

## File identification

Resolution of sanctioning procedure no. no. PS 24/2022, referring to the Department of Health ( Assisted Residence for the elderly Laia González Feixa )

## Background

1. 10/14/2020 , the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Laia González Feixa Assisted Living Home for the elderly (hereinafter, the Home), with reason for an alleged breach of the regulations on the protection of personal data . This letter was supplemented by a later one dated 11/11/2020.

Specifically, the complainant (who, as he stated, was a worker at the Residence that depended on the Department of Labor, Social Rights and Families - hereinafter, DTSF-) stated that *"to register we have to put our full number, DNI, telephone and temperature on a sheet that is in the concierge in view of anyone who enters or leaves the center"*. And he added that the same document was used by all the people who entered the building, whether it was a worker, messenger, external services (such as hairdressers, podiatry, dentist), family members, etc.

In order to substantiate his complaint, the complainant provided several photographs, including the following:

a) PHOTO 1: the image of a list entitled *" Register of Entries and Departures at the Feixa Llarga Residence "*, which consists of several columns - name, temperature, telephone, ID, date, entry time, exit time, username/ company- \_ The list provided - which corresponds to October 11 and 12, 2020 - includes the data of 13 people (anonymized in the photograph), who have completed most of the sections. The *"user name/company"* column is only completed in relation to two people and in both cases the company listed is *"INSS"*.

b) PHOTO 2, according to the complainant, would show the place where the mentioned register is located: a counter located right in front of the entrance to the Residence.

2. The Authority opened a preliminary information phase (no. IP 312/2020), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied to 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 susceptible to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 11/23/2020 the DTSF was required to report on the following:

- Confirm whether, as the person making the complaint stated, the document shown in PHOTO 1 must be completed by each of the people who access the Residence, regardless of the reason for their entry (provision of services as staff owned by the Residence or external services, couriers, relatives, etc. ).
- Indicate the legal basis that would protect the processing of the data included in the register.
- Confirm that this record is in the location shown in PHOTO2 (background 1).

4. On 12/21/2020, the DTSF responded to the aforementioned request, through a report issued by the Residence Management, in which it stated the following:

- That *"this document is only filled out by professionals who provide services at the center (own staff and professionals from outsourced companies such as kitchen, cleaning, laundry, hairdresser, podiatrist and maintenance staff). No courier company or suppliers have access to it (...). Families do not have access either, since since March 13, 2020 they have not had access to the center through the main door. The only exception is the visits of a maximum of 1 person in end-of-life processes, who enter through this door (...) and sign a specific document independent of the entry registration"*.
- That, *"it is true that the document is at the concierge, and as you can see on the right of the image, where you can see the concierge, under her custody. Concierge is a place that is covered 24 hours a day. Before the pandemic, this area was the main access to the center. From March 13, this access is only for our own staff and the professionals of subcontracted companies such as kitchen, cleaning, laundry and maintenance staff"*.
- That due to the pandemic, the center was closed to external visits on 03/13/2020, and that the rules and instructions given by the Department of Health were followed at all times. That *"the data is only collected without any treatment of the same, outside the administrative management of the center, whenever the collection is a preventive action in order to dispose of the same in case of contagion due to COVID- 19 and Public Health asks us for data on the contacts that have occurred on certain dates . That in the document "Instructions for residences for the prevention and protection of infection by COVID-19" of the General Directorate of Autonomy and Disability of the Department of Work, Social Affairs and Families, dated 11/ 03/2020, the following instruction is included : "A registration check must be carried out on all people who access the center in order to act more quickly to carry out the study of contacts in cases of contagion (with the following basic information: name of the person, ID, telephone, day of the visit and time of entry and exit)"* .
- That in the document *"De- escalation plan in residential centers. Version 2.0 of May 2020, Department of Health"* , in section 1.4, relating to the "Early detection of cases", it is determined that, *"all residents and professionals, except those who are not already confirmed or probable cases of COVID-19, will be subject to the control list ( check list ) cynical and epidemiological daily. This list must include, temperature (...)"*.
- That in the Residency Contingency Plan of 04/08/2020, *"drawn up and delivered in a mandatory manner to the Public Health Service of the territory, and which has been assessed by the same and returned to the Center as favorable"*, it states in its section 12.1, the following: *"every day a TEMPERATURE CHECK will be carried out on EVERY PERSON WHO ACCESSES THE RESIDENCE (nursing, auxiliaries, technical staff, subordinates, service assistants, cleaning, kitchen and other external companies)"*.
- That *"the Territorial Health Services (Primary Care Teams and CATALUNYA), the Territorial Services of Social and Family Affairs and the Epidemiological Surveillance Service of the territory, requested us daily for personnel data that in case of suspicion of a case or if a case occurred, the data contained in the document should and should be sent immediately to locate possible close contacts. In order to be able to comply with everything, the cited document was created with the sections contained in it and which are the ones that oblige us to collect according to the documents mentioned in the previous sections"*.

- That, *"because of all this, I believe that leaving this document at the concierge was the fastest and most agile way to have all the data that is required of us by Public Health and specifically the best way so that the Surveillance Service Epidemiological department would quickly have the list of personnel who could be at risk, to urgently contact them and be able to take preventive measures in order to avoid the spread of COVID-19"*.
- That the old registration system has now been recovered, so that it is no longer registered in any manual listing; and that the temperature control is done in a specific register to which only the person who has been tasked with taking it has access.

5. On 10/01/2022, the Authority made a new request to the DTSF to report whether the right to information was complied with (art. 13 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 circulation of these -hereinafter, RGPD-) of the center's own staff and those professionals who provided service in its facilities (kitchen, cleaning, laundry, hairdresser, podiatrist and maintenance staff), regarding the collection of data relating to body temperature; and, in the affirmative, to certify it.

6. On 01/25/2022, the DTSF responded to this last request, stating the following.

- That, as reported by the Residence management, through the messaging system of the Center's comprehensive management program ( Resiplus ), workers are informed of the various regulations, instructions, measures and recommendations established, among them the need of body temperature control when entering the workplace.
- That a photograph is provided of the poster that was installed at the access to the premises (where the controversial record was located) in which internal and external workers were informed of the extremes provided for in the protection regulations of data
- That, the taking and collection of the temperature, both of the own staff and of external companies providing the Residence, was protected by article 6.1.c) and 9.2.i) of the RGPD, in connection with Organic Law 3/1986, of April 14, on special measures in the field of public health (art. 1, 2 and 3), Law 18/2009, of October 22, on public health (art. 1, 55.1.j/) , Law 33/2011, of 4 October, general public health (art. 54.1). And it would also be protected in the *" Decree Law 48/2020, of December 1, on measures of an organizational nature in the health, social and public health field to deal with the health crisis caused by the COVID-19 and amending Decree Law 30/2020, of August 4; and of Decree Law 41/2020, of November 10, which provides that the necessary identification and contact data of its own and external personnel who work or collaborate there must be made available to the Department of Health, in order to the management and monitoring of the diagnostic tests for COVID-19 through the information systems created for this purpose"*.
- That these records were kept for a maximum of 15 days.

Together with this office, images were provided of the information that was provided to the own staff about the temperature taking through the center's integral management program; and also from the information poster located at the entrance to the offices, next to the counter where the controversial register was left. It is noted that this poster contains the basic information provided for in Article 11 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LODGDD) and it is also indicated an email address that would allow access to additional information.

7. Given that the DTSF had reported that the disputed register only collected the data of its own staff and of external companies that provided service to the Residence, thus

contradicting what the complainant had stated in his written complaint (in which stated that the data of family members, messengers, etc. were also collected ), on 01/25/2022 (notified on the same day), a letter was sent to the complainant in order to provide some proof or element that could prove the their statements in this regard.

The reporting person did not respond to this request for information.

**8.** Although in the context of this previous information the DTSF did not expressly report this circumstance, it was found that the General Directorate of Personal Autonomy and Disability (on which the residences depend), passed on 04/11/2020 to be attached to the DTSF, to be of the Department of Health, in accordance with the provisions of article 5 of Decree Law 12/2020 of April 10; a situation that remained until 23/06/2021, when Decree 256/2021, of 22 June, restructuring the Department of Social Rights entered into force. Thus, at the time when the events that were the subject of the complaint occurred (October 2020), the Department of Health was responsible for the treatment of the controversial data.

**9.** In view of what was stated in the previous 8th, by means of an official of 28/03/2022 the Department of Health was informed of the facts reported, at the same time it was given a transfer of the requests made to the DTSF and of the answers given by said Department, so that, within 10 working days, it would present what it considered appropriate, to the extent that, according to the aforementioned regulations, on the dates on which the reported data processing took place, the Department of Health would hold the status of responsible for the processing of said data.

The period granted expired without the Department of Health giving any response.

**10.** On 03/05/2022, 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 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 on 05/05/2022 and a period of 10 days was granted to formulate allegations.

**11.** In the same initiation agreement, certain treatments were briefly analyzed that, although they had not been expressly denounced, were closely linked to it and that due to their interest deserve to be analyzed, specifically, the collection by the Residence, in the controversial record, of the data referring to the own staff and external companies that provide services in the Residence - first and last name, telephone, ID, date, time of entry, time of departure, user/company name-, and in particular the collection of body temperature, which is a health data provided as a special category (art. 9 of the RGPD), treatments that were considered respectful of data protection regulations. What is considered most relevant and which may have a doctrinal interest is transcribed below

*"In this regard, it must be said that on the dates when the data was collected in the list subject to complaint (October 2020), the treatment of body temperature data, both from the own staff and from external companies, was protected by article 6.1.c) and 9.2.i) of the RGPD, in connection with Organic Law 3/1986, of April 14, on special measures in matters of public health (art. 1, 2 and 3 ), Law 18/2009, of October 22, on public health (art. 1, 55.1.j), Law 33/2011, of October 4, general public health (art. 54.1); rules all invoked by the DTSF in*

*its letter of 01/25/2022. To the previous regulations it is necessary to add that Resolution SLT/1429/2020, of June 18, by which basic protective and organizational measures are adopted to prevent the risk of transmission and favor the containment of SARS-CoV infection -2 (in force on the date on which the data contained in the list would have been collected - October 2020-) determined the basic prevention measures, which had to be completed with drawn up and approved sectoral action plans within the framework of the PROCICAT Action Plan (Territorial Emergency Plan of Catalonia) for emergencies associated with emerging communicable diseases with high risk potential. The adoption of temperature control, on the dates indicated, was foreseen in the residential area in the June 2020 "Restoration of normalcy in the residential area" Sectoral Plan.*

*On the other hand, regarding the collection of the name, surname and ID of the own staff, this is information that the DTSE already had (and also the Department of Health, on whom the residences would have come to depend, as has said -antecedent 8th-). With regard to the collection of this same information from the staff of external companies, it is clear that the temperature control must be linked to specific people, although only the name and surname data or ID card would be sufficient. But the truth is that the DTSE (and the Department of Health) would already have both data based on the occupational risk prevention regulations (art. 24 of Law 31/1995, of November 8, on the prevention of occupational risks, and Royal Decree 171/2004, of January 30, which develops article 24 of Law 31/1995, of November 8, on the prevention of occupational risks, in matters of coordination of business activities), without ruling out that this data had also been collected based on the procurement regulations (such as based on article 76 of Law 9/2017 of November 8, on Public Sector Contracts).*

*Regarding the collection of the telephone, it is information that was momentous in order to be able to contact them quickly for the early detection of COVID-19, which is in the context and circumstances in which this data was collected.*

*Finally, it is necessary to demonstrate that, as stated in the antecedents, and in relation to this specific treatment, other principles were complied with such as that of information and that of limiting the term of conservation".*

**12.** In the initiation agreement, the accused entity was granted a period of 10 working days to formulate allegations and propose the practice of evidence that it considered appropriate to defend its interests.

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

### **proven facts**

In October 2020, the Assisted Residence for the elderly Laia González Feixa - dependent on the General Directorate of Personal Autonomy and Disability, a body attached at that time to the Department of Health -, included in a list entitled " *Register of Entries and Exits at the Feixa Llarga Residence* ", the data relating to the own staff and external companies that provided service to said Residence (name and surname, body temperature, telephone, ID, date, time of entry, time of departure, username/company). This list, located on the counter located right in front of the entrance to the Residence and under the custody of the caretaker, was completed by the workers, so that each of them could know the details of the rest of the people who were there.

## 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 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. In accordance with article 64.2.f) of the LPAC and in accordance with what is indicated in the agreement initiating this procedure, this resolution should be issued without a previous resolution proposal, given that the accused entity has not made allegations in the initiation agreement. This agreement contained a precise statement of the imputed liability.

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 of the RGPD, which provides for the following:

*"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»).*

For its part, 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 section on proven facts has been duly proven, which is constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies as such the violation of *"the basic principles for treatment"*, 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.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. 77.1 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 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 the case we are dealing with, it is not appropriate to require corrective measures as it is a one-off fact that has already been accomplished.

**For all this, I resolve:**

1. 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.

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](http://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,

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