

## File identification

Resolution of sanctioning procedure no. PS 23/2021, referring to the Management Foundation Hospital of the Santa Creu and Sant Pau Hospital.

## Background

1. On 06/25/2020, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Foundation for Health Management of the Hospital de la Santa Creu i Sant Pau ( hereinafter, the Foundation), due to an alleged breach of the regulations on the protection of personal data. Specifically, the complainant - a doctor who provided service at the Hospital - complained that on 04/24/2020 from the secretariat of the Hospital's (...) Service, it was sent to all the team of this Service (optional/ves and residents) an email, which was accompanied by an excel document relating to the distribution of work shifts, in which it was indicated that the reason for the absence from work of some of the people listed there was a medical leave and, in some specific cases, that said leave was related to COVID.

The person making the complaint, in order to prove these facts, provided a copy of the email that was sent on 04/24/2020 at 1:37 p.m. from the secretariat of the Service of (...) to the staff of cited Service. This email was accompanied by the excel document entitled "*April 20-May 3 Distribu-1.xlsx*", which includes a table with two columns named, respectively, "*Covid + leave or under study*" and "*Medical leave*", in which it states the initial of the full first and last name of the doctors of the Service who would be in any of the situations described.

2. The Authority opened a preliminary information phase (no. IP 178/2020), 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 were capable of motivating the initiation of a sanctioning procedure.

3. In this information phase, on 09/21/2020 the reported entity was required to report on the following:

- Justify the need to send to all the people who appear in the excel table that accompanied the aforementioned email, the specific reason for the absence from work of the people listed in the columns "*Covid leave + or in study*" and "*Medical leaves*".
- Indicate whether the explicit consent of the people included in the table as affected by a medical leave or COVID was counted, to provide this information to the rest of the people to whom the aforementioned e-mail was sent.

4. On 05/10/2020, the Foundation responded to the aforementioned request in writing in which it set out the following:

- That the excel document that contained the data subject to the complaint (*"a table showing the professionals who worked that week"*) was sent in a context of high healthcare pressure due to the pandemic
- That *"during that time the hospital underwent an exaggerated organizational change and in order to organize the changes that were happening from one day to the next, the management of the service worked with this Excel which contained the planning who worked that week and who was on leave, and therefore could not provide the services. It was essential to know why the professional could not provide services, since it was not the same to have tested positive for Covid, as to be absent for another reason. It should be noted that this was only an internal document of the service management. Also, initially, with the lack of knowledge about the disease, the selection of not being in a Covid area could follow the criterion of having already been infected or not. That is to say, the placement of the worker in a device could be motivated by whether the person had already been infected, that is, by a criterion of protection (sic)"*.
- That *"to understand how the head of service came to have this detail of information, it is important to bear in mind that when there was a positive, it was necessary to see if it was necessary to carry out a contact study by Occupational Health. In the contact study, the contacts that the infected person had had 48 hours before testing positive had to be studied. Therefore, the occupational health service, in the event that it was necessary to carry out a contact study, communicated this to the head of service to obtain more information"*.
- That *"with regard to the request for information regarding whether the interested party's consent was available, it must be indicated that in no case was there a desire to provide this information to the rest of the service's personnel. Once the document was worked on, and for coordination purposes, it was sent to the rest of the professionals in the service, eliminating the leave table. By mistake, the secretary sent the document without erasing the table"*.

5. On 04/16/2021, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the Foundation for an alleged infringement provided for in article 83.5.a), in relation to the article 5.1.f); 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 04/19/2021.

6. In the initiation agreement, the accused entity was granted a term of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests

7. On 04/22/2021, the Foundation formulated a letter in which it did not question the facts alleged in the initiation agreement, nor its legal qualification; and he reiterated what he had stated in the framework of the previous information in relation to the circumstances that led to the facts that are imputed in this procedure.

8. On 06/21/2021, the instructor of this procedure formulated a resolution proposal, by which she proposed that the director of the Catalan Data Protection Authority admonish the Foundation as responsible for an alleged infringement in article 83.5.a) in relation to article 5.1.f), both of the RGPD.

This resolution proposal was notified on 06/23/2021 and a period of 10 days was granted to formulate allegations.

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

proven facts

On 04/24/2020, from the secretariat of the Service of (...) of the Foundation - dependent on the direction of the Service -, it was sent to the entire team of the aforementioned Service (facultatives and residents) an email, which was accompanied by an excel document entitled "*20 abril-3 mayo Distribu 1.xlsx*", which contained the distribution of work shifts during that week. This table included two columns called, respectively, "*Leaves with Covid + or under study*" and "*Medical leaves*", which contained the initial of the first name and the full first surname of the doctors of the Service who would be in one of the situations described.

Thus, all the recipients of the controversial email were able to know the situation of "medical leave" or "leave due to Covid or in study", in which certain people were on that date.

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 imputed entity has not made any objections to the resolution proposal, and how has the Foundation, in its letter of 04/22/2021, submitted to the initiation agreement of the present procedure, he also did not question the facts alleged in said agreement, nor their legal qualification; rather, he limited himself to reiterating what he had already stated in the framework of the previous information in relation to the circumstances that led to the facts that are imputed in this procedure, and which is reproduced here. As the instructor did in the proposal, it should be noted from this letter that the Foundation wanted to make it clear, first, that the controversial document was sent at a time of high healthcare pressure due to the pandemic; and, secondly, that *"in no case was there any desire to facilitate this*

*information to the rest of the service staff. Once the document was worked on, and for coordination purposes, it was sent to the rest of the professionals in the service, eliminating the leave table. By mistake, the secretary sent the document without erasing the table".*

In this regard, it is worth saying that this Authority is fully aware of the very high healthcare pressure that all the health centers suffered on the dates when the shipment that was the subject of the complaint took place (April 2020); and understands that, certainly, the circumstances were very complicated and required an additional over-effort on the part of all the staff at the service of the health centers and hospitals; however, it should also be noted that despite the exceptionality of these circumstances, those responsible for the treatment must continue to guarantee the right to data protection of those people whose data they treat, and especially when the data subject to treatment is data of health, which are considered a "special category of data" in the RGPD and which are subject to special protection, precisely because they affect the most intimate and private sphere of people.

This Authority does not dispute that the Head of Service should have known the controversial data, for the reasons set out by the Foundation in the previous information and reiterated in its letter of 04/22/2021; but the rest of the people in said Service did not have to know them, since to carry out their duties it was enough for them to know who the professionals were on each shift. This is why, despite the exceptional circumstances in which the facts that are considered proven occurred, they must be considered to constitute a violation of the data protection regulations, in accordance with the qualification that is indicated below .

3. 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 provides that:

*"1. The personal data will be:*

*(...)*

*f) processed in such a way as to guarantee an adequate security of personal data, including protection against unauthorized or illegal processing and against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality").*

On the other hand, Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter, LOPDGDD), establishes the following in its article 5, relating to the duty of confidentiality:

*"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.*

*2. The general obligation indicated in the previous section is complementary to the duties of professional secrecy in accordance with its applicable regulations (...)"*

During the processing of this procedure, the fact described in the proven facts section, which is considered constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies the violation of *"the principios básicos para el tratamiento"*, among which the principle of confidentiality is at the top.

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"*

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:

*"(...) 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."*

And section 3 of art. 77 LOPDGDD, establishes that:

*"3. Without prejudice to what is established in the previous section, the data protection authority must also propose the initiation of disciplinary actions when there are sufficient indications to do so. In this case, the procedure and the sanctions that must be applied are those established by the legislation on the disciplinary or sanctioning regime that is 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 this case, however, and as indicated by the instructor in the proposal, it is not considered appropriate to require the adoption of corrective measures when it is a one-off fact that has already been accomplished.

For all this, I resolve:

1. Admonish the Foundation for Health Management of the Hospital de la Santa Creu i Sant Pau as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), both of RGPD

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 4th legal basis.

2. Notify this resolution to the Health Management Foundation of the Hospital de la Santa Creu i Sant Pau

3. Communicate the 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.

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,