CNS 8/2019

Opinion in relation to the consultation on access to the record of access to the medical history of a deceased person by persons related by family or de facto reasons

A letter is submitted to the Catalan Data Protection Authority, in which a report is requested to this Authority on access to the clinical history of a deceased person by third parties.

Specifically, the query asks whether people linked to a deceased person for family or de facto reasons can request access, specifically, to the record of access to the deceased's clinical history (HC).

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

I

(...)

II

The inquiry asks whether, in application of data protection regulations, "could a person linked to a deceased for family reasons or in fact request the registration of access to the deceased's medical history (that is, traceability)" .

It is necessary to start from the basis that, according to article 4.1 of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), personal data is "all information about an identified natural person or identifiable ("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;

According to article 4.15 of the RGPD, 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" .

The processing of data (art. 4.2 RGPD) of natural persons who receive assistance in health centers is subject to the principles and guarantees of the personal data protection regulations (RGPD and Organic Law 3/2018, of December 5, of protection of personal data and guarantee of digital rights (LOPDGDD)).

It should be borne in mind that, according to recital 27 of the RGPD:

> **"This Regulation does not apply to the protection of personal data of deceased persons. Member States are competent to establish rules relating to the treatment of their personal data."**

According to article 2.2 of the LOPDGDD:

> **"2. This organic law will not apply: (...) b)
> To the data processing of deceased
> persons, without prejudice to what is established in article 3. (...).”**

Despite this, article 3 of the LOPDGDD, to which the question raised refers, provides the following:

> **"1. Persons linked to the deceased by family or de facto reasons, as well as their heirs, may contact the person responsible for the treatment to request access to their personal data and, where applicable, their rectification or deletion.**
>
> **As an exception, the persons referred to in the previous paragraph will not be able to access the deceased's data, nor request its rectification or deletion, when the deceased person had expressly prohibited it or so established by law. Said prohibition will not affect the right of the heirs to access the property data of the deceased.**
> **2. The persons or institutions to which the deceased had expressly designated for it may also request, according to the instructions received, access to his personal data and, where appropriate, their rectification or deletion.**
>
> **By royal decree, the requirements and conditions will be established to certify the validity and validity of these mandates and instructions and, where appropriate, their registration.**
> **3. In the event of the death of minors, these powers may also be exercised by their legal representatives or, within the framework of their powers, by the Public Prosecutor's Office, which may act ex officio or at the instance of any interested natural or legal person.**
> **In the event of the death of persons with disabilities, these powers may also be exercised, in addition to those mentioned in the previous paragraph, by those who had been designated for the exercise of support functions, if such powers are understood to be included in the support measures provided by the designated."**

Although the data protection regulations (RGPD and LOPDGDD) are not applicable to the processing of data of dead people, the regulations expressly provide that certain people linked to them "for family or de facto reasons" can access the information regarding to the deceased person and, where appropriate, request its rectification or deletion (art. 3.1 LOPDGDD).

This, unless there is an express prohibition of the owner of the information or certain legal provisions may limit the exercise of this faculty. In the event that the deceased person is a minor or a person with a disability, the specific provisions regarding the exercise of these powers must be taken into account (art. 3.3 LOPDGDD).

Regarding this, we note that the provision of article 3 of the LOPDGDD refers to access and, where appropriate, rectification (art. 16 RGPD) or deletion (art. 17 RGPD) regarding the personal information of a dead person, without establishing specific conditions or differences depending on whether the persons linked to the holder wish to access one or another type of personal information or on the basis of the type of data.

III

Having said that, the content of the HC is foreseen in the regulations (article 10.1 Law 21/2000, of December 29, on the rights of information concerning the patient's health and autonomy, and clinical documentation; article 15 Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations regarding information and clinical documentation).

The patient autonomy regulations recognize the possibility for people linked to the patient for family reasons or in fact to access the patient's own health information and, therefore, HC data.

As this Authority has highlighted on previous occasions (among others, Opinions CNS 36/2018 or CNS 37/2018 (which can be consulted on the website: www.apd.cat), the patient autonomy regulations provide the communication of the patient's health data related to the care process to the people linked to it, either for family or factual reasons (arts. 3.1 Law 21/2000 and 5.1 Law 41/2002).

In cases of physical or mental incapacity of the patient, the regulations provide that it is necessary to inform "relatives or people who are linked" (art. 3.2 Law 21/2000, and art. 5.3 Law 41/2002). Even, in exceptional cases, the regulations on patient autonomy provide that consent to carry out interventions in the field of health must be obtained, by substitution, "from the relatives of this person or the persons that are linked to it" (art. 7.2 Law 21/2000, and art. 9.3 Law 41/2002). Obviously, in this case - or in cases where a "state of therapeutic necessity" is present (art. 5.4 Law 41/2002) - the people linked to the patient should receive certain information about the patient from the health center, when the circumstances described.

Along these lines, and for the purposes of interest, article 18.4 of Law 41/2002, specifically provides for access by persons linked to deceased patients, in the following terms:

> "(...)
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> 4. Health centers and individual practitioners will only provide access to the clinical history of deceased patients to persons related to them, for family or de facto reasons, unless the deceased had expressly prohibited it and this is proven. In any case, the access of a third party to the clinical history motivated by a risk to your health will be limited to the relevant data. No information will be provided that affects the privacy of the deceased or the subjective notes of the professionals, nor that harms third parties."

Thus, the legal system recognizes the people linked to the patient for family reasons or in fact, a certain degree of involvement or participation in the patient's care process and, as a logical consequence, recognizes them in certain circumstances a right to receive information about the deceased patient.

This, without prejudice to the fact that, in the face of the request for access to the HC from people related to a patient who has died, (and, where appropriate, for the rectification or deletion of personal data), this link will need to remain duly accredited.

In any case, there is no doubt that people linked to a dead patient, for family or de facto reasons, must be able to ask the person responsible (a healthcare facility) for access to the patient's HC data and, where appropriate, the rectification or deletion of patient data, given that this is recognized by the patient autonomy regulations and the data protection regulations (art. 15 RGPD and art. 3 LOPDGDD).

IV

Regarding the content and scope of the right of access to personal information, it is necessary to refer to article 15 of the RGPD, according to which:

> "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:
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> a) the purposes of the
> treatment; b) the categories of personal data in question;
> c) the recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular recipients in third parties or international organizations; 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; h) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.
>
> (...)."

This precept recognizes the right of the person affected or interested - and, in connection with article 3 of the LOPDGDD, the right of people linked to a holder who has died - to request and obtain from the data controller a copy of your personal data subjected to treatment, including certain information about this treatment, such as, for the purposes that concern, the recipients to whom these data have been communicated or are expected to be communicated.

In the consultation, it is considered whether people linked to a deceased patient for family or de facto reasons can request the access register of this patient's HC.

This Authority already analyzed the possibility of accessing the identity of the people who have accessed the HC and, therefore, the access register, in Opinions 40/2015 and 15/2016, to which we refer, although both Opinions predate the full application of the RGPD and analyze the issue raised from the perspective of Organic Law 15/1999, of December 13, on the protection of personal data, repealed by the LOPDGDD .

As agreed in the aforementioned Opinions (as well as in Opinion 11/2007), in the context of the HC, and in line with what is established in the Working Document on the processing of personal data relating to health in the electronic medical records, adopted by the Article 29 Working Group (February 15, 2007), it may be advisable to establish systems that allow the citizen to know who and when he has accessed the medical history, in order to generate a greater degree of trust in the patients themselves.

However, as this Authority has clearly highlighted, and as it should be reiterated in application of the provisions of the RGPD and the LOPDGDD, this recommendation (enabling mechanisms to know "who and when" has accessed the electronic HC), does not imply the obligation to communicate to the affected person the accesses of the own staff of the health center responsible for the treatment.

It should be borne in mind that in those cases article 15 of the LOPD was applicable, which established that, among other aspects, the right of access included information on "the communications made".

On the other hand, the wording of article 15.1.c) of the RGPD refers to:

"c) The recipients or the categories of recipients to whom the personal data was communicated or will be communicated, in particular third-party recipients (countries) or international organizations"

At the outset it should be noted that this article does not require that the specific recipient of the communication be identified. It may be sufficient to identify a category of recipients (for example, the company that manages the server where the information is hosted).

Beyond this, certainly, the definition of recipient contained in Article 4.9) of the RGPD may raise some doubts about the scope of this obligation of transparency given that the recipient is defined as "the natural person or legal entity, public authority, service or other body to which personal data is communicated, whether or not it is a third party. (...)".

But the key element, as was the case with the LOPD, must be found in the reference to the existence of a data communication.

If the RGPD does not contain a definition of what is to be understood by "communication", it seems clear that access by the person in charge's own staff cannot be considered as such, given that they are part of the person in charge. Only when it leaves the scope of the person in charge can it be considered that we are dealing with a recipient to whom the personal data is "communicated" and, therefore, suitable for the concept of recipient.

Access by people who carry out their professional functions as an integral part of the entity responsible for the treatment (as an example, the different care professionals or administration and management of a health center), would not mean properly a "communication" for the purposes of the data protection regulations since, in this case, the data of the affected person (the patient treated at the health center) do not leave the control and management scope of the person responsible.

Thus, this access would not be part of the information that article 15.1 of the RGPD requires to be given to the affected person, since the staff of the entity that is responsible for the HC (a health center) would not be a "recipient to whom personal data has been communicated or will be communicated", for the purposes of article 15.1.c) of the RGPD.

From the point of view of the principle of transparency, once the person concerned knows the identity of the person in charge (and the identity of any of the assignees of the information) they already have elements to know the scope of the persons or categories of persons who may have knowledge of your information. And it is not necessary for this to identify each of the employees of the data controller or of the transferee entity.

It should be noted that article 15 RGPD refers to "recipients or categories of recipients". That is to say, that in a case like the one we are considering, if it were interpreted that it also included the need to inform about the access by the workers of the person responsible for the treatment, the information offered could be limited to indicating how to addressee category, such as, for example, "the person in charge". It does not seem that a mention of this type provides more information or more transparency to the person concerned, given that any person can have, without the need for this mention, the expectation that their information will be treated by the staff of the data controller who required for the exercise of the functions derived from the purpose that justifies the treatment.

In conclusion, the right of access (art. 15 RGPD) exercised by persons linked to the deceased holder based on the provisions of article 3 of the LOPDGDD, does not include the obligation, for the person in charge, to communicate the identity of the specific persons who, as staff of the entity responsible for the treatment, may have had access to the holder's personal data.

A different issue is that communications of the dead patient's data, which have occurred with respect to an external recipient, must be reported to the person responsible for the treatment.

In this case, given the provision of article 15.1.c) RGPD, it will be necessary to inform the people linked to the patient who died for family or de facto reasons, of the communications of patient data that may have occurred, if applicable, to recipients external to the data controller.

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

Conclusions

The right of access to the HC exercised by persons linked to a deceased patient (art. 3.1 LOPDGDD), does not include the obligation to communicate the identity of specific persons who, as personal personnel of the person in charge of the treatment, may have access the HC of the deceased.

This, without prejudice to the fact that beyond the content of the right of access, the health center can provide this information voluntarily.

Barcelona, February 18, 2019