CNS 53/2019

Opinion in relation to the consultation of a Data Protection Delegate on the communication of identifying data of professionals who access the clinical history of patients

A letter from the Data Protection Delegate of (...) is presented to the Catalan Data Protection Authority, in which he requests the opinion of this Authority on the legitimacy to communicate the identifying data of professionals who access the data of the clinical history of the patients.

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The Data Protection Delegate (hereinafter, the DPD) requests the opinion of this Authority on the legitimacy to communicate the identification data of the professionals who access the data of the patients' clinical history.

Specifically, in his letter of inquiry he proposes:

a) If, in the face of a possible exercise of the right of access of an interested party, including expressly the traceability of accesses to the clinical history, the communication of the merely identifying data of the professionals who have accessed the clinical history by the responsible for the treatment of an interested party would be empowered by article 24 of Law 19/2014, of December 29, on transparency, access to public information and good governance.

b) If so, what actions should those responsible take towards their professionals to comply with this communication with full safeguarding of their rights and freedoms.

c) In the negative case, and following the Authority's criteria on the possibility of providing this information voluntarily, what requirements would need to be met by those responsible.

We refer to these issues in the following sections of this opinion.

III

This Authority has previously had the opportunity to examine (among others, in opinions CNS 40/2015, CNS 15/2016 or CNS 8/2019) the possibility of communicating the identity of professionals who have accessed data from the clinical history of the patients in response to the requests made in this regard by the patients themselves (or people linked for family reasons or in fact to deceased patients) to those responsible for the treatment.

This examination has always been carried out on the basis of the exercise of the right of access that the legislation on the protection of personal data recognizes to the interested parties, concluding, for the purposes they are interested in, that the exercise of this right does not include the obligation to communicate the identity of specific people who, as staff of the entity responsible for the treatment, have been able to access the medical history. On the other hand, it does make it possible to know the data communications that may have occurred, if applicable, to recipients external to the person in charge of the treatment.

The DPD states in its consultation that it is aware of the pronouncement of this Authority on the scope and content of this right of access of the interested party, so we refer to the considerations made in the aforementioned opinions, especially , in opinion CNS 8/2019, taking into account, for said examination, Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD), fully applicable from May 25, 2018.

Having said that, it is necessary to examine, below, whether, as proposed in the consultation, there is another way other than exercising the right of access of the interested party (Article 15 RGPD) that allows communicating the personal information that is usually request

IV

Article 5.1.a) of the RGPD establishes that all processing of personal data (Article 4.2)), such as the communication of the identity of the people who have had access to the medical history, must be lawful, loyal and transparent in relation to the interested party (principle of legality, loyalty and transparency).

In this sense, article 6 of the RGPD establishes that there must be a legal basis that legitimizes the treatment, either the consent of the affected person (section 1.a)), or any of the other legitimizing bases that it provides, for example, that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment
(section 1.c)).

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), the processing of data can only be considered based on this legal basis of article 6.1.c) of the RGPD when it is established by a rule with the rank of law.

At the same time, article 86 of the RGPD provides that "the personal data of official documents in the possession of any public authority or public body or a private entity for the performance of a mission in the public interest may be communicated by said authority, body or entity in accordance with the Law of the Union or of the Member States that applies to them in order to reconcile public access to official documents with the right to the protection of personal data under this Regulation."

Given this, mention should be made of Law 19/2014, of December 29, on transparency, access to public information and good governance (hereafter, LTC), which aims, among others, to "regulate and guarantee people's right of access to public information and documentation"
(article 1.1.b)).

In this sense, article 18 of the LTC establishes that "people have the right to access public information, referred to in article 2.b, individually or in the name and representation of any person legally constituted legal entity" (section 1).

Article 2.b) of the LTC defines "public information" as "the information prepared by the Administration and that which it has in its possession as a result of its activity or

the exercise of its functions, including that supplied by the other obliged subjects in accordance with the provisions of this law".

In the present case, the information requested, regarding the traceability of accesses to the clinical history, would be part of the registration or control of accesses to the clinical history of the patients that would be available to the entities responsible for the treatment.

This is public information for the purposes of the LTC and would therefore remain subject to the access regime provided for in this regulation, which establishes, as a general criterion, that the right of access to public information can only be denied or restricted for the reasons expressly established by law (article 20 et seq.).

In this sense, and in the case of information that includes personal data, the provisions of articles 23 and 24 of the LTC should be taken into consideration.

Specifically, taking into account that the requested data, despite being related to the patients' clinical history, are not data that form part of the clinical history and, therefore, are not considered data deserving of special protection (article 9 RGPD), access should be governed by the provisions of article 24 of the LTC, according to which:

> **"1. Access to public information must be given if it is information directly related to the organization, operation or public activity of the Administration that contains merely identifying personal data unless, exceptionally, in the specific case it has to prevail over the protection of personal data or other constitutionally protected rights.**
>
> **2. If it is other information that contains personal data not included in article 23, access to the information can be given, with the previous reasoned weighting of the public interest in the disclosure and the rights of the people affected. To carry out this weighting, the following circumstances must be taken into account, among others:**
>
> **a) The elapsed time. b)**
> **The purpose of the access, especially if it has a historical, statistical or scientific purpose, and the guarantees offered. c) The fact that it is data relating to minors. d) The fact that it may affect the safety of people. (...).”**

The DPD maintains that the provisions of article 24.1 of the LTC would enable the communication to the interested party of the requested data about the professional people who have been able to access their medical history, as it is merely identifying data related to the organization, operation and activity of the responsible entity, unless there is a specific case in which there are circumstances that advise maintaining the privacy of the person affected (the professional).

It must be taken into account, however, that the information on the traceability of accesses to a patient's clinical history actually includes a set of information that goes beyond what can be understood as merely identifying data related to the organization, the operation or the public activity of the data controller, this is the identity (name and surname) and the position, or in this case the professional category (care or not), of those affected.

We refer, specifically, to information such as the date and time of access to the clinical history and/or the center and module or unit from which these accesses may have occurred, the knowledge of which could reveal the existence of possible improper access to history

clinic by any employee of the responsible entity, in the event that these accesses were not justified by any assistance or administrative action. Therefore, information that could reveal the existence of irregular action on the part of professionals.

In view of this, the provisions of article 24.1 of the LTC cannot be considered applicable to the present case, so access to said information requires a prior weighting between the interest public in the disclosure of information and the rights of affected persons, as required by article 24.2 of the LTC.

In relation to this weighting, it must be taken into account that, in the case raised, the information about the people who have accessed a certain medical history is requested by the holder of this medical history.

This fact is relevant, given that this position could justify a different treatment, in terms of the possibility of accessing said information, to what could correspond if it were a third party.

In accordance with article 18.2 of the LTC, the exercise of the right of access is not subject to motivation but the fact that the applicant expresses what is the purpose he is pursuing and ultimately the reasons for which he is interested in knowing the information may be relevant when deciding on the prevalence between the right of access of the applicant and the right to data protection of the affected persons (professionals). In fact, the purpose is one of the weighting criteria indicated by the LTC itself (article 24.2. b)).

Point out, in this regard, that the right of access to public information can legitimately respond to particular interests. Regarding this, article 22.1 of the LTC, in demanding that the limits applied to the right of access to public information be proportional to the object and purpose of protection, mentions the taking into consideration, in the application of these limits, of "the circumstances of each specific case, especially the concurrence of a superior public or private interest that justifies access to the information."

For its part, State Law 19/2013, of December 9, on transparency, access to public information and good governance, mentions taking into consideration the fact that the applicant justifies their request for information in the exercise of a right (article 15.3.b)).

Taking into account the context in which we find ourselves and the type of personal information requested, it seems clear that the purpose intended with the request for information about the professionals would be related to the defense of the interests of the person requesting , holder of the clinical history.

Data protection legislation imposes the obligation on the data controller to adopt the necessary technical and organizational measures to guarantee the security of personal data processed, including protection against unauthorized or unlawful processing (articles 5 and 24 GDPR).

At the same time, it recognizes the affected person's right to submit a claim before, in this case, this Authority when it considers that there has been a breach or infringement of the data protection regulations affecting the processing of their personal data (articles 77 RGPD), as would be the case if there had been improper access to the data of your clinical history. This, without prejudice to being able to take other legal actions that it deems appropriate.

In this context, it seems clear that, in order to take this or other legal actions for the defense of his interests, the requesting person should be able to access certain information about the accesses to his medical history.

Given this, and in view of the principle of data minimization (Article 5.1.c) RGPD), which requires that access be limited to the data strictly necessary to achieve the intended purpose, it could be considered whether, in the present case , it would be sufficient to deliver the requested information in a pseudonymized manner (article 4.5 RGPD), that is, replacing the first and last names of the professionals affected by a code that would not allow their identification by the applicant (re-identification would only have if possible linking this code with the affected person to whom it was associated and, therefore, it could only be done by the

However, it must be borne in mind that providing information in this way does not seem to allow in this case to verify whether access to the clinical history is really justified or not, that is to say, whether they have been carried out by the professionals who are authorized to access when responding to assistance or administrative actions. For this purpose, it would also be necessary to have the identity of these professionals.

At this point, it is also worth remembering that 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, as well as the Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in matters of information and clinical documentation) regulates a right to information to the patient in fairly broad terms (article 2.2 Law 21/ 2000).

Following the criterion of this Authority in opinion CNS 15/2016, these aspects would include, among others, knowing which professionals are in charge and have intervened in your care process, that is to say, knowing which professionals attend to you and , by extension, could be considered to include knowing which people have accessed the medical record to carry out or participate in this care, including the staff of the center itself.

All in all, taking into account the information requested and the relevance of this information to achieve the intended purpose, it can be concluded that in the present case the right of access of the affected person (the patient) to the traceability of access to your medical history, including the identity and professional category of the workers who have had access to it.

Consequently, the delivery of this information by the entity responsible for the treatment would remain covered by the legal basis of article 6.1.c) of the RGPD.

v

The DPD also considers what actions those responsible should take towards their professionals to comply with the communication of the requested information (traceability of accesses to the clinical history, with indication of the identity of the professionals who have accessed it) with full safeguarding their rights and freedoms.

Article 31 of the LTC establishes that if the request for public information may affect the rights or interests of third parties, identified or easily identifiable, they must be given a transfer of the request, so that they can make the allegations they consider appropriate, in those cases in which they can be determined from the meaning of the resolution.

This procedure is essential so that the affected persons have the possibility to state if they consent to access to the information or if there is any element that, depending on the personal situation of the affected person, in their opinion should involve a limitation of access.

It is the responsibility of the person in charge of the treatment to carry out this procedure of hearing the affected persons (in this case, the professionals) prior to the resolution of the request for access of the requesting person.

The DPD states in its consultation that, following the effective application of the RGPD, those responsible have noted a significant increase in the exercise of the right of access of the holders of clinical histories to the aforementioned information.

It must be taken into account, from the point of view of the right to data protection, that article 13.1.e) of the RGPD recognizes the right of the interested or affected person to obtain from the person in charge information about "the recipients or the categories of recipients of personal data, if applica

Article 4.9) of the RGPD defines as recipient "the natural or legal person, public authority, service or other body to which personal data is communicated, whether or not it is a third party. (...)".

As we have seen, article 24.2 of the LTC would enable the communication to the holders of the medical history of information related to the traceability of access to their medical history, including the identity and category of the professionals who have accessed it.

From the point of view of data protection, the holders of the medical history to whom this information is provided referring to the professionals who have accessed their medical history must be considered recipients of said personal information.

Therefore, the professionals (affected) would have the right to be informed about these recipients or, at the very least, the categories of recipients to whom it is planned to communicate their personal data, for the purposes, where appropriate, of opposing there

For this purpose, it could be convenient, along the lines of the action carried out by the Management General of Public Function last October 15, as reflected in the consultation, that those responsible inform their workers, through their intranet or by other means (for example, via email), that:

a) Article 24.2 of the LTC would enable the communication to the holders of the medical history of information related to the traceability of access to their medical history, including the identity and category of the professionals who have accessed it.

b) These data (of the professionals) can be omitted with reason when they apply duly justified personal circumstances.

c) Professionals in whom there is a personal and extraordinary circumstance that requires special protection can address a confidential letter to the entity responsible for the treatment, in order to be able to weigh the interest in the disclosure of their data and the degree of impact on your right to data protection or other protected rights that should prevail.

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

Conclusions

The communication to the holder of the medical history of the information relating to the traceability of the accesses to their medical history, with an indication of the identity and category of the prof

who have accessed it, would find protection in the legal basis of article 6.1.c) of the RGPD, in relation to the provisions of article 24.2 of the LTC.

Professionals have the right to obtain from the manager information about the categories of recipients of their personal data (Article 13.1.e) RGPD). To this end, professionals could be informed, via the intranet or by e-mail, of the access regime applicable to their data and urge them to, where appropriate, bring the person in charge to the attention of the concurrence of any circumstance personnel who could justify limiting their access when appropriate.

Barcelona, November 18, 2019