Procedure No.: PS/00187/2019

 RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and based on

to the following

BACKGROUND

FIRST: The claimant filed a written claim on 01/03/2019

before the Spanish Agency for Data Protection. The claim is directed against HM

HOSPITALS 1989, S.A. with NIF A79325858 (hereinafter HM). The reasons in which

based on the claim are, in summary, the following: that on 11/08/2018 he went to the

HM emergency department being admitted; on the occasion of admission, he had to fill out

form where there was a box to check in which it was indicated that he yielded

the data to third parties if you did not mark it; which subsequently HM submitted the report

doctor to Mapfre, your insurance company, to apply for admission; that he

11/23/2018 was denied by Mapfre medical test based on the report

referred and that his hospital admission was not authorized for what was going to be requested

reinstatement of the amount and, taking advantage of these circumstances, recalculate the

amount of the insurance policy premium.

Provide the following documentation:

- Copy of ID.

- Copy of claim before the Health Council of the Autonomous Community of Madrid.

- Copy of the document submitted to the HM requesting documentation.

- Copy of the documentation delivered by HM.

- Copy of the complaint filed with the Getafe Police Station and extension of

complaint to the Móstoles Police Station.

In the document provided by the claimant Urgent Admission Request for

HM contains the following clause:

And then the following is added in relation to the regulations of

Data Protection:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

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SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant, the Subdirectorate General for Inspection of

Data proceeded to carry out preliminary investigation actions for the

clarification of the facts in question, by virtue of the investigative powers

granted to the control authorities in article 57.1 of the Regulation (EU)

2016/679 (General Data Protection Regulation, hereinafter RGPD), and

in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law

Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of

digital rights (hereinafter LOPDGDD).

On 02/01/2019, the claim filed was transferred to the claimant for

analysis and communication to the claimant of the decision adopted in this regard. Equally,

he was required so that within a month he sent to the determined Agency

information.

On the same date, the claimant was informed of the receipt of the

claim and its transfer to the claimed entity.

On 03/06/2019, HM responded to the request for information, indicating the

following: that every patient who comes to the Emergency Unit is informed that the

expenses of your stay will be communicated to the insurance company as in the present

case, in order to check the coverage you may have contracted as

insured and that his refusal to such communication would entail the commitment of

meet the aforementioned expenses; that in order to provide adequate assistance it is

It is necessary that there are transfers of data between HM and the insurers with which

have signed an Agreement without at any time having to request a

specific consent for such communication; that the main reason why

addressed to HM focused on access to data by agent and operator of

Mapfre question that is of operation of that and in terms of documentation

requested that at no time has it been denied but had to be documented

informing you about the response times and the security measures applied.

On 05/03/2019, in accordance with article 65 of the LOPDGDD, the Director

of the Spanish Agency for Data Protection agreed to admit the claim for processing

submitted by the claimant.

THIRD: On 06/27/2019, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged

infringement of article 6.1.a) of the RGPD, typified in Article 83.5 of the RGPD.

FOURTH: Once the aforementioned initiation agreement was notified, on 07/10/2019 the respondent presented

brief of allegations in which, in summary, it stated the following: that the

the claimant's entry document was not adapted to the new

regulations on data protection; that the information given to patients who

go to the centers of the claimed is carried out in accordance with articles 13 and 14

of the RGPD, not considering the typification carried out by the AEPD of the

offense committed; that in the specific case authorization was needed from the

insurance company to pay the expenses derived from the income, being essential to give

transfer of the emergency document; that the respondent has implemented measures of

security in order to prevent incidents similar to the one that occurred.

FIFTH: On 08/02/2019, the opening of a practice period of

tests, remembering the following:

- Consider reproduced for evidentiary purposes the claim filed by the

claimant and his documentation, the documents obtained and generated by

the Inspection Services that are part of file E/01052/2019.

- Consider reproduced for evidentiary purposes, the allegations to the agreement of

start PS/00187/2019 presented by HM and the documentation that they

accompanies.

SIXTH: On 11/15/2019, a Resolution Proposal was issued in the sense of

that the Director of the Spanish Data Protection Agency sanctioned

HM, for an infringement of article 6.1.a) of the RGPD, typified in article 83.5.a) of the

RGPD, a fine of €48,000 (forty-eight thousand euros). Also, it was accompanied

Annex containing the relationship of the documents in the file in order to

obtain a copy of those it deems appropriate.

The representation of HM in writing of 11/29/2019 presented a letter reiterating what

indicated in the procedure and, furthermore, that the dismissal of the

sanctioning procedure as there is no infringement of article 6 of the RGPD having

acted in accordance with what is stated in the Guide published by the AEPD, requesting

the dismissal of the sanction to the claimed.

PROVEN FACTS

FIRST. On 01/03/2019, the AEPD received a written document from the affected party in which

claims against HM; declares that having gone to his emergency service, he had to

be admitted and for the same reason he had to fill out a form which stated

a box to mark in which it was indicated that it transferred the data to third parties if not

marked; that HM subsequently sent the medical report to Mapfre, his company

insurer, to apply for admission; which was later denied by his

insurer medical proof based on the report submitted and that your income

hospital was not authorized, so the reinstatement of the amount was going to be requested

paid and recalculate the amount of the insurance policy premium.

SECOND. The claimant has provided a copy of her DNI nº ***NIF.1.

THIRD. In the document Request for Urgent Income provided by the claimant

where your personal data was collected contains the following informative clause:

“In accordance with Organic Law 15/1999, of December 13, on the Protection of Personal Data

Personal, we inform you that the data provided here will be incorporated into a set of

files duly registered with the Spanish Data Protection Agency by HM Hospitales, which

comprises the following entities: HM Hospitales 1989, S.A., Sanatorio Quirúrgico Modelo, S.L.,

Universal Medical Surgical, Unmequi, S.A., Medical Cabinet Velázquez S.L., Medical Center La

Moraleja, S.L.

Each of these entities has files whose purpose is health care and management, as well as

as the administrative management of services.

We inform you that your data will be treated with the confidentiality required in the regulations on

of data protection and with the security measures required therein.

You can exercise your rights of access, rectification, cancellation and opposition through the Service of

Patient Care of any of the Hospitals of the Companies or by sending a letter to HM

Hospitals Plaza conde Valle de Suchil nº 2, 28015 Madrid.

If you do not want this information to be provided to third parties, check this box

Likewise, and unless expressly indicated, I authorize the person responsible for the file, HM HOSTALES 1989, S.A., to

use of the patient's personal data to send information about their products and services,

being able to revoke said consent at any time.

If you do not want to authorize the sending of advertising, check this box

FOURTH. It is known that the affected filed a complaint on 11/26/2018 before the Commissioner

of Police of ***LOCALIDAD.1, later expanded in the Police Station

of ***LOCALIDAD.2, as well as a claim before the Ministry of Health of the

Community of Madrid on 11/26/2018 for the same events. It is also written

addressed to HM requesting copies of the signed documents in relation to your

hospitalization.

FOUNDATIONS OF LAW

By virtue of the powers that article 58.2 of the RGPD recognizes to each

control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection is competent to initiate

and to solve this procedure.

Yo

The RGPD in its article 5, Principles related to data processing

personal, states that:

II

"1. The personal data will be:

a) processed in a lawful, loyal and transparent manner in relation to the interested party

("legality, loyalty and transparency");

b) collected for specific, explicit and legitimate purposes, and will not be processed

subsequently in a manner incompatible with those purposes; according to article 89,

paragraph 1, the further processing of personal data for archiving purposes in

public interest, scientific and historical research purposes or statistical purposes are not

deemed incompatible with the original purposes ("purpose limitation");

(…)

On the other hand, article 6 of the RGPD, Legality of the treatment, indicates that:

"1. The treatment will only be lawful if at least one of the following is met

conditions:

a) the interested party gave their consent for the processing of their data

personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the

interested party is a party or for the application at the request of the latter of measures

pre-contractual;

(…)

Article 4 of the GDPR, Definitions, in section 11 states that:

“11) «consent of the interested party»: any manifestation of free will,

specific, informed and unequivocal by which the interested party accepts, either through

a statement or a clear affirmative action, the processing of personal data that

concern you”

And article 7 of the aforementioned Regulation, Conditions for consent,

notes that:

"1. When the treatment is based on the consent of the interested party, the

responsible must be able to demonstrate that he consented to the treatment of his

personal information.

2. If the data subject's consent is given in the context of a statement

writing that also refers to other matters, the request for consent will be

presented in such a way as to be clearly distinguishable from other matters, in a manner

intelligible and easily accessible and using clear and simple language. It will not be binding

any part of the declaration that constitutes an infringement of these Regulations.

3. The interested party shall have the right to withdraw their consent at any

moment. The withdrawal of consent will not affect the legality of the treatment

based on consent prior to withdrawal. Before giving your consent, the

Interested party will be informed of this. It will be as easy to withdraw consent as it is to give it.

4. In assessing whether consent has been freely given, account will be taken

to the greatest extent possible whether, among other things, the execution of a

contract, including the provision of a service, is subject to the consent of the

processing of personal data that is not necessary for the execution of said

contract".

Also article 6, Treatment based on the consent of the affected party,

of the new Organic Law 3/2018, of December 5, on Data Protection

and Guarantee of Digital Rights (hereinafter LOPDGDD), points out

that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU)

2016/679, consent of the affected party is understood to be any manifestation of will

free, specific, informed and unequivocal by which he accepts, either through a

declaration or a clear affirmative action, the treatment of personal data that

concern.

2. When the data processing is intended to be based on consent

of the affected party for a plurality of purposes, it will be necessary to state

specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the

processing of personal data for purposes unrelated to the

maintenance, development or control of the contractual relationship".

III

It should be noted that data processing requires the existence of a database

legal that legitimizes it, such as the consent of the interested party for the treatment of the

personal data for one or more specific purposes.

In the present case, HM is accused of violating article 6.1.a) of the

RGPD when evidencing the illegality of the treatment in obtaining the consent by

part of the claimed; procedure that is instructed in addition to the lack of

adaptation of the data protection regulations to the new RGPD, by the clauses

included in the document Request for Urgent Income provided by the claimant and

which was issued by HM.

It should be noted that the aforementioned document shows the absence of

adaptation to the new regulations on data protection and obsolescence

of the clauses included in it to obtain consent.

In the first place, it refers to the Organic Law 15/1999, of 13

December, on the Protection of Personal Data, which was not in

in force at the time the personal data was collected, November

of 2018, from which it can be deduced that its content was not adapted to what

established in the regulations in force at the time of collecting the information related to

personal data, since the RGPD is fully applicable from the

05/25/2018, after a period of two years from its approval, which was deemed sufficient

to comply with the obligations contained therein.

Second, the formula for obtaining the consent of the claimant

at the time of your hospital admission, both for information to third parties and for

sending advertising is inappropriate, not complying with the requirements of the RGPD.

The respondent contemplates the use of the personal data of the claimant

for purposes other than the mere fulfillment of the business relationship. Specific,

in the clause of the Urgent Admission Request document, HM limits the options of the

interested in marking the boxes through which you record your

opposition to the aforementioned data processing, both in relation to the information to

third parties such as sending advertising. The data collection form and

provision of consent reads as follows:

If you do not want this information to be provided to third parties, check this box

Likewise, and unless expressly indicated, I authorize the person responsible for the HM file

HOSTALES 1989, S.A., to the use of the patient's personal data for the

sending information about its products and services, being able to revoke said

consent at any time.

If you do not want to authorize the sending of advertising, check this box

With this mechanism, consent is obtained through the inaction of the
interested (If you do not want to…, check this box), contrary to what is established in the
GDPR. It is not an affirmative action, but a pure inaction that does not ensure
that the interested party unequivocally grants consent (normally when
marks something is because you want it, not because you don't want it; may not have understood
the double negation; You may not have paid due attention when skimming through the
indications in question). It is, in short, a tacit consent (the
consent is deduced from inaction) and therefore contrary to the RGPD.

Therefore, the requirement that “consent must
given through a clear affirmative act that reflects a manifestation of will
free, specific, informed, and unequivocal of the interested party to accept the treatment of
personal data that concerns you”, it being understood that “inaction does not
must constitute consent” (Recital 32).

The GDPR excludes implied consent and requires it to be explicit. With the
entry into force of the RGPD and the new LOPDGDD, only the consent will be valid
express. The most important novelty regarding the consent incorporated in the
GDPR is based is that it must be granted through a clear affirmative act that
evidence a declaration of free, specific, informed and unequivocal will of the
Interested in admitting the processing of personal data that affect you; that
There is not the slightest doubt that there has been a manifest will on the part of the
client, giving their express consent to be able to treat their personal data with
the specific purposes detailed in the form.

The GDPR does not accept inactivity; the request for consent must be clear
and specifically, that it does not unnecessarily alter the use of the service for which it is provided. all of it

it does nothing but insist on the need for the interested party to expressly consent to the

treatment, not being an adequate means the establishment of formulas such as those

indicated on the HM entry form-print.

The reference to expressing the refusal to the treatment allows to write the text

in the negative sense. That is, you can indicate how it is done in the form "if not

If you want this information to be provided, check this box" or "if you do not want to authorize the

sent advertising check this box", instead of a positive marking "check

this box if you want this information to be provided or transferred" or "check this box if

you want to receive advertising", since the difference between one text and another is important

since the former is often used because it creates confusion and the tendency not to

check the box.

Therefore, HM violated article 6.1 of the RGPD, not by obtaining the consent

of the claimant, but by including in the document Request for Urgent Admission, as

points out above, a way to obtain consent at the time of your

hospital admission, both for information to third parties and for sending

advertising, inappropriate not meeting the requirements of the RGPD.

The infraction that is attributed to the claimed one is typified in the

article 83.5 a) of the RGPD, which considers that the infringement of "the basic principles

IV

for processing, including the conditions for consent under the

articles 5, 6, 7 and 9" is punishable, in accordance with section 5 of the aforementioned

Article 83 of the aforementioned Regulation, "with administrative fines of €20,000,000 as maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

The LOPDGDD in its article 71, Violations, states that: "They constitute infractions the acts and behaviors referred to in sections 4, 5 and 6 of the Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to the present organic law".

And in its article 72, it considers for prescription purposes, which are: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in particularly the following:

(…)

b) The treatment of personal personal data without the concurrence of any of the the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679.

(…)"

In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which point out:

v

"1. Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances

of each individual case, in addition to or as a substitute for the measures contemplated

in article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

f) the degree of cooperation with the supervisory authority in order to put

remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in

particular if the person in charge or the person in charge notified the infringement and, in such case, what extent;

i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its Article 76, “Sanctions and corrective measures”, establishes that:

"two. In accordance with the provisions of article 83.2.k) of the Regulation (EU) 2016/679 may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of treatments of personal data.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have induced the commission of the offence.

e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of data.

h) The submission by the person in charge or person in charge, with

voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any

interested."

The representation of the accused has argued that the infraction cannot

classified as very serious and that the measures adopted with

subsequently during the procedure initiated by the Agency, evidencing the

implementation of security measures to correct any error that could be

produce.

In the present case, it has been proven that HM violated article 6.1.a)

as a consequence of the inadequate and obsolete formula of obtaining consent

included in the clause of the Urgent Entry Request document at the time of

hospital admission both for information to third parties and for sending advertising

by not meeting the requirements of the RGPD and the lack of adaptation of the document to the aforementioned

Regulation.

On the other hand, in accordance with the transcribed precepts, in order to set the

amount of the fine sanction to be imposed in this case for the infraction

typified in article 83.5 of the RGPD for which HM is responsible, in a

initial assessment, the following factors are considered concurrent:

- The merely local scope of the treatment carried out by the entity

claimed.

- The duration of the infraction since the adaptation to the new regulation of

data protection must have been carried out as of 05/25/2018, date of entry

in force of the RGPD.

- The damage caused to the claimant, since as a consequence

of the incident produced, he had to go to the entity filing a claim,

before the Ministry of Health and report to the police.

- Linking the activity of the offender with the performance of treatments

of personal data, since due to its activity it usually deals with

customer and third party data.

- The claimed entity is considered a large company.

- There is no evidence that the entity had acted maliciously,

although negligent action is observed.

- Only one person has been affected by the offending conduct.

- It is also worth noting that the entity has provided documentation that

certifies having adopted measures to prevent incidents from occurring again

as claimed.

Therefore, in accordance with the established graduation criteria, both

adverse and favourable, a penalty of 60,000 euros is proposed, of which HM

must answer.

However, HM has acknowledged in the pleadings to the settlement agreement

start of this procedure that on 11/08/2018 the document Application for admission

urgent was not adapted to the new data protection regulations, in

specifically to the RGPD, recognizing its responsibility in the facts, for which reason

in accordance with article 85.1 of Law 39/2015, of October 1, on the Procedure

Administrative Common of the Public Administrations (LPACAP), it carries rigged

a reduction of 20% of the sanction to be imposed, equivalent in this

case to 12,000 euros, so with the application of this reduction, the sanction

would be established at 48,000 euros.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE HM HOSPITALES 1989, S.A., with NIF A79325858, for a infringement of Article 5.1.a) of the RGPD, typified in Article 83.5 of the RGPD, a fine of €48,000 (forty-eight thousand euros).

SECOND: NOTIFY this resolution to HM HOSPITALES 1989, S.A.

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once Once this resolution is enforceable, in accordance with the provisions of the art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure Common Public Administrations (hereinafter LPACAP), within the payment term voluntary established in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its entry, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise, it will be collected during the executive period.

Received the notification and once executed, if the date of execution is is between the 1st and 15th of each month, both inclusive, the term to carry out the

voluntary payment will be until the 20th day of the following month or immediately after, and if is between the 16th and last day of each month, both inclusive, the term of the payment will be until the 5th of the second following month or immediately after.

In accordance with the provisions of article 50 of the LOPDGDD, the This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a period of month from the day following the notification of this resolution or directly contentious-administrative appeal before the Contentious-Administrative Chamber of the National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of July 13, regulating the Contentious-administrative jurisdiction, within a period of two months from the day following the notification of this act, as provided in article 46.1 of the aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP, the firm resolution may be provisionally suspended in administrative proceedings if the interested party expresses his intention to file a contentious appeal-administrative. If this is the case, the interested party must formally communicate this made by writing to the Spanish Agency for Data Protection,

through the

Electronic Registration of

introducing him to

the agency

[https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the

precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency