

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

File identification

Resolution of sanctioning procedure no. PS 32/2021, referring to the Catalan Health Service.

Background

1. En data 29/06/2020 va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per trasllat de l'Agència Espanyola de Protecció de Dades, un escrit d'una persona pel qual formulava denúncia contra diverses entitats amb motiu de various alleged breaches of the regulations on personal data protection. This letter was supplemented by a later one dated 08/19/2020. Among others, the complainant (Mr. (...)) complained that *"in the week of 14/11/2019"* a person who claimed to call from the Catalan Health Service (hereinafter, CatSalut) , he called the landline at his home and *revealed "to his mother and family who picked up the phone"* that the complainant was a patient in a mental health center at the time, a fact that, according to the complainant, these relatives did not know. The complainant indicated that CatSalut had tried to make the call to the Mental Health Center responsible for the call (...), but that he questioned the eventual responsibility of this Center since the person who called, according to the complainant, he made it clear that he was doing it on behalf of CatSalut.

In order to prove this fact, the complainant provided a copy of the email that had been sent to him on 12/02/2020 by the CatSalut Citizen Management Department, through which he responded to the claim that the complainant here would have made before this entity for the same facts that are the subject of a complaint before this Authority, in the following terms:

"In relation to your claim in which you refer to the violation of your privacy through a telephone call from the CSMA (...), we inform you that: The CatSalut User Management Division has found that an error occurred when indicating where the phone survey was being called from and the center has been contacted to prevent this type of situation from happening again.

It has been verified that the phone listed on your record as insured is your home phone. In order to modify this data and for the communication to be directly with you, we offer you to send us your mobile phone, through this web form.

The User Management Division will contact you in order to modify this data and prevent you from having to do it in person at your Primary Care Center.

They are very sorry for the inconvenience this event may have caused and the appropriate measures are being taken to ensure that these events do not happen again."

2. The Authority opened a preliminary information phase (no. IP 182/2020), 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 1 October, on the common administrative procedure of public administrations (now

hereinafter, LPAC), to determine whether the facts were likely to motivate the initiation of a disciplinary procedure.

3. In this information phase, on 10/29/2020 the Center (...) SA (hereinafter, CPB) - entity that manages the Mental Health Center (...) - was required to inform if an employee of said mental health center had made the disputed call that was the subject of the complaint; and, in the event of an affirmative answer, state the reasons and circumstances that would have justified the disclosure of the information relating to the complainant to the family members who answered the call.

4. On 11/11/2020, the CPB responded to the aforementioned request in writing in which it reported the following:

- That, *"after the relevant inquiries have been made in collaboration with the administrative and assistance managers of the CSM (...), it is not known that any worker or collaborator of Center (...), SA has made a telephone call with characteristics similar to the one reported by the interested party"*.
- That *"in addition, it has been verified that the administrative department of care for the user of the Center in question does not have the telephone number to which, according to the complainant, the call that motivated the complaint was made of the interested party (93...). This telephone number is also not included in any other file that Center (...), SA owns."*

5. In view of the above, on 19/11/2020 CatSalut was required to answer several questions relating to the events reported, specifically:

- Details of the actions that had been carried out by the CatSalut User Management Division that made it possible to verify, in accordance with what was specified in the mail that was sent here denouncing the 12 /02/2020 (transcribed in background 1) that *"an error occurred when indicating where the phone survey was being called from and the center has been contacted in order to avoid that this type of situation is repeated again"* .
- Indicate the center from which, according to the investigations carried out by the Division of User Management, the call object of the complaint was made.

6. On 14/12/2020, CatSalut responded to the previous request in writing in which it informed that the call object of complaint had been made from the entity Obertament Associació Catalana per a la Lluita contra l 'Stigma in Mental Health (henceforth, OPEN), which was *"the promoter of the assessment/ survey"* on the stigmatization of patients with mental health problems, in the framework of which the said phone call.

7. On 17/12/2020 the entity was required OPENLY, in order to comply with the following:

- Indicate the circumstances and in what condition OPENLY he would have accessed the data of the complainant as recipient of the survey on stigmatization of people with mental health problems, being a user of a mental health center in the framework of the public provision of health services.
- Confirm whether any employee/collaborator of OBERTAMENT, in the week of 14/11/2019, disclosed by telephone to any person in the family environment of the complainant that he was a user of a health center mental. If you answer in the affirmative, indicate the reasons why such information would have been provided to a person other than the affected person.
- Report if OPENLY has any protocol or instruction addressed to its employees or collaborators in relation to the processing of data in the context of telephone calls intended for users of the public health system.

8. On 01/22/2021, OBERTAMENT answered the previous request in writing in which it reported the following:

- That *"scientific literature confirms that the prejudices present among health professionals affect the treatment received by patients with a psychiatric diagnosis and, therefore, the quality of care"*, and that it was under this premise that *"together with the Department of Health developed an anti-stigma intervention aimed at professionals in this area. The intervention is part of the Comprehensive Care Plan for People with Mental Disorders and Addictions of the Generalitat de Catalunya"*.
- That *"during the development process of the intervention, the possibility arose to include a question within the survey system to assess the quality of the service and the degree of satisfaction of the users. The question is: "How willing is the professional who attends you to respect the decisions you make?". The hypothesis is that this question would help to monitor the degree of paternalism and meddling of the professionals. To validate the question and verify its psychometric properties, it was necessary to test it on a randomized group of patients from Adult Mental Health Centers"*.
- That *"to carry out the validation from Catsalut, a work system was defined and two people from the Obertament technical team were trained: the one who made the calls and the entity's project manager"*.
- That *"Catsalut sent our organization the name, surname and telephone number of the sample. The calls were made following the instructions and directions given by Catsalut. They were done by connecting to a Catsalut IP switchboard, which was the one that actually contacted the patient's phone."*
- That, indeed, *"the call to the user's phone was made. The person responsible for making the calls does not remember the incident. It turns out that he no longer works for us (...). In the time he worked for us, he proved to be a good professional and to be sensitive to our mission (...)"*.
- That OPENLY *"it does not include telephone calls to users of the public health system as part of its ordinary activities, so it does not have a specific protocol of its own. For the calls made as part of the project, the professional followed the"*

protocol and the instructions defined by Catsalut (appendices 1, 2 and 3), of which he also received training, as well as the obligations defined in the Obertament security document for all users who process personal data (annex 4), and that the workers sign when formalizing their employment contract" a copy of which was signed by the professional who would have made available to the Authority.

Along with his letter, he OPENLY provided the following documentation:

- a) Annex 1, document entitled "*Procedure for carrying out satisfaction surveys from the centres*", which contains the Catsalut-Department of Health logo. In this document, in the section "*instructions for surveyors*", the following instruction is given, among others: "*Ask to always speak to the person on the list (read the user's first and last name)*".
- b) Annex 2, document entitled "*Perception, experience and satisfaction surveys from the centres. PLAENSA "online" surveys: Iplaensa 2019*", which includes the CatSalut-Department of Health logo.
- c) Annex 3. Document entitled "*Conducting telephone surveys*".
- d) Annex 4. Document on "*Protection of personal data*" that must be signed by the employees of OBERTAMENT, and in which section entitled "*Duty of confidentiality and secrecy*", the following is specified: "*It is not will communicate personal data or any personal information to third parties. Special attention will be paid not to divulge protected personal data during telephone consultations, e-mails, etc.*"

9. In view of the information provided by OBERTAMENT, on 03/02/2021 CatSalut was again required to comply with the following:

- Indicate on which date, at least approximately, CatSalut communicated to OBERTAMENT, as part of the collaboration to carry out the survey, the data of the users - including those of the reporting person - that were part of the sample (name, surname, telephone and the fact that they were users of a mental health center).
- Information on the legal basis that would have legitimized the communication of data by CatSalut to OBERTAMENT. In the event that there was a data processor contract, a copy of it was provided.

10. On 02/15/2021, CatSalut responded to this last request, and in its letter stated the following:

- That the patient data necessary for OBERTAMENT to carry out the survey were provided to this entity during the period September-October 2019.
- That CatSalut did not sign with OBERTAMENT "*an express and written contract, but it was a verbal order. We are aware of the need to collect these verbal orders in writing, but the circumstances of the moment meant that the verbal order was considered sufficient. In any case, we consider that the legal basis is in accordance with article 6.1 e) to fulfill a mission carried out in the public interest or in the exercise of powers*"

public given to the person in charge of the treatment. In this case, it is OPENLY understood that he would have acted on behalf of CatSalut".

- That "in this case, we recognize that the need to formalize the data processor contract between CatSalut and Obertament in writing was omitted."

11. On 20/05/2021, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against CatSalut for an alleged violation provided for in article 83.4.a), in relation to the article 28; 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 05/24/2021.

On the same date, an archive resolution was also issued regarding the OBERTAMENT entity, in relation to the eventual disclosure of data from the complainant here to third parties. In that resolution, the reasons that had led to its filing were justified.

12. In the initiation agreement, CatSalut was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of tests that it considered appropriate to defend its interests .

13. On 05/31/2021, CatSalut submitted a written statement in which it did not question the alleged facts nor their legal qualification; at the same time they set out the measures that had been taken in order to avoid in the future events such as those that have given rise to the present sanctioning procedure.

14. On 02/07/2021, the instructor of this procedure formulated a resolution proposal, by which she proposed that the director of the Catalan Data Protection Authority admonish CatSalut as responsible for an alleged infringement in article 83.4.a) in relation to article 28, both of the RGPD.

This resolution proposal was notified on 02/07/2021 and a period of 10 days was granted to formulate allegations.

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

proven facts

In 2019, CatSalut commissioned OBERTAMENT, the Catalan Association for the Fight against Stigma in Mental Health, to carry out a survey on the care provided by adult mental health centers to their patients (background 8th). To carry out this survey, on an undetermined date but in any case between the months of September and October 2019, CatSalut provided the aforementioned association with a list containing the personal data (name, surname , telephone number and the fact that they were patients of a mental health center) of some of the patients of said centers - those who were part of the sample - ,

without having signed the corresponding data processor contract in accordance with the provisions of article 28 of the RGPD.

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 any objections to the proposed resolution, and how it has progressed in the antecedents, in its letter of 31/05/2021 that it presented before the agreement to initiate the present procedure neither did he question the facts alleged in said agreement, nor their legal qualification. On the contrary, he affirmed that CatSalut is fully "aware of the need to formalize these orders in writing"; and, in this sense, he explained that, in order to avoid in the future "any contract or agreement involving the processing of personal data can be signed, without the simultaneous signing of the corresponding written data processing contract". Resolution SLT/1579/2021, of 20 May, had been issued on the delegation of powers in the matter of the protection of personal data to certain bodies that have jurisdiction in matters of recruitment (DOGC no. 8418, of 26/05 /2021).

In this regard, it must be said, along the lines set out by the instructor in the proposal, that although this Authority values the actions of CatSalut in order to prevent actions like those described in the proven facts from occurring in the future, the it is true that these facts have been considered constitutive of an infringement in accordance with the qualification indicated in the legal basis below. And it should be noted that the formalization of an agent contract, with the guarantees it entails, is of particular relevance in cases like this in which the data that is the subject of communication is health data that affects the most intimate sphere of people

3. In relation to the fact described in the proven facts section, it is necessary to refer to sections 3 and 9 of article 28 of the RGPD, which provide for the following:

"3. The processing by the controller will be governed by a contract or other legal act in accordance with the Law of the Union or the Member States, which binds the controller with respect to the controller and establishes the object, duration, nature and purpose of the processing, the type of personal data and categories of interested parties, and the obligations and rights of the person in charge. Said contract or legal act will stipulate, in particular, that the manager:

a) will treat personal data solely following the documented instructions of the person in charge, including with respect to the transfer of personal data to a third country or an international organization, unless it is obliged to do so by virtue of the Law of the Union or of the Member States

- that applies to the person in charge; in such a case, the manager will inform the person in charge of that legal requirement prior to the treatment, unless such Law prohibits it for important reasons of public interest;*
- b) will guarantee that the persons authorized to treat personal data have committed to respect confidentiality or are subject to a confidentiality obligation of a statutory nature;*
- c) will take all the necessary measures in accordance with article 32;*
- d) will respect the conditions indicated in sections 2 and 4 to resort to another treatment manager;*
- e) will assist the person in charge, taking into account the nature of the treatment, through appropriate technical and organizational measures, whenever possible, so that he can comply with his obligation to respond to requests aimed at the exercise of the rights of the interested parties established in chapter III;*
- f) will help the manager to ensure compliance with the obligations established in articles 32 to 36, taking into account the nature of the treatment and the information available to the manager;*
- g) at the choice of the person responsible, will delete or return all personal data once the provision of the treatment services is finished, and will delete the existing copies unless the conservation of personal data is required under Union Law or member states;*
- h) will make available to the person in charge all the information necessary to demonstrate compliance with the obligations established in this article, as well as to allow and contribute to the performance of audits, including inspections, by the person in charge or another auditor authorized by said responsible*

In relation to what is provided in letter h) of the first paragraph, the person in charge will immediately inform the person in charge if, in his opinion, an instruction infringes the present Regulation or other provisions in the area of data protection of the Union or the Member States. (...)

9. The contract or other legal act referred to in sections 3 and 4 shall be in writing, including in electronic format."

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 83.4.a) of the RGPD, which typifies as such the violation of *"the obligations of the person in charge and the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43"*, among which there is that provided for in article 28 RGPD.

The conduct addressed here has been included as a serious infringement in article 73.k) of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD), in the following form:

"k) Entrust the processing of data to a third party without the prior formalization of a contract or other written legal act with the content required by article 28.3 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:

"(...) 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".

From what is recorded in the proceedings, it is clear that the task that CatSalut gave to the organization OBERTAMENT so that this association carried out a survey on the care provided by mental health centers for adults to their patients, has ended on the date on which this resolution is issued, so it is not considered necessary to require CatSalut to formalize a contractor contract in accordance with the provisions of article 28 of the RGPD. However, taking into account that as part of the survey, CatSalut provided the aforementioned association with health data relating to users of mental health centers, CatSalut is required so that as soon as possible, and in all case within the maximum period of 10 days from the day after the notification of this resolution, certify that the entity has OPENLY deleted or returned to CatSalut all the personal data of patients processed as part of this order, in accordance with the provisions of article 28.2.g) of the RGPD.

Once the corrective measure described has been adopted, within the specified period, CatSalut must inform the Authority within the following 10 days, without prejudice to the inspection powers of this Authority to carry out the corresponding checks.

For all this, I resolve:

1. Admonish the Catalan Health Service as responsible for an infringement provided for in article 83.4.a) in relation to article 28, both of the RGPD.
2. To require the Catalan Health Service to adopt the corrective measures indicated in the 4th legal basis and to accredit before this Authority the actions carried out by fulfill them
3. Notify this resolution to the Catalan Health Service
4. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.
5. 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,