Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 46/2021, referring to the Catalan Health Institute (CAP Besòs Mar).

Background

1. En data 06/03/2020 va tenir entrada a l'Autoritat Catalana de Protecció de Dades, provinent de l'Agència Espanyola de Protecció de Dades (en endavant, AEPD), un escrit pel qual una persona (en endavant, persona complainant) filed a complaint against the Department of Health, on the grounds of an alleged breach of the regulations on the protection of personal data.

In particular, the complainant stated that, through the My Health digital space (http://lamevasalut.gencat.cat, hereinafter, LMS), he had access to his shared medical history (hereinafter, HC3) , which contained another person's health data. In particular, he pointed out that he had access to the result of a medical test (spirometry) carried out on 06/20/2019, which the complainant had not carried out. He pointed out that the spirometry test report contained some of his data, such as his first and last name and his CIP number, but that the rest of the information contained in it (weight, age, etc. .), in addition to the evidence itself, it did not correspond to his person.

It also stated that, on the same date of that test (20/06/2019), the person making the complaint had made an ophthalmology control visit, following a medical intervention that was carried out between the months of March and April of 2019, but that there was no report on this control visit in his medical record, alluding to the possible publication of his report in another person's medical record.

In order to substantiate the facts he was reporting, he provided as annex 1 a report in which a CAP was mentioned and the title "FVC maneuver nº 1 REPORT" was included.

2. The Authority opened a preliminary information phase (no. IP 86/2020), 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 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 02/02/2021 the Department of Health was required to report on the reasons why the reporting person could access through their HC3 of La Meva Salut the report of health referred to a third person. And also to specify the time interval during which this documentation would have been
accessible by the reporting person, as well as if this had been resolved

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incident, and in such a case that you indicate the date on which it was resolved and that you provide the documentation to prove it. And the last one was required to indicate whether a medical report corresponding to the person making the complaint had been published in the HC3 following the control visit of the ophthalmology intervention to which this person referred. This requirement was reiterated on 02/24/2021.

4. On 07/03/2021, the Department of Health responded to the aforementioned request in writing, accompanied by a report dated 06/03/2021 from its general secretary, in which it stated the following:

- That "We cannot determine exactly what the reasons are, but, as we can see, the fact that the first and last name together with the CIP (thirteen digits out of fourteen) are coincident may have generated the incorporation of the document into the medical history (HC3) of the reporting person".

- That "The information was available from the date of the test, however, given the person's statement that the test is not theirs, we have proceeded to unpublish it".

- That "We do not have any ophthalmology reports on these dates (...) We consider it important to know that in follow-up visits and in many other care activities, no reports are made, only the clinical course of the actions carried out during the hearing is recorded. So we understand that no incident has occurred in relation to this activity".

The Department of Health did not accompany its letter with any document attesting to the depublication of the controversial HC3 medical report of the complainant.

5. On 11/03/2021, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the Department of Health for an alleged violation 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 of these (hereinafter, RGPD). This initiation agreement was notified to the Department of Health on 03/17/2021.

6. In the initiation agreement, the Department of Health was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of the tests it considered appropriate to defend their interests.

7. On 09/04/2021 the statement of allegations was received from the Department of Health, accompanied by an attached document entitled "proof of publication", tending to certify that it had been deleted from the HC3 of the reporting person, the medical report of another person.

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8.- On 05/17/2021, after verifying that the report of the medical test (spirometry) - erroneously included in the HC3 of the person making the complaint - stated that it would have been carried out at the CAP Besòs Mar, the Authority required the Department of Health to report on the health center from which said medical report dated 06/20/2019 had been incorporated into its HC3, as well as to confirm and certify that said report had already it was not published in the HC3 of the reporting person. This requirement was reiterated on 06/21/2021.

9.- On 06/28/2021, the Department of Health's response letter was received, through which it stated, among others, the following:

- In relation to the spirometry report, that: "the report and the result are from the month of June 2019 and the center that carried it out was the CAP Besós Mar". The response was accompanied by a screen printout of the logs or records indicative of, among others, the code that would correspond to the CAP Besòs Mar (hereinafter, CAP Besòs), managed by the Catalan Health Institute (henceforth, ICS)

- In relation to the depublication of the report, that: "the effective date of depublication was April 7, 2021, and the depublication was carried out by the technical services of the ECAP application (Primary Care Clinic) (...) The check has been done again and it is not accessible". The response was accompanied by a screen print of the logs that would indicate the unpublishing of the report.

10.- On 02/08/2021, the director of the Authority issued a resolution agreeing to the dismissal of sanctioning procedure no. PS 18/2021, assigned to the Department of Health. In the second legal basis of this resolution, the reasons for the dismissal were set out, as follows:

"2.- During the processing of the present sanctioning procedure it has been made clear (precedent 9th) that the publication of the mentioned spirometry report in the HC3 of the person making the complaint, occurred from CAP Besòs, managed by the ICS. On the other hand, in the statement of objections to the initiation agreement, the Department of Health has stated that it was not aware of this erroneous publication until 02/02/2021, when it received the request of information from the Authority in the preliminary information phase, and that after carrying out the corresponding checks, on 04/07/2021 it unpublished the aforementioned HC3 report of the complainant.

Accordingly, from the point of view of the principle of culpability, it is considered that the offense related to the violation of the principle of confidentiality (art. 5.1.f of the RGPD) due to an action committed by CAP Besòs , would be attributable to the ICS, and not to the Department of Health. Although the Department of Health is responsible for the HC3, it should be borne in mind that it was CAP Besòs who erroneously published the controversial medical report in the HC3 of the complainant, and that the Department unpublished it both good point

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to know that it was a mistake. For this reason, it is not appropriate to maintain the imputation made in the initiation agreement against the Department of Health, given that the concurrent circumstances in the present case lead to the conclusion that the responsibility for the reported facts corresponds to the ICS, and it is this entity to which it is appropriate to attribute the commission of the infringement."

11. On 02/08/2021, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the ICS for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.f), both of the RGPD.

This initiation agreement was notified to the ICS on 23/08/2021, and it was granted a period of 10 working days to formulate allegations and propose the practice of the tests it considered appropriate to defend its interests.

12. On 16/09/2021, the ICS made objections to the initiation agreement.

13. On 11/18/2021, the person instructing this procedure formulated a proposed resolution, by which it was proposed that the director of the Catalan Data Protection Authority admonish the ICS as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.d) , both of the RGPD. This resolution proposal was notified to the ICS on the same date, and it was granted a period of 10 days to formulate allegations.

14. On 02/12/2021, the SC submitted a statement of objections to the proposed resolution.

proven facts

On 20/06/2019, CAP Besòs incorporated a medical report, corresponding to a spirometry test, referring to another person to the HC3 of the person reporting. The reporting person when accessing his HC3 viewed this report, in which
they contained their first and last names together with other data referring to this third person -and which were erroneously linked to the person making the complaint-, which included health data.

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.

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2. The ICS has made objections to both the initiation agreement and the resolution proposal, through separate written letters from the Director of the EAP Besòs. The first ones were already analyzed in the resolution proposal, but even so it is considered interesting to analyze them here together with those that have been succinctly formulated before the proposal.

2.1. On the lack of notification of the processing of the disciplinary file.

In the first section of her letter of allegations, the Director of the EAP Besòs states that "the DAR Besòs, until today, has not been aware that there was a disciplinary file at the root of an alleged breach of data protection".

In this regard, what is relevant is that the ICS has become aware of the present sanctioning procedure and its imputation, with the notification of the agreement to initiate this sanctioning procedure, where it has been given the corresponding procedure of hearing, so that he could present, as he has done, the allegations he deemed appropriate in defense of his interests, in accordance with the provisions of articles 10.3 of Decree 278/1993 and 64.2.f) and 82.2 of l 'LPAC, and the notification of the proposed resolution has offered it a new procedure for allegations, which would distort any allegation of defenselessness raised on the basis of this reason.

In addition, the fact that the previous information no. IP 86/2020, with which the present sanctioning procedure is related, if opened, as explained in the background, in relation to the Department of Health and not in relation to the ICS, it is in accordance with the law taking into account, of a on the one hand, that articles 7 of Decree 278/1993 and 55.2 of the LPAC regulate the discretionary and non-mandatory nature of the opening of a preliminary information procedure prior to the processing of a sanctioning procedure, but above all, because the purpose of the preliminary information phase is, among others, to find out the identity of those allegedly responsible for the infractions to be imputed in a sanctioning procedure.

These guarantees have been fully respected in this case.

2.2. On the lack of intentionality in the imputed facts, the result of an unintentional human error.

Then, in the statement of objections to the initiation agreement, the ICS asserts that: "at no time did the professional who performed the test and the registration in the patient's HCAP knowingly violate the confidentiality of data as referred to in article 5.1.f) of Regulation (EU) 2016/679 nor breached the duty of secrecy that our profession has" and that "this management considers the act as a human error without any intention of

cause moral damage to the complainant". In the same way, before the proposed resolution, the ICS has reiterated this allegation, pointing out that: "(...) what happened is the result of human error, and the necessary measures have been taken since that the case has been known, making a double check of the users' data".

These allegations do not call into question the reality of the imputed facts, but rather their qualification as constitutive of an infringement and their imputation to the ICS.

In relation to the allegation of the ICS according to which the proven facts are attributed to the error of "the professional who did the test and the registration in the patient's HCAP", it should be noted that, according to the system of responsibility provided for in the RGPD, and particularly in article 70 of the LOPDGDD, the responsibility for breaches of the data protection regulations falls, among others, on those responsible for the treatments, and not on the personal headquarters
Specifically, the mentioned article 70 of the LOPDGDD establishes that:

"Responsible subjects.
1. They are subject to the sanctioning regime established by Regulation (EU) 2016/679 and this Organic Law:
a) Those responsible for the treatments."

So things are, in accordance with the responsibility regime provided for in the personal data protection regulations, the person responsible for the facts that are considered proven in this file is the ICS, given its status as the person responsible for the treatment in relation to the what has been committed the offense charged here.

And in the case at hand, since the ICS is a legal entity, the repeated doctrine of the Supreme Court on the attribution of responsibility applies when the offense is committed by the employees of a legal entity, based on -se in the existence of a fault "in eligendo" or "in vigilando", for all in the STS of 28/11/1989, in which he argued the following:

"(...)residing in the correct foundation of the employer's administrative responsibility for the faults of the employees or relatives in his service and committed on the occasion of providing it, in the fault "in eligendo" or/and in the "in vigilando", with Millenary roots in common law, as stated in the Judgment of the former 3rd Chamber of this High Court of April 29, 1988; in the same way that, and with the same foundation, the jurisprudence declares with a general character in the field of penal administrative law, the responsibility of legal persons for the actions of their dependents and employees."

More recently, the Supreme Court has ruled in the same sense on this same issue, specifically in judgment 196/2021, of 15/02/2021, issued in the field of data protection, in which it affirms the Next:

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"We fully share the opinion of the Trial Chamber when it states (FJ 6º of the appealed sentence) that << (...) The responsibility of the Administration holding and in charge of the file [San Sebastián City Council] cannot be excused in its action diligently, separately from the performance of its employees or positions, but it is the "culpable" performance of these, as a consequence of the violation of the aforementioned obligations to protect the reserved character of personal data that grounds the responsibility of the former in the sanctioning scope whose application is concerned; for "own" acts of their employees or positions, not of third parties>>".

Likewise, with regard to the allegation of the ICS according to which the facts tested would have been committed as a result of a human error by the professional who performed the test "without any intention of causing moral damage to the complainant", there are several considerations to be made.

The principle of culpability, that is to say, the need for there to be intent or fault in the punitive action, is fully applicable to the penal administrative law, in accordance with what it provides article 28 of Law 40/2015, of October 1, on the legal regime of the public sector. This one need for guilt as a constitutive element of the administrative offense has been expressly recognized by the Constitutional Court in its ruling 76/1990.

However, in the area of personal data protection, jurisprudence maintains that the intention of the infringing subject is irrelevant. Certainly, the doctrine maintains that willful conduct is not required, but that "simple negligence or failure to fulfill the duties that the Law imposes on the persons responsible for files or data processing is sufficient to exercise extreme diligence..." (Judgment of the National Court of 12/11/2010, appeal n. 761/2009).

Along the same lines, the Supreme Court pronounces itself, among others, in the judgment of 25/01/2006, also issued in the area of data protection, specifically in relation to another special category of data such as data ideological, when he states that "the principle of culpability consists in the lack of diligence observed by the appellant entity when processing data relating to the ideology of the complainant in an automated manner, rendering irrelevant the invocations that are made (...) about the absence of intentionality or the existence of the error, and this because the culpable element of the sanctioning type applied occurs when the expressed data on ideology is included, not being precise the concurrence of a specific intentionality tending to reveal private data of the affected".

In short, it is necessary that in the conduct that is imputed there must be an element of culpability, but in order for culpability to exist it is not necessary that the facts have occurred with intent or intent, but it is sufficient that negligence has intervened or a lack of diligence, as would be the case analyzed here, in which, contrary to the statements made by the Director of the EAP, the inclusion by mistake of a third party's medical report in the HC3 of the person reporting here would have been carried out without a "double verification of user data", this verification which

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it is necessary to avoid mistakes like the one analyzed here. It is also worth saying that the duty of care is maximum when activities are carried out that affect fundamental rights, such as the right to the protection of personal data.

This has been declared by the Judgment of the National Court of 02/05/2014 (appeal n. 366/2012) issued in the matter of data protection, which maintains that the status of person responsible for processing personal data "imposes a special duty of diligence when carrying out the use or treatment of personal data or its transfer to third parties, in what concerns the fulfillment of the duties that the legislation on data protection establishes to guarantee the fundamental rights and public liberties of natural persons, and especially their honor and personal and family privacy, whose intensity is enhanced by the relevance of the legal assets protected by those rules".

And even more, when it comes to health data they are part of the so-called special categories of data (Article 9 of the RGPD) and which, as such, require special protection.

For all of the above, in the present case it is clear the lack of diligence on the part of the ICS staff, attributable to the ICS itself, for having incorporated in the HC3 of the person making the complaint a medical report referring to another person, and not having noticed the error during the almost two years that the report was published in the HC3 of the reporting person.

In accordance with everything that has been presented, this instructor considers that in the present case the culpability element required by the regulations and jurisprudence is present and that allows the ICS to be charged with the commission of the offense that is the subject of the present sanctioning procedure .

2.3. Regarding the fact that the report published in the HC3 of the reporting person is not of a medical nature.

The ICS stated in its statement of allegations in the initiation agreement that "the erroneously published report is not of a medical nature, it is a non-invasive test and that it has not caused any physical harm to the patient . The result of the test did not require any medical procedure".

In this regard, what is relevant is to determine whether the disputed document contained health data, taking into account that article 4.15) of the RGPD defines health-related data as those "personal data related to physical or mental health of a natural person who reveal information about their state of health, including the provision of health care services".

Likewise, recital 35 of the RGPD states the following:

"Among the personal data relating to health, it is necessary to include all those that provide information about the state of physical or mental health of the interested party, whether past, present or

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future It includes the information about the natural person collected on the occasion of their registration for the purpose of healthcare, or on the occasion of the provision of this assistance, in accordance with Directive 2011/24/EU of the European Parliament and the Council; any number, symbol or data assigned to a natural person that uniquely identifies him for health purposes; information obtained from tests or examinations of a part of the body or a body substance, including from genetic data and biological samples; any information relating to, for example, a disease, disability, risk of disease, medical history, clinical treatment or physiological or biomedical condition of the data subject, regardless of its source, for example a doctor or another healthcare professional, a hospital, a medical device or an in vitro diagnostic test."

Consequently, this allegation cannot succeed, given that it is incontrovertible that the report to which the complainant was able to access is the result of a medical test and therefore contains health data. And in any case, such consideration does not alter the imputation of the facts or their legal classification, given that the type of sanction applied -relating to the violation of the principle of accuracy- does not require that health data have been processed, but is it is enough to verify that inaccurate data has been processed, a matter that has been confirmed when the ICS itself has recognized that the personal data appearing in the controversial medical report do not correspond to the person making the complaint.

3. With regard to the legal classification of the facts described in the proven facts section, it should be noted, in line with the criterion set out in the resolution proposal, that although in the initiation agreement such facts were considered constitutive of a violation of the principle of integrity and confidentiality, in view of the allegations of the ICS and the rest of the considerations set out in this resolution, it is considered that they have a better fit in the imputation consisting of a violation of the principle of data accuracy. And this because, on the one hand, the proven fact is that the HC3 of the reporting person contained inaccurate data; specifically, the health data contained in the report published in HC3 that were not his, given that this medical report corresponded to another user assigned to the same CAP Besós. And on the other hand, because the violation of the principle of confidentiality is distorted by considering that the coincidence in name and surname and almost in age of the person reporting with this other user of the same CAP would have prevented the first from identifying this different user, according to it is inferred from the letter of complaint, in which the complainant stated that the report "is identified with my data, number and reference of health card".

The principle of accuracy is enshrined in article 5.1.d) of the RGPD, which provides that "Personal data will be: (...) d) accurate and, if necessary, updated; all reasonable measures will be taken to delete or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed".

For its part, article 4.1 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereafter LOPDGDD) regulates the accuracy of the data in the following terms:

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

During the processing of this procedure, the infringing fact has been duly proven, based on the complaint made by the person reporting to the Authority, which he accompanied with a copy of the controversial medical report, together with the recognition by part of the ICS of the error committed in the publication of the medical report in the HC3 of the reporting person, as stated in the antecedents of this resolution.

According to the provisions of article 83.5.a) of the RGPD, the violation of "the basic principles for treatment", among which the principle of accuracy is the first, constitutes an infringement. In turn, article 72.a) of the LOPDGDD provides as a very serious infraction: "a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/ 679".

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

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

In similar terms 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 the present case, given the circumstances of the offense that is being declared, relating to a particular event already completed, and that the disputed medical report was depublished from the HC3 of the person reporting when the error was made known , it is not appropriate to adopt any corrective measures regarding this particular extreme object of the complaint.

However, it should be borne in mind that a possible effect of the offense committed is also that the medical report may not appear in the history or clinical histories of the person who performed the spirometry. This fact has not been confirmed, but in any case the ICS should do so

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verify, and in its case, carry out the appropriate measures so that the report is incorporated into the medical history of the data holder.

This is why it is necessary to request the ICS as soon as possible, and in any case within a maximum period of 10 days from the day after the notification of the resolution issued in this procedure, to certify that this medical report has been incorporated into the history or clinical histories of the person holding the personal data (who performed the spirometry test), or who states that it was already incorporated.

Once the corrective measure described has been adopted, within the period indicated, the ICS must inform the Authority within the following 10 days, without prejudice to the Authority's inspection powers to carry out the corresponding checks .

For all this, I resolve:

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

2. Require the Catalan Institute of Health to adopt the corrective measures indicated in the 4th legal basis and certify to this Authority the actions taken to comply with them.

3. Notify this resolution to the Catalan Health Institute.

4. Communicate this resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

5. Order that the 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 ICS can file, on an optional basis, an appeal for reinstatement before the director of the Catalan Data Protection Authority , 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 administrative contentious jurisdiction.

If the ICS expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended under the terms provided for in article 90.3 of the LPAC.

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Likewise, the ICS can file any other appeal it deems appropriate to defend its interests.

The director,