

Opinion in relation to a query about the authorization for third party access to the medical history

A query is submitted to the Catalan Data Protection Authority, in which a report is requested to this Authority on access to a patient's clinical history (henceforth, HC) by third parties.

The consultation considers that the general powers that lawyers sometimes provide to access the HC of patients would not be sufficient if they are not accompanied by express authorization or if these powers do not have a clause that allows them to access health data.

The query also asks how a third party can collect a copy of a patient's HC if the patient is, for some reason, unable to authorize it (if they have a degenerative disease, are in a coma, etc...), but he has not been legally incapacitated and he has not made notarial documents enabling him to do so.

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

I

(...)

II

According to the consultation, the general powers provided by lawyers to access the HC of patients would not be sufficient if they are not accompanied by express authorization or if these powers do not have a clause that allows them to access health data.

The query also asks how a third party can collect a copy of a patient's HC if, for some reason, the latter is unable to authorize it (degenerative disease, is in a coma, etc...), but has not been legally incapacitated and has not made notarized documents enabling it.

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 health care, is subject to the principles and guarantees of the regulations for the protection of personal data (RGPD). The HC of the patients (the "interested persons", ex. art. 4.1 RGPD), contains health data (art. 4.15 RGPD) and, therefore, it must be taken into account that information relating to the health of natural persons 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;

(...)"

To this it should be added that the clinical history is regulated and protected by a specific regulation (Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation, and Law 41/2002, of November 14, basic, regulating patient autonomy and rights and obligations regarding information and clinical documentation).

III

Article 15 of the RGPD, in relation to the right of access to personal data, determines the following:

*"1. The interested party will have the right to obtain from the controller confirmation of whether or not personal data concerning him or her are being processed and, in such case, **the right to access personal data** and the following information:*

a) the purposes of the treatment; b) the categories of personal data in question; c) the recipients or the categories of recipients (...). d) if possible, the expected period of personal data conservation or, if not possible, the criteria used to determine this period; e) the existence of the right to request from the person in charge the rectification or suppression of personal data or the limitation of the treatment of personal data relating to the interested party, or to oppose said treatment; f) the right to present a claim before a control authority; g) when the personal data has not been obtained from the interested party, any available information about its origin; (...).

2. (...).

3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. (...).

4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

To this it should be added that the patient autonomy regulations specifically provide for access to the HC by representation.

Specifically, article 13 of Law 21/2000 provides the following:

"1. With the reservations indicated in section 2 of this article, the patient has the right to access the documentation of the clinical history described by article 10, and to obtain a copy of the data contained therein. It is up to the health centers to regulate the procedure to guarantee access to the clinical history.

2. The patient's right of access to the documentation of the clinical history can never be to the detriment of the right of third parties to the confidentiality of their data appearing in the aforementioned documentation, nor of the right of the professionals who have involved in the preparation of this, who can invoke the reservation of their observations, appreciations or subjective notes.

3. The patient's right of access to the clinical history **can also be exercised by representation, as long as it is duly accredited."**

In the same sense, article 18.2 of Law 41/2002 provides that: "The patient's right of access to the clinical history can also be exercised by duly accredited representation."

Thus, the applicable regulations (RGPD and regulations governing patient autonomy) enable the possibility that third parties other than the patient, holder of the HC, such as the lawyers referred to in the consultation, can exercise the right of access and obtain a copy of the patient's HC information by representation, as long as this condition is duly accredited.

In this regard, it should be borne in mind that access to HC data implies access to particularly protected information (art. 9 RGPD), and may affect other fundamental rights, such as the privacy of the patient himself and of third parties. Given that the regulations especially protect the confidentiality of said information and the privacy of both the patient himself and third parties (art. 5.1.f) RGPD, and art. 13.2 Law 21/2000), it will be necessary to ensure that access to the HC by third parties is duly accredited.

In this regard, health centers can enable appropriate mechanisms to ensure that the patient accesses their HC, if applicable, through a third person, for example, by making available to patients an access authorization form to the HC.

In this sense, regarding the exercise of the right of access by representation, article 13.1 of Law 21/2000, in fine, provides that: "It is up to the health centers to regulate the procedure to guarantee access in the clinical history."

Although it is not up to this Authority to establish what the content of the access forms to the HC by representation should be, by applying the principle of minimization (art. 5.1.a) RGPD), these should contain the identification data of the patient and their representative that are appropriate, relevant and limited to what is necessary to allow the correct identification of both parties involved, as well as, where appropriate, the specific information from the HC that the patient wants to access through a third party .

In any case, given the doubt raised in the consultation, as to whether the general powers would be sufficient "if they are not accompanied by express authorization", it should be clarified that if

a third party provides the authorization that the center itself makes available to patients for the purposes we are concerned with (the form), it would not be necessary to provide, in addition, powers of attorney.

IV

Having said that, in the absence of the authorization form for access to the HC that the center itself could make available to patients, the provision of notarial powers can also be an appropriate way to accredit the qualification to access the HC for representation of the holder.

Thus, given that the patient autonomy regulations provide for the possibility of exercising the right of access to the HC by representation (Law 21/2000 and Law 41/2002), nothing prevents the exercise of this right by part of a patient, holder of the right to information about his health (art. 3.1 Law 21/2000, and art. 5.1 Law 41/2002), is articulated through a power of attorney, in favor of the authorized person

The query is not formulated in relation to the provisions of a certain power of attorney, nor is a copy of any specific example attached that this Authority must take into account, but is formulated in general terms.

In any case, it should be noted that, according to the provisions of Title IX of the State Civil Code, which regulates the legal form of the mandate: "By the contract of mandate a person is obliged to provide some service or do something, por cuenta or encargo de another (art. 1709 Civil Code).

According to article 1712 of the Civil Code:

"The mandate is general or special.
The first includes all the client's businesses.
The second one or more specific businesses."

According to article 1713 of the Civil Code:

"The mandate, conceived in general terms, does not include more than administrative acts.
To compromise, alienate, mortgage or execute any other act of strict ownership, an express mandate is required. (...)."

The power of attorney is a public document, authorized by a notary, which allows a person to designate another to act on their behalf and representation, in relation to certain legal acts or for the exercise of rights, with a scope more or less broad which, in any case, determines the person who grants the power.

In principle, any person over the age of majority can grant a power of attorney in the absence of circumstances that may limit their ability to grant said powers, under the terms provided for in the applicable regulations. The person designated as attorney must prove their status as such (if applicable, in front of health centers), by showing an authorized copy of the notarial power of attorney.

Notarial powers can be "general" and provide for the authorization of the authorized person to act in the name and representation of the person who grants the power in various areas (for example, general powers for the administration of assets and patrimony.. .), or they can be "special" powers and empower the authorized person to act

in relation to a specific legal act (for example, a sale or the acceptance of an inheritance).

As an example, article 1280.5 of the state Civil Code mentions the powers that must be included in a public document: "The power to contract marriage, the general for lawsuits and the special ones that must be presented in court; the power to administer goods, and anyone else who has the object of an act drawn up or that must be drawn up in public writing, or has to harm a third party."

In any case, the casuistry regarding the scope and concretization of a power of attorney can be very broad, and will depend on the scope that the person granting the power of attorney wishes to attribute to it, and on the variety of business and legal acts to which the power refers.

At the outset, if a natural person (the owner of the personal data, ex. art. 4.1 RGD), who is qualified to do so, grants a "special" power of attorney referring, specifically, to the exercise of the right to 'access and, where appropriate, the exercise of other informational self-determination rights or habeas data rights (arts. 15 et seq. RGD, to which we refer), either in relation to your health data (HC) or, in broader terms, in relation to other personal information processed by different managers (art. 4.7 RGD), this would allow the proxy to exercise the right of access to the HC by representation. It is not problematic, then, that access to HC data by representation is provided for in special powers of attorney.

Logically, it would also not be problematic, from the perspective of data protection, for the exercise of the right of access to the HC or, in general, the exercise of habeas data rights, to be provided for in notarial powers "general", which also refer to other areas of activity or interest of the holder (economic, personal, patrimonial...).

In this sense, we note that the right of access (art. 15 RGD) refers to all personal information of a natural person, including health data (art. 4.1 RGD).

Thus, the possibility for a natural person to exercise the right of access to his own personal information by representation, or designating another person, would not only occur in relation to the health information of the HC, but could occur in relation to other personal information.

Therefore, it could be the case that notarial powers (whether general or special), provide for the exercise of the right of access (art. 15 RGD) and, where appropriate, other rights of habeas data, in relation with the data of the person who grants the powers of attorney, or it could be foreseen, only, access to the HC, which expressly provides for the regulation of patient autonomy.

In either case, these forecasts should be considered sufficient for the health center to give information about the HC to the authorized person.

Having said that, given that, as has been said, the casuistry and typology of notarial powers can be very diverse, we also cannot rule out that general notarial powers that do not make a detailed mention of the right of access to the HC, or even in the exercise of habeas data rights, may also be sufficient for the purposes of allowing the authorized person to access HC data.

Regarding this possibility, it should be borne in mind that the person who grants the general powers can, in the broad terms allowed by the principle of autonomy of the will, grant a margin of action to the authorized person that includes, among others issues, the exercise of all those rights and actions that the authorized person considers appropriate, for the defense of the interests of the person granting the power of attorney.

Thus, it is not unusual that, through general powers, the authorized person can exercise the rights that correspond to the person who grants the power of attorney, in the name and representation of the latter, without limitations other than those that may be established by the regulations.

Therefore, we cannot rule out that general powers, in these terms, may be sufficient for the purposes of giving a copy of the HC data to the authorized person, who exercises the right of access to the HC (based on the provisions of the patient autonomy regulations), or the rights of habeas data (based on the RGPD), in the name and representation of the owner of the information.

Having said that, it will be necessary for the authorized person (either a lawyer, a family member, or another person, as long as it is recorded as such in the notarial power of attorney), provide a copy of said power of attorney to the corresponding health center, in order to access patient data contained in their HC.

In conclusion, in order for any third person other than the patient (such as the lawyer, in the case presented) to be able to access the patient's HC, it is necessary for this person to prove their identity and qualification to the health center, either through the center's own form, or notarial powers, whether general or special.

v

The query raises whether a third party could request a copy of a patient's HC, if the latter is incapacitated to authorize it (has a degenerative disease, is in a coma, etc...), but has not been legally incapacitated and has not made notarial documents that enable it.

Title II of Book Two of the Civil Code of Catalonia, relating to the person and the family, approved by Law 25/2010, of 29 July (hereafter CC de Catalunya), articulates various institutions for the protection of minors age, of those who cannot govern themselves, if they are not under parental authority, and of those who need assistance.

The CC foresees that these functions of protection of the person "must always be exercised in the interest of the assisted person, in accordance with his personality, and are aimed at the care of his person, at the administration or defense of their assets and patrimonial interests and the exercise of their rights" (article 221-1 of the CC of Catalonia).

If a person is in one of these situations, or has been legally incapacitated, it is clear that the persons appointed or who must fulfill the protection functions provided for in the regulations (CC of Catalonia) will be able to access the HC of this person, in consideration of the powers that have been established, or what is provided for in the corresponding sentence of incapacitation.

Notwithstanding this, both the data protection regulations and the patient autonomy regulations provide for access to information about a person's state of health (therefore, HC information), in favor of of third parties.

Thus, based on the provisions of article 9.2.c) of the RGPD, the general prohibition of processing health data (art. 9.1 RGPD) would not be applicable, if "the treatment is necessary to protect the vital interests of the interested party or another natural person, in the event that the interested party is not able, physically or legally, to give their consent."

Therefore, the need to protect the patient's own or a third party's vital interests could enable third parties to access information from the patient's HC, without the patient's consent, for example, in case of physical incapacity (for example, if the person is in a coma, as the inquiry points out), without the need for judicial incapacitation.

Also, according to article 3 of Law 21/2000:

"1. The holder of the right to information is the patient. People related to the patient must be informed to the extent that the patient expressly or tacitly allows it.

2. In the event of the patient's incapacity, he must be informed based on his level of understanding, without prejudice to also having to inform whoever is representing him.

3. If the patient, at the discretion of the doctor responsible for assistance, is not competent to understand the information, because he is in a physical or mental state that does not allow him to take charge of his situation, must also inform the family members or the people who are related to it."

Article 5 of Law 41/2002 provides that:

"1. The holder of the right to information is the patient. People related to him, for family or de facto reasons, will also be informed, to the extent that the patient expressly or tacitly allows it.

2. The patient will be informed, even in case of incapacity, in a manner adequate to his possibilities of understanding, complying with the duty to also inform his legal representative.

3. When the patient, according to the criteria of the attending physician, lacks the capacity to understand the information due to his physical or mental condition, the information will be made known to the persons linked to him for family or de facto reasons.

4. The right to health information of patients can be limited by the proven existence of a state of therapeutic need. Therapeutic necessity will mean the doctor's ability to act professionally without first informing the patient, when for objective reasons the knowledge of his own situation could seriously harm his health. When this case arrives, the doctor will leave a reasoned record of the circumstances in the clinical history and will communicate his decision to the people related to the patient for family or de facto reasons."

As an example, this communication of health information could be enabled in cases of degenerative disease, or of the patient's state of coma -suppositions indicated by the consultation-, without it being necessary to have a sentence of incapacitation or notarial powers that provide for the right of access by representation.

Given these provisions, it is clear that people linked to the patient for family or de facto reasons must be able to access the patient's health information - in his HC -, in those cases in which the circumstances provided for in the regulations (art. 9.2.c) GDPR, art. 3 Law 21/2000, and art. 5 Law 41/2002).

This, without prejudice to the fact that these people will have to identify themselves in front of the health center, and they will have to prove their status as family members or their relationship with the patient, in order to access information from the patient's HC.

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

Conclusions

In order for any third party other than the patient (such as the lawyer, in the case at hand) to be able to access the patient's HC, it is necessary for this person to prove their identity and qualification to the health center, either through the center's own form, or notarial powers, whether general or special.

People related to the patient for family or de facto reasons can access the patient's health information, in those cases where, at the doctor's discretion, the patient does not have the capacity to take care of it, without the need to have powers of attorney notaries

This, without prejudice to the fact that these people will have to identify themselves and prove their status as family members or their relationship with the patient.

Barcelona, June 28, 2018

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