

File identification

Resolution of sanctioning procedure no. PS 11/2022, referring to the Department of Health

Background

1. On 05/26/2021, the Catalan Data Protection Authority received a letter in which a person (hereafter, complainant) filed a complaint against the Department of Health of the Generalitat of Catalonia, on the grounds of an alleged breach of the regulations on personal data protection. In particular, the complainant stated that on 03/24/2021, this department notified him by electronic means of the "*Fees settlement notification no. 288/233*", attaching the pdf document "*Administrative act*", which contained the notification of the payment of the fee related to food control in health establishments, corresponding to another person. In the letter of complaint, the complainant also states that he does not know whether the notification containing the data corresponding to his fee settlement was sent to someone else.

It is also clear from the letter of complaint that the complainant presented these facts through the form of the generic processor and that, on 11/05/2021, he received a response email, sent from "DAAM mailbox anim health service" (animal.daam@gencat.cat). In this email, the former Department of Agriculture, Livestock, Fisheries and Food (hereafter, DARP) communicated the following (the emphasis is ours):

- "*The notification you have received, which was addressed to a farmer in Ripollès, was made by the Department of Health of Girona [...]*
- *In order to solve this incident, we urgently proceeded to: - Contact the Animal Health Prevention Service of the DARP with the Territorial Services of the Department of Health of Girona, which has confirmed to us that it is an error in the attached documentation (they attached a document from another rancher). The Department of Health has informed us that they will soon proceed to send the notification correctly [...]*".

The reporting person provides a copy of this email.

2. The Authority opened a preliminary information phase (no. IP 220/2021), 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 01/26/2022 the reported entity was required to report on the following:

- Confirm if, as the DARP informs the person making the complaint, the person responsible for the "*Notification of settlement of fees no. 288/233*" dated 03/24/2021, is the Department of Health and if the cause of the events reported was "a mistake in the attached documentation". If this is the case, specify how the events happened or, otherwise, state your version.

- Report on what were the personal data of the "Ramader del Ripollès" that were contained in the document "Administrative act" attached to the controversial notification that the complainant received.
- Report on whether the notification of the settlement of fees in relation to which the reporting person was the liable subject, was notified to a third party. In this case, he was required to explain which personal data were included in the notified administrative act and the date on which the notification took place.
- State whether, following knowledge of the facts reported, the Department of Health has adopted any measure to mitigate any potential damage caused.

4. On 09/02/2022, the Department of Health responded to the above-mentioned request through a letter which communicates, in literal terms, the following:

"1. We confirm the fact that the person responsible for the "Notification of the settlement of fees no. 288/233" was the Department of Health and that the cause of the events reported was an error in the attached documentation.

2. The personal data of the "Ramader del Ripollès" contained in the document were the name and surname, the address and the NIF number.

3. After having carried out the appropriate checks, we have verified that the notification of the settlement of fees in which the complainant was the liable subject was not notified to a third party.

4. As a result of the knowledge of the facts reported, we have proceeded to adopt as an extra security measure to give a security word to each pdf that we attach, so that only the holder of the same can access the document through their NIF".

5. On 10/03/2022, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary 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 03/14/2022.

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 tests that it considered appropriate to defend their interests

7. On 03/28/2022, the Department of Health requested this Authority to extend the period granted for the presentation of allegations, under article 32 of the Law 39/2015, of October 1, of the common administrative procedure of public administrations, given *"the complexity of the matter that requires the participation of both the central services of the Secretariat of Public Health and the Territorial Services of the Department of Health of Girona, and the need for the Department of Health to manage several urgent matters "*.

8. On the same date, the Authority ordered that the period of 10 days granted to the denounced entity to submit allegations, be extended by another 5 days.

9. On 04/05/2022, the Department of Health formulated the allegations in the initiation agreement which are transcribed below and which are addressed in the second section of the legal foundations:

" We reiterated in the letter of January 27, 2022, in response to the request for prior information (...).

- *Indeed, there was a material error when the complainant was notified, by electronic means, of the payment of the fee related to the food control of health establishments that corresponded to another person. It should be noted that this notification did not contain particularly protected data as it contained the name and surname, the NIF, the address and the amount of the fee pending settlement. It should also be noted that the notification corresponding to the complainant was not sent to any other recipient. Therefore, we consider that the impact of the exposed data should not be described as very serious.*
- *We understand that the infringing behavior may entail the alleged violation of data protection regulations regarding the principle of data confidentiality, but at the same time we state that the alleged violation was the result of an error without any intention or desire to violate the said confidentiality. In this sense, the procedure for notification of the payment of the fee used included precautions that were security measures in accordance with article 32 RGPD that had been sufficient until now for the proper functioning of the procedure.*
- *Despite the desire to carry out adequate treatment of personal data, it is not possible to ensure zero risk, as the situation that has given rise to this procedure shows. However, if the appropriate actions have been taken to prevent it from happening again and, in this sense, a new security measure has been adopted in the processing of notifications consisting of giving a security word to each pdf file that is attached, so that currently only the addressee can access it through their NIF. "*

10. On 04/27/2022, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish the Department of Health as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1. f), both of the RGPD.

This resolution proposal was notified on 04/27/2022 and a period of 10 days was granted to formulate allegations.

11. The deadline has been exceeded and no objections have been submitted.

proven facts

On 03/24/2021, the Department of Health notified the reporting person of the "fee settlement no. 288/223", attaching to the notification the payment of the fee related to food control in health establishments belonging to another person. The reporting party, upon accessing the notification, viewed the attached documentation containing the data referring to this third person.

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, apply to this procedure. 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 formulated allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the most relevant part of the motivated response of the instructing person to these allegations.

In essence, the allegations presented by the Department showed that the notification of the settlement of reference fees that was notified to the now complainant, and that contained information from a third person, obeyed an error in the attached documentation. He also reported that he had proceeded to adopt an additional security measure, consisting of assigning a security word to each pdf file that is notified, so that only the person to whom the document is addressed can access it, through his NIF .

In this regard, it should be noted that, even though the incident reported occurred as a result of an error, the lack of intention (human error) cannot exonerate the Department of Health from responsibility. In this regard, it is necessary to take into account the doctrine of the principle of culpability, which highlights that 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 culpability, incompatible with a regime of objective responsibility without fault, and establishes that for the element of fault to occur, conduct is not required intentional but it is sufficient that the infringement occurred due to the negligence of its author. In this sense, the Supreme Court in several judgments, including those of 15/04/2016 and 24/11/2011, refers to the doctrine of the Constitutional Court when it quotes verbatim " *objective responsibility does not fit in the scope of administrative sanctions or without fault, doctrine that is reaffirmed in sentence 164/2005, of June 20, 2005, under which the possibility of imposing sanctions for the mere result is excluded, without proving a minimum of culpability, even for mere negligence* " .

Also the National Court, in the Judgment of 10/30/2017, in matters of personal data protection indicated, citing what it had already declared in previous judgments (for all, the judgment of 11/12/2010) the following: "*But , as we have repeatedly affirmed in this matter, the sanctions do not require intentional intent but mere carelessness or lack of diligence is sufficient; in the words of this Court "the simple negligence or non-fulfilment of the duties that the Law imposes on the persons responsible for data processing files is enough to exercise extreme diligence..." and even if no economic gain was obtained"*.

In short, negligence does not require a clear intent to infringe, but rather lies precisely in carelessness, and in this specific case, in the lack of attention required by the entity in fulfilling the duty of confidentiality referred to article 5.1.f) of the RGD. At this point it should be emphasized 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. Certainly, in the present case, the sending of documentation relating to a fee settlement to the now complainant, allowed him to access personal data of a third person, which entailed a violation of the principle of confidentiality of the personal data of those affected.

For all the above, it is considered that the set of allegations highlighting the lack of intentionality in the commission of the facts, cannot prosper for the purposes of exonerating the accused entity from responsibility.

3. In relation to the facts described in the proven facts section, it is necessary to go to article 5. f) of the RGPD, which provides that personal data will be " *treated in such a way as to guarantee adequate security to personal data, including protection against unauthorized or illegal processing and accidental loss, destruction or damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")*."

As indicated by the instructing person, during the processing of this procedure the facts described in the proven facts section, which are constitutive of the offense provided for in article 83.5 a) of the RGPD, have been duly proven, which typifies the violation of " *the basic principles for treatment, including the conditions for consent, in accordance with articles 5, 6, 7 and 9* " among which, the principle of confidentiality is contemplated (art. 5.1 f RGPD).

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

"i) 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 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 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 addition, it can propose, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".

In the present case, it becomes unnecessary to require corrective measures for the effects of the infraction given that the infringing conduct refers to a single fact already accomplished, the notification of documentation relating to another person, which, due to its instantaneous nature, cannot be corrected with the application of a corrective measure.

For all this, I resolve:

1. Notify the Department of Health as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f), both of the 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 Department of Health.

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,