Ref. CNS 37/2019

**Opinion in relation to the consultation of a healthcare center on the transfer of patient data to third parties in the context of property and legal claims against the center**

A letter from a healthcare center (hereafter referred to as the Hospital) is submitted to the Catalan Data Protection Authority, requesting a report from this Authority on the communication of patient data within the framework of the claims filed by them either for professional malpractice or for other reasons.

Specifically, the consultation refers to requests for information from insurers and lawyers involved in the various administrative and judicial claims procedures brought by the patients themselves, when the Hospital does not have their consent to send information regarding the assistance received at the Hospital.

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 Hospital receives requests for access to patient data, in relation to claims submitted for the care received at the Hospital, by judges, from the administration that must resolve the claim, and also from lawyers and insurance companies.

According to the consultation, the doubt arises in this last case, "when we receive requests for access to data from insurers and lawyers who intervene in the various procedures of administrative and judicial claims that have been filed by the patients themselves, and we do not have the their consent to send information related to their attendance at (the Hospital)."

In relation to this, the Hospital formulates the following question:

"Is it legally justified to send information related to the patient's assistance to lawyers and insurers involved in the resolution of the administrative or judicial claim?"

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 April 27, general data protection (RGPD), personal data is "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 clinical history of 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 the information relating to the health of natural persons it is subject to special protection.**

**It should be borne in mind that a patient's claim against the health center that treated him may be due to reasons other than the health care received, and not directly related to it. In any case, the mere fact of communicating data of a natural person who has been treated in a health center could lead to the processing of health data. In other cases, when the claim is due to the medical assistance received, the information flow to which the query refers will clearly involve the treatment of health data.**

**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, for the purposes in question:**

> **"f) the treatment is necessary for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function.**
>
> **(...)**
>
> **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;**
>
> **(...)".**

**It is also necessary to take into account the provisions of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (LOPDGDD).**

**Specifically, according to article 9.2 of the LOPDGDD:**

> **"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-enforcement law, which may establish additional requirements relating to its security and confidentiality.**
>
> **In particular, said rule may cover the treatment of data in the field of health when this is required by the management of public and private healthcare and social systems and services, or the execution of an insurance contract of which the affected be part."**

**To this it should be added that the clinical history (HC) 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 the documentation clinic, and Law 41/2002, of 14 November, basic, regulating patient autonomy and rights and obligations in the field of information and clinical documentation).**

III

Given the terms of the consultation, we must refer to two different cases.

First of all, that the lawyers who request access to data of the patient treated at the Hospital, represent the interests of the patient himself. That is to say, that the request for access is made by the lawyer acting on behalf and representation of the claimant patient or, where applicable, the insurance company that provides legal assistance to the patient based on an insurance contract signed by patient

Secondly, it could be the case, given the terms of the consultation, that the insurance company or the lawyer requesting access to health information of the complaining patient does so in the name and representation of the Hospital itself or, if where appropriate, of the health professional of the center against which the claim is made (for example, in a case of professional malpractice, the doctor who treated the patient).

We refer below to the first mentioned assumption.

From the perspective of the personal data protection regulations, we would be faced with the exercise of the right of access to personal data, by representation. In other words, in this case it is the patient himself who has filed a claim against the Hospital, who exercises a right of access to his data, through his lawyer.

We note that this Authority has analyzed access to HC data by a patient's lawyer in Opinion CNS 36/2018, on the authorization for third-party access to the clinical history, which can be consulted on the website www.apd.cat, and which is of particular interest in the case raised.

Article 15 of the RGPD 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, such as the lawyers who represent him, can exercise the right of access and obtain a copy of information from the patient's HC.

In any case, as this Authority has agreed in Opinion 36/2018, it is necessary for this condition of representation of the lawyer who goes to the Hospital to request patient data, to be duly accredited.

As has been pointed out, 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.

We note that, according to the consultation, the doubt arises in those cases in which the Hospital does not know the patient's consent to communicate his data - in the case we are analyzing, to the lawyer who represents him.

In this regard, it could be advisable for the health center to enable appropriate mechanisms to ensure that the patient accesses his HC, if applicable, through a third person (his lawyer, in this case), for example, making available of the patient an authorization form for access 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 application of the minimization principle (art. 5.1.c) 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

**In the case at hand, it would be possible to articulate access by the lawyer representing the patient to data from the HC through a predefined form, which would limit the treatment only to those personal data that may be relevant for the purpose of presenting and arguing the claim of the affected patient.**

**Having said that, as also highlighted in CNS Opinion 36/2018 (FJ IV), it must be borne in mind that the provision of notarial powers by a patient's lawyer can also be an appropriate way to sufficiently accredit the authorization to access the HC on behalf of the owner.**

**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 person proxy, in the case at hand, of his lawyer.**

**It should be noted that, according to the provisions of Title IX of the State Civil Code (CC), 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 (art. 1709 CC).de**

**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 CC:**

> **"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.**

**Thus, it does not seem to be ruled out that the authorized person, in particular, the lawyer representing the patient, presents a notarial power of attorney document in order to access the patient's data in order to articulate a claim against the center, access that is would produce in the name and representation of its owner.**

**If this happens, the Hospital will have to take it into account, since this could enable access to the patient's data in the case in question.**

**In conclusion, given the applicable regulations, in order for a third person other than the patient, in this case, a lawyer representing the patient, to be able to access data from the patient's HC by representation, it is necessary for this person to prove their identity and the corresponding authorization before the Hospital, either through the form that it can articulate to resolve requests such as the one that is the subject of the consultation, or, where appropriate, through the provision of powers of attorney notarized documents granted by the patient who submits a claim against the Hospital.**

**IV**

**We refer below to the second case, in which the insurance company or the lawyer who requests access to a patient's information, acts on behalf of the Hospital itself or, where appropriate, of the Hospital's professional or professionals against the who articulates the claim (for example, the doctor who treated the patient).**

**According to article 6.1 of the RGPD:**

> **"1. The treatment will only be lawful if at least one of the following conditions is met:**
>
> **(...)**
>
> **c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;**
>
> **(...).”**

**Starting from this premise, as has been said, the regulations allow the processing of patient health data to be considered enabled, if applicable, in relation to the exercise and defense of claims (art. 9.2.f) RGPD). It is clear the legitimate interest of the person or entity against which the claim has been lodged, in being able to use the health information held by the health center or the professional who has provided a certain assistance, to be able to defend themselves of claims that are related to this assistance, in order to be able to exercise your right of defence.**

**Recital 52 of the RGPD must be taken into account, according to which:**

> **"Also, exceptions to the prohibition of processing special categories of personal data must be authorized when established by the Law of the Union or of the Member States and as long as the appropriate guarantees are given, in order to protect personal data and other fundamental rights, when in the public interest, (...). Such an exception is possible for purposes in the field of health, including public health and the management of health care services, especially in order to guarantee the quality and profitability of the procedures used to resolve claims for benefits and services in the health insurance regime, or for archival purposes in the public interest, scientific and historical research purposes or statistical purposes.**
>
> **The treatment of said personal data must also be authorized on an exceptional basis when it is necessary for the formulation, exercise or defense of claims, either for a judicial procedure or an administrative or extrajudicial procedure.”**

**As agreed by this Authority in Opinion CNS 7/2018, referring to the provision of medical data to judicial processes without the patient's consent or prior judicial request (FJ IV), the jurisprudence establishes that "the right to reserve the the data contained in the clinical history is not, therefore, absolute and unlimited, but its disclosure may be for the sake of a preferential interest, which may be the resolution of a judicial conflict if it requires the knowledge of those and only with respect to the information necessary for the decision of the case" (Provincial Court of Madrid, Order of January 18, 2005 (Rec. 559/2004)).**

**It therefore occurs in cases like the one raised in the consultation, a collision between two fundamental rights. On the one hand, the right to the protection of character data**

**personal, derived from article 18 of the Constitution and enshrined as an autonomous right and informer of the constitutional text by STC 292/2000, of November 30, and, by another, the right to effective judicial protection of judges and courts, contained in article 24 of the Constitution.**

**As the Constitutional Court's repeated jurisprudence maintains (for all, Judgment 186/2000, of July 10) "the right to privacy is not absolute, as is none of the fundamental rights, being able to yield to constitutionally relevant interests, always that the cut that he has to experience is revealed as necessary to achieve the intended legitimate end, proportionate to achieve it and, in any case, be respectful of the essential content of the right".**

**Taking this into account, and given the applicable regulatory framework, it cannot be ruled out that the right of defense, either of the health center itself, or of a health professional against whom a patient files a claim, may necessitate the access to health data of the affected patient, by the lawyer representing the center or the affected professional or by the insurance company that, if applicable, has to deal with the payment of compensation based on the contract insurance subscribed either with the health center or directly with the affected professional.**

**Thus, the exercise of the right to effective judicial protection (art. 24 CE), which legitimizes the use of the necessary means of proof in a judicial process, could be sufficient authorization for the communication of certain patient data to a lawyer , in the terms referred to in the consultation, with the sole purpose of articulating the defense of the center or the professional following the patient's claim and, where appropriate, to compensate the affected (art. 9.2.f) RGPD).**

**On the other hand, this right of defense is predicable not only of the health or professional center to which the claim is made, but it is necessary to take into account the eventual obligations of the center's insurance companies or the professionals who prov**
**Thus, in accordance with article 73 of Law 50/1980, of October 8, on the insurance contract (LCA):**

> **"For civil liability insurance, the insurer undertakes, within the limits established in the Law and in the contract, to cover the risk of birth borne by the insured of the obligation to indemnify a third party for damages and losses caused by a done provided for in the contract for the consequences of which the insured is civilly responsible, according to law. (...).”**

**Article 74 of the same Law establishes that:**

> **"Unless agreed to the contrary, the insurer will assume the legal direction against the injured party's claim, and the defense costs incurred will be on his account. The insured must provide the necessary collaboration in order to the legal direction assumed by the insurer. (...).”**

**Likewise, article 76 of the LCA provides that: "The injured party or his heirs will have direct action against the insurer to demand compliance with the obligation to indemnify, without prejudice to the insurer's right to claim against the insured, in the case that the damage or injury caused to a third party is due to his willful conduct. (...).”**

**In this context, according to article 18 of the LCA:**

**"The insurer is obliged to pay the compensation at the end of the investigations and expertise necessary to establish the existence of the accident and, if applicable, the amount of the damages resulting from it. In any case, the insurer must make, within forty days, from the receipt of the claim declaration, the payment of the minimum amount of what the insurer may owe, according to the circumstances known to him.**

**When the nature of the insurance allows it and the insured consents to it, the insurer may substitute the payment of the indemnity for the repair or replacement of the damaged object."**

**In relation to this, it should be borne in mind that article 99.2 of Law 20/2015, of July 14, on the organization, supervision and solvency of insurance and reinsurance entities, has come to expressly recognize the possibility that entities insurers access health information in certain cases:**

**"2. Insurers may process data related to their health without the consent of the interested party in the following cases:**

**a) For the determination of the health care that should have been provided to the injured party, as well as the compensation that, if any, should be provided, when the same have to be satisfied by the entity.**

**b) For the appropriate payment to health care providers or the reimbursement to the insured or his beneficiaries of health care expenses that would have been carried out in the scope of a health care insurance contract.**

**The processing of the data will be limited in these cases to those that are essential for the payment of the compensation or the provision derived from the insurance contract. The data may not be processed for any other purpose, without prejudice to the information obligations established in this Law.**

**The insurance companies must inform the insured, the beneficiary or the injured third party about the treatment and, where applicable, the transfer of health data, in the terms provided for in article 5 of Organic Law 15/1999, of 13 December (RCL 1999, 3058), Personal Data Protection unless, in the case of collective insurance, such obligation is contractually assumed by the policyholder."**

**That is to say, in accordance with letter a) of section 2 of this article, access to health data may be justified not only by the obligation of the insurance entity to take charge of the payment of the benefits received by the insured person, but also in the event that the insurance company has to take over an indemnity derived from this health care.**

**The insurance company that, on behalf of a health center or the affected professional, has to deal, where appropriate, with compensation, must be able to access the information available to the health center, directly related to the claim and the care received by the patient, which is necessary to carry out the investigations and the expertise that must determine, if applicable, the amount of the compensation. This could include, given the context of the consultation, patient health informa**

**In short, given the aforementioned regulatory framework, it must be concluded that access to certain health data of a patient treated at a health center, without the consent of the person concerned, could be enabled for lawyers acting on**

**representation of the health center or the affected professionals or their insurance companies, when this information is relevant for the exercise of the right of defense or the fulfillment of the insurance contract, following claims related to the health care provision.**

**In any case, it must be noted that the application of the principle of data minimization is necessary, according to which these data must be adequate, relevant and limited in relation to the purpose for which they are processed (art. 5.1. c) RGPD), so that indiscriminate access to the medical history of the affected person would not be justified.**

**It is worth reiterating that, according to the provisions of article 16.3, in fine, of Law 41/2002, in relation to access to the HC, it provides the following: "Access to clinical history data and documents is strictly limited to the specific purposes of each case."**

**Therefore, without prejudice to the fact that there may be authorization for the treatment and transfer of certain health data of the patient who presents a claim against the Hospital in the terms indicated, this authorization will always be limited to those minimum data essential for the fulfillment of the purpose pretense, in this case, the exercise of the right of defense of the center or, where appropriate, of the professional or professionals affected by the claim filed by the patient.**

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

**Conclusions**

**In order for the lawyer representing the patient to be able to access data from the patient's HC, it is necessary for him to prove his identity and qualification to the health center, either through the form that the center can articulate for resolve these requests, or, where appropriate, through the provision of notarial powers granted by the patient.**

**The communication of certain patient health data may be enabled, without their consent, to the Hospital's lawyers or insurance companies or to the affected professionals, when this information is necessary for the exercise of the right of defense or the fulfillment of the insurance contract, as a result of the claims related to the healthcare provision.**

**Barcelona, September 10, 2019**