CNS 30/2018

Opinion in relation to a consultation on the access of social psychologists who work with the primary care teams of penitentiary centers to ECAP care information

A query is submitted to the Catalan Data Protection Authority regarding the access of social psychologists who work with the primary care teams of penitentiary centers to ECAP care information.

Having analyzed the request, which is not accompanied by more information, in view of the current applicable regulations, and the report of the Legal Counsel, the following is ruled.

I

(...)

II

The consultation raises whether social psychologists who work in teams with the primary care teams of penitentiary centers can access the care information of ECAP ("Primary Care Clinic"). According to the consultation, "the fact that it is not done now is generating that the drug analysis data are not integrated in the ECAP."

The consultation adds that access should be limited to only what is needed based on the usual work of these professionals.

Given the consultation in these terms, it is necessary to start from the basis that, according to article 4.1) of Regulation (EU) 2016/679, of 27 April, general data protection (RGPD), in force since 25 May 2016, and fully applicable from May 25, 2018 (Article 99 RGPD), are personal data "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person;

The processing of personal data (art. 4.2 RGPD), in particular, the processing of data of natural persons who receive medical care in penitentiary centers, is subject to the principles and guarantees of the regulations for the protection of personal data (RGPD), among others, the principle of legality (art. 5.1.a) RGPD), as well as the principle of minimization, understood as the requirement that data be processed only to the extent that they are appropriate, relevant and limited to that necessary for the fulfillment of the intended purpose (article 5.1.c)).

Article 6.1 of the RGPD establishes that there must be a basis that legitimizes the treatment, specifically, in the absence of the consent of the affected person (art. 6.1.a), any of the circumstances foreseen, such as, among d others, that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (art. 6.1.c)), or that "the treatment 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" (art. 6.1.e)).

To this it should be added that, according to article 6.3 RGPD, the basis of the treatment indicated in article 6.1, letters c) and e), must be established by European Union Law (art. 6.3.a)) , or by the law of the Member States that applies to the data controller (art. 6.3.b)).

Given that the consultation refers to access to "care information" -specifically, drug analysis-, of people who are incarcerated in penitentiary centers (the "interested persons", ex. art. 4.1 RGPD), it is necessary take into account that information relating to the health of natural persons (art. 4.15 RGPD) is subject to special protection.

Thus, article 9 of the RGPD regulates the general prohibition of the processing of personal data of various categories, among others, data relating to health (section 1).
Section 2 of the same article provides that this general prohibition will not apply when one of the following circumstances occurs:

> "(...)
>
> 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 **healthcare professional** and without prejudice to the conditions and guarantees contemplated in section 3;
>
> (...)".

With all this, in the absence of the consent of the people affected, and taking into account the obligations that arise for the competent Public Administrations in relation to these people (in particular, with regard to the healthcare treatment they are entitled to receive), it will be necessary to examine the provisions of the applicable regulations, in order to analyze whether the access of the psychologists of the penitentiary centers to healthcare information of these people conforms to the principles of the data protection regulations.

III

According to article 214 of the General Penitentiary Regulations, approved by Royal Decree 190/1996, of February 9:

> "1. All inmates, upon entering the Establishment, will be examined by a doctor. (…).
>
> 2. The result will be recorded in the Income Book and in the individual clinical history, which must be open to all internal staff."

According to article 84 of Decree 329/2006, of September 5, which approves the Regulations for the organization and operation of criminal enforcement services in Catalonia:

> "1. All inmates must have a medical history open, which will be opened at the time of their admission to a penitentiary center, and which will accompany the inmate if a transfer is made to another center or establishment.

2. The medical history must be unique for each intern.

3. The clinical history will be the basic instrument that will collect the data relating to the care process of each patient.

(...)

6. Regarding the definition and treatment of the clinical history, its content, uses and conservation, as well as the right of the interns to information and **access to their clinical history,** confidentiality of the data and the informed consent, it will be necessary to take into account, in general, the provisions contained in the **legislation on information rights concerning health,** patient autonomy and clinical documentation and the regulations in force regarding the protection of personal data and, in particular, those referring to the protection of data of a medical and health nature."

In view of this provision, reference must be made to Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation, and to Law 41/2002, of 14 November, basic, regulating patient autonomy and rights and obligations in the field of information and clinical documentation.

According to article 14.1 of Law 41/2002: "The clinical history includes all the documents relating to the care processes of each patient, with the identification of the doctors and other professionals who have intervened in them, with the aim of to obtain the maximum possible integration of each patient's clinical documentation, at least within the scope of each center."

According to article 16.1 of Law 41/2002: "1. The clinical history is an instrument primarily intended to guarantee adequate assistance to the patient. The healthcare professionals of the center who carry out the diagnosis or treatment of the patient have access to the patient's clinical history as a fundamental tool for their adequate assistance.

In the same sense, article 11 of Law 21/2000 provides that:

"1. The clinical history is an instrument primarily intended to help guarantee adequate assistance to the patient. For this purpose, **the care professionals** of the center who are involved in the diagnosis or treatment of the patient must have access to the clinical history.

2. Each center must establish the mechanism that makes it possible that, while assistance is provided to a specific patient, the professionals attending to him can, at all times, have access to the corresponding clinical history. (...)."

Therefore, the care professionals who treat the patient would be able to access and treat certain health information contained in the patient's HC, for the purposes of diagnosis and treatment of the patient.

IV

It should be noted that the consultation does not provide information on the "ECAP" which, as can be seen from the consultation, would contain the healthcare information of the persons concerned (art. 4.1 GDPR).

According to the information available on the website http://salutweb.gencat.cat:

"eCAP is the computerized clinical history program used by family doctors, pediatricians and nurses in Primary Care centers when they visit their patients. It is a clinical management tool that offers a comprehensive view of the patient and their state of health and that supports decision-making through the monitoring of different parameters.

The eCAP is integrated with other Information Systems of the public network. Since its launch in 2001, the eCAP has introduced constant improvements and new functionalities that help professionals in the development of a quality care task.

On July 12, 2017, an Agreement was formalized between the Catalan Health Service (CatSalut) and the Catalan Institute of Health (ICS) for the establishment of a joint collaboration framework with the aim of to promote the technological development of the digital clinical history in the field of primary care in the Comprehensive Public Health System of Catalonia (SISCAT) through the eCAP computer application."

According to the information available, the "Primary Care Clinic Station" (ECAP), would be the care management computer program for primary care consultations which, as can be deduced from the consultation, is also a tool used by primary care teams of penitentiary centers, given that prison primary care teams (EAP) are integrated into the ICS.

At this point, reference should be made to Decree 399/2006, of 24 October, which assigns to the Department of Health the functions in matters of health and healthcare for persons deprived of their liberty and minors and young people interned in centers of juvenile justice, and penitentiary and juvenile justice health services are integrated into the public health system, specifically, in its article 1, according to which:

"1.1 The Department of Health, through the Catalan Health Service, must guarantee, through professionals, the centers, services and establishments that make up the public health system, the right of persons deprived of liberty and minors and young people admitted to **comprehensive health care,** including both health promotion and disease prevention as well as the necessary curative and rehabilitative actions, (...).

The healthcare provision (...), will be made through the network of public healthcare entities, without prejudice to the fact that the healthcare specific to the field of primary care must be provided in particular by the penitentiary healthcare services and of juvenile justice.

1.2 Penitentiary and juvenile justice health services are integrated into the organizational structure of the Catalan Institute of Health, which assumes management, without prejudice to the powers of the Department of Justice (...)."

And according to article 2 of Decree 399/2006:

"1. (...), and the **care functions of the health teams are** ascribed to the Department of Health, through the **Catalan Health Service and the Catalan Institute of Health,** in the terms provided for in Law 15/1990, of July 9, on the health system of Catalonia, and in the regulations that implement it and in this Decree.

3. The health staff of the Department of Justice assigned to the penitentiary health services are functionally attached to the Catalan Institute of Health (...)."

At this point, it is worth noting that, in relation to access to healthcare information from ECAP, the consultation explains that: "the fact that it is not done now is causing the drug analysis data to not be integrated into the ECAP."

It seems that, according to the consultation, the fact that the psychologists who work with the primary care teams - to which the consultation refers - cannot access the healthcare information of the ECAP, would have something to do with the fact that the data of drug analyzes "not integrated in the ECAP".

Given the information available, it does not seem that there should be a relationship between the fact that psychologists who work with the primary care teams (EAP) in penitentiary centers can or cannot access certain inmates' health data (specifically, of drug analyses), with the fact that these data are or are not integrated in the ECAP.

At the outset, given the provisions of the regulations regarding the content of the HC (article 15.2 Law 41/2002, and article 10 Law 21/2000), it seems likely that the information on drug consumption analyzes of people in prisons , is included in the corresponding HC of the penitentiary center (art. 214 General Penitentiary Regulation).

A different issue is that the data related to drug analysis, mentioned in the consultation, be incorporated into the computerized clinical history program ("ECAP"), an issue that is unknown, given the information provided in the consultation and that, in in any case, it is not up to this Authority to determine. The incorporation of drug analysis data into the ECAP will depend on the configuration that the Department of Health has articulated for said program, a matter on which no information is available.

In any case, given the information available, it does not seem that the integration of information on drug analysis in the ECAP should depend on the fact that certain professionals who work with the primary care teams of penitentiary centers (in particular, psychologists), can access it or not. Nor does it seem that it should be up to these professionals to incorporate drug analysis data into the ECAP.

v

Given the terms of the consultation, referring to psychologists "who work as a team with the primary care teams of penitentiary centers", it is not clear whether they would be part of the EAP or not.

However, since it cannot be ruled out that the psychologists referred to in the consultation are members of the EAPs - a question that falls to be organized by the penitentiary centers and which, given the information available, is unknown - the following must be done.

According to article 12 of Law 16/2003, of May 28, on cohesion and quality of the National Health System: "Primary care is the basic and initial level of care, which guarantees the globality and continuity of care to throughout the patient's life, acting as case manager and coordinator and flow regulator.
It will include health promotion activities, health education, disease prevention, health care, health maintenance and recovery, as well as physical rehabilitation and social work."

According to Annex II of Royal Decree 1030/2006, of September 15, which establishes the portfolio of common services of the national health system and the procedure for its update:

> **"Primary care** is the basic and initial level of care, which guarantees comprehensiveness and continuity of care throughout the patient's life, acting as case manager and coordinator and flow regulator.
> It will **include** health promotion activities, health education, disease prevention, health care, health maintenance and recovery, as well as physical rehabilitation and social work.
> **All these activities,** aimed at individuals, families and the community, **under a biopsychosocial approach, are provided by interdisciplinary teams,** guaranteeing the same quality and accessibility, as well as continuity between the different areas of attention in the provision of health services and coordination between all the sectors involved. (…)."

To this it should be added that, according to article 41.2 of Law 15/1990, of 9 July, on the health system of Catalonia (Law 15/1990):

> "2 **The Primary Care Team** is the set of health and non-health professionals, working in the Basic Health Area, which develops in an integrated manner, through teamwork, actions related to public health and the promotion , the prevention, treatment and rehabilitation of the individual and collective health of the population of the Basic Area. These activities are mainly carried out within the framework of a physical and functional structure called the Primary Care Center.
> They make up the Primary Care Team:
>
> a) Health personnel.
> a.1.) Medical staff:
> General practitioners of primary care. Primary care paediatricians-puericulturists. Primary care dentists-stomatologists. a.2.)
> Auxiliary health personnel: Technical health assistants/diplomas in primary care nursing. Primary care clinic assistants. a.3.) Primary care social workers. a.4.) Those **healthcare professionals or those linked to healthcare** that are determined based on the care needs of the area. b) Non-health personnel. c) The local health officials of the bodies of doctors and full-time practitioners, who must be incorporated into the Primary Care Team in the terms provided for by current regulations."

The Order of May 6, 1990, approving the Framework Regulation for the operation of primary care teams, defines the EAP as: "set of **health** and non-health professionals working in the basic area of health (in hereinafter ABS) and main physical location in the primary care center (hereinafter CAP)", which "constitutes an operational unit for planning, management and evaluation of its actions in the area of the ABS to which it is responsible to develop the functions provided for in article 9 of Decree 84/1985, of 21 March, on urgent measures for the reform of primary health care in Catalonia" (article 1.1 Order), and adds that: "The purpose of the EAP is the improvement of the health level of the population of the ABS" (article 1.2 Order).

According to article 6 of State Law 44/2003, of November 21, on the regulation of health professions:

> "3. They are also licensed **health professionals** who hold an official specialist title in Health Sciences

established, in accordance with the provisions of article 19.1 of this Law, for **psychologists,** (...)."

According to the seventh additional provision of State Law 33/2011, of October 4, general public health:

"1. **It will be considered a qualified** and regulated health profession with the title of **General Health Psychologist** of licensed/graduate level, in the terms provided for in article 2 of Law 44/2003, of November 21, on the Ordinance of Health Professions, the licensed/graduated in Psychology when they develop their professional activity for their own account or for others in the health sector, provided that, in addition to the aforementioned university degree, they hold the official Master's degree in General Health Psychology, (...).

(...), corresponds to the General Health Psychologist, carrying out investigations, evaluations and psychological interventions on those aspects of the behavior and activity of people that influence the promotion and improvement of the general state of their health, provided that these activities do not require specialized care by other healthcare professionals.

(...).

4. The psychologists who develop their activity in centers, establishments and services of the National Health System or in concert with it, to make effective the health services derived from the portfolio of common services of the same that correspond to said professionals, must be in possession of the official title of Psychologist Specialist in Clinical Psychology referred to in section 3 of annex I of Royal Decree 183/2008, of February 8, (...).

(…)."

Given these regulatory provisions, it seems clear that psychology professionals can be part of the EAP, given that these include the category of "health professionals or those linked to health" (art. 41.2, section a.4), Law 15/1990).

VI

At this point, it should be borne in mind that the regulations on criminal enforcement services in Catalonia provide that penitentiaries must have, at least, a multidisciplinary team (art. 36 Decree 329/2996), of which in part, among others, "The psychologist/teacher assigned to the team" (art. 37.2.b) Decree 329/2006). According to article 38.1 of Decree 329/2006, these multidisciplinary teams carry out several functions. Thus, they draw up the treatment program or the individual intervention model for the inmates assigned to them (art. 38.1.a)); carry out the direct analysis of the problems and demands formulated by the interns (art. 38.1.b)), or carry out the necessary actions for the professional guidance and socio-labor integration of the interns (art. 38.1.h)), among others.

We cannot rule out that, in the exercise of the functions that the regulations attribute to the aforementioned multidisciplinary teams, the professionals who are part of them will have to access certain information, including certain personal information of people in prisons, to which they must 'attend.

Now, having said that, the inquiry specifically refers to access to health data from the HC of people in prisons. Therefore, it is necessary to refer to the regulatory provisions on the provision of health care to people in prisons, who must have their HC in the prison, for the purposes of determining whether access is enabled.

Organic Law 1/1979, of 26 September, provides that penitentiaries must have health care for inmates (article 36). In addition, article 66 of the same rule provides that:

> "1. For certain groups of inmates, whose treatment requires it, programs based on the principle of therapeutic community can be organized in the corresponding centers.
>
> 2. Special attention will be given to the organization in the establishments of fulfillment of as many **psychopedagogical counseling and** group psychotherapy sessions as are deemed convenient (...).
>
> 3. The training and professional development of those subjects whose readaptation requires it will also be integrated into the treatment program, carried out with **continuous psychological counseling** during the training process and prior to the corresponding personal orientation."

More specifically, article 68.1 of Decree 329/2006, cited, provides that:

> "1. Health care in the penitentiary field, which must have a **comprehensive character, with a biopsychosocial orientation** that contemplates both the prevention and promotion of the health of the general incarcerated population as well as the healing and rehabilitation of the sick, must integrate the primary, specialized, hospital and socio-health care resources that are necessary to guarantee continuity of care for inmates and parolees."

Regarding the organization of health care in penitentiary centers, article 72 of the same Decree 329/2006 states that: "1. The health services of the penitentiary centers will be organized under the direction of a coordinator of the health area, who will be responsible for organizing, directing and supervising all the general actions and the daily activity of the of the establishment's health professionals. (...)."

And article 74.1 of Decree 329/2006 provides that:

> "1. The public entity managing penitentiary health **will determine,** depending on the volume and characteristics of the inmates to be served and the type of center, **the number and type of assistance professionals primary school** that will carry out their work inside the establishments.
>
> 2. In any case, the primary care that is provided in the penitentiary centers will be carried out, **at least,** with the following professionals: family doctors, technical assistants, health workers with diplomas in nursing, and nursing assistants. (...)."

Although article 74.2 of Decree 329/2006 does not specify the inclusion of professional psychologists in the primary care team of penitentiaries, it follows from the regulations studied (art. 41.2 Law 15/1990), that the psychologists, as health professionals, could participate in the provision of primary assistance to people in prisons, which must have a "biopsychosocial orientation",

according to the applicable regulations (art. 68.1 Decree 329/2006, and Annex II of Royal Decree 1030/2006, cited).

Therefore, the various healthcare professionals (among whom, in principle, psychology professionals should be included, in the terms indicated), who are part of the EAPs of penitentiary centers and are involved in the care treatment of inmates, have to be able to access certain health information, contained in the HC.
Given the principle of proportionality, in its minimization aspect, this access should occur to the health information that is relevant, adequate and limited to what is necessary for the said assistance purpose (art. 5.1.c) RGPD) .

This access could include, where appropriate, information on drug analytical tests, as well as other health information that may be contained in the HC of the affected persons, as long as it is justified, as the inquiry points out, by the function to be carried out by the 'EAP, and the professionals who are part of it.

All this without prejudice to the fact that access must occur through the ECAP or by other means, a question that depends on the organizational model that the Department of Health articulates in relation to access and processing of data from the HCs of penitentiary centers

VII

However, given the terms in which the query is formulated, it cannot be ruled out that the psychologists it refers to are not part of the EAPs, but rather collaborate with them, on terms and for purposes that, in any case, the query does not specify.

In this case, the access to health data from the HC of people incarcerated in penitentiary centers by these psychologists -whether through ECAP or through other mechanisms-, would not respond to a purpose of assistance and healthcare provision, which is the one that enables, from the perspective presented, access to the HC.

This, without prejudice to the fact that other legal regulations enable access to certain information from the HC, a possibility that cannot be ruled out, but which does not coincide in view of the specific regulations studied, in relation to professionals who are not integrated in the EAP. The regulations to which we have referred (legislation on patient autonomy, and prison regime regulations), do not seem to be able to serve as a basis for enabling access to the health information contained in the HC, by psychologists who they do not perform health care functions, as they are not part of the EAP.

Taking this into account, psychologists who, without being part of the EAPs, carry out other functions in prisons not related to the provision of comprehensive health care to the inmates, should have the consent of the affected persons or, in the absence of the consent, from another basis that legitimizes access to the health data contained in the HC (eg art. 6 and 9 RGPD).

This, whether access occurs through the ECAP, or whether it occurs through other mechanisms.

In the event that the access to data from the HC of the people incarcerated in penitentiary centers does not have the purpose of treatment and assistance to the affected person - in the terms of article 12 of Law 16/2003, cited -, to which we have already referred, but that it responds to other purposes, it must be taken into account that, according to article 16.3 of Law 41/2002:

> "3. Access to clinical history for judicial, epidemiological, public health, research or teaching purposes is governed by the provisions of Organic Law 15/1999, of December 13, on the Protection of Personal Data, and Law 14/1986, of April 25, General Health, and other applicable rules in each case. Access to the clinical history for these purposes obliges to preserve the personal identification data of the patient, separate from those of a clinical-care nature, so that, as a general rule, anonymity is ensured, unless the patient himself has given his consent not to separate them."

In the same sense, article 11.3 of Law 21/2000.

The patient autonomy regulations allow access to health data from the HC for the aforementioned purposes (art. 16.3 Law 41/2002), provided that consent is available or that the patient's identifying data is preserved separate from the rest (clinical-assistance information), in the terms provided for in said regulations.

Thus, in the event that the purpose of accessing data from the HC of people incarcerated in penitentiary centers is not related to the provision of assistance and health care (main use of the HC), but to the uses or purposes provided for in article 16.3 of Law 41/2002, it would be necessary to separate the patient's identifying data from the rest of the information or obtain the consent of those affected, in the terms provided for in the aforementioned regulations.

As an example, in the event that psychologists (or even other professionals) from the penitentiary wanted to access data from the HC (specifically, information on drug use), for the purpose of "a study or research on the impact of drug use in prisons, or for the planning of certain actions in the center, this access would be enabled if consent is available, or if identifying data is separated from the rest of information, as provided for in the patient autonomy regulations, in the terms indicated.

VIII

Finally, it should be noted that the data protection regulations impose a general duty of secrecy (art. 5.1.f) RGPD), which obliges any person who processes personal data (in this case, the health professionals of the EAP of penitentiary centers, including psychologists, in the terms indicated), to respect the confidentiality of patient information included in the HC.

According to article 9.3 of the RGPD, quoted:

> "The personal data referred to in section 1 may be treated for the purposes mentioned in section 2, letter h), when its treatment is carried out by a professional subject to the obligation of professional secrecy, or under his responsibility, in accordance with the Law of the Union or of the Member States or with the rules established by the competent national organisms, or by any other person also subject to the obligation of secrecy in accordance with the Law of the Union or of the Member States or of the rules established by the competent national bodies."

Also the sectoral regulations, regulating HC and patient rights (art. 7.1 Law 41/2002, and art. 5.1 Law 21/2000), impose a specific duty to respect the confidentiality of patient information, in the case which concerns us, of people in prisons.

Likewise, according to article 215.1 of the Penitentiary Regulations:

> "1. The data included in the individual clinical history will have a confidential nature, and must be properly filed and guarded, being only accessible to authorized personnel."

Therefore, the aforementioned regulations impose on all care professionals in penitentiary centers, among others, psychologists, a duty of secrecy regarding the health information, in this case, of people incarcerated in penitentiary centers.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

Psychologists who, as health professionals, can be part of the EAP of penitentiary centers, to the extent that they participate in the provision of comprehensive health care to inmates in the terms provided for in the regulations, must be able to access certain data of the clinical history (HC), through the ECAP platform or by other mechanisms - including, where applicable, drug analysis data -, as long as access is necessary for the provision of said assistance (art. 5.1.c)

RGPD).

Psychologists who, without being part of the EAP, carry out functions in penitentiary centers not related to the provision of comprehensive health care to the inmates, should have the consent of the people affected, or another legal basis that legitimizes the 'access to the health data contained in the HC, if applicable, through the ECAP.

Barcelona, June 13, 2018