CNS 9/2019

Opinion in relation to the consultation on the exercise of rights by minors from the age of fourteen

A letter from a body in the health field is presented to the Catalan Data Protection Authority, in which a report is requested to this Authority on the exercise of rights by minors, who are over 14 years.

Specifically, the query asks if parents need authorization from their children under age, over 14 and not incapacitated, for the exercise of rights over minors' data.

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

The query asks if parents need authorization from their children over 14 and under 18 who are not incapacitated for the exercise of their data rights minors

Given the consultation in these terms, it is necessary to take into account Regulation (EU) 2016/679, of April 27, general data protection (RGPD), according to which personal data is "all information about a natural person identified 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;

Therefore, 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 5 December, of protection of personal data and guarantee of digital rights (LOPDGDD)).

III

Regarding the provision of consent by minors for the processing of their personal data, article 8 of the RGPD provides that:

> **"1. When article 6, section 1, letter a) is applied, in relation to the direct offer to children of services of the information society, the treatment of the personal data of a child will be considered lawful when he is at least 16 years old. If the child is under 16 years old, such treatment will only be considered**

legal if consent is given or authorized by the holder of paternal authority or guardianship over the child, and only to the extent that it is given or authorized.

The Member States may establish by law a lower age for such purposes, provided that this is not lower than 13 years."

It is worth noting that this provision, relating to the age at which minors can give their consent for data protection (art. 6.1.a) RGPD), is established in relation to the company's services information

In any case, the same article 8.1 of the RGPD establishes that the Member States can determine an age lower than 16 years - in no case lower than 13 years -, for the purposes of providing the minor's consent.

Article 7 of the LOPDGDD provides for the following:

"1. The treatment of the personal data of a minor can only be based on his consent when he is over fourteen years old.
The cases in which the law requires the assistance of the holders of parental authority or guardianship for the celebration of the legal act or business in whose context consent for the treatment is obtained are excepted.

2. The treatment of the data of minors under fourteen years of age, based on consent, will only be lawful if the holder of parental authority or guardianship is included, with the scope determined by the holders of parental authority or guardianship."

Thus, taking into account the provisions of article 8.1 of the RGPD, the LOPDGDD has established that, from the age of 14, minors can give their consent for the processing of their data, with the exception of the cases that may be foreseen by the regulations.

The establishment of the age of 14 for the purposes indicated (art. 7.1 LOPDGDD), coincides with the provision of the previous state regulations, already repealed (article 13.1 of the Regulation for the implementation of Organic Law 15/1999, approved by Royal decree 1720/2007, of December 21).

It should be noted that the provision of article 7 of the LOPDGDD on the provision of consent by minors is applicable to all areas of personal data processing, and not only to the provision of consent in relation to services of the information society, such as the provision of article 6.1 of the RGPD, cited.

Having said that, with regard to the exercise of data protection rights, the RGPD provides for the right of access (art. 15), the right of rectification (art. 16), the right of deletion or "right to the oblivion" (art. 17), and the right of opposition (art. 21), and it also incorporates new rights that must also be considered as part of the right of informative self-determination. Thus, the RGPD establishes the right to limit treatment (art. 18), the right to data portability (art. 20), or the right of every person not to be subject to automated individual decisions (art. 22).

The exercise of personal data protection rights corresponds to the interested person, holder of the information (art. 4.1 RGPD).

According to article 12 of the LOPDGDD:

"1. The rights recognized in articles 15 to 22 of Regulation (EU) 2016/679 may be exercised directly or through a legal or voluntary representative.

(...)

5. When the laws applicable to certain treatments establish a special regime that affects the exercise of the rights provided for in Chapter III of Regulation (UE) 2016/679, it will be in accordance with those provisions.

6. In any case, the holders of parental authority may exercise the rights of access, rectification, cancellation, opposition or any other that may correspond to them in the context of this organic law in the name and representation of children under the age of fourteen.

(...).”

The provision of article 12.6 of the LOPDGDD provides that "in any case" holders of parental authority may exercise their rights in relation to children under 14 years of age. However, this regulatory provision does not exclude the possibility that these same holders may exercise their rights in relation to minors over the age of 14, taking into account the provisions of the applicable sectoral regulations.

The query mentions the requests to exercise rights that the body formulating the query would have received, as well as previous queries made to this Authority in relation to access to clinical data of minors by their parents.

It is therefore necessary to take into account, on the one hand, the patient autonomy legislation (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 in the field of information and clinical documentation).

The healthcare regulations expressly provide for the possibility that the patient's right of access to the clinical history can also be exercised by representation, as long as it is duly accredited (article 13.3 of Law 21/2000, and article 18.2 of Law 41/2002).

On the other hand, as this Authority has decided on previous occasions (among others, Opinion CNS 13/2015, CNS 33/2015, CNS 33/2017, CNS 58/2017, or CNS 10/2018 which can be consult the Authority's website, www.apd.cat), the regulations state that the parents are the holders of parental authority over unemancipated minor children (article 236-1 of Book Two of the Civil Code of Catalonia, hereinafter , CCC).

The exercise of parental authority over children involves their legal representation (art. 236-18 CCC). The second section of the same article 236-18, excludes from the legal representation of children, among others, "the acts relating to the rights of personality, unless the laws that regulate them establish something else."

Therefore, the parents of minors, to the extent that they exercise their legal representation based on the provisions of the regulations, can exercise the rights of habeas data or informative self-determination, in the name and representation of the minors and, consequently, they must be able to have access to minors' health information and, where appropriate, exercise the rest of the rights provided for in the regulations.

This, without prejudice to the fact that the data protection regulations establish, as a general rule, that minors who are over 14 years of age must be able to exercise the rights of informational self-determination for themselves.

In this regard, given that minors who are over 14 years of age have the capacity to consent to the processing of personal data (art. 7.1 LOPDGDD), they must also be able to exercise the rights inherent in informative self-determination, because not it would make sense to recognize their capacity to consent to the treatment and not to exercise the rights of informative self-determination.

In any case, as this Authority has done in agreement, the fact that the regulations provide for the exercise of the aforementioned rights by minors over the age of 14 should not lead to the conclusion that parents who hold parental authority cannot access the clinical documentation of these or exercise the rest of the informational self-determination rights.

In this sense, it must be borne in mind that parental authority is an inexcusable function that is exercised in the interest of the children (art. 236-2 CCC), and that this function would justify access to the minor's information and, where appropriate , the exercise of rights on behalf and representation thereof.

To this it should be added that article 236-17 CCC, which regulates relations between parents and children, states that: "1. Parents, by virtue of their parental responsibilities, must take care of their children, provide them with food in the broadest sense, live with them, educate them and provide them with a comprehensive education. (...).” This duty of care regarding children obviously includes care regarding their state of health.

In fact, Law 21/2000 itself provides that "if the patient, in the judgment of the doctor responsible for the assistance, is not competent to understand the information, because he is in a physical or mental state that does not allow him to -if you are in charge of your situation, you must also inform your family members or the people who are related to you" (art. 3.3). Obviously, this situation in many cases will be predictable with respect to minors.

For all this, it is clear that the duties that the legal system attributes to the holders of parental authority enable them to access the clinical documentation that affects the minors under their authority and, by extension, the exercise of the rest of the informational self-determination rights referred to in the query (rectification, cancellation and opposition), on behalf of minors, including minors over 14 years of age.

In any case, we agree that neither the provisions of the CCC cited, nor the rest of the regulations studied, provide that the exercise of rights by the holders of parental authority in the area that concerns us is subject to prior authorization or consent of the minor himself. Among other things, because this would distort the actual exercise and purpose of parental authority.

For all the above, in view of the regulations studied, this Authority considers that the possibility of exercising informational self-determination rights, on the one hand, by the minor himself or herself over 14 years of age, and on the other, by parents or legal representatives of this m without the need for the latter's authorization, they are not incompatible or exclusive, since both possibilities are provided for in the regulations in force at the time of issuing this report.

IV

A different issue is that, in certain cases, and given the concurrent circumstances, the regulations allow parents or legal representatives to limit access to certain health data of the minor and, ultimately, the exercise of the rights subject to consultation.

As this Authority has agreed (FJ IV of Opinion 10/2018), it is necessary to take into account article 17.1 of Law 14/2010, of May 27, on rights and opportunities in childhood and adolescence (LDOIA), according to which: "children and adolescents can exercise and defend their rights themselves, unless the law limits this exercise. In any case, they can do it through their legal representatives, as long as they don't have interests that conflict with their own."

According to article 5.1 of the LDOIA: "The best interest of the child or adolescent must be the inspiring and foundational principle of public actions."

In any case, it is necessary to take into account the circumstances of each case, in order to consider whether there are concurring circumstances (for example, situations of risk for the minor, as mentioned in the consultation) and regulatory provisions that could justify the limitation or exclusion of the exercise of the rights of informative self-determination by the parents or legal representatives, in relation to certain healt

As an example, we note that the regulations provide for the possibility of depriving parents of parental authority (art. 236-6 CCC). Thus, as this Authority has highlighted (Opinions CNS 58/2017 and CNS 10/2018), in the event that parental authority is suspended - as can happen, for example, as a result of the instruction of a deprivation procedure in the terms provided for in the regulations (article 228-1 CCC, and arts. 106 et seq. LDOIA)-, the exercise of the rights in question by the person or persons exercising said parental authority would be impossible, at least, while the suspension or deprivation of said power lasts.

Nor can it be ruled out that, in specific cases and with respect to specific medical actions, the minor himself over the age of 14 may exercise the right, as the owner of his personal data, to limit or even to prevent their parents or guardians from accessing certain health data. This is what this Authority has done in Opinion CNS 33/2017 (Legal Basis V), to which we refer.

Also by way of example, Organic Law 2/2010, of March 3, on sexual and reproductive health and the voluntary termination of pregnancy, provides (art. 13) that information about this fact to the parents of women aged 16 or 17 who have decided on the voluntary termination of pregnancy can be limited to one of the parents or none of them when circumstances arise that could generate a conflict to the detriment of the minor:

> "Fourth In the case of 16- and 17-year-old women, consent to the voluntary termination of pregnancy corresponds exclusively to them in accordance with the general regime applicable to older women.
>
> At least one of the legal representatives, father or mother, persons with parental authority or guardians of the women in those ages must be informed of the woman's decision.
>
> This information will be dispensed with when the minor alleges that this will cause a serious conflict, manifested in the certain danger of violence

intrafamilial, threats, coercion, ill-treatment, or a situation of uprooting or helplessness occurs."

If this is the case and the minor alleges the concurrence of a conflict in a well-founded way, this should lead to the parents or guardians not being able to access certain health information of this minor, in the terms provided for in the regulations .

In short, the legal system, in these and other rules, foresees certain situations or circumstances in which the principle of the best interests of the minor - which must inform all actions carried out towards minors of age and, therefore, also actions in the health field-, would allow parents or guardians to exclude access to and knowledge of certain medical information of the minor (information which, in principle, they should have access for the fulfillment of the duties required of them by the legal system itself, in the terms indicated) and, for the purposes of interest, the exercise of the rights of informative self-determination by parents or guardians, in relation to personal health data of the minor, in the terms provided for in the regulations.

For all this, it cannot be ruled out that, in specific cases, and given the concurrent circumstances, the applicable regulations must lead the data controller (art. 4.7 RGPD) to deny the minor's parents or legal representatives the exercise of rights (for example, access to the minor's data or, where applicable, the rectification or deletion of information).

In any case, it must be reiterated that this does not imply that the prior authorization of the minor over the age of 14 is generally necessary for the exercise of these rights by the holders of parental authority.

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

Conclusions

The exercise of informative self-determination rights by the parents or legal representatives of minors over the age of 14 does not require the minor's authorization, and is not incompatible or excludes the exercise by the minor himself, since both possibilities are provided for in the applicable regulations at the time of issuing this report.

This, without prejudice to the fact that, in certain cases, and given the applicable regulations, the best interests of the minor may justify the limitation of the exercise of the rights of informative self-determination by the holders of parental authority.

Barcelona, March 6, 2019