

Opinion in relation to the query raised in relation to the transfer of data of identified or identifiable persons to the Security Forces and Bodies

A consultation of a public body in the field of health is presented to the Catalan Data Protection Authority in which the Authority's opinion is requested in relation to the communication of data to the Forces and Bodies of Security (FFCCS), from the judicial and governmental police side. The inquiry asks about the access requirements in both cases, access to sensitive and non-sensitive data, and access to video surveillance images.

Analyzed the request, which is accompanied by a copy of the "Protocol of action against requests for personal data by the security forces and bodies", of the body making the inquiry, and given the current applicable regulations, and the 'report of the Legal Counsel, the following is ruled.

I

(...)

II

The consultation requests the opinion of the Authority in relation to the communication of data to the Security Forces and Bodies (FFCCS), "from the judicial and governmental side", for the access requirements in both cases, for the differentiation between access to sensitive and non-sensitive data, and for access to video surveillance images.

Specifically, the inquiry asks to determine "what is meant by "real danger to public security or repression of criminal offences", how the principle of proportionality and the determination of judicial police operate."

The consultation is accompanied by a copy of the "Protocol regarding the requests made by Forces and Security Forces in the centers of (...)", for the evaluation of this Authority.

At this point, it should be noted that the validation of the content of a Protocol such as the aforementioned is not the subject of this opinion, notwithstanding that the institution or, where appropriate, the health centers (...), as responsible for the processing of personal data not only of the patients treated, but also of other people (centre staff, visitors, patients' companions...), can take into account the considerations made in this and other opinions of this Authority.

Having said that, as a starting point, it should be borne in mind that Regulation (EU) 2016/679, of April 27, general data protection (RGPD), is not applicable to the treatments carried out in the 'police and criminal justice area, as can be seen from article 2.2.d) of the RGPD, which provides the following:

"2. This Regulation does not apply to the processing of personal data:

(...)

d) by the competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal sanctions, including protection against threats to public security and their prevention.”

In this area, it is necessary to take into account Directive (EU) 2016/680 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of prevention, research, detection or prosecution of criminal offenses or the execution of criminal sanctions, and the free circulation of this data and by which the Framework Decision 2008/977/JAI of the Council is repealed.

The member states of the European Union had to transpose this directive before May 6, 2018.

Given the lack of transposition of Directive 2016/680 by Spain, in the case at hand it is necessary to take into account the provisions of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD), which remain temporarily in force.

In any case, the assumption raised must be examined from the point of view of the fundamental right to the protection of personal data (art. 18.4 CE), which is the perspective from which this opinion is issued.

From this perspective, and without prejudice to the fact that the processing that the FFCCS may do of the personal information required of a health center is not subject to the RGPD, the data processing carried out by a health center, either of patients or of other people (workers, visitors and accompanying patients, etc.), including transfers that may be made to a third party, is fully subject to the principles and guarantees of the RGPD.

From the perspective of the RGPD, information relating to the fact that a person has been treated in a health center, as well as any information relating to their health, is patient health information (art. 4.15 RGPD), included in the your clinical history (HC), the definition and content of which is defined in the patient autonomy regulations (Law 21/2000, of December 29, and Law 41/2002, of November 14, basic, of patient autonomy).

As this Authority has done in the past (among others, Opinion CNS 1/2009), although patient autonomy legislation regulates access to HC, not all possible transfers of health data (HC) find their qualification, necessarily, or exclusively, in the patient autonomy legislation. Thus, we cannot rule out, at the outset, that the legal authorization to communicate health data to the FFCCS is also found in other rules with the rank of law.

Having said that, for the purposes of being able to process and, where appropriate, communicate a patient's health data, it should be borne in mind that article 9 of the RGPD establishes a general prohibition of the processing of personal data of various categories, among d 'others, of data relating to health, genetic data, or data relating to the sexual life or sexual orientation of a natural person (section 1). Section 2 of the same article provides that

this general prohibition will not apply when one of the following circumstances occurs:

"a) the interested party gives his **explicit consent** for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;

(...)

g) the treatment is necessary **for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States**, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party;

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 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;

(...)."

In the case at hand, the transfer subject to consultation does not respond to the purpose of providing medical treatment to the patient or to third parties (art. 9.2.h) RGPD), but to different purposes, such as purposes related to the functions that the regulatory framework attributes to the FFCCS.

However, the RGPD itself (art. 9.2.g) RGPD) admits that the law of the Union, or the law of the Member States, can enable the processing of this particularly protected personal information, such as the health information of patients This, as long as the communication can be considered proportionate (art. 5.1.c) RGPD).

Despite the fact that recital 41 of the RGPD provides that "when the present Regulation makes reference to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament", it must be taken into account that the same recital establishes that this is "without prejudice to the requirements in accordance with the constitutional order of the Member State in question".

Given the differences between the various legal systems of the countries of the Union, the RGPD does not establish what the form of the legal rule that provides for the treatment should be, but refers to the requirements derived from each constitutional right.

In this sense, the referral to the legitimate basis established in accordance with the internal law of the States referred to in article 9.2, sections g) ih) of the RGPD requires, in the case of the Spanish State, that the rule of development, as it is a fundamental right, has the status of law, given the requirements derived from Article 53 EC.

We note that, according to article 9.2 of the Draft Organic Law on the Protection of Personal Data, which is in the parliamentary processing phase:

"2. Data processing contemplated in letters g), h) ei) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law **must be covered by a law**, which may establish additional requirements relating to its security and confidentiality.

For all this, starting from the premise that, in the case raised, the explicit consent of the affected is not available (art. 9.2.a) RGPD), it will be necessary to take into account the relevant regulatory provisions, to analyze whether the communication (art. 4.2 RGPD) of patients' personal information in the FFCCS, without their consent, can be considered sufficiently enabled, and in what terms can it be considered adjusted to the principle of proportionality (art. 5.1.c) RGPD).

III

Reference should be made, specifically, to the regulatory provisions on the function of the FFCCS as judicial police.

Article 164.5 of the Statute of Autonomy of Catalonia (EAC) provides that the police of the Generalitat-Mossos d'Esquadra have as their scope of action the entire territory of Catalonia and exercise all the functions typical of a police force, in the areas of public security and public order, administrative police, and judicial police and criminal investigation, including the various forms of organized crime and terrorism, in the terms established by the laws

Likewise, Law 4/2003, of April 7, on the organization of the public security system of Catalonia (LSPC), provides that the functions of the Generalitat police, the police and the protection of the authorities of the Generalitat and the surveillance and custody of its own buildings, facilities and dependencies, those of the public security police and public order, those of the administrative police and those corresponding to it as judicial police (article 28.2 LSPC). According to article 28.3 of the same LSPC, local police also exercise, among others, judicial police functions, especially in relation to traffic (article 28.3.f) LSPC).

Article 11 of Law 16/1991, of July 10, on the local police, lists the functions that correspond to the local police in their field of action, among others, those of judicial police, as well as the relating to actions related to prevention efforts and actions aimed at preventing the commission of criminal acts. Article 12 of the same law provides that the local police can perform judicial police functions, in the terms specified in the aforementioned article.

In short, and without prejudice to the functions that may correspond to other FFCCS at state level, it is clear that the police forces that act in the area of Catalonia (squad officers and local police), are assigned the exercise of functions of various nature, among others, judicial police functions.

With regard to the Judicial Police, article 126 of the Spanish Constitution provides that it depends on the Judges, the Courts and the Public Prosecutor in their functions of investigating the crime and discovering and securing the criminal, in the terms that the law establishes.

Article 547 of Organic Law 6/1985, of July 1, on the Judiciary (LOPJ), provides that:

"The function of the Judicial Police includes assistance to the courts and tribunals and the Public Prosecutor's Office in the investigation of crimes and in the discovery and securing of criminals. This function will apply, when required to provide it, to all members of the Security Forces and Bodies, whether they depend on the central government or the Autonomous Communities or local entities, within the scope of their respective powers.

Article 549.1 of the LOPJ specifies, in the following terms, the functions of the Judicial Police units:

"a) The investigation about those responsible and the circumstances of the criminal acts and the arrest of the first ones, giving an account immediately to the judicial and fiscal authority, in accordance with the provisions of the laws. b) Assistance to the judicial and fiscal authorities in any actions that must be carried out outside their headquarters and require the presence of the police. c) The material performance of the actions that require the exercise of coercion and order the judicial or fiscal authority. d) The guarantee of compliance with the orders and resolutions of the judicial or fiscal authority. e) Any other of the same nature in which his cooperation or assistance is necessary and ordered by the judicial or fiscal authority."

Article 282 of the Criminal Procedure Law (LECRIM) states that:

"The Judicial Police's purpose, and it will be the obligation of all those who make it up, to find out the public crimes that are committed in their territory or demarcation; carry out, according to their attributions, the necessary diligence to check and discover the criminals, and collect all the effects, instruments or evidence of the crime whose disappearance there would be danger, making them available to the judicial authority."

Finally, according to Royal Decree 769/1987, of June 19, on the regulation of the judicial police (RDPJ), the general functions of the judicial police correspond to all members of the FFCCS, insofar as they must provide the collaboration required by the judicial authority or the Public Prosecutor's Office in actions aimed at investigating crimes or discovering or securing criminals, with strict subjection to the scope of their respective competences (article 1). It is added that the members of the FFCCS carry out the judicial police function at the request of the judicial authority, the Public Prosecutor or their police superiors, or on their own initiative through the latter, in the terms provided for in the articles following of the RDPJ (article 2 of the RDPJ).

Article 4 of the RDPJ provides that all the components of the FFCCS, whatever their nature and dependency, must practice on their own initiative and according to their respective attributions, the first steps of prevention and assurance as soon as they have news of the perpetration of the allegedly criminal act, and they must occupy and guard the objects that come from the crime or are related to its execution, and it is added that they must give an account to the judicial or fiscal authority, directly or through the organic units of the judicial police.

According to article 16.3 of Law 41/2002:

"Access to clinical history for **judicial**, epidemiological, public health, research or teaching purposes is governed by the provisions of the Law

Orgánica 15/1999, of December 13, Protection of Personal Data, and in 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.

The cases of **investigation by the judicial authority** in which the unification of the identification data with the clinical-care data is considered essential are excepted, in which **cases the judges and courts** in the corresponding process will follow. Access to the data and documents of the clinical history is strictly limited to the specific purposes of each case."

Article 16.3 of Law 41/2002, limits access to HC data without anonymization to "judicial purposes", linking these purposes and, ultimately, the transfer of the data, to the "cases of investigation of the "judicial authority".

Thus, as this Authority already agreed in Opinion CNS 42/2014, it should be considered that article 16.3 of Law 41/2002 is a sufficient legal authorization to communicate data from the HC to the FFCCS when these, in exercise of judicial police functions, accompany your request with a request from the judicial authority or the Public Prosecutor's Office.

As this Authority has also pointed out, it must be remembered that according to the aforementioned regulations (LOPJ and RDPJ), the judicial police can carry out investigations related to allegedly criminal acts, without having, at first, a judicial request. In this sense, the aforementioned regulations include among the actions of the FFCCS as judicial police, those that are carried out at the request of police superiors, or even on the own initiative of the FFCCS agents, through these superiors, and not only those that are due to a previous judicial request.

In any case, the regulations require the judicial and fiscal authorities to be notified immediately (article 282 LECRIM, and article 549.1.a) LOPJ, cited).

In the event that the FFCCS, in the exercise of their judicial police functions, do not have a specific judicial requirement, the assignment would also be enabled, not only by the provisions of the cited regulations, but because it derives from the article 11.2.d) of the LOPD, according to which the consent of the owner of the data is not necessary when the communication to be made is addressed to, among others, the Public Prosecutor's Office or the judges and courts

As this Authority has also done in the past, in the event that the transfer of data required by the FFCCS to health centers may lead to the transfer of specially protected data, specifically health data, it will be necessary to take into account the provisions of article 22.3 of the LOPD:

"The collection and processing by the Security Forces and Bodies of the data referred to in sections 2 and 3 of article 7 can be done **exclusively** in the cases in which it is **absolutely necessary for the purposes of an investigation concrete**, without prejudice to the control of the legality of the administrative action or the obligation to resolve the claims made, where appropriate, by the interested parties who correspond to the jurisdictional bodies."

In other words, article 22.3 of the LOPD establishes a specific requirement for the transfer of health data to the FFCCS, in particular, that this transfer is based and justified in the purposes of a specific investigation.

For all that has been said, in consideration of the specific provision of article 22.3 of the LOPD, it must be concluded that the entity that formulates the consultation and the health centers should proceed with the transfer of health data (specially protected data) of a patient, without his express consent, to the FFCCS, only in the event that they act as judicial police for a specific investigation.

IV

As has been explained, in order for a health center managed by it to transfer health data contained in the clinical history, without anonymization, to the FFCCS, without the express consent of the holders, these must necessarily act in their capacity judicial police. Consequently, it is clear that the entity and the health centers should not transfer the health data of a patient, when the FFCCS act in the exercise of functions other than those of the judicial police, given the framework normative exposed. In the event that, as the consultation points out, the request from the FFCCS is not clear enough (in relation to the specific functions performed by the police force requesting the information), the health center could, logically, request clarification in this regard.

Having said that, it should be borne in mind that a patient's HC contains data of various natures, specifically, patient and assistance identification data, clinical care data, and social data, according to the classification in article 10.1 of Law 21/2000, on patient autonomy. That is to say, not all the data available to a healthcare center on a patient are necessarily health data or data deserving of special protection.

Thus, even though, quantitatively, the main content of the HC refers to health data, the assumption that the FFCCS request access to a patient's data that is not particularly protected information (for example, access to identifying data, or data contained in the social report that are not particularly protected data). Likewise, it is also possible that the FFCCS request data from people other than the patients treated (staff, family members of the patients...), which are not information deserving of special protection.

Starting from this basis, and given the terms of the consultation, it is necessary to refer to the transfer of data that is not data deserving of special protection, to the FFCCS, when they do not act in the capacity of judicial police.

In this case, as this Authority has already agreed, the specific provision of article 22.3 of the LOPD, quoted, would not apply, but we will have to refer to the general provision of article 22.2 of the LOPD , which enables the transfer of data for the fulfillment of "police purposes", which are not exhausted or not limited to the fact that there is a prior investigation by the judicial authority ("judicial purposes"), in the terms of article 16.3 of Law 41/2002.

Thus, article 22.2 of the LOPD, provides the following:

"2. The collection and processing for **police purposes** of personal data by the Forces and Security Bodies **without the consent** of the affected persons are limited to those cases and those categories of data that are necessary for the **prevention of a danger real for public security or for the repression of criminal offences**, and must be stored in specific files established for this purpose, which must be classified by category based on the degree of reliability."

Although this Authority cannot determine in general terms what is meant by a "real danger to public security", or in which cases this circumstance would occur - the issue to which the consultation refers -, it is clear that the regulations (art.

22.2 LOPD) requires that this element be met, in order to consider the processing of data by the FFCCS enabled. It will be necessary to assess the concurrence or not of this indeterminate legal concept in view of the circumstances of each case, and in relation to each request for information formulated by the FFCCS.

In any case, article 22.2 of the LOPD does not require, unlike article 22.3 of the LOPD, the existence of a specific investigation for which the transfer of specially protected data is absolutely necessary.

In addition, as has been said, according to the applicable regulations, the FFCCS perform different functions, one of them, but not the only one, being the judicial police function.

For all this, as this Authority has agreed on previous occasions, article 22.2 of the LOPD could enable the transfer of certain data that are not specially protected data to the FFCCS without the need to link this transfer to a specific investigation and, also, without necessarily linking it to the development of judicial police functions by the FFCCS.

In any case, in order for this transfer to be enabled, it will be necessary to comply with the requirements provided for in said article 22.2 of the LOPD, that is to say, that the transfer is limited to those cases and those categories of data that are necessary for the prevention of a real danger to public safety or for the repression of criminal offences.

If these requirements are met, or if some other qualification is met in other rules with legal status, health centers should attend to the request for access to data from the clinical history that is not health data, formulated by the FFCCS, even if they do not act in their judicial police functions.

v

The consultation also refers to the communication of images captured by video surveillance systems of health centers, to the FFCCS.

This Authority has analyzed the communication of video surveillance camera data to FFCCS, among others, in Opinion CNS 28/2018, to which we refer for illustrative purposes.

The image of a natural person is personal identifying data and is therefore protected by data protection regulations (art. 4.1 RGPD).

At the outset, a hospital center, as the data controller (art. 4.7 RGPD), will be able to capture and process images through video surveillance systems, as long as it is done with full respect for the principles and guarantees of the RGPD. It must be taken into account, in particular, that the capture of images and, where appropriate, the communication that is made (if applicable, to the FFCCS), must respect the principle of proportionality and minimization (art. 5.1.c) RGPD).

The communication of images, captured by the video surveillance systems of health centers that allow the direct or indirect identification of natural persons would not, in principle, be a case of communication of specially protected data (such as the health data contained in the HC) , because the graphic image of a person does not, in principle, or in general, have this consideration. For example, the graphic image of people who work at the center, or who visit a patient, captured by video surveillance systems, would not in principle be particularly protected information.

In this case, the health centers should communicate the images captured by the video surveillance systems at the request of the FFCCS if the requirements of article 22.2 of the LOPD are met, that is to say, that the transfer is limited to those cases and those data that are necessary for the prevention of a real danger to public safety or for the repression of criminal offences. This, as long as it is about images that cannot be considered as deserving of special protection, in the terms indicated (art. 9 RGPD).

Having said that, it is necessary to agree that certain images captured by video surveillance systems of health centers -always starting from the premise that these treatments have been carried out, by the centers, with full respect for the principles and guarantees of the RGPD- , they could be considered specially protected information.

As an example, as this Authority has done on previous occasions, this could be the case if the images make it possible to know that a person has been treated in a health center specializing in certain pathologies, or in a certain service or consulting room a center. The type of pathology or disease could be inferred from these images, or even other information relating to a person's sex life or sexual orientation could be inferred, which is particularly protected information (art. 9.1 RGPD).

In cases like this, in which communicating the graphic image of a person may mean communicating specially protected information, the provision of article 22.3 of the LOPD will apply, so that the communication will only be adjusted to the regulations if is "absolutely necessary for a specific investigation".

Also in these cases, it is particularly relevant that the center reviews, is formed prior to the communication of data, if the principle of proportionality in its aspect of the principle of minimization is adjusted to the principle (art. 5.1.c) RGPD), since in the case at hand, the concurrence of a legal authorization for the transfer of data (art. 22.3 LOPD), does not prevent compliance, by the person in charge, with the principles and obligations of the RGPD.

Therefore, for the purposes of interest, those responsible for the capture and processing of images through video surveillance systems (...), who are subject to the processing of video surveillance provided by the RGPD, will have to assess whether the communication of these images to the FFCCS conforms to the principle of proportionality, given the terms of the request formulated, in each specific case, by the FFCCS. Especially, in those cases where it cannot be ruled out that the images are particularly protected information.

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

Conclusions

In accordance with the provisions of article 22.3 of the LOPD, health data contained in a patient's medical history, or other specially protected data, without the latter's express consent, may be communicated to the FFCCS, in the event that these act performing functions of judicial police, in the cases in which it is absolutely necessary for the purposes of a specific investigation.

The regulations would enable the transfer of data that are not specially protected data in the FFCCS (for example, identifying data, or certain images of natural persons), without the need to link this transfer to a specific investigation, when necessary for the prevention of 'a real danger to public security or to the repression of criminal offenses (art. 22.2 LOPD).

Barcelona, September 18, 2018

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