Opinion in relation to a query about the incorporation of certain services from entity A to entity B.

A letter from entity B is submitted to the Catalan Data Protection Authority in which it requests the opinion of this Authority on the actions that must be taken to comply with data protection legislation personal data in view of the incorporation of certain services provided by entity A to entity B.

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

Entity B states, in its letter of inquiry, that the City Council of (...) has decided to incorporate into the entity some of the services previously provided by entity A, so patient data that entity A has, they must communicate to entity B. Given this, it considers what actions must be taken in order to comply with the legislation on the protection of personal data.

In order to provide an adequate response to the query raised, it is considered necessary, at the outset, to clarify the position occupied by both municipally owned entities in relation to the processing of personal data that would be the subject of transmission. In view of the information available, it cannot be ruled out, as explained below, that both entity A and entity B have the status of data processors in the present case.

In accordance with Organic Law 15/1999, of December 13, on the protection of personal data (hereafter, LOPD) the person in charge of the treatment is understood as "the natural or legal person, the public authority, the service or any other body that, alone or jointly with others, processes personal data on behalf of the data controller" (article 3.g)).

Data controller means "the natural or legal person, of a public or private nature, or administrative body, which decides on the purpose, content and use of the treatment"
(article 3.d) LOPD).

In the electronic headquarters of the City Council of (...) you can consult the agreement of the Plenary meeting of November 28, 2017, through which it is agreed to initially approve the modification of the form of management of health services mental and addictions in the city of (...), which until now has been managed by entity A and which will now be managed by entity B.

As can be seen from the antecedents of this agreement, on March 15, 1995, an agreement was signed between the Catalan Health Service (hereinafter, CatSalut) and entity A, under which entity A would manage the aforementioned mental health and addiction health services in the city of (...) on behalf of CatSalut.

From the point of view of data protection, it could be understood that CatSalut, through the subscription of said agreement, would be entrusting entity A with the processing of the data

personnel necessary for the provision of the aforementioned services. We would therefore be faced with access to data on behalf of third parties (article 12.1 LOPD).

However, in order to enjoy the effects provided for in article 12.1 of the LOPD, it is not only necessary that the data processing (what entity A does or used to do) be on behalf of the person in charge (CatSalut), but that it is also necessary that the assignment of the treatment is regulated in a contract or written agreement that allows to certify its agreement and the minimum content required by article 12.2 of the LOPD, that is "that the person in charge of the treatment it must only treat the data in accordance with the instructions of the data controller, who cannot apply or use them for a purpose other than that stated in the aforementioned contract, or communicate them to other people, not even to keep -les", as well as "the security measures referred to in article 9 of the LOPD that the person in charge of the treatment is obliged to implement."

The aforementioned 1995 agreement does not contain any provision or condition that incorporates the points indicated in this article 12 of the LOPD. Nor is there any addendum in this regard. However, the existence of a specific agreement or similar legal act in this regard cannot be ruled out, taking into account that in other orders for the provision of health services carried out by CatSalut with third parties, the corresponding order has been formalized treatment. In this sense, it is worth highlighting the fact that CatSalut has signed with this same entity a specific agreement for the care of drug addictions (of January 2, 1996), in respect of which, in 2017, add an additional clause (27a) which regulates the obligations that correspond to entity A as the processor in relation to the personal data linked to the provision of this service. In view of these facts, therefore, it could not be ruled out that entity A also held the said status of data controller in relation to the personal data linked to the provision of the mental health service on behalf of CatSalut.

This possible condition of data controller (article 3.g) LOPD) in the provision of mental health services and additions seems clearer in the case of entity B.

The aforementioned agreement of the Plenary of the City Council of (...) of November 28, 2017 incorporates, as annex 1, a proposal for a cooperation agreement between CatSalut, the City Council and entity B to guarantee the continuation of the aforementioned mental health and addiction services by the city of (...).

The content of certain clauses of this proposed agreement show that entity B, once the agreement is formalized, could adopt, with regard to the processing of the personal data required for the provision of the aforementioned services on behalf of CatSalut , the position of data controller. Thus, for example, the following clauses should be highlighted:

> "Fourth.- The entity will carry out the mental health and drug addiction care defined in this agreement and in its additional clauses for patients treated on behalf of CatSalut."

> "Fortnight.- The entity must deliver to each user served by the public health system, the information determined by CatSalut through the appropriate instructions. (...)

> With regard to HC3, the entity is responsible for complying with the regulations on the protection of personal data, both of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD) , as of Royal Decree 1720/2007, of December 21, which approves the Development Regulations of the LOPD, and the other deployment and application regulations.

In the same sense, the entity will inform the members of its staff who have authorized access that each of them assumes the responsibility of protecting the data and the identification and authentication systems, and inform that there remains traceability of all the accesses made. On the other hand, making use of it implies knowing and accepting the rights and duties related to access to the HC3."

"Twenty-and-twelve.- The entity is obliged to comply with everything established by Organic Law 15/1999, of December 13 (LOPD) mentioned above, and Royal Decree 1720/2007, of December 21 , which approves the Development Regulations of the LOPD, in relation to the personal data to which it has access during the validity of this agreement.

The documentation and information that comes out or to which you have access during the provision of the services derived from this agreement, which correspond to the Contracting Administration responsible for the personal data file, is confidential and may not be reproduced in whole or in part by any means or support; therefore, it may not be processed or computerized, nor transmitted to third parties outside the strict scope of the direct execution of the agreement, not even among the rest of the staff that the entity has or may have that provides the service that is the subject of this agreement. (...)".

III

Taking these considerations into account, it could be understood that the transmission of the personal data of the patients held by entity A to entity B, referred to in the consultation letter, would be a consequence of a change of entity who must act as the person in charge of the treatment (article 3.g) LOPD) with regard to personal data linked to the provision of mental health health services and additions on behalf of CatSalut, responsible for said information (article 3 .d) LOPD).

If this were the case, it should be taken into account that, in accordance with the provisions of article 12.2 of the LOPD, already cited, the person in charge of the treatment could not communicate to any other recipient the data to which he had access in the execution of the order, or those that had been drawn up from this data, unless the order agreement or contract had established that, at the end of the order, the person in charge must deliver the data to the new person in charge designated by the person in charge.

In the event that this agreement or commission contract establishes the return of the data to the person in charge at the end of the commission, the communication could also be carried out if the person in charge gives instructions to the person in charge in order to deliver them to the new person in charge he has appointed.

This is clear from article 20.3 of the RLOPD, according to which:

"3. In the event that the person in charge of the treatment uses the data for another purpose, communicates it or uses it in breach of the stipulations of the contract referred to in section 2 of article 12 of Organic Law 15/1999, of December 13, it will be considered, also, responsible for the treatment, responding to the infractions that he had personally incurred.

However, the person in charge of the treatment will not incur liability when, with the express indication of the person in charge, he communicates the data to a third party designated by him, to whom he had entrusted the provision of a service in accordance with the provisions of this chapter."

Therefore, in the event that in the present case the corresponding assignment agreement (or addendum clause to the agreement) had not provided for the delivery of the personal data available to entity A as a result of the provision of the mental health health services and additions on behalf of CatSalut to a new person in charge (entity B), it would correspond to CatSalut, as responsible, to give the appropriate instructions to entity A to deliver such information to entity B .

At the same time, it would be necessary to resolve the agreement or contract for commissioning the treatment that CatSalut could maintain with entity A and formalize a new one with entity B.

In this regard, and in view of the provisions of the proposed agreement between CatSalut, the City Council and entity B (annex 1 of the Plenary agreement), it must be borne in mind that Regulation (EU) 2016/679 , of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (hereinafter, RGPD), has introduced changes in the minimum content of the contract that regulates the processing order, which affect both the obligations of the person in charge as well as the obligations of the person in charge and, where applicable, sub-person in charge.

Given that article 99.2 establishes that the RGPD will not be applicable until May 25, 2018, the regime provided for in the LOPD (article 12) and the Regulation for the development of the LOPD, approved by the Royal Decree 1720/2007, of December 21, (articles 20 to 22), but it must be borne in mind that from the aforementioned date any processing order must meet the requirements of the new regulation.

Therefore, it must be borne in mind that the clauses of the commission agreement that CatSalut can formalize with entity B (either in the same agreement for the management of the provision of health services or in another specific agreement) must comply with the provisions of article 28.3 of the RGPD, according to which:

> "3. The processing by the controller will be governed by a contract or other legal act in accordance with the Law of the Union or the Member States, which binds the controller with respect to the controller and establishes the object, duration, nature and purpose of the processing, the type of personal data and categories of interested parties, and the obligations and rights of the person in charge. Said contract or legal act will stipulate, in particular, that the controller: a) will treat personal data solely following the documented instructions of the controller, including with respect to transfers of personal data to a third country or an international organization, unless it is obliged to it by virtue of the Law of the Union or of the Member States that applies to the person in charge; in such a case, the manager will inform the person in charge of that legal requirement prior to the treatment, unless such Law prohibits it for important reasons of public interest; b) will guarantee that the persons authorized to treat personal data have committed to respect confidentiality or are subject to a confidentiality obligation of a statutory nature; c) will take all the necessary measures in accordance with article 32; d) will respect the conditions indicated in sections 2 and 4 to resort to another treatment manager; e) will assist the person in charge, taking into account the nature of the treatment, through appropriate technical and organizational measures, whenever possible, so that he can comply with his obligation to respond to requests aimed at the exercise of the rights of the interested parties established in chapter III; f) will help the manager to ensure compliance with the obligations established in articles 32 to 36, taking into account the nature of the treatment and the information available to the manager;

g) at the choice of the person responsible, will delete or return all personal data once the provision of the treatment services is finished, and will delete the existing copies unless the conservation of personal data is required under Union Law or member states; h) will make available to the person in charge all the information necessary to demonstrate compliance with the obligations established in this article, as well as to allow and contribute to the performance of audits, including inspections, by the person in charge or another auditor authorized by said responsible

In relation to what is provided in letter h) of the first paragraph, the person in charge will immediately inform the person in charge if, in his opinion, an instruction infringes the present Regulation or other provisions in the area of data protection of the Union or the Member States. "

In relation to the signing of the processor contract, it may be of interest to consult the Guide on the processor in the RGPD prepared by the data protection authorities to help controllers and processors in the adaptation to the requirements of the RGPD, available on the Authority's website http://apdcat.gencat.cat/ca/inici/.

On the other hand, although it is not required, it would be advisable to inform the affected people (the people served, until now, by entity A) about the formalization of this contract or assignment agreement with entity B.

IV

However, as has been said, it is not clear, in view of the information available, that entity A has, in relation to the processing of personal information linked to the provision of these health care services mental and addictions, the consideration of the person in charge of the treatment (article 3.g) LOPD).

Apart from, as we have seen, not knowing the existence or not of a contract or commission agreement between CatSalut and entity A in the terms established in article 12.2 of the LOPD, it is necessary to bear in mind that, according to entity B's statements, the personal data that would be the subject of transmission (patient data) are included in the Electronic Clinical History files available to entity A.

It has certainly been possible to verify that entity A has declared, under its responsibility, in the Catalan Data Protection Register several personal data files of clinical history, which correspond to each of its mental health and care centers to drug addictions.

Being, therefore, personal data for which entity A would be responsible (article 3.d) LOPD), its communication to entity B should be considered a priori as a transfer of data (article 3.i) LOPD), which should be subject to the data communication regime of article 11 of LOPD.

This article establishes, in its section 1, that "the personal data subject to treatment can only be communicated to a third party for the fulfillment of purposes directly related to the legitimate functions of the transferor and the transferee with the prior consent of the interested". However, the same article provides, in its section 2, that said consent is not necessary when, among other exceptions, the assignment is authorized by a law or standard with the status of law (letter a).

At this point, it is particularly important to refer to the reason why the personal data for which entity A is responsible would be communicated to entity B.

As can be seen from the Plenary agreement, already cited, for reasons of efficiency entity B will take over all the mental health and addiction services that entity A has so far managed in the city of (...), " being subrogated in all those relationships of a contractual, concessionary nature and/or the rights and obligations affected by the aforementioned services" (fifth agreement).

The local regime legislation attributes to the territorial local bodies, within the scope of their competences, the power of self-organization (article 4.1.a) of Law 7/1985, of April 2, regulating the bases of the regime local (hereafter, LRBRL) and article 8.1.a) of the Consolidated Text of the Municipal and Local Regime Law of Catalonia, approved by Legislative Decree 2/2003, of April 28, (hereafter, TRLMRLC).

In this sense, article 246 of the TRLMRLC establishes that local bodies have full power to establish, organize, modify and delete the services under their jurisdiction, in accordance with what is established by local regime legislation and other applicable provisions.

For its part, article 249 of the TRLMRLC specifies that the power to establish the management system of public services corresponds to the power of self-organization of local bodies (section 1) and, it adds, that public services of local competence they must be managed, in the most sustainable and efficient way, directly or indirectly (section 2).

The City Council, exercising the powers of self-organization and management of public services attributed to it by the local regime legislation, would have decided to agree on a modification in the form of management of mental health and addiction health services in the municipality, in such a way that the 'entity B would subrogate in the position of entity A.

Considering that the intended communication of data would actually be an inevitable consequence of this subrogation - otherwise the continuity of the services could not be guaranteed - from the point of view of data protection, it could be said that we would not properly meet before a transfer of data, but before a succession in the ownership of the files, this is a modification of its manager (article 3.d) LOPD). Consequently, it is understood that there would be no inconvenience in carrying out the transfer of personal information to entity B.

In fact, this is a situation already contemplated in the personal data protection legislation itself. Thus, article 19 of the RLOPD establishes that "in the event that there is a modification of the person responsible for the file as a result of a merger operation, spin-off, global transfer of assets and liabilities, contribution or transmission of business or branch of business activity, or any operation of corporate restructuring of a similar nature, contemplated by commercial regulations, no data transfer will occur, without prejudice to compliance by the responsible party with the provisions of article 5 of Organic Law 15/1999, of December 13."

Point out, at this point, that a new organic law on the protection of personal data is currently being drafted that will replace the current LOPD, in order to adapt the Spanish legal system to the RGPD and complement its provisions (text published in the BOCG, series A, No. 13-1, of 24.11.2017)), article 21 of which establishes that:

> "1. Unless proven otherwise, the processing of data, including its prior communication, which could be derived from the development of any operation of structural modification of companies or the contribution or transfer of business or branch of business activity, will be presumed to be lawful, provided that the treatments would be necessary for the good end of the operation and guarantee, when applicable, the continuity in the provision of services.

2. In the event that the operation is not completed, the transferee entity must proceed immediately to the deletion of the data, without the blocking obligation provided for in this organic law being applicable."

This being the situation examined, it would be necessary, once the subrogation is effective (published in the BOP the agreement of the Plenary in which the modification of the management of health services is definitively approved), to notify the Data Protection Registry of Catalonia the modification of the Electronic Clinical History files with regard to the section relating to the person in charge, using the corresponding form (available at the Authority's electronic headquarters https://seu.apd.cat/ca).

In the event that, for organizational reasons, the new person in charge (entity B) considers it relevant to integrate the data from said files into the patient file at his disposal, it would be necessary to delete the Electronic Clinical History files, indicating the destination of the data (in this case, the patient file), and, where appropriate, adapt the destination file. These deletions and, where appropriate, modification, should be notified to the Data Protection Registry of Catalonia.

Having said that, it should be borne in mind that the GDPR removes, from 25 May 2018, the need to formally create, modify or delete files and to notify them to the data protection register of the controlling authorities. Until this date, therefore, the obligation of the person in charge to notify the Data Protection Registry of Catalonia of file modifications or deletions (as well as creations) remains.

On the other hand, it would be necessary to inform the people whose personal data are obtained as a result of the subrogation of the change in the entity responsible for their treatment, as is apparent from article 19 of the RLOPD, previously cited .

This, unless any of the exceptions to the obligation to inform the interested parties referred to in the LOPD (article 5.5) or the RGPD (article 14.5) were considered applicable, which do not seem to apply in the case now examined.

All this, regardless of compliance by entity B with the rest of the principles and obligations referred to in the data protection legislation, as well as the need to formalize the corresponding processing order with CatSalut, in the terms of article 28.3 of the RGPD, if the provision of the aforementioned health services must entail access by entity B to personal data for which CatSalut is responsible. On this last question we refer to the previous section of this opinion.

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

According to the information available, the communication of data from the clinical history files from entity A to entity B would be the result of a change in the way mental health and addictions services are managed, whereby entity B would be substituted in the position of entity A. Consequently, and until the RGPD is fully applicable (May 25, 2018), it would be necessary to notify the Data Protection Registry of Catalonia of the modification of the responsible for these files.

Likewise, it would be necessary to inform the people whose data is obtained as a result of this subrogation of the change in the entity responsible for its treatment,

unless any of the exceptions provided for in data protection legislation (articles 5.5 LOPD and 14.5 RGPD) apply, which do not seem to apply in the present case.

If the management of these services involves the processing of personal data for which CatSalut is responsible, it would be necessary to formalize an agreement or order for the processing between entity B and CatSalut in the terms established in article 28.3 of the RGPD.

All this, without prejudice to compliance with the rest of the principles and obligations established in data protection legislation.

Barcelona, March 26, 2018.