Machine Translated by Google

apdcat
Autoritat Catalana de Protecció de Dades

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

File identification

Resolution of sanctioning procedure no. PS 52/2020, referring to the Adult Mental Health Center of the Sacred Heart Hospital in Martorell.

Background

1. En data 11/10/2019, va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per remissió de l'Agència Espanyola de Protecció de Dades, un escrit d'una persona pel qual formulava denúncia contra l'Institut Català of Health (henceforth, ICS), due to an alleged breach of the regulations on the protection of personal data. From the letter of complaint it is inferred that the person making the complaint complained that they had provided him with an analytics request sheet in which the words *"ANALYTICS REQUEST"* were mentioned *"MENTAL HEALTH".* The reporting person provided the anonymized request sheet.

Machine Translated

2. The Authority opened a preliminary information phase (no. IP 275/2019), 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. In this information phase, on 20/10/2019 the ICS was required to report, among others, on whether around 20/09/2019 an analysis had been requested regarding the reporting person and, if so, the reasons why the expression *"mental health" was included in the analytical request sheet.*

4. On 05/12/2019, the ICS responded to the request through a letter in which it indicated that *"in the analytical request Cap Just Oliveres is listed as the receiver, the issuer is the CSMA* [Centre de Salut Mental d'Adults] *of the Sagrat Cor de Martorell Hospital which does not have a laboratory, which is why they refer the request for analysis to the ICS, giving the patient the request form. It is for this reason that ICS does not have the request sheet".*

5. Given that the header of the analytics request sheet corresponded to CAP Just Oliveras de l'Hospitalet de Llobregat, on 09/12/2019, the ICS was again required to report, among others , on whether the ICS drew up the analytical request model that the CSMA of the Sagrad Cor de Martorell Hospital would have used in relation to the person making the complaint.

6. On 11/12/2019, still within the framework of this prior information phase, the Hospital Sagrat Cor de Martorell was required to, among others, report on whether it had requested the 'ICS an analysis referring to the reporting person.

Machine Translated by Google

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

7. On 12/23/2019, the Hospital Sagrat Cor de Martorell responded to the previous request through a letter in which it stated that *"we do not have in our database any analysis requested on behalf of the complainant ."*

8. On 23/01/2020, the ICS responded to the request made on 09/12/2019, through a letter in which it stated, among others, the following:

ÿ That the analytical request had been made by the CSMA of the Hospital Sagrat Cor de Martorell, but the request model was drawn up by the Hospitalet Clinical Laboratory, which belongs to the ICS.
ÿ That this model was made available to Mental Health centers that did not have ECAP (electronic processing) in order to make it easier for citizens to have the extraction done at their health center.

- That the reporting person is not a patient of the CSMA, but rather her daughter, that the analytical sheet was given to the patient.
- That the CSMA indicates that they do not have a copy of the analysis sheet. That the request to the patient and that no copies remain.
- That from the CSMA they indicate that *"for two years the requests that are used no longer include Mental Health and they understand that the reason why this sheet was handed in is that there were some old requests and it was mistakenly given to the patient."*

9. On 06/29/2020, the CSMA of the Sagrat Cor de Martorell Hospital was requested to, among others, confirm whether the analytical request that is the subject of the complaint was requested in relation to the daughter of the complainant. If the answer is yes, specify the date of the request. He was also required to report if, at the time of said request, the models provided by the ICS no longer contained the words *"Mental Health".*

10. On 07/14/2020, the CSMA of the Sagrad Cor de Martorell Hospital responded to the request dated 06/29/2020, by means of a letter stating the following:

- That there is a request for analysis relating to the daughter of the reporting person dated 09/16/2019.
- That *"the ICS model that was used at the time no longer included mental health".*
- That *"by mistake, an old print that said Mental Health was used".*
- That *"we have proceeded to review if there are old forms in the CSMA in order to proceed with ours destruction".*

11. On 06/11/2020, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the CSMA of the Sagrat Cor de Martorell Hospital for an alleged infringement provided for in article 83.5.a) , in relation to article 5.1.c); 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). This initiation agreement was notified to the imputed entity on 11/18/2020.

Machine Translated by Google

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

12. 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.

13. On 30/11/2020, the CSMA of the Hospital Sagrat Cor de Martorell made objections to the initiation agreement, which are addressed in section 3 of the legal foundations.

14. On 01/21/2021, the person instructing this procedure, in view of the allegations presented by the accused entity and the rest of the actions contained in this procedure, in accordance with the provisions of article 90.2 of the LPAC, considered it more appropriate to classify the facts as a violation of the principle of confidentiality of data, contained in article 5.1.f) and formulated a resolution proposal, by which it proposed that the director of the Catalan Data Protection Authority declared that the CSMA of the Hospital Sagrat Cor de Martorell had committed an infringement provided for in article 83.5.a) in relation to article 5.1.f) of the RGPD.

This resolution proposal was notified on 28/01/2021 and a period of 10 days was granted to formulate allegations. The deadline has passed and no objections have been submitted.

15. On 03/02/2021, the accused entity paid in advance 1,200 euros (one thousand two hundred euros), corresponding to the monetary penalty proposed by the investigating person in the resolution proposal, once the reduction of 20% provided for in article 85.2 of Law 39/2015.

proven facts

On 09/16/2019, the Adult Mental Health Center (CSMA) of the Hospital Sagrat Cor de Martorell gave the daughter of the person making the complaint an analytical request form so that an analytical test could be performed on her Clinical Laboratory Clinical Laboratory Just Oliveres de l'Hospitalet (centre belonging to the ICS). The analytics request form contained the words "Mental Health" which was in no way necessary data to be able to practice analytics.

Fundamentals of law

1. In accordance with article 3.f) of Law 32/2010, of October 1, of the Catalan Data Protection Authority, the scope of action of the Catalan Data Protection Authority Data Protection includes the treatments carried out by: *"f) other private law entities that provide public services through any form of direct or indirect management, if it is files and treatments linked to the provision of these services ".* 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 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.

Machine Translated by Google

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

2. In accordance with article 85.3 of the LPAC, both the recognition of responsibility and the voluntary advanced payment of the proposed monetary penalty lead to the application of reductions. The effectiveness of these reductions is conditioned on the withdrawal or renunciation of any action or appeal through the administrative route against the sanction. For both cases, sections 1 and 2 of article 85 of the LPAC provide for the termination of the procedure.

3. Although it presented allegations in the initiation agreement, the imputed entity has not formulated allegations in the resolution proposal, and has opted for the option of voluntary payment to reduce the amount of the penalty. However, it is considered appropriate to reiterate below the most relevant of the reasoned response that the instructing person gave to the allegations before the initiation agreement.

3.1 On the existing relationship between CatSalut and the CSMA and on the controversial document.

First of all, the accused entity stated that, although the request for analysis was made by the CSMA, the document model that included the mention "Mental Health" was provided by the Just Oliveres Clinical Laboratory (the ICS) . Well, in relation to the laboratory, it should be clarified that it is one of the six clinical laboratories of the ICS, which assumes the primary care activity of its area of influence, specifically, the Southern Metropolitan Area. It should be added that the CSMA "does not have a laboratory, which is why it refers the analytical request to the ICS, giving the patient the request form".

Secondly, the CSMA stated that it never received any instructions or communication from the data controller (from the ICS, from the Clinical Laboratory of l'Hospitalet, nor from CatSalut) to remove the words from the analytical request forms "MENTAL HEALTH".
At the outset, with regard to this specific data treatment, it is necessary to determine who is responsible for the treatment and also who acts as the person in charge of treatment, in order to determine responsibility for the use of the controversial model. According to article 4.7) of the RGPD, the data controller is the natural or legal person, public authority, service or other body that, alone or together with others, determines the purposes and means of the treatment; on the other hand, it is in charge of treatment: the natural or legal person, public authority, service or other body that processes personal data on behalf of the person responsible for the treatment (Article 4.8) of the RGPD). Well, on 01/01/2012, CatSalut and the CSMA signed the "Unique Agreement to link to the network of internment centers for public use in Catalonia and to manage mental health services", which has a duration of ten years. In accordance with the same, the CSMA is in charge of managing mental health services for patients treated on behalf of CatSalut. In relation to the protection of personal data, the twenty-sixth agreement of the agreement determines that the Contracting Administration (CatSalut) is responsible for the treatment (at that time, responsible for the file). Therefore, we can conclude that CatSalut is the controller, while CSMA is the controller.

Regarding the obligations regarding the protection of the personal data of the people served by the CSMA on behalf of CatSalut, the fourth agreement of the agreement obliges the CSMA to carry out the corresponding personal data protection audits. The eleventh agreement obliges the CSMA to “do

Machine Translated by Google

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

special mention" in the aspects of structure, procedure and management that refer to privacy. In particular, it is interesting to highlight the twenty-sixth agreement, which, referring to the CSMA, establishes that "The documentation and information that comes out or to which you have access during the provision of the services derived from this agreement, which correspond to the Contracting Administration responsible for the personal data file (CatSalut), is confidential and may not be reproduced in whole or in part by any means or support; therefore, it may not be processed or computerized, nor transmitted to third parties outside the strict scope of the direct execution of the agreement, not even among the rest of the staff that the entity has or may have that provides the service that is the subject of this agreement". In addition, he adds that he will have to respect Recommendation 1/2008, of April 15, of the Catalan Data Protection Authority, on the dissemination of information containing personal data via the Internet.

In accordance with what has been set out above, it can be concluded that CatSalut is responsible for treatment, while the CSMA is the person in charge of treatment(s) of the data of the people who are treated at the CSMA on behalf of from CatSalut. Since the CSMA does not have a clinical analysis laboratory, it refers the people it treats on behalf of CatSalut to the Just Oliveras Clinical Laboratory, which belongs to the ICS. Consequently, in relation to the data processing carried out for the provision of the extraction and analysis service, the clinical laboratory acts as sub-processor. In relation to this treatment, it is not stated in the agreement, nor has it been proven that CatSalut had given any instructions to the CSMA on the use of the controversial form model.

Thirdly, the CSMA stated that two years before the alleged events, specifically in November 2017, it decided to delete the mention "MENTAL HEALTH" from the forms, because it understood that it contravened the right to the protection of patients' data. Into evidence was an email dated November 6, 2017, sent from a CSMA email address to a plurality of recipients corresponding to CSMA addresses. The content of the email referred to a new version of the analytics request form. More specifically, it was mentioned that the Clinical Laboratory had introduced small changes to the form, without specifying them, and added: *"we have removed the title "Mental Health" in favor of data protection of the person served. From now on this is the model we have to use and remove the old one. We can reuse the forms that are made as raw sheets".* He also contributed
a series of emails from the address (...)ics@gencat.cat, from the clinical laboratory, sent to two CSMA email addresses. Specifically, the email dated 2/11/2017, the subject of which specifies "analytics request form" and its content is as follows: *"Good afternoon, I am attaching a new version of the form for making analytics requests, with minor changes in format. I will appreciate please use this new one and release the previous one. Send it to all your colleagues."* There is no attached document. Another mail dated 3/11/2017, with the same subject and an attached document entitled “PETITION MENTAL HEALTH 20171027.docx, the content of the mail is the same as the previous one. Finally, the email dated 11/15/2017, the subject of which is "RE: analytical request form" and its content: *"I am sending the request form again. It seems that the one I sent you on the 3rd had an error that made it difficult to complete it”.* As an attached document the following: "Petition Mental Health.docx."

Machine Translated by Google

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

Well, it has been proven that it was the laboratory that provided the model form, in fact the laboratory's email address is from the ICS and not from CatSalut, who is responsible for the treatment. On the other hand, there is no record that CatSalut gave any instructions in the sense of using an analytics request form that included the mention "Mental Health". In addition, the CSMA, with good judgment and in compliance with the twenty-sixth section of the agreement signed with CatSalut, in November 2017 decided to delete "Mental Health" from the analytical request forms because it violated the right to the protection of patient data. He also instructed his workers not to use the old forms and that any printed sheets that might have been left should be used as blank sheets. Despite everything, two years later there were still forms that included the controversial mention, as has been proven and recognized by the accused entity. It records that they were used on at least one occasion.

In accordance with what has been stated, this instructor considers that the use in 2019 of the obsolete form can be attributed to a one-time error, but she also believes that the old forms should have been destroyed or rendered useless that were not usable, thus avoiding their use by mistake. That is why it is considered that the plea cannot succeed.

3.2 On the nature and significance of the error.

The reported entity alleged that the facts did not have sufficient entity to motivate a sanctioning procedure and cited the file resolution of this Authority relating to IP 295/2018. However, the cited resolution is not applicable to the present case. In effect, the above-mentioned file resolution dealt with an error in registering an email address, and during the preliminary information phase it could not be proven that personal data had been compromised. On the other hand, in this case personal data is compromised, specifically data from special categories, such as health data.

It also alleged that the person was not affected and refers to an alleged letter sent to the CSMA by the representative of the affected person in which he would express his desire not to demand responsibility from the CSMA. Well, with respect to this, this instructor considers that it is not up to her to pronounce on the intention of the representative of the affected person to demand responsibility or not from the CSMA, which in any case is a right that the affected person has recognized in the article 79 of the RGPD. However, what needs to be stated is that the degree of impact on the person does not distort the proven facts or the legal qualification, and that it is the competence of this Authority to determine the eventual responsibilities that arise from the facts of which it has knowledge and that constitute a violation of the regulations on data protection

3.3. On the nature of the concept "MENTAL HEALTH" and the communication of data in a health environment.

Next, the accused entity argued that the concept "Mental health" does not involve the treatment of a new category of data, since the laboratory carries out health data treatments and, even, the conditions of the treatment are subject to to the provisions of article 9 of the RGPD. In relation to this, it should be noted that Article 9 of the RGPD establishes the general prohibition of

Machine Translated by Google

apdcat
Autoritat Catalana de Protecció de Dades

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

processing of data of special categories, except for those circumstances that are included in the same article. This is why health data can only be processed in the cases established in article 9.2.h) of the RGPD and by a professional subject to the obligation of professional secrecy or under his responsibility (article 9.3 RGPD) . Having said that, it should be borne in mind that the fact that the laboratory carries out treatments involving health data does not authorize the CSMA to treat the data without taking into account the principles applicable to the treatment, among which is the principle of confidentiality. As explained in section 3.1, the ICS, or in other words, the laboratory that belongs to the ICS, is in this case a third party to which the CSMA has communicated health data that in no case is it necessary in order to practice an analysis.

The communication of this data is not protected in the relationship between the person in charge of treatment, given that the ICS is a third party. Even more, as provided in article 5 of the LOPDGDD "1. those responsible and in charge of data processing as well as all the people who intervene in any phase thereof are subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679". Therefore, even if the communication of data has taken place in an environment where health data is processed, this does not mean that the "Mental Health" data can be disclosed, which is in no case necessary to carry out an analysis on the person affected and in this case the communication is made to a third party, the laboratory. In fact, section 2on of the previous article emphasizes that the duty of confidentiality is complementary to the duty of professional secrecy, which implies extra diligence on the part of those responsible and in charge of the treatment, without it being considered that because the laboratory treats health data, the CSMA is not obliged to apply the necessary measures to comply with the principle of confidentiality.

Machine Translated

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

3.4 On the reporting principles of Administrative Law and objective responsibility.

Finally, the accused entity claimed that no type of penalty should be imposed, as the reporting principles of Administrative Law are contrary to objective responsibility.

On this, this Authority has recalled in several resolutions (for all, the resolution of sanctioning procedure no. 52/2012), the jurisprudence on the principle of culpability.

In accordance with the same, 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. Having said that, the Supreme Court specifies the concept of culpability in several judgments, all of 16 and 22/04/1991, and considers that culpability exists when the action or omission classified as an administratively punishable offense is imputable to its author due to grief or imprudence, negligence or inexcusable ignorance. And in the specific area of data protection, the National Court pronounces itself in the same sense: *"simple negligence or breach of the duties that the Law imposes on the persons responsible for files or data processing is enough to extremar diligence..." (SAN* of 12/11/2010, Rec 761/2009). Still along the same lines, the Supreme Court, among others, in the sentence of 01/25/2006, also issued in the area of data protection, establishes that intentionality is not a necessary requirement for a conduct be considered guilty.

Machine Translated by Google

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

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

4. In relation to the facts described in the proven facts section, relating to the principle of confidentiality,

it is necessary to refer to article 5.1.f) of the RGPD, which foresees that personal data *"must be treated in such a way as to guarantee adequate security, including protection against unauthorized or unlawful processing and against the loss, destruction or accidental damage of data, through appropriate technical or organizational measures (integrity and confidentiality)".*

During the processing of this procedure, the fact described in the proven facts section, which is constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies the violation *"a) The basic principles for treatment, including conditions for consent, in accordance with articles 5, 6, 7 and 9".*

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

> *"The violation of the duty of confidentiality established by article 5 of this organic law."*

5. As the CSMA of the Hospital Sagrat Cor de Martorell is a private law entity, the general sanctioning regime provided for in article 83 of the RGPD applies.

Article 83.5 of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 20,000,000 euros at most, or in the case of a company, an amount equivalent to 4% 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, as explained by the investigating person in the resolution proposal, the possibility of replacing the sanction of an administrative fine with the sanction of reprimand provided for in article 58.2.b) RGPD should be ruled out, given that the facts imputed in in relation to the violation of the principle of confidentiality affecting health data, which have an added protection for affecting the intimate sphere of the affected person.

It is ruled out that the penalty of an administrative fine should be replaced by a warning, according to what is established in article 83.2 of the RGPD and article 29 of Law 40/2015 which enshrines the principle of proportionality, a penalty of 1,500 euros (thousand five hundred euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, the concurrence of the following causes is observed:

Machine Translated

Machine Translated by Google

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

- The lack of intentionality or negligence in the infringement (article 83.2.b RGPD).
- There are no previous violations committed by the entity (article 83.2.e RGPD)
- The lack of profits obtained as a result of the commission of the offense (article 76.2.c LOPDGDD).

On the contrary, as aggravating criteria, the following elements must be taken into account:

- The categories of personal data affected by the infringement (article 83.2.g GDPR)

6. On the other hand, in accordance with article 85.3 of the LPAC and as stated in the initiation agreement, if before the resolution of the sanctioning procedure the accused entity acknowledges its responsibility or does the voluntary payment of the pecuniary penalty, a 20% reduction must be applied on the amount of the provisionally quantified penalty. If the two aforementioned cases occur, the reduction is applied cumulatively (40%).

Well, as indicated in the antecedents, on 03/02/2021 he paid in advance 1,200 euros (one thousand two hundred euros), corresponding to the amount of the penalty resulting once the reduction of 20 %.

7. Article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, authorizes the director of the Authority for the resolution declaring the infringement to establish the appropriate measures so that cease or their effects are corrected. In the present case, however, given that it was a one-off error and that the accused entity proceeded to review the existence of old forms and, if found, to proceed with their destruction, it should not be required the adoption of corrective measures, because they have already been taken.

For all this, I resolve:

1. To impose on the Adult Mental Health Center of the Sagrad Cor de Martorell Hospital the sanction consisting of a fine of 1,500 euros (one thousand five hundred euros), as responsible for an infringement provided for in article 83.5. a) in relation to article 5.1.f), both of the RGPD.

2. Declare that the Adult Mental Health Center of the Hospital Sagrat Cor de Martorell has effected the advance payment of 1,200 euros (one thousand two hundred euros), which corresponds to the total amount of the penalty imposed, a once applied the 20% deduction percentage corresponding to the reduction provided for in article 85.2 of the LPAC.

3. Notify this resolution to the Adult Mental Health Center of the Sagrad Cor de Martorell Hospital.

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.

Machine Translated

Machine Translated by Google

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 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.

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,

Machine Translated