

Processing of personal data in Mexico amidst COVID-19

Mexico City, April 16, 2020

On April 13, 2020, the National Institute for Transparency, Access to Information and Protection of Personal Data (the “Institute” or “INAI”) published the Public Statement INAI/118/20 (the “Public Statement”), informing that the Institute will deal with complaints via email for improper use of personal data during the diagnosis, monitoring and care of cases of COVID-19.

In the Public Statement, INAI summoned the general public to report any alleged violation of the regulations governing the right to protection of personal data committed by data controllers either from the private sector or the federal public sector, as soon as the complainant has knowledge of the improper processing in question.

The Public Statement defines as improper treatment of personal data, any:

- (i) illegal use;
- (ii) unauthorized disclosure; or
- (iii) excessive and disproportionate storage of personal data, carried out by the person responsible for its protection, in any physical or electronic media.

It is important to note that, according to the Public Statement, the complaint can be made by any person, and not only by the owner(s) of the personal data whose protection is considered to have been violated, during the year immediately following the occurrence of the events. Likewise, the Public Statement limits the reporting of violations in the public sector, to those carried out specifically by federal authorities.

In Mexico, the Federal Law on the Protection of Personal Data Held by Individuals and the General Law on the Protection of Personal Data Held by Regulated Entities (the “Personal Data Protection Regulations”), establish an array of obligations for individuals or corporations of a private nature, as well as for the various authorities and institutions of the government, who have access and manage personal data, among which is the obligation to act with the express, informed and specific consent of data holders, and to timely and adequately notify these of the terms and conditions that will govern said processing (including their transfers to third parties).

The foregoing becomes especially relevant when it comes to the handling of information and data by public and private health care service providers (and, in general, by any third party), during the health emergency due to the SARS-CoV-2 virus (COVID-19), since the Personal Data Protection Regulations establish a higher protection threshold for the so-called Sensitive Personal Data, namely, that which affects the most intimate sphere of its owner, or whose improper use may give rise to discrimination or entail a serious risk for she/he (among which is the data that may reveal aspects of the present or future health status of its holder).

Therefore, it is not permissible for any regulated entities, including without limitation those responsible for the processing of personal data for the provision of medical services, to publicly communicate (in physical or electronic means) the name or any other personal data of employees or patients who test positive for COVID-19, or to publish or transfer information from the patient's clinical record, without observing the applicable legal provisions.

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Now, although there are provisions in the Personal Data Protection Regulations that, on the one hand, (i) recognize that the principles and rights set forth therein are limited in terms of their observance and exercise, to safety and public health, and on the other, (ii) allow the waiver of, and / or restriction of certain obligations and rights for emergency situations (capable to harm an individual in his person or property), or in the case of the prevention or medical diagnosis or the management of health services (for example, the waiver of the duties of obtaining consent and cancellation of data, or the restriction on the exercise of ARCO rights), the Public Statement allow us to conclude that it does not currently exist any declaration from the Regulator, by which it officially:

- (i) recognizes the possibility that the health emergency due to the SARS-CoV-2 virus (COVID-19), deactivates the different controls and guarantees established in the applicable legislation for the protection of personal data; or
- (ii) communicates that the Agreement published by the General Health Council in Mexico's Official Gazette dated March 30, 2020, is comparable to a duly founded and motivated resolution by a competent authority, or adjusts to the requirements established in the Personal Data Protection Regulations in such a way that the processing of personal data is allowed even in absence of consent from the relevant data holder, and that the cancellation of data can be denied-, or the exercise of ARCO rights can be restricted, all, for reasons of public order or public health and safety.

On the contrary, the Public Statement invites to continue with a strict observance of the dispositions that govern in the matter, with the purpose of eliminating any obstacle in the exercise of the actions for the protection of the respective rights.

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