Opinion in relation to the consultation of a health center on the communication of patient data to the competent authority in the field of Traffic

A letter from a health center (hereinafter referred to as the Hospital) is submitted to the Catalan Data Protection Authority regarding the communication of patient health data, ex officio, to the competent Traffic authority, in relation to with the patient's lack of psychophysical abilities which may lead to the loss of validity of the driver's license.

Having analyzed the request, which is not accompanied by other documentation, and considering the current applicable regulations and the report of the Legal Counsel, the following is ruled.

I

(...)

II

The consultation shows that the medical staff, when providing health care to a patient, may suspect that they have lost the psychophysical skills that the road safety regulations require in order to retain the administrative authorization of the driver's license.

The consultation asks whether, in this case, it would be adjusted to Organic Law 15/1999, of December 13, on the protection of personal data, which on its own initiative and without prior request from the competent Traffic authority, the medical professional or the ICS communicate to this authority the patient's medical data, for the purposes of the administrative procedure for the declaration of loss of validity of the driver's license due to the disappearance of the psychophysical aptitudes required by the regulations.

The inquiry asks whether, alternatively, the communication to the competent Traffic authority of the identity of the patient who may have lost the psychophysical conditions required to drive, "without specifying the medical or clinical data that objective or indicative of this circumstance".

Based on the consultation in these terms, it is necessary to start from the basis that the information relating to the people treated in health centers is personal information and, as such, is protected by the principles and guarantees of the regulations on the protection of personal data, specifically, by the General Data Protection Regulation (EU) 2016/679 (RGPD), which is fully applicable from May 25, 2018 (art. 99 RGPD).

Without prejudice to the fact that, as of May 25, 2018, some aspects regulated by Organic Law 15/1999, of December 13 (LOPD), may continue to be applicable - either because they are outside the scope of application of the 'RGPD or because the same RGPD allows regulation at state level-, the processing of data of natural persons in the case raised in the query is subject to the provisions of the RGPD.

In any case, the data protection regulations prior to the RGPD (LOPD, as well as Directive 95/46/EC, on data protection, repealed by article 94 RGPD), which was in force until the moment of the full application of the RGPD, also provided for a regime of

reinforced protection of certain categories of personal data, among others, health data (article 8 Directive, and article 7 LOPD).

Having said that, it is data relating to health: "personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health." (art. 4.15 GDPR).

The information relating to the fact that a person has been treated in a health center, as well as any information relating to the illnesses or health problems of this person, is patient health information, included in their clinical history (HC).

Article 9.1 of Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation, states that “1. The clinical history collects the set of documents relating to the care process of each patient while identifying the doctors and other care professionals who have intervened", and article 10 of the same rule specifies the content. Regarding the definition and content of the HC, we also refer to the provisions of articles 14 and 15 of Law 41/2002, of November 14, basic, regulating patient autonomy and rights and obligations in terms of information and clinical documentation.

Communicating a patient's health data, in particular, those related to their psychophysical abilities to drive, would mean providing information related to the health and the healthcare treatment received by the affected or interested party (art. 4.1 RGPD), which is in the HC of this and that it is specially protected information.

Thus, Article 9.1 of the RGPD establishes a general prohibition of the processing of personal data of various categories, among others, data relating to health, genetic data, or data relating to sexual life or orientation sexual of a natural person.
Section 2 of the same article 9 of the RGPD states 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;

b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;

c) 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 physically or legally able to give their consent;

(…)

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;

i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or sanitary products, on the basis of the Law of the Union or of the Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy,

(…).".

Health centers process the health data of the patients they attend with the main purpose of providing them with medical assistance. Thus, the treatment of the health data of the patients treated at the Hospital that formulates the consultation, for healthcare purposes, can be carried out without the patient's consent, based on the provisions of the aforementioned regulations (art. 9.2.h) RGPD and health regulations).

However, the assignment subject to consultation does not respond, strictly, to the purpose of providing medical treatment to the patient or to third parties, but to different purposes, such as those related to the control of the concurrence of the conditions necessary to dispose of the authorization to drive, by the competent Traffic authority.

At this point, it should be borne in mind that, according to the RGPD itself (art. 9.2.g) RGPD) the law of the European Union or the law of the Member States, could enable the processing of this specially protected personal information, as can be the patients' health information, for "reasons of essential public interest". This, as long as the communication can be considered proportionate (art. 5.1.c) RGPD).

Regarding this, despite the fact that recital 41 of the RGPD provides that "when the present Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament", it should be taken into account that the same considering 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 the form of the legal rule that provides for a certain treatment, 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 of the RGPD requires, in the case of the Spanish State, that the rule of development, to be treated of 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 to the competent Traffic authority, without their consent, can be considered sufficiently enabled.

III

Article 10.3 of Law 14/1986, of April 25, general health, states that everyone has the right: "To the confidentiality of all information related to your process and your stay in public and private health institutions that they collaborate with the public system."

Article 7.1 of the law provides that: "Every person has the right to respect the confidential nature of data relating to their health, since no one can access them without prior authorization covered by the Law." In the same sense, article 5.1 of Law 21/2000.

The medical professional who obtains and processes patient information is obliged to respect the duty of secrecy or confidentiality regarding this information. This duty of secrecy not only derives from the obligation that, in general, is imposed by the data protection regulations themselves (art. 5.1.f) RGPD), but is expressly provided for in the health regulations (art. 16.6 Law 41/2002, and art. 11.6 Law 21/2000), regarding access to clinical history data (art. 15 Law 42/2002 and art. 9 Law 21/2000).

As has been said, the legislation on patient autonomy provides that the HC includes data on the patient and data on the patient's relatives (mainly family history) and, where appropriate, information referring to very diverse personal situations that affect the patient and , often, their family environment, of which the doctor may be aware in the course of health care for the patient.

In the context of the medical care that a patient receives, he often has to share with the doctor questions that affect his own privacy and that of the closest family environment (art. 18 CE). In this way, the doctor becomes, in relation to the patient, a "necessary confidant", since he must know this data, in order to provide the patient with adequate medical care.

The maintenance of professional secrecy by the doctor (and the confidence, on the part of the patient, that the doctor will maintain this secrecy), is a necessary element in order to establish a minimum relationship of trust between the two and, consequently, the legal system obliges the doctor to respect professional secrecy.

In short, the doctor-patient relationship generates in the former a burden to maintain the confidentiality of the patient's personal and health information and, in the latter, an expectation of privacy that the legal system guarantees.

For all the above, we must conclude that the regulatory framework studied does not enable the communication of a patient's health data to the Traffic authority by doctors who participate in the patient's medical care, in the terms proposed in the query,

since the maintenance of professional secrecy is a duty inherent in the exercise of the medical profession, which cannot be excepted in the case at hand.

IV

The Law on Traffic, motor vehicle movement and road safety, approved by Royal Legislative Decree 6/2015, of October 30, regulates, among others, the authorizations that, in order to guarantee the safety and smoothness of traffic , granted by the Administration prior to carrying out activities related to the circulation of vehicles, especially motor vehicles (art. 1.2.e) Traffic Law).

According to article 1.2 of Royal Decree 818/2009, of May 8, which approves the General Regulation of Drivers (RGC): "The permits and driving licenses are of regulated nature and content and their granting will be conditioned on the verification of that the drivers meet the psychophysical fitness requirements and the knowledge, skills, aptitudes and behaviors required to obtain them as determined in this Regulation."

According to article 7.1.d) of the RGC, meeting the required psychophysical aptitudes is a requirement to obtain a driving permit or licence.

The regulations provide for different periods for the validity of the permits, depending on the age of the drivers (art. 12, sections 1 and 2 RGC). Section 3 of the same article 12 of the RGC provides that:

> "3. The period of validity of the various classes of permit and driver's license indicated in the previous sections may be reduced if, at the time of its granting or extension of its validity, it is verified that the holder suffers from an illness or deficiency that, if momento does not prevent that, it is likely to worsen."

According to article 13.1 of the RGC:

"1. The validity of driving permits and licenses may be extended, for the periods respectively indicated in the previous article, by the Provincial Traffic Headquarters, upon request of the interested parties, in the established official model, and **once they have certified that they retain** the **psychophysical aptitudes required to** obtain the permit or license in question. (…)."

Thus, the regulations establish the carrying out of medical tests of psychophysical abilities both for obtaining a driving license (Annex III, section A).1.f) RGC), and for the extension of its validity (Annex III, section B).2.b) RGC), with a periodicity that may vary. Specifically, Annex IV of the RGC foresees that, in relation to certain pathologies that may imply a decrease in the drivers' abilities, the periodic checks are carried out in shorter time frames than those foreseen for the rest of the drivers .

In this context, according to article 69 of the Traffic Law:

> "The administrative authorizations regulated in this title may be subject to a declaration of nullity or lesividad when any of the foreseen cases occur and in accordance with the procedure regulated in the regulations on common administrative procedure."

According to article 70 of the Traffic Law:

"1. Regardless of what is provided in the previous article, the validity of the administrative authorizations regulated in this title will be subordinated to maintaining the requirements required for their granting.
2. The autonomous body Central Traffic Authority will be able to declare the authorizations regulated in this title no longer valid **when the requirements** on knowledge, skills or psychophysical aptitudes required for authorization are proven to have disappeared.
To agree to the loss of validity, the Administration must notify the presumed lack of the required requirement to the interested party, who will be granted the faculty to prove its existence in the terms determined by the regulations. (...)."

Article 35 of the RGC provides that:

"1. The loss of validity will be declared for administrative authorizations whose holder does not meet the requirements for their granting or has totally lost their allocation of points. (…).
2. The competence to declare the loss of validity corresponds to the Provincial Head of Traffic."

Regarding the procedure for the declaration of the loss of validity of the authorization to drive, article 36 of the RGC provides that:

"1. The Provincial Traffic Office **that has knowledge** of the presumed disappearance of any of the requirements that, regarding knowledge, skills, aptitudes or behaviors essential for traffic safety or psychophysical aptitudes, were required for the granting of the authorization, prior to the reports , assessments or tests that, in his case and in attention to the concurrent circumstances, he deems appropriate, will initiate the procedure of declaring the validity of this one. (…)

3. The agreement referred to in the previous section will be notified by the Provincial Traffic Office to the holder of the authorization, they will be given access **to the file** in the terms provided for in Law 30/1992, of November 26, and they will indicate the terms and forms available to **certify the existence of the required requirement** or requirements. Against said agreement, the holder of the authorization may allege what he deems relevant to his defense or, as the case may be, demonstrate in time and form that he does not lack such requirements.

A) (…)

B) **The forms to certify the existence of the required requirement** or requirements will be the following: a) (…). b) If it will affect the **psychophysical requirements** required to drive, submitting **to the psychophysical aptitude tests** that proceed **before the competent health services** and, where applicable, to the corresponding aptitude and behavior control tests that, if necessary, will be carried out in accordance is determined in article 61.3.

(…)."

According to the applicable regulations, if the Traffic Authority is aware of the presumed disappearance of the requirements required to drive, it must initiate the procedure to declare the license invalid (art. 36.1 RGC). However, the rule does not specify what the flow of information can be that leads the Traffic authority to have this knowledge and, therefore, whether this information can come from a doctor who treats the patient for healthcare purposes (art. 9.2 .h) RGPD).

In this sense, the regulations provide that, in the event that the initiation of the procedure is agreed (art. 36.2 RGC), it is necessary to view the file to the driver's license holder, so that he can certify the existence of the requirements required (art. 36.3 RGC). It is in this context, once it has been agreed to initiate the review file, and having adequately informed the affected person, that the regulations enable the carrying out of psychophysical fitness tests on the affected person.

In addition, the regulations governing the procedure in question determine that the corresponding medical tests must be carried out "in front of the competent health services". Thus, according to the regulations, the informational flow of patient data that must occur would be through the performance of medical tests by certain health professionals who have been designated for that function.

This could enable the communication of certain patient data (the result of the tests), collected by the health professionals designated for this function to the corresponding Traffic authority, in the terms provided for in the regulations. On the other hand, it would not, in general, enable the communication of patient health data collected outside the driving fitness review procedure, such as health data processed in the course of the care that the patient receives in the 'Hospital (art. 9.2.h) RGPD).

Therefore, the studied regulations do not enable the communication to the competent Traffic authority of health data of any patient who receives medical attention at the Hospital for healthcare purposes, in order to review the authorization to drive of this patient .

v

The query refers, as a possible rule enabling the communication of health data in the case at hand, to Law 39/2015, of October 1, on the Common Administrative Procedure of Public Administrations. Specifically, the query refers to article 58 of Law 39/2015, referring to administrative procedures, according to which:

> "Procedures will be initiated ex officio by agreement of the competent body, either on its own initiative or as a consequence of a superior order, **at the reasoned request of other bodies or by complaint."**

Article 61 of Law 39/2015 provides that:

> "1. **Reasoned petition** is understood as the proposal to initiate the procedure formulated by any administrative body that does not have the competence to initiate the same and that has had knowledge of the circumstances, conduct or facts that are the subject of the procedure, either occasionally or because they have been assigned functions of inspection, investigation or investigation.
>
> (...)".

According to article 5.1 of Law 40/2015, of October 1, on the Legal Regime of the Public Sector:

> "1. Administrative units will be considered administrative bodies to which they are assigned functions that have legal effects vis-à-vis third parties, or whose action has a prescriptive character."

We cannot rule out that, in application of this provision (art. 58 Law 39/2015), certain administrative bodies may formulate a "reasoned petition" to the competent Traffic authority, so that it initiates a certain procedure related to the loss of the requirements to drive (for example, when an officer of a security body detects that a person is driving without meeting these qualifications).

However, it is clear that the reasoned request, or the complaint referred to in the regulations (art. 61.1 Law 39/2015), should not come into contradiction with the regulations on the protection of personal data, which protects in a reinforced way the treatment of health data, given the terms in which, as we have seen, the legislation imposes the duty of secrecy regarding the information collected on the occasion of an assistance provision.

Therefore, these regulatory provisions of Law 39/2015 would also not enable the communication of patient data in the terms indicated in the consultation.

VI

Finally, the consultation proposes, in an alternative form, the possibility of communicating to the competent Traffic authority the identity of a patient who is suspected of having lost the psychophysical conditions required to drive, "without specifying the medical or clinical data that objectify or are indicative of this circumstance".

The mere fact that identification data of a natural person is provided, who will be identified as a patient of a hospital center, together with the doctor's suspicion that there may be some psychophysical cause that makes the patient's ability to drive impossible , also implies a communication of health data, especially protected for the purposes of article 9 of the RGPD, even if the specific disease or disorder suffered by the patient is not specified.

In this sense it should be remembered that, according to article 4.15 of the RGPD, it is understood by: "Data relating to health: personal data relating to the physical or mental health of a natural person, including the provision of care services health, which reveal information about your state of health;

Therefore, with regard to the possibility raised in the consultation, it is necessary to reach the same conclusion as the one noted above, since the communication of the patient's identity together with the suspicion that he may have lost the psychophysical conditions to drive, (even if the disease or disorder you are suffering from is not specified), it involves the communication of health data and is not sufficiently qualified in terms of legal status, in the terms set out in the consultation.

In accordance with the considerations made in this opinion the following are made,

Conclusions

The regulatory framework studied does not enable the communication of a patient's health data to the Traffic authority by doctors who participate in the patient's medical care, since the maintenance of professional secrecy is an inherent duty exercise of the medical profession, which cannot be excepted in the case at hand and in the terms raised by the consultation. This regardless of whether or not the pathology that motivates the communication is specified in the communication.

Barcelona, September 28, 2018