

## File identification

Resolution of sanctioning procedure no. PS 21/2023, referring to the Department of Health.

## Background

1. On 09/21/2021, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the Department of Health of the Generalitat of Catalonia, on the grounds of an alleged non-compliance 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 (hereafter, RGPD).

Specifically, the reporting person explained that on 09/12/2021, despite being a Sunday, he received a call from a person (A) who said he was calling from the Department of Health; the call was made from the phone number 934013300, and this person (A) stated that he was on the list of people not vaccinated for covid-19 and that he wanted to make a phone appointment "to get the vaccine"; that when faced with this offer, he replied that he understood that the administration of this vaccine was not mandatory, and that this person (A) then asked him the reason why he had not been vaccinated, in order to stop -noted it. The person making the complaint complained that he had not authorized anyone to communicate his health data to a *call center*, *that he did not know how his data would be treated, that the reason he had not been vaccinated was personal, and that she felt coerced*. He provided a screen print of the call received on his cell phone showing the day, time and phone number from which he had been called.

Subsequently, on 31/01/2022 the complainant sent an email to the Authority, stating that in October 2021 he had received an email from the Catalan Health Service (CatSalut) containing the following sentence: "after reviewing the call...". Based on this sentence, the complainant inferred that his telephone conversation on 09/12/2021 had been recorded, and stated that during the call he was not informed that the conversation would be recorded.

2. The Authority opened a preliminary information phase (no. IP 369/2021), 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 22/06/2022 the Department of Health was required to report on several issues related to the events reported. This information requirement was reiterated on 11/21/2022 and on subsequent dates.
4. On 02/14/2023, the Department of Health responded to the aforementioned request stating the following:
  - 4.1. Regarding the entity that made the call to the reporting person on 12/09/2021, the reason and the purpose pursued:

"The vaccination strategy in Catalonia took shape in different actions with the idea of reaching all citizens. Thus, different vaccination campaigns were carried out by age groups, or by some sectors of activity. Among them, a specific procedure was designed to address people whose vaccination data was not available, called "Management order 061: task force calls respesca covid vaccination ". In execution of this procedure, the call that is the subject of this complaint was made.

(...)

The action was carried out by the Primary Care Teams ( EAPs ) and by 061 (SEM), depending on the groups to which the recipients belonged.

Given that the reporting person had never been vaccinated, the call would correspond to the EMS (...)."

#### 4.2. With regard to the treatment order and sub-order :

"The Department of Health tasked CatSalut with the technical execution of the vaccination campaign aimed at controlling covid-19 through a management assignment formalized on April 15, 2021 (...).

On the other hand, the relationship between CatSalut and the SEM in force at the time of the events that have been reported was articulated through a management assignment agreement dated June 1, 2011, for the management of care services provided for in the agreement itself and in its additional clauses.

The mandate given to the SEM is specified in its sixth clause indicating that "the SEM (...) is responsible for participating in the management of the emergency and emergency care systems in Catalonia established by the Department of Health, as well as, in general, all those activities that can be entrusted to him in the field of assistance and the transfer of sick people, the coordination and implementation of health actions, or any other special risk that increases the protection and safety in the field of health, and the integrated management of requests for attention and health information to citizens.

Likewise, in the additional clauses to this management assignment agreement corresponding to the year 2017, a fourteenth additional clause is incorporated by which the SEM is empowered to act as the person in charge of the processing of the files to which it is given access CatSalut, in order to be able to effectively provide the services it entrusts. The duration of this clause is established to be "Indefinite duration, as long as the main agreement is in force". In accordance with this, the clause was applicable until the entry into force of the new agreement formalized on December 29, 2021 (...)."

#### 4.3. Regarding the identification of the data controller:

"The person responsible for the reported treatment is the Department of Health (Vaccination Registry of Catalonia) in the exercise of the health authority functions attributed to it by article 5 of Law 18/2009, of October 22, of public health, in the context of the covid-19 pandemic, specifically the Vaccination Register of Catalonia".

#### 4.4. Regarding the collection of information regarding the reason why the people who received the call had not been vaccinated against covid-19:

"The actions were carried out based on the Covid vaccination strategy , drawn up by the Ministry of Health (<https://www.sanidad.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov/vacuNaCovid19.htm>), and deployed by the Generalitat in the area of Catalonia.

The aforementioned vaccination strategy considered it necessary to record not only the data of the vaccine administered but also the person's decision not to vaccinate, given that it is an act of free decision, with the indication of some taxed reasons that they moved to the regulation of the Vaccination Register of Catalonia carried out through Decree Law 48/2020, of December 1 (...)"

#### 4.5. Regarding compliance with the duty of information provided for in articles 13 of the RGPD:

"It has not been collected in the document "Management order 061: Task Force calls repesca vaccination covid " the information provided for in article 13 RGPD that had to be provided to the recipients of the calls, so compliance with the obligation of information that corresponded to the Department of Health cannot be accredited as responsible for the treatment". (the underlining is from the Authority).

#### 4.6. The Department of Health provided the document mentioned in point 4.1 above, which was entitled "Management assignment 061: Task Force calls repesca covid vaccination ", with the CatSalut logo, and with the following content:

"By order of Public Health i for such to advance in vaccination is will perform during the month of September one TASK FORCE calls for the recruitment of people not vaccinated against COVID.

(...)

This one document picks up the order of management at the 061 for strengthen the task performed by EAPs inside of the strategy of TASK FORCE of calls, for the capture of people no vaccinated of the covid for vaccination of the first dose.

(...)

A continuation is they describe the characteristics of the intervention what they have of to allow dimension work teams also taking into account the available physical space.

##### Characteristics of the intervention:

- **DURATION:** 3 weeks. Starting on September 4 and ending on the 30th of September.
- **POPULATION DIANE:** From 20 to 40 there are approximately 563,000 people waiting to be vaccinated (without any dose). It would be done at a decreasing rate. The population is expected to be divided equally between ICS and 061. Therefore, we would be talking about calling around 280,000 people.
- **HOURS :** 8am-10pm from Monday to Sunday (...)

(...)

##### Necessary requirements:

- access diary at the listed Updated extracted of K2. They have created 6 reports what contain the total of citizens between 20 and 40 years old that we currently have in K2:
  - That they have not received (or it is not recorded in K2) any doses of the vaccine for COVID

- Who do not have an appointment scheduled in K2 (they could have an appointment in ECAP, but this data is not available)
- The reports have been added to the SAU - Listados de personas folder . And they are grouped by years (...).

Objectives to achieve:

- (...)
- register reasons of no programming in every situation what can to be of interest (death, no flight get vaccinated, derivation a doctor header, phone Incorrect, not contacted...) seconds agreement with health Public and CatSalut (...)

5. On 03/10/2023, also during this preliminary information phase, the Authority's Inspection Area made a series of inquiries via the Internet, with the following result:

5.1. The document entitled "Management assignment signed, on April 15, 2021, between the Department of Health and the Catalan Health Service for the technical execution of the vaccination campaign aimed at controlling the COVID-19 in the framework of the Comprehensive Health System for Public Use of Catalonia (SISCAT) in coordination and under the criteria of the Secretariat of Public Health", published on the CatSalut website. In the third clause it is pointed out that CatSalut will act as the person in charge of the treatment.

The annex to this document contains the regulation of the processing order. In section 1 it is pointed out that : "the treatment will consist of access to data from the Department of Health on the population that requires vaccination, the doses received and information relevant to the priority and prioritization of the vaccination rate ( ...)", and for this purpose (section 2), the Department of Health makes available to CatSalut the information included in STOPCOVID19, the Catalan Vaccination Register and the website of COVID data (section 2). And in section 4, CatSalut is authorized to subcontract this data processing. Finally, section 5, relating to the obligations of the data controller, states that:

"Corresponds to the data controller:

(...)

f. Comply with the right to information of those affected."

5.2. The management assignment agreement dated 01/06/2011, for the management of healthcare services, signed by the Medical Emergency Service, SA (hereinafter, SEMSA) and CatSalut, published on the CatSalut website. The fourteenth additional clause, signed on 16 and 17/01/2018 and referring to data processing, contains the regulation of the order signed by CatSalut and SEMSA.

5.3. In relation to the telephone number from which the call was made to the reporting person, the Google search resulted in access to several newspaper articles in which a message published on the Department's Twitter was reproduced of Health, in which it was pointed out, among others, that the phone number 93 401 33 00 corresponded to that of the SEMSA teams in charge of monitoring close contacts of covid-19, and a video from the Department of Health published in Facebook , which contained the same information.

From the result obtained, the corresponding due diligence was carried out.

6. On 03/10/2023, the Authority received a final letter from the Department of Health, responding to a request for information from the Authority regarding whether the complainant's call had been recorded. The Department pointed out that: "In the first phases of the actions carried out to promote mass vaccination, the call was not recorded. Subsequently, the actions to encourage vaccination were standardized and protocolized and the recording of the calls began."
7. On 03/21/2023, the director of the Authority agreed to initiate a disciplinary procedure against the Department of Health for an alleged violation provided for in article 83.5. *b* in relation to article 13, both of the RGPD. This initiation agreement was notified to the Department of Health on 03/23/2023.
8. The initiation agreement explained the reasons why no charge was made with respect to the facts reported relating to the alleged communication of data, as well as the collection of the reason for non-vaccination. Next, the corresponding section is transcribed:

"1.- Regarding the communication of data by the Department of Health to a "call center "

The complainant complained that he had not authorized anyone to communicate his health data to a "call center ".

From the statements made by the Department of Health and the documentation reviewed in the antecedents section, it appears that SEMSA was the entity that made the controversial call to the complainant on 12/09/2021, and that it to do as part of an order from CatSalut (background 5.2), who in turn had received the order from the Department of Health to carry out technical tasks in the vaccination campaign against covid-19, following the criteria determined by the Secretary of Public Health of said Department (background 5.1). Both orders of treatment would comply with the requirements of article 28 of the RGPD.

Therefore, the transfer of personal data from the Department of Health to CatSalut and from the latter entity to SEMSA does not constitute a communication of data in accordance with the provisions of article 4 (sections 9 and 10) of the RGPD; and the legal basis that would legitimize the processing of the data by SEMSA and CatSalut would remain the same that would justify the processing by the Department of Health as the data controller, and that will be analyzed in the following section.

2.- On the collection of data relating to the reason for not being vaccinated against COVID-19.

The reporting person expressed his dissatisfaction with the fact that he was asked about the reason why he had not been vaccinated against covid-19. Although, as has been advanced, there is no record of the person reporting this specific data, it is considered appropriate to make a brief mention of the legitimacy of the collection and treatment of this health information that has the consideration of special protection data (art. 9 of the RGPD).

The RGPD requires that, in order to carry out a treatment of health data, the concurrence of a legal basis is required from those provided for in article 6.1; and, in addition, that any of the exceptions established in article 9.2 of the same rule apply.

Among the legal bases provided for in article 6.1 of the RGPD it is interesting to cite the one provided for in letter *e* , according to which the treatment is lawful when it:

"it is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment."

For its part, article 8.2 of the LOPDGDD establishes, in line with what is provided for in article 53 EC, that the processing of data based on the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person in charge, must derive from a competence attributed by a rule with the rank of law.

In the case at hand, the Department of Health (which was responsible for the treatment and on whose behalf SEMSA carried out the " Management Order 061: Task Force calls respesca vaccination covid ") is the body that has attributed the competences in the matter of prevention and control of communicable infectious diseases and epidemic outbreaks, and public health surveillance (in accordance, at the time of the events, with Decree 21/2021, of May 25, of creation , naming and determining the scope of competence of the departments of the Administration of the Generalitat of Catalonia and Decree 254/2021, of 22 June, restructuring the Department of Health ; in connection with the provisions of Organic Law 3/ 1986, of April 14, on Special Measures in the Matter of Public Health (articles 2 and 3) and Law 18/2009, of October 22, on public health (articles 5 and 55).

Concurrent with one of the legal bases established in article 6.1 of the RGPD, it must be seen if any of the exceptions provided for in article 9.2 of this same rule, which would allow the processing of data of health Among these exceptions, it is necessary to review those listed in sections *h* and *i* :

- h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a health professional and without prejudice to the conditions and guarantees contemplated in section 3;  
(...)
- i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health (...)."

For its part, article 9.2 of the LOPDGDD, provides the following:

"2. The data treatments provided for in letters *g* , *h* and *i* of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a standard with the rank of law, which may establish additional relative requirements to your security and confidentiality. In particular, this rule can protect the processing of data in the field of health when this is required by the management of health and social assistance systems and services, public and private, or the execution of a contract insurance of which the affected person is a party".

Well, in this regard, it is necessary to cite here 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 Decree-law 41/2020, of November 10, which regulates in article 3 the Catalan Vaccination Register, and foresees what the data are on vaccination against covid-19 that must be collected in said Register, and made available to the Secretary of Public Health for the purpose of carrying out the surveillance and monitoring of the covid-vaccination strategy 19 and learn about the evolution of coverage. Among the personal data that it foresees that must be collected, there is the reference to the reason for not vaccinating:

"1. In order to exercise the powers attributed to it in the field of prevention and control of communicable infectious diseases and epidemic outbreaks, and public health surveillance, the Secretary of Public Health of the Department of Health must have the data relating to vaccination against COVID-19 and (...). Specifically, this data processing must allow surveillance and monitoring of the COVID-19 vaccination strategy to be carried out and to know the evolution of coverage, including the entire target population that is being incorporated .  
(...) In the case of the vaccine against COVID-19, and in accordance with the vaccine strategy defined at any time by the health authorities, there must be a record of the non-administration including any of the following variables: the non-supply of the vaccine due to the free decision of the recipient or his legal representative; the non-supply of the vaccine due to the existence of contraindications for administration, with the indication of whether the contraindication is temporary or indefinite; or the non-supply of the vaccine to be in a situation of immunity.  
These data are integrated into the "Catalan Vaccination Register", which is owned by the Department of Health."

In accordance with the aforementioned regulations, it is considered that the collection and subsequent treatment in the Catalan Vaccination Register of the data relating to the reason for non-vaccination against COVID-19, is covered by article 6.1. *and* \_ and article 9.2 - letters *h* and *i* - of the RGPD (...)."

9. In the initiation agreement, the Department of Health was granted a period of 10 working days to formulate allegations and propose the practice of tests that it considered appropriate to defend its interests. This deadline has been exceeded and no objections have been made.

### **proven facts**

The Department of Health, as responsible for the treatment, entrusted CatSalut with the technical execution of the vaccination campaign aimed at controlling covid-19 within the framework of SISCAT (background 5.1). In turn, CatSalut, within its scope of competence, commissioned SEMSA in September 2021 to make calls to people who had not been vaccinated against covid-19, or who had not been inoculated with the 2nd dose of the vaccine (background 4.2). In order to carry out this assignment, SEMSA accessed reports that contained lists of SISCAT users who had not been vaccinated against covid-19 (of any dose), among which the complainant would appear.

In compliance with this order, on 09/12/2021, SEMSA called the complainant. It is not proven, however, that in the context of this call the reason why this person had not been vaccinated was collected , nor that he was recorded.

In any case, the Department has recognized that the purpose of the calls made as part of the mentioned campaign (such as the one made to the complainant) was to collect, among other information, the data relating to the reason that had led certain people not to get vaccinated. Considering that SEMSA made approximately 280,000 calls (background 4.6) , there is no doubt that this entity collected - on behalf of the Department of Health - this information from a large number of people.

The Department of Health has also recognized that, from a certain date, the calls made by SEMSA as part of this campaign were recorded (precedent 6th).

The Department of Health has not proven to have informed those people who were called and whose data was collected of the extremes provided for in article 13 of the RGPD (the reason why they had not been vaccinated - in the cases in which the person provided this information - and/or his voice - in the cases in which the call was recorded).

## **Fundamentals of law**

### **1. competition**

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. Lack of allegations**

In accordance with article 64.2.f) of the LPAC and in accordance with what is indicated in the agreement to initiate this procedure, this resolution should be issued without a previous resolution proposal, given that the The Department of Health has not made any objections to the initiation agreement. This agreement contained a precise statement of the imputed liability.

### **3. Legal qualification of the facts imputed and now proven**

In relation to the right to information, it is necessary to go to article 12.1 of the RGPD, which provides that: " 1. The person responsible for the treatment will take the appropriate measures to provide the interested party with all the information indicated in articles 13 and 14 ( ...)".

For reference, article 13 of the RGPD provides for the following:

"1. When the personal data that refer to the interested party are obtained from the interested party himself, at the time of collecting them, the data controller must provide the information indicated below:

- a) The identity and contact details of the person in charge and, where appropriate, of their representative.
- b) The contact details of the data protection representative, if applicable.
- c) The purposes of the treatment for which the personal data are intended and the legal basis of the treatment.



d) If the treatment is based on article 6, section 1, letter f), the legitimate interests of the person in charge or of a third party.

e) The recipients or the categories of recipients of the personal data, if applicable.

f) If applicable, the intention of the person in charge to transfer personal data to a third country or an international organization (...).

2. In addition to the information mentioned in section 1, when obtaining the personal data, the data controller must provide the interested party with the following information, necessary to guarantee fair and transparent data processing:

a) The term during which the personal data will be kept. If this is not possible, the criteria used to determine this term.

b) The right to request from the person in charge of the treatment access to the personal data relating to the interested party, to rectify or delete them, to limit the treatment or to oppose it, as well as the right to data portability.

c) (...).

d) The right to present a claim before a control authority.

e) If the communication of personal data is a legal or contractual requirement, or a necessary requirement to sign a contract, as well as if the interested party is obliged to provide personal data and is informed of the possible consequences of not doing so .

f) The existence of automated decisions, including the creation of profiles (...)"

Failure to comply with the duty of information on the points indicated in the precept transcribed could constitute an infringement, as provided for in article 83.5.b of the RGPD, which typifies as such the violation of: "The rights of the interested parties, in accordance with articles 12 to 22".

During the processing of this procedure, the imputed conduct has been duly proven. This conclusion is reached taking into account that in the letter dated 02/14/2023 the Department of Health stated that it could not certify that it had complied with the duty of information, and acknowledged that in the document "Order of management 061: Task Force calls respesca vaccination covid " this obligation to inform the extremes of article 13 of the RGPD had not been collected.

The omission of this information in the calls that SEMSA made to SISCAT users in the vaccination campaign aimed at controlling covid-19, constitutes a very serious violation of article 72.1.h of the Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), in the following form:

"h) The omission of the duty to inform the affected person about the processing of their personal data in accordance with the provisions of articles 13 and 14 of Regulation (EU) 2016/679 and 12 of this Organic Law."

#### 4. Penalty to be imposed and corrective measures

Article 77.2 of the 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 sanctioning them with a warning. The resolution must also establish the appropriate measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected."

In similar terms to the LOPDGDD, article 21.2 of Law 32/2010 determines that: "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 specific case, it is considered that informing the affected people now about the extremes of Article 13 of the RGPD would involve a disproportionate effort by the Department of Health, taking into account, among other issues, the high number of people affected (in the document that contained the order it was foreseen that SEMSA would call about 280,000 people). Therefore, the adoption of corrective measures should not be required.

This does not prevent us from remembering the importance of informing about the ends provided for in Article 13 of the RGPD when calls are made that involve the collection of personal data, unless the affected persons already have this information.

## **solution**

For all this, I resolve:

**1.** Notify the Department of Health as responsible for an infringement provided for in article 83.5. *b* in relation to article 13, 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 under 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,

Machine Translation