordinate the shift number assigned between the CAP information desk and the telephone service number (managed by an external provider of the call center service).

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

In this regard, it must be said that despite attributing the eventual delay in the implementation of the "Plexus" system to the current situation of uncertainty, both health and economic, caused by the current pandemic, this does not justify that, until after this implementation, the data protection regulations will continue to be violated, especially considering that some of the possible alternative solutions proposed by the FAMT itself could be perfectly valid - with small variations that would avoid the risk evidenced by the FAMT due to age advance of CAP users, such as the delivery of numbered tickets. So, for example, noting the shift number in the doctor's analysis request (which is the document that the user enters into the mailbox), instead of being done by the patient, could be done by an employee of the FAMT.

As it has been advanced, by virtue of the faculty attributed to the director of the Authority in article 21.3 of Law 32/2010, the FAMT is required because as soon as possible, and in any case within the maximum period of two months from the day after the notification of this resolution, adopt the appropriate measures to guarantee the security of personal data in the framework of the treatment and the center specified in the declared facts proven in this procedure, without prejudice of the inspection faculty of this Authority to carry out the corresponding checks.

resolution

For all this, I resolve:

1. Admonish the Terrassa Mutual Aid Foundation as responsible for an infringement provided for in article 83.4.a) in relation to article 32, both of the RGPD.

2. To require the Mutual Aid Foundation of Terrassa to adopt the corrective measures indicated in the 5th legal basis and to accredit before this Authority the actions carried out to comply with them.

3. Notify this resolution to the Mutual Aid Foundation of Terrassa

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

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

notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating 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,